

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 9:25-CV-80526-DMM

GOOD SAMARITAN MEDICAL
CENTER, INC., et al.,

Plaintiffs,

v.

THE LEAPFROG GROUP,

Defendant.

**THE COMMUNITY HOSPITALS' OPPOSITION TO LEAPFROG'S MOTION FOR
RECONSIDERATION AND TO ALTER OR AMEND THE JUDGMENT, OR NEW TRIAL**

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INTRODUCTION

The Community Hospitals brought this case to stop Leapfrog from deceiving consumers about healthcare safety and coercing hospitals into handing over their private data on pain of baseless penalties. After hundreds of pages of briefing and five days of trial, this Court entered a carefully considered, 41-page order finding that Leapfrog “inten[tionally] create[d] the false impression that Leapfrog’s grades reflect actual performance,” Dkt. 212 at 26, and imposed a tailored injunction to halt Leapfrog’s unlawful scheme.

Leapfrog now contends that the Court’s injunction should be dissolved, or a new trial ordered, under Rule 59. Those requests defy the well-established standards for Rule 59 relief. Leapfrog’s Motion identifies no newly discovered evidence, no intervening change in law, and no manifest error in the Court’s factual findings. Instead, Leapfrog asks the Court to decide entirely new constitutional issues that Leapfrog failed to litigate through summary judgment, trial, and post-trial briefing. Rule 59 does not permit that about-face—as Leapfrog’s own cases explain.

Leapfrog frames this Court’s order as an assault on free speech. But this case has never been about whether Leapfrog may express views on hospital safety. It is about whether Leapfrog may fabricate punitive scoring inputs, present the resulting “Safety Grades” as data-driven measures of actual safety performance, and use those Grades to pressure hospitals into surrendering data to which Leapfrog has no right. This Court correctly found that Leapfrog may not.

Leapfrog now says that its Safety Grades and methodology should be deemed “pure opinion” under the First Amendment. But this Court rejected Leapfrog’s attempt to characterize its challenged conduct as categorically protected opinion at the motion-to-dismiss stage. And in any event, Leapfrog never preserved any argument that injunctive relief would cross whatever constitutional line Leapfrog now claims the Court recognized. To the contrary, Leapfrog abandoned its pure-opinion theory at trial, defending its methodology as a scientifically valid way to measure objective facts about hospital safety. It asked the Court to credit the methodology as evidence-based, expert-informed, and tied to actual safety performance. Because the Court rejected those arguments in detailed factual findings, Leapfrog now runs away from its position at trial. But Leapfrog cannot have it both ways.

Leapfrog’s Motion next raises a series of new arguments—ranging from actual malice and constitutional avoidance to prior restraint and compelled speech. If Leapfrog wanted these arguments considered, it was required to raise them prior to the entry of judgment ““in such a way as

to afford [this] court an opportunity to recognize and rule on [them].” *Juris v. Inamed Corp.*, 685 F.3d 1294, 1325 (11th Cir. 2012). But Leapfrog did not. Nor does Leapfrog identify any reason it could not have previously raised such arguments.

Leapfrog’s post-judgment change of counsel does not justify a post-judgment change in theory. “[T]he retention of a new attorney able to perceive or draft different or more creative claims” is “no excuse” for the untimely assertion of new arguments. *Rhodes v. Amarillo Hosp. Dist.*, 654 F.2d 1148, 1154 (5th Cir. 1981). Having tried the case on one theory, Leapfrog cannot use a post-judgment Rule 59 motion to litigate another.

BACKGROUND

From the outset, the Community Hospitals alleged that Leapfrog’s so-called Safety Grades “are a fraud,” that Leapfrog’s new “imputation model deceives consumers” by arbitrarily penalizing safety scores when hospitals do not respond to Leapfrog’s commercially driven survey, and that Leapfrog’s deliberate efforts to cover up its non-participation penalty through false representations about its methodology are “clear lie[s].” Dkt. 1 ¶¶ 1, 52, 54. They thus sought an injunction to prevent Leapfrog from applying this deceptive methodology to their facilities and a declaration that Leapfrog’s coercive scheme to extract hospital data violates the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”). *Id.* Prayer for Relief.

Leapfrog moved to dismiss, contending that its “Safety Grades,” “related statements,” and “published methodology”—all purportedly “based on *verifiable data*”—nonetheless represent “‘pure opinion’” that “cannot be proven true or false.” Dkt. 39 at 13, 15 (emphasis added). Leapfrog’s motion did not assert any additional First Amendment arguments.

This Court denied the motion to dismiss in full. Dkt. 41. The Court acknowledged Leapfrog’s assertion that “its online grades and methods are protected as unfalsifiable, purely opinionated speech,” but then rejected that characterization. *Id.* at 6. As it explained, a FDUTPA claim is “not barred by the First Amendment when it involves a challenge to false or misleading statements made about the rating process itself,” which can “mislead consumers” about what the ratings and methodology actually measure (*e.g.*, “absent data” rather than “damning data”). *Id.* at 6–7.

Months later, the parties cross-moved for summary judgment. *See* Dkts. 86, 99. Leapfrog’s motion for summary judgment focused almost entirely on the merits of Leapfrog’s methodology and Leapfrog’s contention that FDUTPA plaintiffs must demonstrate “actual consumer injury.” Dkt. 99 at 1. The motion did *not* assert any freestanding First Amendment defense. Instead,

it claimed that summary judgment on Leapfrog’s anti-SLAPP defense would be warranted “if this Court grant[ed]” the rest of Leapfrog’s motion, in which case the various requirements for a statutory anti-SLAPP defense would “be satisfied.” *Id.* at 19. In the course of seeking summary judgment on anti-SLAPP grounds, Leapfrog (1) included one sentence stating that its “mission is premised on free speech in connection with a public issue,” and (2) mused in one clause of one sentence that “this case” itself “amounts to prior restraint.” *Id.* Leapfrog did not develop any argument as to either assertion, both of which appeared in the last paragraph of its brief. *See id.* Leapfrog also did not renew its pure-opinion argument, did not contend that the Community Hospitals were required to demonstrate actual malice, did not argue that actual malice would be unsatisfied, and raised no compelled-speech concerns. Leapfrog’s reply similarly omitted any objection under the First Amendment. *See generally* Dkt. 124.

Leapfrog’s opposition to the Community Hospitals’ own summary-judgment motion was yet more oblique. In one sentence, the motion contended that “Leapfrog is entitled to summary judgment on this front,” *i.e.*, anti-SLAPP, yet presented no supporting reasoning and failed to mention the First Amendment or any related doctrine. Dkt. 102 at 18.

