ORAL ARGUMENT REQUESTED

CASE NO. 19-7030

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FREEDOM WATCH, INC., et al

Plaintiffs-Appellants
v.

GOOGLE, INC., et al

Defendants-Appellees.

APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANTS' OPENING BRIEF

Larry Klayman, Esq.
Freedom Watch, Inc.
2020 Pennsylvania Ave. N.W.
Suite 800
Washington, D.C. 20006
Tel: (561)-558-5336
Email: leklayman@gmail.com

Attorney for Plaintiffs-Appellants

Dated: December 5, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

Freedom Watch, Inc. is a 501(c)(3) non-profit and a Plaintiff/Appellant. Laura Loomer is an individual and a Plaintiff/Appellant. Google, Inc. is a corporation and a Defendant/Appellee. Facebook, Inc. is a corporation and a Defendant/Appellee. Twitter, Inc. is a corporation and a Defendant/Appellee. Apple, Inc. is a corporation and a Defendant/Appellee There were no amici in the district court.

B. Rulings

Appellants appeal from the U.S. District Court for the District of Columbia's order granting the Defendants/Appellees' Motion to Dismiss and all other rulings averse to Appellants in this matter. App. ___.

C. Related Cases

This case was not previously before this court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 26.1, Appellants are not officers, directors, or majority shareholders of any publicly traded corporation.

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JURISDICTIONAL STATEMENT

The basis for the U.S. District Court for the District of Columbia's ("District Court") subject-matter jurisdiction is pursuant to 28 U.S.C. § 1331 under Federal Question Jurisdiction. The basis for the U.S. Court of Appeals for the District of Columbia Circuit's jurisdiction is pursuant to 28 U.S.C. § 1291 because this appeal is from a final judgment that disposes of all parties' claims. Pursuant to the order of the Court, Appellants' Initial Brief is due December 5, 2019 having received two extensions of time to file.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err by granting Appellees' Motion to Dismiss on March 14, 2019? App ___.

STATEMENT OF THE CASE

Appellants brought this suit against Appellees, all of whom are major technology and social media corporations, in response to their well-documented and publicized pattern and practice of suppressing and censoring conservative content. The Amended Complaint sets forth in extreme detail news publications which include admissions from employees employed by Defendants that such targeted suppression and censorship was, indeed, occurring. For example, this includes admissions, inter alia, from employees of Defendant Facebook that their conduct

had a chilling effect on conservative news." App. _____

As set forth below, Appellees' conduct violates not only the Constitution, but also numerous federal and state statutes. Appellees' status as large and influential technology corporations simply cannot shield them from liability in this regard. They must be held to the same level playing field as everyone else, and since Appellants have pled viable causes of action which are supported by well pled concrete facts, the District Court dismissed Appellants' claims in error.

This Amended Complaint is centered upon Appellees' "conspiracy to intentionally and willfully suppress politically conservative content," App. _____, and the resulting severe damages that this conspiracy has had on Freedom Watch and Ms. Loomer, both of whom are prominent conservative organizations/figures who rely on social media platforms to "to inform the public about [their] conservative advocacy and to raise the funds through donations to further its public advocacy and mission." App. ____ The aim of this conspiracy to suppress politically conservative content is to "take down President Donald Trump and his administration with the intent and purpose to have installed leftist government in the nation's capital and the 50 states." App. ____

The Amended Complaint sets forth in detail how Appellees have acted to suppress and censor conservative content. For instance, YouTube, which is owned and operated by its parent company, Appellee Google, demonetized the channels

of the conservative Prager University and Western Journal and also targeted conservative pundit Alex Jones of InfoWars due to their conservative political viewpoints. App.____. Furthermore, the Amended Complaint details how Google has censored conservative content via its search engine, with "an incredible 96% of Google search results for 'Trump' news came from liberal media outlets, using the widely accepted Sharyl Attkisson media bias chart." App. _____. Indeed, only recently, whistleblowers and former employees revealed how Google was trying to "influence the 2020 election process against Trump." One stated, "[t]hey have very biased people running every level of the company…. They have quite a bit of control over the political process. That's something we should really worry about. They really want Trump to lose in 2020. That's their agenda."[1]

