No. 21 - _____

IN THE SUPREME COURT OF THE UNITED STATES

Freedom Watch, Inc. and Laura Loomer

Petitioners

v.

Google, Inc., Facebook, Inc., Apple, Inc., and Twitter, Inc.

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the U.S. Court of Appeals for the D.C. Circuit err by failing to find that the District of Columbia Human Rights Act's prohibition on political discrimination does not require a physical location?

2. Did the U.S. Court of Appeals for the D.C. Circuit err by failing to find that Respondents are subject to the First Amendment to the Constitution?

3. Did the U.S. Court of Appeals for the D.C. Circuit err by failing to find that Respondents had violated the Sherman Act?

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PETITION FOR WRIT OF CERTIORARI

Freedom Watch, Inc. ("Freedom Watch") and Laura Loomer ("Ms. Loomer") (collectively "Petitioners"), by and through Larry Klayman, Esq., respectfully petition this Court for a writ of certiorari to review the order of the order of the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit")

OPINIONS BELOW

On August 5, 2020, the D.C. Circuit issued a *per curiam* order denying Petitioners' Petition for Rehearing En Banc. App. 121. On May 27,2020, the D.C. Circuit issued a *per curiam* judgment affirming the ruling of the U.S. District Court for the District of Columbia. App. 117 - 120.

JURISDICTION

The D. C. Circuit issued a *per curiam* order denying Petitioners' Petition for Rehearing En Banc. App. 121. Pursuant to the Court's March 19, 2020 order regarding filing deadlines due to the ongoing COVID-19 pandemic, Petitioners 's Petition for Writ of Certiorari must

be filed within 150 days from the date of the order denying petition for rehearing, which is January 4, 2021.[1]

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Petitioners brought this suit against Respondents, all of whom are major technology and social media corporations, in response to their well-documented and publicized anti-competitive 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 Respondents that such targeted suppression and censorship was, indeed, occurring. For example, this includes admissions, inter alia, from employees of

[1] The exact date is January 2, 2021, which is a Saturday.

Respondent Facebook that their conduct had a chilling anti-competitive effect on conservative news." App. 008.

As set forth below, Respondents' conduct violates not only the Constitution, but also numerous federal and state statutes. Respondents' status as large and influential technology corporations, who can pay for and employ well-funded lobbyists to do their bidding, simply cannot shield them from liability in this regard. They must be held to the same level playing field as everyone else.

This Amended Complaint is centered upon Respondents' "conspiracy to intentionally and willfully suppress politically conservative content," App. 004, 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. 011. The aim of this conspiracy to use anti-competitive means to suppress politically conservative content was 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. 017.

The Amended Complaint sets forth in detail how Respondents have acted anticompetitively to suppress and censor conservative content. For instance, YouTube, which is owned and operated by its parent company, Respondent 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. 006 - 007. 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. 007. 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."[2] And, after this case was filed the Antitrust Division of the U.S. Department of Justice, as well as tens of attorneys general throughout the states, sued these unbridled social media companies in a manner similar to Petitioners – who were ahead of the pro-competitive curve.

The Amended Complaint thus sets forth in detail how Facebook has in concert with other social media giants anticompetitively 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. 008. In 2018, Facebook instituted an algorithm change that further suppressed conservative content. App 009. 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

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

010. 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 010.

The Amended Complaint also sets forth how Twitter "has banned nasty accounts perceived as right-wing while ignoring similar activity from the left." App. 011. This includes "shadowbanning" conservative accounts while ignoring radical left-wing interest groups. App. 011.

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. 012. 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 012. Freedom Watch has experienced a declining number of subscribers after experiencing years of steady growth right when Respondents began suppressing conservative content. App. 013. Crucially, the Amended Complaint alleges that these damages are "the result of the illegal and anti-competition actions as pled herein." *Id.*

Petitioner Loomer is a well known conservative investigative journalist and activist, and a Jewish woman. App. 014. 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. 014. In furtherance of their conspiracy to suppress conservative content, Respondent 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. 014.