The parties later submitted a joint pretrial stipulation wherein they were required to state, among other things, any issues of law or fact that remained for trial. *See* Dkt. 129. Leapfrog’s introduction claimed that “anti-SLAPP relief is warranted” because its Safety Grades involve a “public concern,” *id.* at 8, but Leapfrog yet again made no mention of pure opinion, actual malice, constitutional avoidance, prior restraint, or compelled speech. The “issues” section of its brief also identified none of these arguments, instead simply copying the text of the Florida anti-SLAPP statute without elaboration. *See id.* ¶ 210.

In advance of trial, the parties submitted proposed findings of fact and conclusions of law (“PFFCL”). *See* Dkts. 135, 136. Leapfrog’s PFFCL did not renew or elaborate on its pure-opinion theory and, indeed, did not assert any freestanding First Amendment defense. Instead, like Leapfrog’s motion for summary judgment, its PFFCL suggested that Leapfrog should receive judgment on its anti-SLAPP defense. Dkt. 135 ¶¶ 383–92. In so doing, Leapfrog asserted in one sentence that the first element of an anti-SLAPP defense is satisfied because “Leapfrog’s mission is premised on free speech in connection with a public issue.” *Id.* ¶ 388. Leapfrog did not contend that actual malice was necessary to impose liability, did not contend that actual malice was unsatisfied, did not advance any theory of prior restraint, and did not raise compelled-speech concerns.

After this Court denied the parties’ summary-judgment motions, Dkt. 139, a five-day bench trial ensued. At the close of the Community Hospitals’ evidence, Leapfrog orally moved for judgment under Rule 50(a), Day 3 Tr. 133:4–6, which this Court denied, *id.* at 166:12–13. At no time during her Rule 50(a) argument did Leapfrog’s counsel refer to the First Amendment, pure opinion, actual malice, prior restraint, or compelled speech. *See generally id.* 133:4–156:18.

On the last day of trial, the Community Hospitals in closing arguments extensively previewed the injunctive relief they believed would be appropriate, all while displaying a slide explaining that the Community Hospitals would seek relief against Leapfrog’s methodology, Safety Grades calculated pursuant to that methodology or any similar methodology, and various corrective disclosures. Day 5 Tr. 28:5–30:14, 41:2–11. Leapfrog’s counsel acknowledged that she had seen the “slide about the relief they want.” *Id.* at 42:15–16. When Leapfrog’s counsel delivered her own closing argument, however, she raised *no* objections related to pure opinion, actual malice, prior restraint, or compelled speech. To the contrary, Leapfrog’s counsel affirmatively conceded in a colloquy with this Court that the Court could impose a requirement for Leapfrog to publish “a better footnote.” *Id.* at 80:19–23.

At the end of closing arguments, the Court instructed the parties to include any and all legal arguments they wished to raise in their post-trial PFFCL: “[I]n the conclusions of law you can include briefing, whatever law you want to put in, put in that.” Day 5 Tr. at 97:24–98:1. Yet Leapfrog’s post-trial PFFCL did *not* develop any First Amendment argument. *See generally* Dkt. 204. It did not address pure opinion, actual malice, prior restraint, or compelled speech. And it did not object to any specific aspect of the Community Hospitals’ requested relief, whether on prior restraint, compelled speech, or any other grounds. Instead, Leapfrog simply copied and pasted the same paragraphs about anti-SLAPP found in its pretrial PFFCL. *Id.* ¶¶ 589–598.

One month after the parties submitted their proposed findings, this Court entered its post-trial order imposing liability on Leapfrog under FDUTPA. *See* Dkt. 212. The Court found that “Leapfrog’s change in methodology has no scientific basis, unfairly penalizes non-participating hospitals, and misrepresents hospital safety.” *Id.* at 2. The Court also found that Leapfrog personnel “intended to create the false impression that Leapfrog’s grades reflect actual performance,” *id.* at 26; that it was Leapfrog’s “central goal” for “poor scores [to] be used to ‘harass’ the hospitals who chose not to participate,” *id.* at 17; that the “decision to increase the penalty for nonparticipation was a simple business decision,” *id.* at 2; that “Leapfrog understood that penalizing hospitals

could impact their grades,” *id.* at 20; that Leapfrog personnel knew its “expert panel” had not approved the methodology change, *id.* at 24 n.6; and that Leapfrog personnel “want[ed] consumers to think that visiting a hospital with a C, D or F grade could seriously injure or even kill them,” even though Leapfrog lacked any “real data” substantiating that claim, *id.* at 24. The Court’s order awarded an injunction to the Community Hospitals, adopting the general formulation the Community Hospitals had requested while slightly narrowing the scope of relief. *Compare* Dkt. 203, ¶¶ 282–296, *with* Dkt. 212 at 40–41.

In the intervening months, Leapfrog has not sought a stay from this Court or the Eleventh Circuit. *See* Fed. R. App. P. 8(a). To the contrary, it has publicly represented that it will comply with the injunction, *see* Dkt. 219-1 & n.1, and says it has already begun to do so, *see* Dkt. 215. Paradoxically, Leapfrog now contends that the injunction violates its First Amendment rights and that it is entitled to a new trial or dissolution of the injunction under Rule 59(a) or (e). But Leapfrog premises its purported entitlement to admittedly “exceptional” relief on a mix of arguments this Court either already rejected or was never asked to consider. Dkt. 220 at 1.

LEGAL STANDARDS

Rule 59 of the Federal Rules of Civil Procedure governs requests for a new trial or to alter or amend the judgment. *See* Fed. R. Civ. P. 59(a), (e). Neither form of relief permits a losing party to rehash already-decided issues or to introduce new arguments that could have been previously pressed. As the Eleventh Circuit has explained, “a motion for new trial is not a vehicle for sandbagging an opposing party” after the defendant receives “an unfavorable verdict.” *Cummings v. Dep’t of Corr.*, 757 F.3d 1228, 1235 (11th Cir. 2014). Nor may the losing party “merely seek to relitigate old issues.” *F.W. Woolworth Co. v. Seckinger*, 125 F.2d 97, 98 (5th Cir. 1942). So too with motions to alter or amend the judgment. As Leapfrog’s own case explains, courts evaluating Rule 59(e) motions “will not address new arguments or evidence that the moving party could have raised before the decision issued.” *Banister v. Davis*, 590 U.S. 504, 508 (2020); *accord Michael Linet, Inc. v. Village of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005) (parties “cannot use a Rule 59(e) motion to relitigate old matters, [or] raise argument or present evidence that could have been raised prior to the entry of judgment”). Discretion to deny a motion to alter or amend the judgment “is ‘especially soundly exercised’ when a party gives no reason for not previously raising an issue.” *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009).

The failure to assert a purported constitutional right at the procedurally appropriate stage

forfeits the argument. *See Clement v. U.S. Att’y Gen.*, 75 F.4th 1193, 1202 (11th Cir. 2023) (“mere lack of diligence is sufficient to forfeit a constitutional or statutory right”). The First Amendment is no exception. *See Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 475 (11th Cir. 1999) (refusing “to consider” the issue when litigant “did not present a First Amendment argument”).