The Amended Complaint also sets forth in detail how Facebook has censored and suppressed conservative content, including through the admissions of it former employees who admitted that they "routinely suppressed news stories of interest to conservative readers from [its] influential 'trending' news section" App. ___. In 2018, Facebook instituted an algorithm change that further suppressed conservative content. App ___. According to a study by Western Journal, "Liberal publishers have gained about 2 percent more web traffic from Facebook than they

[1] https://www.newsweek.com/google-engineer-anti-trump-conservative-bias-fox-news-employees-kevin-cernekee-tucker-carlson-1452492

were getting prior to the algorithm changes implemented in early February. On the other hand, conservative [and thus Republican] publishers have lost an average of nearly 14 percent of their traffic from Facebook." App ____. This is not accidental. By Facebook's own admission, Campbell Brown, the leader of Facebook's news partnerships team, admitted that Facebook would be censoring news publishers based on its own internal biases, stating:

> This is not us stepping back from news. This is us changing our relationship with publishers and emphasizing something that Facebook has never done before: **It's having a point of view**, and it's leaning into quality news. … We are, for the first time in the history of Facebook, taking a step to try to to define what 'quality news' looks like and give that a boost." App____.

The Complaint also sets forth how Twitter "has banned nasty accounts perceived as right-wing while ignoring similar activity from the left." App. ____. This includes "shadowbanning" conservative accounts while ignoring radical left-wing interest groups. App. ______.

The Amended Complaint details how, "[s]ince Defendants have begun suppressing and censoring Freedom Watch's content on these platforms, Freedom Watch has suffered a dramatic loss in viewership and user engagement, and this has led directly and proximately to a dramatic loss in revenue." App. ____. For instance, Freedom Watch's YouTube channel "has remained static and is now declining especially over the last several months, after years of steady grow[th], which simply cannot be a coincidence given the facts set forth in the previous

section." App ____. Freedom Watch has experienced a declining number of subscribers after experiencing years of steady growth right when Defendants began suppressing conservative content. App. _____. Crucially, the Amended Complaint alleges that these damages are "the result of the illegal and anti-competition actions as pled herein." *Id.*

Appellant Loomer is a well known conservative investigative journalist and activist, and a Jewish woman. App. _____. Ms. Loomer relied heavily on social media platforms in order to perform her work as a journalist, with over 260,000 followers on Twitter as of November 21, 2018. App. _____. In furtherance of their conspiracy to suppress conservative content, Defendant Twitter permanently banned Ms. Loomer on November 21, 2018 for the following tweet:

> Ilhan is pro Sharia Ilhan is pro- FGM Under Sharia homosexuals are oppressed & killed. Women are abused & forced to wear the hijab. Ilhan is anti Jewish. App. ____.

Facebook also banned Ms. Loomer for 30 days.[2] App. _____

SUMMARY OF THE ARGUMENT

The District Court erred in dismissing Appellants' Sherman Act claims because it went outside of the allegations of the Amended Complaint to find that no agreement occurred between the Appellees. It further erred by holding that

[2] Loomer was then permanently banned by Facebook on May 2, 2019 and Instagram, which is owned by Facebook, and labeled as a "dangerous" individual while these tech companies still allowed for Islamic terrorist organizations including Hamas, Hezbollah, and ISIS to have accounts.

Appellees are not "public accommodations" for the purposes of the D.C. Human Rights Act, as conclusively disproven by the amicus brief submitted by the District of Columbia itself. It also erred by finding that Appellees are not quasi-state actors capable of being sued for constitutional violations, given the Supreme Court's recent opinion in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

STANDARD OF REVIEW

Whether the District Court properly granted Appellees Motion to Dismiss and entered judgment on the pleadings in favor of Appellees is a question of law, which this Court reviews *de novo*. *Peters v. National R.R. Passenger Corp*., 966 F.2d 1483, 1485 (D.C. Cir. 1992); *see also Croixland Properties Ltd. v. Corcoran,* 174 F.3d 213, 215 (D.C. Cir. 1999). In doing so, this Court must treat all the factual allegations of the complaint as true, *see Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993) (reviewing de novo the district court's dismissal of claims), and must grant plaintiff[s] "the benefit of all inferences that can be derived from the facts alleged," *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979).

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In several cases, the U.S. Supreme Court addressed the standards for deciding motions to dismiss a complaint for failure to state a claim.

