ORAL ARGUMENT REQUESTED

CASE NO. 19-7030

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

FREEDOM WATCH, INC. AND LAURA LOOMER

Plaintiffs-Appellants
v.

GOOGLE, INC., et al

Defendants-Appellees.

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

PETITION FOR REHEARING EN BANC

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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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FED R. APP. P. 35 STATEMENT

Numerous errors pervade the 4-page panel opinion, but in particular, its treatment of the District of Columbia Human Rights Act ("DCHRA") brings this case within the Fed. R. App. P. 35 standard. This is an issue of exceptional importance, as people in modern society have increasingly, and almost entirely at this point, replaced the traditional physical "public forum" with the internet and social media. This rings particularly true given the current state of events, with COVID-19 severely hampering the ability of individuals to physically gather. With the extreme uncertainty around the future of large physical gatherings, it is more incumbent on this Court than ever accept reality and to adapt and evolve with the changing times and make the "common sense" ruling that the internet and social media qualifies as a "place of public accommodation" under the DCHRA.

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 restraining trade by 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. 0117.

As set forth below, Appellees' conduct violates not only the antitrust laws and 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. 0112, 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. 0119. 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. 0125.

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. 0112-0119. 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. 0115.

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. 0116. In 2018, Facebook instituted an algorithm change that further suppressed conservative content. App 0117. According to a study by Western Journal, "Liberal publishers have gained about 2 percent more web traffic from Facebook than they 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 0117-0118. 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 0118.

The Complaint also sets forth how Twitter "has banned nasty accounts perceived as right-wing while ignoring similar activity from the left." App. 0119. This includes "shadow-banning" conservative accounts while ignoring radical left-wing interest groups. App. 0119.

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. 0121. 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 0120. Freedom Watch has experienced a declining number of subscribers after experiencing years of steady growth right when Defendants began suppressing conservative content. App. 0120. Crucially, the Amended Complaint

alleges that these damages are "the result of the illegal and anti-competition actions as pled herein." App. 0121.

Appellant Loomer is a well known conservative investigative journalist and activist, and a Jewish woman. App. 0121-0122. 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. 0122. 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. 0122.

Facebook also banned Ms. Loomer for 30 days. App. 0122. Today, years later she has been totally banned.

ARGUMENT

I. APPELLANTS' DCHRA CLAIM

The Panel's treatment of Appellants' claims under the DCHRA, specifically finding that a "place of public accommodation" needs to be a physical location was in error. It is undeniable that this issue is one of extreme importance, given the rapidly changing ways that humans interact with one another, and the fact this has been exponentially compounded due to the COVID-19 pandemic. Indeed, even recently, the District of Columbia Court of Appeals courthouse was closed for an

extended period of time, forcing everyone who wished to utilize its services to do so via the internet. This is undeniably the wave of the future, as people are less and less likely to physically gather, or even physically go out into the world for essential services. Groceries are now delivered. Meals are delivered. Instead of having to go to a traditional retailer, any person can buy just about any item they need on Amazon. The traditional "place of public accommodation" is a dying breed and when it is usable it has been overrun by violent vigilantes. This Court needs to update its archaic definition of it to keep pace with the modern world.

This undeniable truth has been recognized by seemingly everyone but the Appellees (who have a vested interest in the status quo) and the original panel on this appeal. This issue 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, which should be reviewed thoroughly, en banc – such is the importance of this petition.

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).

The panel recognized that the ADA and the DCHRA are "similar," but chose not to make the leap to adapt with changing practices and trends like other courts have already done. This is why en banc review is so crucial, as it presents an opportunity for this Court to review and follow the example set by these other courts.

II. APPELLANTS' ANTITRUST CLAIMS

The Panel further erred with regard to Appellants' claims under the Sherman Act when the found that "Freedom Watch does not explain why either factor tends to show an unlawful conspiracy, rather than lawful independent action by the different Platforms." The Amended Complaint alleged 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 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.
>
> 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.

Thus, the Amended Complaint alleged that all of the Appellees were engaged in the same behavior that directly caused a loss in revenue. There is simply no explanation for this other than concerted action.

III. APPELLANTS' FIRST AMENDMENT CLAIMS

The Panel's further erred in finding that Appellees were not subject to First Amendment restrictions, but it failed to address 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 form 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 speech that every individual, including the honorable judges on this Court, 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. More importantly, this is the only reasonable interpretation of the law as written given present day practices and realities.

CONCLUSION

Based on the foregoing, it is clear that there are issues of exceptional importance at stake that this Court, en banc, must step in and address. It is incumbent on this Court to recognize and adapt to changing times to ensure that the law keeps up with the reality. This is an opportunity now for the Court do so.

Appellants respectfully request oral argument, by Zoom or Skype if necessary. The three judge panel denied this request, but oral argument, with all parties present, is now the best way, to flush out the important issues at stake.

This case is not just about Freedom Watch and Ms. Loomer, but all Americans who desire to exercise their rights of free speech, free from the illegal and anti-competitive practices of giant social media companies, who have restrained trade and who believe and act as if they are above the law.

Dated: July 6, 2020

Respectfully Submitted,

/s/ Larry Klayman_____

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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 2,736 words.

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Dated: July 6, 2020 /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 July 6, 2020

/s/ Larry Klayman_____