ARGUMENT

Leapfrog’s Rule 59 Motion should be denied. The old arguments Leapfrog rehashes are squarely barred by the longstanding prohibition against the use of Rule 59 for relitigation. And Leapfrog’s new arguments—which Leapfrog itself admits it did not previously “cal[l] out,” Dkt. 220 at 3—are likewise barred by the equally basic rule that post-judgment motions may not be used to belatedly assert unpreserved allegations of error.

I. Leapfrog’s Pure-Opinion Argument Is Barred, Abandoned, And Meritless

Leapfrog’s Motion principally contends that its Safety Grades and methodology constitute “statements of pure opinion” “unassailable” under the First Amendment, Dkt. 220 at 7–8, including because Leapfrog’s “imputed-value scores” are not “verifiab[le],” *id.* at 12, and because Leapfrog supposedly adequately “disclosed its basis for imputing those scores,” *id.* Having already made and lost these arguments, however, Leapfrog cannot revive them with this Court post-judgment. And those arguments are meritless in any event.

1. Leapfrog’s primary argument—that its Safety Grades and methodology are non-actionable “pure opinion”—was already litigated at the motion-to-dismiss stage. Leapfrog’s motion-to-dismiss brief contended that Leapfrog’s “Safety Grades and related representations are protected under the First Amendment because they are not readily provable as true or false,” and because Leapfrog allegedly publishes “the full grading methodology and data that form the basis” for the Grades, along with “Leapfrog’s representations related thereto.” Dkt. 39 at 2. Leapfrog continued in this vein for several pages, arguing that its Safety Grades, methodology, and “related representations” constitute “pure opinion,” either because they are “subjective,” *id.* at 11–12, or because Leapfrog’s “methodological approach is explained extensively” on its website, *id.* at 15.

That framing failed to persuade the Court. The Court’s order noted Leapfrog’s “claim[that] its online grades and methods are protected as unfalsifiable, purely opinionated speech.” Dkt. 41 at 5. Citing the same case Leapfrog’s brief now leads with, *Turner v. Wells*, 879 F.3d 1254 (11th Cir. 2018), the Court explained that those grades and methods would enjoy First Amendment protection if they were, indeed, “not readily capable of being proven false” or were

“pure opinion,” Dkt. 41 at 5 (quoting *Turner*, 879 F.3d at 1262). But, the Court explained, FDUTPA claims are not barred when they involve “false or misleading statements about the rating process itself,” including false statements that “mislead consumers” about how the ratings they consume are calculated and what they represent (*e.g.*, “absent” instead of “damning data”). *Id.* at 5–6. The Court thus rejected Leapfrog’s pure-opinion argument as “inapplicable.” *Id.* at 6.

That spells the end for Leapfrog’s Motion. By now contending that its “Safety Grades” and their “underlying imputed-value methodology” are “pure opinion that is unassailable under the First Amendment,” Dkt. 220 at 8, the Motion “improperly attempt[s] to relitigate old matters by rehashing arguments” Leapfrog “previously made” and lost. *Allaben v. Howanitz*, 579 F. App’x 716, 719 (11th Cir. 2014). It is thus barred by Eleventh Circuit precedent.

To circumvent that conclusion, Leapfrog tries to recast this Court’s motion-to-dismiss holding. According to Leapfrog, this Court—in calling Leapfrog’s pure-opinion defense “inapplicable”—in fact imposed constitutional “guardrails” by recognizing a supposed “constitutional line” between Leapfrog’s Safety Grades and methodology, on the one hand, and “Leapfrog’s representations *about* the methodology and Grades,” on the other. Dkt. 220 at 8–9. On Leapfrog’s telling, the Court “correctly recognized” that the Grades and methodology are nonactionable opinions, even if Leapfrog’s misrepresentations “*about* the methodology” enjoy no such protection. *Id.* Then, according to Leapfrog, the Court apparently forgot about this supposed constitutional holding and “transgresse[d]” the “guardrails” it “acknowledged” with an injunction that violates the First Amendment by including the Safety Grades and methodology. *Id.* at 9.

The Court’s order does not support that reading. The Court instead recognized that ratings themselves can be deceptive when they falsely purport to rest on objective information like “damning data,” Dkt. 41 at 6, and nowhere restricted the Community Hospitals’ case solely to “representations *about* the methodology,” *contra* Dkt. 220 at 9. The rest of the order confirms the point. The order recognized that the Community Hospitals’ FDUTPA claim concerned not just Leapfrog’s “lie[s] to consumers about how it calculates overall grades,” but also that Leapfrog “arbitrarily assign[s] poor safety ratings to hospitals” through “publication of safety grades.” Dkt. 41 at 7. The Court defined both aspects of “this conduct” as part of the Community Hospitals’ “full claim,” *id.* at 7–8—language that would not make sense had the Court just deemed assignment and issuance of Safety Grades themselves off-limits.

2. Tellingly, Leapfrog until now has never contended that the Community Hospitals’

evidence and arguments about the methodology and Safety Grades (whether at summary judgment, trial, or in post-trial briefing) exceeded the Court’s motion-to-dismiss order. To the contrary, Leapfrog deliberately abandoned its motion-to-dismiss argument that its Safety Grades and methodology are pure opinion by offering a flatly inconsistent position at trial. There, Leapfrog portrayed the penalty for alleged non-response bias (*i.e.*, the notion that non-participating hospitals are hiding adverse information) as based on “the science they teach in medical school” and “within scientific reasoning” purportedly approved—though concededly never voted on—by Leapfrog’s expert panel. Day 5 Tr. 47:16–17, 63:23–64:6. Leapfrog’s post-trial PFFCL also requested findings that its Safety Grades are based on “a scientific process” and “not arbitrary,” but “based on evidence” measuring numerous objective inquiries (like “actual patient harm”). Dkt. 204 ¶¶ 71–72. These arguments cannot be reconciled with Leapfrog’s motion to dismiss, reflecting Leapfrog’s abandonment of its earlier pure-opinion theory. Imputation cannot be a subjective opinion if, as Leapfrog maintained throughout trial, it is based on the scientifically valid measurement of falsifiable information. *See, e.g., Regions Bank v. Commonwealth Land Title Ins. Co.*, 2012 WL 6553966, at *2 (S.D. Fla. Dec. 14, 2012) (“[A] party, in fairness, ought not be able to argue one thing, lose, and then take a different position later.”).