First, in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Court held that facts alleging that companies engaged in parallel business conduct, but not indicating the existence of an actual agreement, did not state a claim under the Sherman Act. The Court stated that in an antitrust action, the complaint must contain "enough factual matter (taken as true) to suggest that an agreement was made," explaining that "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading state; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id*. at 556. The Court also explained, more generally, that ". . . a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," yet "must be enough to raise a right to relief above the speculative level" and give the defendant fair notice of what the claim is and the grounds upon which it rests. *Id*. at 555. In other words, Plaintiffs-Appellants here need only allege "enough facts to state a claim to relief that is plausible on its face" and to "nudge[] the[] claims[] across the line from conceivable to plausible." *Id*. at 570.

Subsequently, in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Court elaborated. There, the Court held that a pretrial detainee alleging various unconstitutional actions in connection with his confinement failed to plead sufficient facts to state a claim of unlawful discrimination. The Court stated that

the claim for relief must be "plausible on its face," *i.e.*, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 1949. In this regard, determining whether a complaint states a plausible claim for relief is necessarily "a context-specific task." *Id*. at 1950. Therefore, if a complaint alleges enough facts to state a claim for relief that is plausible on its face, such as here, a complaint may not be dismissed for failing to allege additional facts that the plaintiff would need to prevail at trial. *Twombly*, 550 U.S. at 570; *see also Erickson v. Pardus*, 551 U.S. 89, 93 (plaintiff need not allege specific facts, the facts alleged must be accepted as true, and the facts need only give defendant "fair notice of what the *** claim is and the grounds upon which it rests" (quoting *Twombly*, 550 U.S. at 555).

Where the requirements of Rule 8(a) are satisfied, even "claims lacking merit may be dealt with through summary judgment." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002). In this regard, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at. 556.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DISMISSING APPELLANTS' SHERMAN ACT CLAIMS

Appellants made claims under both Section 1 and Section 2 of the Sherman Antitrust Act, both of which were dismissed erroneously by the District Court.

A. Section 1 Claim

The District Court found that Appellants failed to adequately state a Section 1 claim because it did not contain enough factual matter to suggest that there was an agreement between the Defendants. First and foremost, as a threshold matter, the Amended Complaint expressly pleads the existence of such an agreement:

> Defendants have entered into an illegal agreement to refuse to deal with conservative news and media outlets, such as Freedom Watch and those similarly situated, as well as to suppress media content and advocacy, which has no legitimate business justification and is plainly anticompetitive. App. ____.

Indeed, concerted action may be "may be proven by direct or circumstantial evidence." *Atl. Coast Airlines Holdings, Inc. v. Mesa Air Grp., Inc.*, 295 F. Supp. 2d 75, 90 (D.D.C. 2003). If circumstantial evidence is used, then there need only be "evidence that tends to exclude the possibility that the [alleged conspirators] were acting independently." *Id*. (internal quotations omitted).

Furthermore, "[c]oncerted action" may be inferred from evidence of parallel business behavior, which in this instance is demonstrated by the fact that each of the four Defendants has acted to suppress and censor conservative content. *Fed. Trade Com. v. Lukens Steel Co.*, 454 F. Supp. 1182, 1189 (D.D.C. 1978). In this instance, in addition to parallel business behavior, there would need to be (1)

evidence that the Defendants acted contrary to their economic self-interest, and (2) evidence of the Defendants' motivation to enter into an agreement. *Id*.

The Amended Complaint sets forth both the evidence that excludes the possibility of independent action, as well as the plus factors necessary for concerted action to be inferred from parallel business behavior. It alleges that Appellees acted against their own economic self-interest in their concerted action to restrain trade:

> Defendants' agreement has a plainly anti-competitive effect and has no rational economic justification, **as they are willing to lose revenue from conservative organizations and individuals like Freedom Watch and those similarly situat**ed to further their leftist agenda and designs to effectively overthrow President Trump and his administration and have installed leftist government in this district and the 50 states. App. ____(emphasis added).
>
> There is no legitimate independent business reason for Defendants "conscious parallelism," as they **are losing revenue from conservative organizations** and individuals like Freedom Watch and those similarly situated. App. ____. (emphasis added).