Facebook also banned Ms. Loomer for 30 days.[3] App. 014.

[3] 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.

REASONS FOR GRANTING THE WRIT

I. This Case Raises Crucial Constitutional Issues That Must Be Addressed, Especially Considering the Current COVID-19 Pandemic

The District Court and the D.C. Circuit both erroneously found that the District of Columbia Human Rights Act's ("DCHRA") prohibition on discrimination on the basis of political affiliation in "any place of public accommodations," D.C. Code § 2-1402.31(a), id not apply to the Respondents because the DCHRA only applied to physical locations.

This is, frankly, an antiquated and false interpretation of the legislation, which promotes First Amendment freedom of speech and the right to assemble and associate, that simply does not even recognize and comply with what the actual reality is in today's world. The days of people congregating together in physical locations are waning if not becoming extinct, as social interaction and debate are now done more and more online. This shift has been amplified by the ongoing COVID-19 pandemic, which has rendered physical gathering in public places impossible, forcing people to turn to Respondents' services for all of their human to human interaction. And, while the COVID-19 pandemic

will (hopefully) eventually subside, it is more than likely that the "paradigm shift" of human interaction from in-person to online will remain.

Thus, given this backdrop, it is absolutely essential that statutes like the DCHRA be read to apply on their face as well as interpreted to fit the realities of modern society. Otherwise, Respondents, as the gatekeepers of almost all modern human to human interaction, will be given free rein to effectively cut out large swathes of the population.

This is the exact same as when in the days before the internet and social media that physical establishments refused to serve individuals on the basis of race or other characteristics, and this is why the DCHRA was enacted in the first place. The only way for the DCHRA to continue to serve its purpose is to interpret it in a fashion that accounts for how people interact today.

Petitioners are not alone in adopting this position. During the course of this matter, 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* were filed in support of

Petitioners' argument. For the sake of judicial efficiency, Petitioners will not rehash the arguments set forth by the *amici curiae*, but encourages the Court to thoroughly digest the compelling arguments set forth therein.

Furthermore, there are some courts who have begun to recognize this new reality, holding that places of public accommodation under the Americans with Disabilities Act ("ADA") need not be physical locations. 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).

Indeed, 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 D.C. Circuit and find that Respondents' internet platforms are places of "public accommodation" for purposes of the DCHRA.

II. The D.C. Circuit's Ruling on Petitioners' First Amendment Claims Does Not Comport With this Court's Recent Ruling in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017)

The District Court dismissed Petitioners' First Amendment Claims on the basis that Respondents do not qualify as state actors capable of being sued for constitutional violations. This was affirmed by the D.C. Circuit, who chose not to address *Packingham*.

In *Packingham*, this 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, this 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, especially given the ongoing COVID-19 pandemic, 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 justices of this Supreme Court, who carry on their mobile smart phones everywhere they go. This just goes to demonstrate the fact that the law needs to be read as it was intended and indeed 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 Respondents' 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 Respondents are not allowed to unilaterally control the tide of the nation, and the world's debate and discourse in their own favor.

III. The D.C. Circuit's Rulings on Petitioners' Antitrust Claims Are Erroneous and Do Not Consider Recent Similar Lawsuits Brought by the United States of America Against Respondents

Petitioners brought claims under both Section 1 and Section 2 of the Sherman Antitrust Act, both of which were erroneously dismissed

by the District Court and this dismissal was affirmed by the D.C. Circuit.

A. Section 1 Claim

The dismissal of this claim was on the basis that Petitioners had 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 Respondents 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. 017.

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 Respondents 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 Respondents acted contrary to their economic self-interest, and (2) evidence of the Respondents' 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 Respondents 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. 017. (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. 017. (emphasis added).

Furthermore, the Amended Complaint also provides evidence of Respondents' motivations, that is collective anticompetitive intent, 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. 004. (emphasis added).