3. Even if Leapfrog’s pure-opinion argument were not forfeited, it is meritless. The core relief the injunction’s first prong awarded, about which Leapfrog principally complains, *see* Dkt. 220 at 9, focused on Leapfrog’s *conduct* in perpetrating a coercive scheme to extract hospital data. The “precis[e]” problem this Court identified was “Leapfrog’s behavior” in using the threat of bad Safety Grades imposed pursuant to an arbitrary methodology “to pressure and penalize hospitals into participating” in Leapfrog’s Survey, even though Leapfrog has no “right to Plaintiff’s private data” that Leapfrog extracts through such coercion. Dkt. 212 at 39. As this Court noted, this threat is a form of “‘blackmail,’” *id.* at 36—conduct that goes far beyond the mere expression of an opinion. And the “regulation of conduct does not violate the First Amendment.” *Rumsfeld v. Forum for Acad. & Institut. Rts., Inc.*, 547 U.S. 47, 70 (2006); *accord United States v. Irving*, 509 F.2d 1325, 1331 n.5 (5th Cir. 1975) (“blackmail” is “properly punished every day” “without consideration of First Amendment issues”).

Nor do Leapfrog’s Safety Grades and methodology constitute pure opinions on their own terms. Arbitrarily calling something an “opinion” does not make it so when the statement “implies a knowledge of facts which lead to the conclusion.” *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 18

(1990). Leapfrog’s Safety Grades and methodology purport to rest on “empirical determination[s] subject to verification,” *Michel v. NYP Holdings*, 816 F.3d 686, 697 (11th Cir. 2016), foreclosing their portrayal as merely “‘subjective opinion’” under Leapfrog’s own precedent, *Home Performance All. v. Better Bus. Bureau of W. Fla., Inc.*, 354 So. 3d 1165, 1166 (Fla. DCA 2d 2023). As this Court’s order recognized, Leapfrog’s Survey, on which its Grades are based, claims to “collec[t] and transparently repor[t] hospital and ASC *performance*” based on “22 quality safety metrics” that “underlie [the] letter grade” Leapfrog issues. Dkt. 212 at 3–4 (emphasis added). These metrics purport to rest on “data sources,” not subjective whim. *Id.* at 5. When Leapfrog is missing data on “imputed” metrics—like whether physicians wash their hands—Leapfrog does not exclude those metrics, but arbitrarily assigns “the lowest score,” supposedly reflecting “*Limited Achievement*” on that metric. *Id.* at 6–7 (emphasis added). Leapfrog then issues a “Safety Grade” as “the product of [this] information” (or the lack thereof). *Id.* at 4.

Both the Safety Grade and methodology thus claim to answer factual questions about how hospitals “actually perform” on patient safety. Dkt. 212 at 27. It is not a matter of “editorial ... judgment,” *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974), or “differing interpretations,” *Lane v. Random House, Inc.*, 985 F. Supp. 141, 152 (D.D.C. 1995), that physicians at the Community Hospitals do not wash their hands. That is an “empirical [claim] subject to verification.” *Michel*, 816 F.3d at 697. Similarly, the Safety Grades are not “pure opinions” either, since they claim to be the final summation of those factual questions and “reflect actual safety performance,” Dkt. 212 at 24—not a subjective assessment of matters of taste.

Leapfrog’s caselaw is either beside the point or merely confirms that its Safety Grades and methodology are not “pure opinion.” For example, a statement deeming “a musical-comedy version of ‘The Phantom of the Opera’” to be “‘fake’” and “‘phony,’” *Phantom Touring, Inc. v. Affiliated Pubs.*, 953 F.2d 724, 725, 728 (1st Cir. 1992), *see* Dkt. 220 at 11, plainly concerns a subjective assessment of taste. Such statements have no inherent “factual connotation.” *Phantom Touring, Inc.*, 953 F.2d at 727. But they bear no resemblance to Leapfrog’s purportedly scientific methodology that claims to answer falsifiable questions, like whether doctors wash their hands. Leapfrog also ignores aspects of its cited cases that undermine its own theory. *Structural Plywood*, for example, did not hold that safety ratings are “just everyone’s opinion.” *Contra* Dkt. 220 at 9. The decision in fact recognized that by stamping lumber with ratings, the company represented it “had subjected the mills to certain quality-control processes,” which “isn’t subjective at all.” *U.S.*

Structural Plywood Integrity Coal. v. PFS Corp., 524 F. Supp. 3d 1320, 1335 (S.D. Fla. 2021). So too here: Leapfrog’s Safety Grades supposedly are the product of objective factual data, even though they are not. Similarly, *Masson* recognized that whatever “interpretive license” an author otherwise might have to interpret data, that license goes out the window when the author simply “fabricate[s]” information. *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 511 (1991).

Implicitly recognizing that its Safety Grades and methodology are “verifiabl[e],” Leapfrog invites the Court to nonetheless treat them as pure opinion because there is supposedly “no dispute that Leapfrog *disclosed* its basis for imputing those scores.” Dkt. 220 at 12. According to Leapfrog, its Safety Grades and methodology are non-actionable because they are “based on a fully disclosed and indisputably *truthful* fact” (*i.e.*, that non-participating hospitals did not respond to the Survey). *Id.* Leapfrog then accuses this Court of violating Leapfrog’s “inalienable right to free expression” because Leapfrog did not satisfy this Court’s “preferences for web design” by burying its incomprehensible methodology on its website. *Id.* at 13.

Leapfrog’s characterization of this Court’s decision misstates the law and ignores the Court’s thorough factual findings. Leapfrog cites various cases allegedly supporting its view that bare disclosure of its methodology elsewhere converts its Safety Grades into pure opinion. But those cases are not on-point. They all turned on a reader’s ability to easily distinguish commentary from facts themselves, either because the author expressly made that distinction in the same publication or because the interpretive nature of the author’s statements would be obvious based on a reader’s existing background knowledge.¹

Leapfrog’s Safety Grades and methodology, by contrast, purport to be *conveying facts*—whether hospitals’ performance reflects only “Limited Achievement” on objectively falsifiable metrics, like whether doctors use computers to order medication. Dkt. 212 at 6. There is no reason to believe that reasonable consumers of the Safety Grades already know those facts—knowledge which would make consumption of the Safety Grades unnecessary. That is why Leapfrog holds itself out (falsely) as “collect[ing] and transparently report[ing] hospital and ASC performance” in

¹ See *Lewis v. Abramson*, 673 F. Supp. 3d 72, 93 (D.N.H. 2023) (“*clear* that the statements were simply interpretations of the facts disclosed in the links” (emphasis added)); *Turner*, 879 F.3d at 1262 (facts must be “set forth in the publication” or “otherwise known or available”); *Partington v. Bugliosi*, 56 F.3d 1147, 1156–57 (9th Cir. 1995) (“*clear* that the challenged statements represent his own interpretation” (emphasis added)); *Hay v. Indep. Newspapers, Inc.*, 450 So. 2d 293, 296 (Fla. DCA 2d 1984) (facts must be “disclosed in the article” or “known or readily available”); *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 497–98 (2d Cir. 2013) (requiring “an accurate description of the data” so readers could evaluate statements’ “validity” “on their face”); *From v. Tallahassee Democrat, Inc.*, 400 So. 2d 52, 57 (Fla. DCA 1st 1981) (“everyone ... would have known” the fact even absent article).

the first instance—because consumers do not already know those facts. *Id.* at 3.