Furthermore, the Amended Complaint also provides evidence of Appellees' motivations in entering into such an agreement:

> Acting in concert with traditional media outlets, including but not limited to Cable News Network ("CNN"), MSNBC, the New York Times and the Washington Post – all of whom are owned and/or managed by persons with a leftist political ideology, **Defendants have intentionally and willfully suppressed politically conservative content in order to take down President Donald Trump and his administration with the intent and purpose to have installed leftist government in the nation's capital and the 50 states**. App. ____. (emphasis added).

Lastly, it is clear that Appellees' illegal agreement is "unreasonably restrictive of competitive conditions." *Mesa Air Grp., Inc.*, 295 F. Supp. 2d at 92. Appellees make no argument that such an agreement to censor and suppress conservative content is not unreasonably restrictive, nor could they. Indeed, Appellees have effectively cut off the same level of access to their platforms to an overwhelming number of individuals. Tellingly, the Antitrust Division of the U.S. Department of Justice, of which the undersigned counsel is an alumnus, having been privileged to be on the trial team that broke up the AT&T monopoly, as well as the attorney's general of fifty states has undertaken an investigation into the exact same anti-competitive acts and practices as alleged herein.[3]

Thus, the District Court erred by ignoring this well-settled law, and looking outside of the Amended Complaint to draw wholly premature and unjustified conclusory inferences to justify dismissing the Amended Complaint. For instance, the Amended Complaint alleges that although Freedom Watch still pays Google and YouTube and Facebook and other Appellees for services, App ___., the Appellees are singling out Freedom Watch and other conservative groups and

[3]https://www.reuters.com/article/us-facebook-probe-antitrust/justice-department-to-open-facebook-antitrust-investigation-source-idUSKBN1WA35M

https://thehill.com/policy/technology/460550-states-launch-antitrust-investigation-into-google

persons by failing to provide the same services that it provides to liberal groups and persons for the same remuneration. App. ____. This is evidenced by Freedom Watch's steady decline in viewership and user interaction on Appellees' platform, as set forth in great specificity in the Amended Complaint. App. ____. Thus, the mere fact that Freedom Watch is still *trying* to obtain services from Appellees does not equate a finding that Appellees are not refusing to deal with Freedom Watch.

The District Court also erred in trying to discount Appellants' allegations that Appellees are acting against their own economic self-interest in their concerted action to restrain trade:

> Defendants' agreement has a plainly anti-competitive effect and has no rational economic justification, **as they are willing to lose revenue from conservative organizations and individuals like Freedom Watch and those similarly situated** to further their leftist agenda and designs to effectively overthrow President Trump and his administration and have installed leftist government in this district and the 50 states. App. ____.
>
> There is no legitimate independent business reason for Defendants "conscious parallelism," as they **are losing revenue from conservative organizations** and individuals like Freedom Watch and those similarly situated. App. ____.

As set forth above in *Lukens Steel Co*, this type of behavior would suffice as a "plus factor" to satisfy Sherman 1 pleading requirements. While the District Court acknowledges that Appellants pled this in its opinion, App. _____, it argues on behalf of Appellees that "[a] loss of income from one source can be offset by larger gains in income from other sources. And the effect of politically motivated

business decisions on the net revenues of corporations is far from clear." If Appellants' assertions are conclusory, the District Court's are even more so. It was clearly erroneous to dismiss Appellants' claims on the mere *possibility* that Appellees made up for the loss of income from other sources, particular since Plaintiff prayed for a jury trial. At a minimum, the District Court should have allowed this issue to be decided after discovery. It is axiomatic that a jurist does not have the right to abrogate unto himself or herself the right to divine facts and dismiss cases simply because they see things in another light than the plaintiff, particularly when a complaint is well pled and no discovery has been undertaken. Prejudgment is not the province of a jurist, particularly since our Founding Fathers created a jury system in civil suits, as they did not trust the king's judges and did not want to give them the power and ability to deny the citizenry due process of law before a jury of their peers. As famously stated by James Madison, "[t]rial by jury in civil cases is as essential to secure the liberty of the people as any one of the pre-existent rights of nature."

B. Section 2 Claim

The District Court dismissed Appellants' claim under Section 2 of the Sherman Act on the basis that it failed to allege that any of the individual Appellees has monopolized or sought to monopolize the market. This is not true. For instance, the Amended Complaint sets forth that "Facebook has the largest

market share in the United States for social networking advertising revenue, at 79.2% in 2018 thus far." App. ____. In fact, even Facebook's CEO, Mark Zuckerberg, struggled to name even a single competitor to Facebook during a joint session between the Senate Judiciary and Commerce committees on April 10, 2018. App. _____. Furthermore, it is pled in the Amended Complaint that Facebook is also the leading way that most Americans get their news. According to the Pew Research Center, just shy of half of all Americans get their news on Facebook – far more reach than any other social media site. App. ____.

