No. 19-7030

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 the United States District Court for the District of Columbia in Case No. 1:18-cv-02030-TNM, Judge Trevor N. McFadden

APPELLEES' CORRECTED ANSWERING BRIEF

Dated: January 31, 2020

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. *Parties and Amici*: The following were parties in the district court proceeding from which this appeal was taken and are parties before this Court, or are amici before this Court:

   a. Freedom Watch, Inc.

   b. Laura Loomer

   c. Google LLC

   d. Facebook, Inc.

   e. Twitter, Inc.

   f. Apple Inc.

   g. Lawyers' Committee for Civil Rights Under Law

   h. Washington Lawyers' Committee for Civil Rights and Urban Affairs

   i. The District of Columbia

   j. The Chamber of Commerce of the United States of America

   k. National Federation of Independent Business

2. *Ruling Under Review*. The rulings under review are the district court's:

   a. Memorandum Opinion granting Defendants' Motion to Dismiss (Dkt. No 44); and

   b. Order Granting Defendants' Motion to Dismiss (Dkt. No 45)

Both rulings were entered by Trevor N. McFadden, United States District Judge for the District of Columbia, on March 14, 2019 in Case No. 1:18-cv-02030-TNM.

3. *Related Cases*. There are no related cases before this court, or any other court.

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INTRODUCTION

The District Court correctly dismissed Appellants' lawsuit claiming that Google, Twitter, Apple, and Facebook conspired against them to suppress politically conservative content on Appellees' online platforms. *First*, Appellants lack standing to assert these claims. *Second,* Appellants' Sherman Act claims fail because they did not allege facts establishing any actual conspiracy or the existence of a monopoly. *Third*, Appellants' complaints about online platforms find no remedy in the D.C. Human Rights Act ("DCHRA"), both because the statute applies only to discriminatory acts relating to physical places in the District of Columbia and because Appellants failed to allege any actual discrimination prohibited by the DCHRA. *Fourth*, Appellees are private online service providers, not state actors, and thus Appellees' online content moderation is not limited by the First Amendment. The District Court's dismissal of this meritless complaint should be affirmed.

STATEMENT OF THE CASE

Appellants are political activists who have sued Google LLC[1] ("Google"), Twitter, Inc. ("Twitter"), Apple, Inc. ("Apple"), and Facebook, Inc. ("Facebook")

[1] Appellants purport to sue "Google Inc." However, "Google Inc." is now known as Google LLC.

(collectively, "Appellees"), alleging that Appellees have engaged in a conspiracy to intentionally and "willfully suppress[] 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." ECF No. 28 ¶ 14. Appellants bring claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2 (2019); the D.C. Human Rights Act, D.C. CODE § 2-1403.16 (2020) ("DCHRA"); and the First Amendment of the U.S. Constitution, via 42 U.S.C. § 1983. *See* ECF No. 28 ¶¶ 103-28.

Appellant Freedom Watch, which describes itself as a "conservative non-profit public interest organization" (ECF No. 28 ¶ 51), filed its Class Action Complaint on August 29, 2018. ECF No. 1. Appellees filed a Motion to Dismiss the Complaint on November 16, 2018. ECF No. 22. In response, Appellants filed an Amended Complaint on December 6, 2018, adding Appellant Laura Loomer, an alleged "conservative investigative journalist and political activist" (ECF No. 28 ¶ 63), as a plaintiff. *See* ECF No. 28. Appellees then filed a Motion to Dismiss the Amended Complaint on December 24, 2018. ECF No. 29. On March 14, 2019, the District Court granted Appellees' Motion to Dismiss. *See* ECF Nos. 44, 45.