Nor does Leapfrog’s bare posting of its methodology somewhere else make it “clear,” as in the above cases, that its Safety Grades and methodology are mere subjective musings. At trial—and certainly to the public—Leapfrog held out its methodology as a “scientific” depiction of “actual performance,” *see supra* 8; Dkt. 212 at 2, 26, not a creative interpretation of non-existent data. And that Leapfrog’s methodology baselessly extrapolates poor performance from no data was far from “clear” to consumers. As this Court found, the Community Hospitals offered “persuasive evidence in the form of Google Analytics” that only *three percent* of website visitors during the relevant period even “accessed [Leapfrog’s] Scoring Methodology document.” Dkt. 212 at 31. That is unsurprising: Users had to navigate “hindrance after hindrance,” including “small,” “inconspicuous,” and “gray-font” hyperlinks, to find the methodology document—a “dense” tome that Leapfrog’s own CEO conceded ““is not meant to be used by the average layperson.”” *Id.* In fact, “all of this is what Leapfrog intended”—to hide its methodology from consumers to maintain the façade “that the grades assigned reflect actual performance.” *Id.* at 25, 31. Leapfrog offers no reason to think those careful factual findings are mistaken. And those findings show that the situation here is far removed from situations where reasonable readers would have readily understood the author was merely offering an opinion rather than attempting to convey objective facts.

Leapfrog plainly disagrees with the Court’s factual findings. *See, e.g.*, Dkt. 220 at 14 (insisting Leapfrog went “out of its way to disclose” its methodology). But Leapfrog identifies no error, much less clear error. Thus, Leapfrog’s “it’s all *technically* there” defense is as wrong now as it was the last time. Dkt. 212 at 30. Simply making the methodology document “*available*,” Dkt. 220 at 14, did not make it clear Leapfrog was somehow offering mere opinion, rather than conveying false statements of fact. Thus, Leapfrog’s website and methodology document do not transform its Safety Grades or methodology into “pure opinion.”

II. Leapfrog’s Actual-Malice Argument Is Forfeited And Meritless

In a belated attempt to shore up the record for appeal, Leapfrog also details several new arguments that “could have been raised prior to the entry of judgment.” *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). Providing no “reason for not previously raising” them, *Wilchombe*, 555 F.3d at 957, Leapfrog instead admits it permitted the case to proceed “without Leapfrog calling out” these supposed “excesses,” Dkt. 220 at 3. The first is Leapfrog’s claim that the Court’s injunction is “constitutionally infirm” because the Court made no “finding of actual malice.” *Id.* at

14. This apparently is an alternative argument to Leapfrog’s “pure opinion” theory; whereas opinions definitionally cannot be false, actual malice is relevant only if, as Leapfrog recognizes, statements are capable of being proven false. *Id.* Developed in the context of libel actions, the doctrine requires proof that the defendant was at least “reckless” about statements’ falsity. *New York Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964). “Although the erroneous statement of fact is not worthy of constitutional protection,” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), the doctrine is designed to protect “‘breathing space’” for “free debate,” *Sullivan*, 376 U.S. at 271–72.

1. Leapfrog’s actual-malice argument is forfeited. Leapfrog failed even to *mention* the term “actual malice” across hundreds of pages of briefing and five days of trial, much less present an argument about why and how that standard would apply here. Its Motion suggests the argument was preserved either in Leapfrog’s motion for summary judgment or its pretrial PFFCL. Dkt. 220 at 4. But neither document mentions “actual malice.” The summary-judgment motion vaguely states that “Leapfrog’s mission is premised on free speech in connection with a public issue,” Dkt. 99 at 19, but it does not request judgment on that basis or suggest the Community Hospitals failed to establish actual malice (or had the burden to do so). To the contrary, Leapfrog phrased the argument in purely conditional terms, stating that “*if this Court grants Leapfrog’s motion [i.e., for summary judgment], summary judgment on its anti-SLAPP defense is also warranted.*” *Id.* (emphasis added). Leapfrog’s pretrial PFFCL also does not mention actual malice or contend that the Community Hospitals failed to establish it, instead simply rehashing the anti-SLAPP point from its prior brief. Dkt. 135 ¶¶ 383–92. So too with Leapfrog’s pretrial stipulation, *see* Dkt. 129, which never claims the Community Hospitals had this burden at trial.

None of that suffices. “[T]o preserve a claim, argument, theory, or defense,” the defendant “‘must first clearly present it to the district court ... in such a way as to afford the district court an opportunity to recognize and rule on it.’” *Juris v. Inamed Corp.*, 685 F.3d 1294, 1325 (11th Cir. 2012). A mere “‘passing referenc[e]’ to an issue” is insufficient “to preserve it,” *NLRB v. Gaylord Chem. Co., LLC*, 824 F.3d 1318, 1333 (11th Cir. 2016), as is the “bare invocation” of a legal concept “without any argument,” *United States v. Defilippis*, ---F.4th---, 2026 WL 1067115, at *10 n.9 (11th Cir. Apr. 20, 2026). Leapfrog’s conclusory references to its “mission” implicating a “public concern” thus did not present or preserve an actual-malice argument, precluding

consideration of the new defense under Rule 59. *See Arthur*, 500 F.3d at 1343.²

Unable to show where Leapfrog preserved its new argument, Leapfrog instead mischaracterizes the Community Hospitals' briefs, claiming that *the Community Hospitals* somehow preserved Leapfrog's new argument in their pretrial PFFCL. That argument is a non-starter, as the burden is on the party asserting the error to have preserved it. *See Juris*, 685 F.3d at 1325. It is also nonsensical. According to Leapfrog, the Community Hospitals "acknowledged" and "recognized" that "actual malice must be found" here. Dkt. 220 at 15. Not so. The Community Hospitals said the opposite: the standard was *inapplicable* under this Court's motion-to-dismiss order and "[e]ven if" the standard applied it would be satisfied given the clear evidence Leapfrog's personnel knew the Safety Grades were bogus. Dkt. 136 ¶ 133. Tellingly, over the course of trial and later briefing, Leapfrog never disputed or responded to this point, never mentioned "actual malice," and never contended that the Community Hospitals' actual-malice analysis ("even if" the standard were applicable) was wrong. Leapfrog's silence *even after* the Community Hospitals preemptively knocked down the argument demonstrates forfeiture, not preservation. Indeed, Leapfrog's conduct strongly suggests "a tactical decision to forego [the] objection at trial," about which Leapfrog now "cannot complain." *Francois v. Wainwright*, 741 F.2d 1275, 1282 (11th Cir. 1984).