In any event, it is clear that in addition to single firm actual monopolization, Section 2 of the Sherman Act also prohibits a conspiracy to monopolize, which necessarily involves multiple firms. Such a claim requires "(1) the existence of a combination or conspiracy to monopolize; (2) overt acts done in furtherance of the combination or conspiracy; (3) an effect upon an appreciable amount of interstate commerce; and (4) a specific intent to monopolize a designated segment of commerce." *City of Moundridge v. Exxon Mobil Corp.*, 471 F. Supp. 2d 20, 41 (D.D.C. 2007).

In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*, 472 U.S. 585 (1985), the Supreme Court found a Section 2 violation where a firm operating three of four mountain ski areas in Aspen, Colorado refused to continue cooperating with a smaller rival in offering a combined four-area ski pass. In doing so the Supreme

Court considered the conduct's "impact on consumers and whether it [had] impaired competition in an unnecessarily restrictive way." Similarly, the Amended Complaint pleads that "Freedom Watch a user and consumer of Defendants' platforms, it is also a competitor, insofar as it creates its own original media content in the form of videos, articles, and podcasts and other audio media, such as radio, which are distributed via the internet in this district, and both nationwide and worldwide." App. _____. This refusal to deal with Freedom Watch, like in *Aspen*, has no viable economic justification and is plainly anticompetitive. App. _____, Similarly, the violative conduct of Appellees has resulted in a worse quality of services for its consumers who tend to lean conservatively and, as set forth in this Amended Complaint, lack any normal business justification. App. ____.

II. THE DISTRICT COURT ERRED BY DISMISSING APPELLANTS' DCHRA CLAIM

The District Court dismissed Appellants' claims under the District of Columbia Human Rights Act on the sole basis of finding that a "place of public accommodation" needs to be a physical location. This has prompted compelling and well-researched amicus briefs from both Lawyers' Committee for Civil Rights Under Law and the Washington Lawyers' Committee for Civil Rights and Urban Affairs, as well as the District of Columbia itself showing exactly why the District Court's finding was in error. For the sake of judicial efficiency, Appellants will not

rehash the arguments set forth by the *amici curiae*, but encourages the Court to thoroughly digest the compelling arguments set forth therein.

In addition to the arguments set forth by the *amici curiae*, the U.S District Court for the Southern District of New York in *Del-Orden v. Bonobos, Inc.*, 2017 U.S. Dist. LEXIS 209251 (S.D.N.Y. Dec. 20, 2017) found that "[a] commercial website itself qualifies as a place of 'public accommodation' to which Title III of the ADA affords a right of equal access." *Del-Orden v. Bonobos, Inc.*, 2017 U.S. Dist. LEXIS 209251, at *19 (S.D.N.Y. Dec. 20, 2017). *See also National Federation of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565 (D. Vt. 2015) (holding that that Title III applied to a digital library subscription service, Scribd, accessible only via the Internet).

The First Circuit's ruling in *Carparts Distribution Ctr. v. Auto. Wholesaler's Ass'n*, 37 F.3d 12 (1st Cir. 1994) is particularly instructive. The *Carparts* Court found that "public accommodations" under the ADA were not limited to actual physical structures. In doing so, *Carparts* paid particular attention to the fact that Congress included "travel service" on its list of services considered "public accommodations," holding that "Congress clearly contemplated that "service establishments" include providers of services which do not require a person to physically enter an actual physical structure." *Id*. at 19. Tellingly, in its definition of "Place of public accommodation," the D.C. Code also lists "travel or tour

advisory services" as a place of public accommodation where discrimination is not allowed. Indeed, this Court has itself expressly adopted the reasoning set forth in *Carparts*, holding:

> Title III's protections extend beyond physical access to insurance offices and prohibit discrimination based on disability in the enjoyment of the goods and services made available at a place of public accommodation. *See Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.,* 37 F.3d 12, 19 (1st Cir. 1994) (finding that public accommodation "is not limited to actual physical structures" and may include access to insurance plans).
> *Baron v. Dulinski*, 928 F. Supp. 2d 38, 42 (D.D.C. 2013).