Lastly, it is clear that Respondents' illegal agreement is "unreasonably restrictive of competitive conditions." *Mesa Air Grp., Inc.*, 295 F. Supp. 2d at 92. Respondents make no argument that such an agreement to censor and suppress conservative content is not unreasonably restrictive, nor could they. Indeed, Respondents have effectively cut off the same level of access to their platforms to an overwhelming number of individuals.

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 Respondents for services, the Respondents are singling out Freedom Watch and other conservative groups and persons by failing to provide the same services that it provides to liberal groups and persons for the same remuneration. This is evidenced by Freedom Watch's steady decline in viewership and user interaction on Respondents' platforms, as set forth in great specificity in the Amended Complaint. App. 011 - 013. Thus, the mere fact that Freedom Watch is still *trying* to obtain services from Respondents does not equate a finding that Respondents are not refusing to deal with Freedom Watch.

The District Court also erred in trying to discount Petitioners' allegations that Respondents 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. 017.

> 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. 017.

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 Respondents pled this in its opinion, App. 026 – 040, it argues on behalf of Respondents 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 Petitioners' assertions are conclusory, the District Court's are even more so. It was clearly erroneous to dismiss Petitioners" claims on the mere *possibility* that Respondents made up for the loss of income from other sources, particular since Petitioners prayed for a jury trial. At a minimum, the District Court should have allowed this issue to be decided after discovery.

This decision flies in the face of the applicable pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which 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 need only be "plausible on its face," *i.e.*, the plaintiff must merely 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. 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

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."

If this petition is granted, this Court will have the important opportunity to clarify what it meant in Twombly, which decision has been misapplied and miscited repeatedly by various of its lower courts to grant to the presiding judge or judges the "right" to substitute its factual judgment for the jury.

The consensus in particular among trial lawyers is that this misapplication and misuse of Twombly by the lower courts has reached crisis proportions, virtually extinguishing the plaintiff's constitutional

right to a jury trial and this case is a good one for this Supreme Court to set the record straight.

B. Section 2 Claim

The District Court dismissed Petitioners' claim under Section 2 of the Sherman Act on the basis that it failed to allege that any of the individual Respondents 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. 018. 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. 018. 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. 020.

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." This refusal to deal

with Freedom Watch, like in *Aspen*, has no viable economic justification and is plainly anticompetitive. Similarly, the violative conduct of Respondents 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.

Petitioners' position is strongly supported by the fact that on October 20, 2020, the United States Department of Justice, along with eleven other states, filed suit in the U.S. District Court for the District of Columbia against Google for violations of Section 2 of the Sherman Act. This Complaint alleges that

> Google has thus foreclosed competition for internet search. General search engine competitors are denied vital distribution, scale, and product recognition—ensuring they have no real chance to challenge Google. Google is so dominant that "Google" is not only a noun to identify the company and the Google search engine but also a verb that means to search the internet. App. 178

It is not only Google who is subject to this inquiry. The Federal Trade Commission has also filed a complaint against Facebook for anticompetitive conduct and unfair competition as well. App. 122. As alleged in this Complaint:

> Facebook holds monopoly power in the market for personal social networking services ("personal social networking" or

> "personal social networking services") in the United States, which it enjoys primarily through its control of the largest and most profitable social network in the world, known internally at Facebook as "Facebook Blue," and to much of the world simply as "Facebook." App. 123.

Thus, given these lawsuits, the D.C. Circuit's refusal to find that Respondents had violated the Sherman Act is no longer tenable, and in fact never was tenable. Accordingly, certiorari should be granted in this regard as well.

CONCLUSION

Based on the foregoing, it is clear that the D.C. Circuit's ruling is erroneous, and it raises significate questions of constitutional rights, federal law, as well as questions regarding the interpretation of precedent set by this Court in *Packingham* and *Twombly.* As such, Petitioners' writ must respectfully be granted in order that these serious and compelling issues of fact and constitutional law can be addressed by this honorable Court, and thus rectified.