"[N]o procedural principle is more familiar ... than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right." *Clement*, 75 F.4th at 1202 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). That principle applies with particular force here, as Leapfrog has given "no reason" why it knowingly "failed to raise this new legal theory before judgment was rendered." *Wilchombe*, 555 F.3d at 957. Leapfrog's actual-malice argument is thus forfeited and not cognizable under Rule 59.

2. In any event, Leapfrog's actual-malice argument is also meritless. Actual malice is irrelevant to the specific conduct this Court enjoined. And even if actual malice applied here, the Community Hospitals' evidence amply established that Leapfrog was "highly aware" its Safety Grades and methodology rested on "probably false" information. *Michel*, 816 F.3d at 703.

² Leapfrog also did not preserve its actual-malice theory (or any of its other new theories) by raising its pure-opinion defense at the motion-to-dismiss stage. A party does not preserve one issue by asserting a different issue "simply because both fall under the [same] broader rubric," such as the First Amendment. *Flowers v. Comm'r, Soc. Sec. Admin.*, 97 F.4th 1300, 1306 (11th Cir. 2024). Thus, a new issue is forfeited when it relies on "a wholly different legal framework" than the issue actually asserted. *Gould v. Interface, Inc.*, 153 F.4th 1346, 1357 (11th Cir. 2025).

As a threshold matter, Leapfrog’s actual-malice argument rests on a false equivalence between the facts of this case and the common-law speech torts that spurred the Supreme Court to develop the actual-malice standard—likely why Leapfrog cites no cases applying actual malice to FDUTPA. The problem here is not that Leapfrog published a false statement negligently, *cf. Sullivan*, 376 U.S. at 288, or merely said something “disagreeable,” *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). To the contrary, Leapfrog actively leveraged the threat of intentionally false statements to extract valuable data from hospitals in advance of the publication of Safety Grades. Thus, this case does not concern “falsity alone,” but Leapfrog’s use of false statements “to gain a material advantage.” *United States v. Alvarez*, 567 U.S. 709, 719, 713 (2012) (plurality). It is akin to a reporter demanding a payoff to withhold publication of false, damaging information. That is not a “new category” of unprotected speech, *Otto v. City of Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020), but a type of conduct that has never enjoyed protection, *see Irving*, 509 F.2d at 1331 n.5.

This Court’s order emphasized this commonsense point. “[P]recisely what concern[ed]” the Court was “Leapfrog’s *behavior*”—its use of “leverage” through the threat of a non-participation penalty “to pressure and penalize hospitals into participating” in Leapfrog’s Survey, and thus to gain access to hospitals’ “private data” to which Leapfrog has no “right,” so that Leapfrog could “maximize revenue” by monetizing the information. Dkt. 212 at 35, 39 (emphasis added). The injuries here thus arose not from “the bare fact of publication” of speech itself, *Sullivan*, 376 U.S. at 262, but from an “unfair or deceptive ac[t] or practic[e]” to improperly extract data from hospitals for commercial gain, Fla. Stat. § 501.204(1). Stamping out unfair conduct may incidentally burden speech. But “a conduct-regulating statute of general application that imposes an incidental burden on the exercise of free speech rights does not implicate the First Amendment.” *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 209 (2d Cir. 2004). Simply put, “the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

3. Even if actual malice *did* apply here, it would be easily satisfied by the evidence at trial and this Court’s findings. That standard does not immunize false speech. Instead, it requires the plaintiff to show clear evidence that the speaker “was highly aware that the [information] was probably false.” *Michel*, 816 F.3d at 703. For example, a publisher acted with actual malice when it “knowingly chose language” open to a false interpretation despite having “sufficient time” to confirm an assertion’s accuracy. *Hunt v. Liberty Lobby*, 720 F.2d 631, 642, 646 (11th Cir. 1983).

This Court’s order is replete with factual findings about Leapfrog personnel’s subjective awareness that Leapfrog’s Safety Grades and surrounding representations rested on false information. For example, Leapfrog personnel “intended to create the false impression that Leapfrog’s grades reflect actual performance.” Dkt. 212 at 26. But Leapfrog personnel knew the actual, “acknowledged goal” of the methodology change was “punishing nonparticipants,” *id.*, by simply “imputing ... the lowest score,” *id.* at 22. Indeed, they “*intended* that lower scores” would serve as “a punitive measure.” *Id.* at 21. Leapfrog personnel also knew that “assignment” of these artificially low scores was “mathematically arbitrary” and “chose arbitrarily low numbers” to create the impression a “hospital was graded on *something*, when in truth it was based on nothing.” *Id.* at 25, 28. And they “intended” to hide Leapfrog’s methodology document to conceal how Leapfrog’s “ratings *actually* work,” so that consumers would continue to be duped into believing the Safety Grades were reliable. *Id.* at 30–31. These repeated and extensive findings confirm Leapfrog’s personnel *at minimum* were “highly aware” the Safety Grades “probably” rested on false information, *Michel*, 816 F.3d at 703, and, indeed, confirm that they actually knew of such falsity at the time. Tellingly, Leapfrog even used grant money to “specifically target” consumers in certain Florida zip codes with advertisements to ensure those searching for the Community Hospitals “would be shown the failing Safety Grades”—a tactic Leapfrog personnel characterized as “harass[ing]” and that of “a Disney villain.” Dkt. 212 at 17, 32.

Given that Leapfrog apparently seeks to reverse this Court by contending that an actual-malice finding is “missing,” Dkt. 220 at 14, this Court could make explicit what its findings already establish by using the magic words “actual malice” to describe its findings in its order disposing of the Motion. Regardless, however, Leapfrog’s argument has no basis in this case’s record.

III. Leapfrog’s Statutory Argument Is Barred, Forfeited, And Meritless

Leapfrog also urges the Court to “reconsider the judgment on statutory grounds,” claiming that Leapfrog’s representations and behavior do not qualify as “deceptive” or “unfair” practices under FDUTPA as a matter of “statutory interpretation,” including because Leapfrog “disclosed [its] methodology.” Dkt. 220 at 17. And it tacks on a “constitutional-avoidance” argument, contending that the Court should construe purported “ambiguity” in FDUTPA’s text to avoid deciding Leapfrog’s forfeited actual-malice defense. *Id.* at 17–18. Each argument fails.

Framed as a statutory argument, Leapfrog’s contention that its conduct falls outside of FDUTPA was already rejected by this Court, and Leapfrog may not “relitigate old matters.”