Lastly, any distinction that Defendants attempt to make between the ADA's definition of public accommodations and the DCHRA's definition would be a distinction without a difference. Both statutes expressly use the same language. Both have been passed for the same purpose – to protect individuals from discrimination. As such, this Court should reverse the District Court and find that Appellants internet platforms are places of "public accommodation" for purposes of the DCHRA.

III. THE DISTRICT COURT ERRED BY DISMISSING APPELLANTS' FIRST AMENDMENT CLAIMS

The District Court dismissed Appellants' First Amendment Claims on the basis that Appellees do not qualify as state actors capable of being sued for constitutional violations. However, this ignores the fundamental holding of the

Supreme Court's recent decision in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

In *Packingham*, the Supreme Court held that a North Carolina law making it a felony for a registered sex offender to access social networking sites where the offender knows that the site allows for minors to join was unconstitutional and in violation of the First Amendment.

In *Packingham*, Mr. Packingham pled guilty to "taking indecent liberties with a child." As a result, he was required to register as a sex offender, which therefore barred him from accessing commercial social media sites. *Id.* at 1734. Under a pseudonym, Mr. Packingham signed up for Facebook and made a post celebrating the fact that the state court had dismissed a traffic ticket against him. *Id*. After doing some research, the police department determined that it was Mr. Packingham who had made the post, and was subsequently indicted for violating N. C. Gen. Stat. Ann. §§14-202.5. *Id*. The lower court denied Mr. Packingham's motion to dismiss on First Amendment grounds, the appellate court reversed, and the North Carolina Supreme Court reversed again. Finally, the Supreme Court reversed a final time, finding a constitutional First Amendment violation.

"A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in

this spatial context." *Id*. at 1735. "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. **It is cyberspace—the "vast democratic forums of the Internet" in general, and social media in particular**." *Id*. (emphasis added) (internal citation omitted). "In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" *Id*. at 1735-36 (citing *Reno* v. *American Civil Liberties Union*, 521 U. S. 844 (1997)). Accordingly, the Supreme Court found that access to these social media sites could form the basis for a constitutional First Amendment issue, and after applying intermediate scrutiny, found that the statute was unconstitutional. *Id*. at 1736.

Although *Packingham* did involve a challenge to a state law, it also does stand for the proposition that denial to access to social media platforms can for the basis for constitutional violations. This is indicative of the fact that is clear that the Internet has overtaken physical public spaces in the traditional sense as the chosen forum for public debate and discourse, which is what the First Amendment specifically seeks to protect. The law surrounding social media and the internet is constantly changing to adapt to what new possibilities technological advances can bring. Not too long ago, people had to be at home, on their computers and using a DSL connection just to access their Facebook accounts. Only short time before

that, people had to scour for free AOL and NetZero discs to dial up to 56K connections in order to check their Myspace pages.

In a shockingly short period of time, social media has evolved to the primary driver of culture and society that every individual, including the honorable judges on this panel, carry on their mobile phones everywhere they go. This just goes to demonstrate the fact that the law needs to evolve to keep up with technology. Gone are the days where people show must up to a public space to protest an injustice. Now, anyone can simply take out their phones and engage in constitutionally protected debate and discourse with anyone in the world, all through Appellees' platforms. Thus, a finding that they are quasi-state actors, capable of being sued for constitutional violations is also an essential progression in the law to ensure that Appellees are not allowed to unilaterally control the tide of the nation, and the world's debate and discourse in their own favor.

CONCLUSION

Based on the foregoing, the District Court's order granting Appellees' Motion to Dismiss should be reversed and this case remanded for further proceedings, including discovery forthwith.

Dated: December 5, 2019 Respectfully Submitted,

/s/ Larry Klayman________

Larry Klayman, Esq.
Klayman Law Group, P.A.
2020 Pennsylvania Ave. N.W.
Suite 800
Washington, D.C. 20006
Tel: (561) 558-5336
Email: leklayman@gmail.com

Attorney for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 4,721 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 15.28 in 14-point Times New Roman.

Dated: December 5, 2019 /s/ Larry Klayman________

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically and served through the court's ECF system to all counsel of record or parties listed below on December 5, 2019

/s/ Larry Klayman________