Michael Linet, Inc., 408 F.3d at 763. At the motion-to-dismiss stage, Leapfrog argued that its “Safety Grades and related representations” do not “constitute unfair or deceptive trade practices” and accused the Community Hospitals of having failed to “plead a ‘deceptive act’ or ‘unfair practice’” under FDUTPA, including because Leapfrog is supposedly “transparen[t]” in publishing its methodology. Dkt. 39 at 19–20. This Court disagreed. As it explained, the Community Hospitals “alleged that [Leapfrog] arbitrarily assigned poor ratings to hospitals, then lied to consumers about how it calculates overall grades.” Dkt. 41 at 7. Taking those allegations as true, the Court found that they qualify “as a deceptive act or unfair practice.” *Id.* Indeed, such conduct would “plainly fal[l] within the ambit of the FDUTPA” if proven. *Id.* After the Community Hospitals proved their case at trial, the Court again explained why Leapfrog’s conduct falls within FDUTPA’s scope as a statutory matter, analyzing text, precedent, and relevant guidance from the Federal Trade Commission. Dkt. 212 at 18, 36–37. Leapfrog offers no reason to depart from these considered holdings as a statutory matter. It simply rehashes (again) the claim that Leapfrog “disclosed” its “methodology,” which supposedly should have dispelled deception for the “reasonable consumer,” Dkt. 220 at 18—a proposition foreclosed by the Court’s extensive factual findings, *see supra* 11.

Framed as a constitutional-avoidance theory, Leapfrog’s argument is forfeited and meritless. Leapfrog never previously argued that its conduct should be construed to fall outside of FDUTPA on avoidance grounds, and its Motion does not even attempt to identify how Leapfrog preserved the argument. Constitutional avoidance also applies “only when ambiguity exists.” *Iancu v. Brunetti*, 588 U.S. 388, 397 (2019). Yet Leapfrog identifies no relevant ambiguity in FDUTPA’s text. “[A] statute is not vague or ambiguous just because it is broad.” *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1240 (11th Cir. 2000). And there is “no constitutional violation to avoid,” *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1094 (11th Cir. 2017), given that Leapfrog’s constitutional arguments are forfeited and meritless.

IV. Leapfrog’s Prior-Restraint Argument Is Forfeited And Meritless

Leapfrog next attacks the “scope” of the injunction as an “unconstitutional prior restraint” on speech. Dkt. 220 at 18. In support of that argument, Leapfrog claims that injunctions “that proscribe speech itself are per se unconstitutional” and that courts may not impose “‘injunctions regarding speech in any circumstance, *even where liability ... has been found*’”—an argument that, if accepted, would have truly extraordinary implications for consumer-protection regimes nationwide. Dkt. 220 at 18 (emphasis in original). This argument is forfeited and meritless.

Across all of its pretrial briefs, throughout five days of trial, and in its lengthy post-trial PFFCL, Leapfrog failed to articulate—let alone develop—any argument that an injunction here would represent an impermissible prior restraint. Leapfrog never raised the argument even after the Community Hospitals extensively detailed the relief they intended to seek at closing argument (including a slide deck spelling out the remedial request), even after counsel for Leapfrog expressly acknowledged the scope of the Community Hospitals’ request in open court, *see* Day 5 Tr. 42:15–22, and even after the Court instructed the parties to include all legal arguments they wished to make in their post-trial PFFCL. *See supra* 4. This silence is deafening—and conclusive.³

Even if the scope of the injunction were in error (which it is not), Leapfrog in fact *invited* that error. In a colloquy with the Court about the scope of relief, Leapfrog’s counsel asserted that the Community Hospitals were using FDUTPA “to silence simple speech.” Day 5 Tr. 44:2. After the Court pointed out that “FDUTPA can be used for deceptive speech,” *id.* at 44:5, Leapfrog’s counsel responded, “They [*sic*] can,” *id.* at 44:6. Having “expressly acknowledged the court could impose” relief for deceptive speech, Leapfrog is “precluded from claiming the court erred” by doing so. *United States v. Love*, 449 F.3d 1154, 1157 (11th Cir. 2006).

In any event, Leapfrog’s prior-restraint argument is also meritless even if it were cognizable. The Court’s injunction does not prevent Leapfrog from publishing speech “‘of any kind,’” *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), but zeroes in on Leapfrog’s coercive *conduct* in running an unfair scheme to extract hospital data. It does not purport to dictate the content of the Community Hospitals’ Safety Grades or require that the Community Hospitals be issued good Safety Grades. To the contrary, it enjoins the deceptive and unfair practice of applying different metrics to participating and non-participating hospitals, a “narrowly drawn” restriction “precisely” targeting what made Leapfrog’s scheme unlawful in the first place. *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 184 (1968). That the injunction encompasses use of any “similar” unfair methodology is also appropriate and unsurprising: Injunctions would be “for naught” if they could be evaded through a “program of experimentation with disobedience of the law.” *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192–93 (1949).

³ The only reference Leapfrog apparently ever made to prior restraint came in part of one sentence in its summary-judgment brief, where it contended that the “filing of this case”—not the injunction—“amounts to prior restraint on free-speech.” Dkt. 99 at 19. This “‘single, passing reference’ to an issue ‘unaccompanied by any discussion or elaboration’ does not preserve an argument,” *United States v. Horn*, 129 F.4th 1275, 1303 (11th Cir. 2025), particularly when Leapfrog has given “no reason for not previously raising [the] issue,” *Wilchombe*, 555 F.3d at 957.

The injunction, of course, also requires Leapfrog to remove existing Safety Grades assigned to the Community Hospitals pursuant to Leapfrog's deceptive and unfair methodology. Dkt. 212 at 41. But the First Amendment does not prohibit narrowly tailored injunctive relief after a final determination that specific conduct and associated representations were deceptive and unfair. As the Supreme Court explained decades ago, it "has never held that all injunctions [affecting speech] are impermissible." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels.*, 413 U.S. 376, 390 (1973). Rather, "[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, *before an adequate determination* that it is unprotected by the First Amendment." *Id.* (emphasis added). The Court in that case thus affirmed an injunction against speech, noting that because "no interim relief was granted," the restraint was imposed only after a "final determination" that the speech was "unprotected." *Id.* The Eleventh Circuit embraced similar reasoning in *Lucero v. Trosch*, 121 F.3d 591 (11th Cir. 1997). As it explained, an injunction against protestors did "not constitute a prior restraint" because "the trial court had made a judicial determination that the defendants' past conduct was harassing and unlawful." *Id.* at 601. In other words, the court was not dealing with "a mere threat of a future violation." *Id.* at 601 n.15; *accord Deligdish v. Bender*, 2023 WL 5016547, at *12 (M.D. Fla. Aug. 7, 2023) (courts have "'previously held that a narrowly tailored injunction prohibiting speech *already found* defamatory by the jury is not an invalid prior restraint when a judgment for monetary damages would not afford the plaintiff effective relief'" (emphasis added)).

Leapfrog's purportedly contrary cases only underscore this distinction. They involve situations where a party either requested preliminary relief absent a prior determination of illegality, or, relatedly, sought to restrain *lawful* speech. *See Basulto v. Netflix, Inc.*, 2023 WL 7129970, at *52 (S.D. Fla. Sept. 20, 2023) ("there has been no determination that the statements are false and defamatory"); *Patriot Lending Servs., Inc. v. Amerifirst Fin. Corp.*, 2020 WL 758155, at *3 (M.D. Fla. Feb. 14, 2020) (preliminary relief); *Vrasic v. Leibel*, 106 So. 3d 485, 486 (Fla. DCA 4th 2013) (preliminary relief); *Chevaldina v. R.K./FL Mgmt., Inc.*, 133 So. 3d 1086, 1088 (Fla. DCA 3d 2014) (preliminary relief); *id.* at 1090 (acknowledging speech can be enjoined if "made in the furtherance of the commission of another intentional tort"); *Town of Lantana v. Pelczynski*, 290 So. 2d 566, 568 (Fla. DCA 4th 1974) (statute prohibiting core political speech); *Krapacs v. Bacchus*, 301 So. 3d 976, 980 (Fla. DCA 4th 2020) (protected speech); *id.* at 981 (acknowledging that

if speech was “not ... protected,” it “could be addressed through injunctive relief”).⁴ Similarly, the injunction in *Sindi v. El-Moslimany*, 896 F.3d 1, 34 (1st Cir. 2018), was deemed overbroad because it enjoined use of specific defamatory words that could lawfully be used in different contexts. Yet Leapfrog presents no argument about some future context in which it lawfully could deploy its methodology to extract hospitals’ private data on threat of an arbitrary penalty.

V. Leapfrog’s Compelled-Speech Argument Is Forfeited And Meritless

Last, Leapfrog briefly attacks the injunction’s third and fourth prongs, claiming that they “unconstitutionally compe[l]” speech, Dkt. 220 at 20, by requiring corrective disclosures to entities that “paid to license” the Safety Grades (which Leapfrog represents it has already done, Dkt. 215 ¶¶ 28–33), and to place the same disclosures “in future contracts,” “advertising materials,” and other materials “that promote paid licensure” of the “next cycle of Safety Grades,” Dkt. 212 at 41.

Leapfrog’s new compelled-speech argument is forfeited and thus not cognizable under Rule 59. As noted, the Community Hospitals extensively presented at trial on the disclosures they sought, *see supra* 4, and the Court thereafter instructed the parties to include all legal argument—including as to the injunction—in their post-trial PFFCL. Yet Leapfrog failed to raise *any argument* regarding the scope of any eventual injunction in that briefing. *See id.* Leapfrog does not suggest its compelled-speech argument is preserved and provides “no reason for not previously raising” it. *Wilchombe*, 555 F.3d at 957. Moreover, even if there were error here (which there is not), Leapfrog itself invited the alleged error. When the Court asked “what type of injunction would allow [Leapfrog] to continue [its] mission,” Day 5 Tr. 80:21–22, Leapfrog’s counsel suggested “a better footnote,” *id.* at 80:23. This statement is, in fact, the *only* argument Leapfrog offered (until now) regarding the scope of the Court’s injunction. Because Leapfrog “expressly acknowledged the court could impose” disclosures as a remedy, Leapfrog cannot now contend that disclosures are impermissible. *Love*, 449 F.3d at 1157. And any challenge to the disclosures Leapfrog already sent is plainly moot. *See Newman v. Alabama*, 683 F.2d 1312, 1317 (11th Cir.

⁴ Leapfrog also says the injunction is a prior restraint because of the Community Hospitals’ recent letters pointing out that Leapfrog’s characterization of Safety Grades on leapfroggroup.org and Leapfrog’s contemplated program for grading ambulatory surgery centers (“ASC”s) are inconsistent with the injunction. Dkt. 220 at 3, 6, 19. Leapfrog misrepresents the Community Hospitals’ letters by claiming they say “Leapfrog cannot so much as report the basic, irrefutable fact that Plaintiffs declined to respond” to the Survey. *Id.* at 3. The Community Hospitals specifically disclaimed this distortion of their letter *before* Leapfrog filed its Rule 59 Motion. *See* Dkts. 219, 219-3. Leapfrog’s continued false characterization of the Community Hospitals’ letters is frivolous. Moreover, the Community Hospitals’ letters are irrelevant to whether the injunction itself is a “prior restraint.” Whether the injunction is properly read to encompass this additional conduct is a determination to be made by this Court in any future injunction enforcement proceedings. The Community Hospitals’ position at this juncture does not itself affect the scope of the injunction.

1982) (challenge “moot” when party already “perform[ed] certain discrete acts” required).

Leapfrog’s compelled-speech challenge is also baseless. The injunction’s disclosure requirements (which this Court carefully tailored, *see* Dkt. 212 at 39–40), target obvious commercial speech—advertisements promoting, and contracts effectuating, paid licensure of the Safety Grades. The Supreme Court for decades has recognized courts’ authority to order factual, corrective disclosures in the commercial-speech context, particularly when those disclosures are tied to adjudicated deception. *See, e.g., Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985) (“[A]n advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”); *In re R.M.J.*, 455 U.S. 191, 201 (1982) (“warning or disclaimer” can be “appropriately required” to “dissipate the possibility of consumer confusion or deception”). Leapfrog’s own case recognizes the point, noting that in the context of “commercial advertising,” courts may “requir[e] the dissemination of purely factual and uncontroversial information.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995). And the Eleventh Circuit recently confirmed the point in *FTC v. Corpay*, 164 F.4th 807 (11th Cir. 2026), which Leapfrog’s brief ignores, but on which this Court’s order expressly relied, Dkt. 212 at 39. *Corpay* affirmed an injunction requiring a company to make future disclosures “unavoidable” to consumers, relief warranted by the company’s “intentional” practice of hiding important information. 164 F.4th at 849–50. This Court made the same finding here: that “Leapfrog intended” for consumers not to be able to locate or understand its methodology, Dkt. 212 at 31, to perpetuate the false belief “that Leapfrog’s grades reflect actual performance,” *id.* at 26.

Leapfrog’s Motion also does not even *try* to object to the content of the required disclosures, which closely tracks disclosures ordered in similar cases. *See, e.g., MacuHealth, LP v. Vision Elements, Inc.*, 2024 WL 3738489, at *9–10 (M.D. Fla. Aug. 9, 2024). The disclosures do not require Leapfrog to abandon its mission or express agreement with the Community Hospitals regarding hospital safety. They require disclosure of a “purely factual and uncontroversial statement” concerning the outcome of this litigation to entities that pay to license the challenged Grades—which Leapfrog itself recognizes is permissible, Dkt. 220 at 20.

CONCLUSION

The Court should deny Leapfrog’s motion for reconsideration and to alter or amend the judgment, or for a new trial.

Dated: May 14, 2026

Respectfully submitted,

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