With respect to Appellants' claim under Section 1 of the Sherman Act, the District Court held that the Amended Complaint failed to allege that Appellees "had a conscious commitment to a common scheme designed to achieve an unlawful

objective." ECF No. 45 at 7 (internal quotation marks omitted). Although "the Amended Complaint repeatedly states that the [Appellees] have engaged in a conspiracy or illegal agreement," "it offers only these conclusory statements to suggest the existence of such agreement," with "no allegations, for example, that any of the [Appellees] met or otherwise communicated an intent to collectively suppress conservative content." ECF No. 44 at 7. With respect to Appellants' claim under Section 2 of the Sherman Act, the District Court concluded that the Amended Complaint failed to "allege that any of the [Appellees], acting individually, has monopolized or sought to monopolize any market." *Id.* at 9. With respect to Appellants' claim of discrimination under the D.C. Human Rights Act, the District Court concluded that Appellees' "online services are not 'places of public accommodation'" under the statute, citing *U.S. Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. 1981). ECF No. 44 at 11. Finally, with respect to Appellants' First Amendment claim, the District Court concluded that Appellants "failed to allege state action" and did "not show how the [Appellees] alleged conduct may fairly be treated as actions taken by the government itself." *Id.* at 12. Appellants filed their Notice of Appeal on April 15, 2019.

SUMMARY OF THE ARGUMENT

Standing. The District Court found that Appellants had standing to raise their claims against all Appellees. However, Freedom Watch has not adequately pleaded

facts establishing any injury that it allegedly suffered—a supposed leveling off of growth of subscribers on its online platforms—is connected to any alleged unlawful conduct. For that reason, this Court may affirm dismissal of Freedom Watch's claims on standing grounds. As to Ms. Loomer, she has not pled any wrongful conduct by Google or Apple and accordingly dismissal of her claims as to these Appellees may be affirmed on that ground.

Sherman Act. The District Court correctly dismissed both of Appellants' claims under the Sherman Act.

Appellants' Section 1 claim—that Appellees conspired to suppress conservative content, ECF No. 28 ¶¶ 103-10—failed because Appellants alleged no facts supporting their alleged conspiracy. As the District Court determined, the Amended Complaint offers only "conclusory statements to suggest the existence of such an agreement. It includes no allegations, for example, that any of the [Appellees] met or otherwise communicated an intent to collectively suppress conservative content." ECF No. 44 at 7. Because Appellants failed to plead facts supporting an actual agreement, the District Court correctly dismissed the Section 1 claim under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). ECF No. 44 at 10.

Appellants' Section 2 claim—that Appellants collectively monopolized some undefined market, ECF No. 28 ¶¶ 111-14—failed for the basic reason that collective monopolization, the only offense alleged, is not a cognizable antitrust violation. *See*

ECF No. 44 at 9. Although Appellants have now abandoned that Section 2 claim, their new conspiracy to monopolize claim falls far outside the allegations of the Amended Complaint and, in any event, the Amended Complaint sets forth no facts to support any of the most essential elements of that Section 2 claim. *Id.* at 9-10.

DCHRA. The District Court correctly held that Appellees' online platforms are not places of public accommodation within the meaning of the DCHRA. Appellants' and amici's arguments conflict with the clear statutory language of the DCHRA and the D.C. Court of Appeals' holding in *U.S. Jaycees v. Bloomfield*. As the Court of Appeals explained, the DCHRA's definition of "place of public accommodation" limits that term to physical locations: the definition includes an extensive list of physical places, none of which resemble Appellees' *online* platforms that are the subject of this litigation. The legislative history of the DCHRA supports this conclusion, and neither Appellants nor their amici offer any viable reason for expanding the DCHRA beyond its text and in defiance of binding case law.

This Court also may affirm dismissal of Appellants' DCHRA claim on the alternative basis that Appellants failed to adequately plead unlawful discrimination by any Appellee. The Complaint's conclusory allegations do not plausibly establish that Appellees took adverse action against Appellants either on the basis of their purported political-party affiliation or religion. Appellant Ms. Loomer's claim fails

for the separate reason that she is a Florida resident suing out-of-state defendants, and it is well settled that the DCHRA does not apply to disputes between non-District residents involving alleged discriminatory conduct that occurred outside the District of Columbia.

First Amendment. The District Court correctly held that Appellants cannot state a claim under the First Amendment because Appellees are not state actors. ECF No. 44 at 12-15. That decision followed established principles of First Amendment law and an unbroken series of cases, including the Supreme Court's recent decision in *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019), rejecting similar efforts to transform private service providers into state actors. On appeal, Appellants do not so much as mention *Halleck*, let alone offer any argument for how their claims could survive the Court's ruling. Instead, Appellants rely solely on an earlier case, *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), which does not even address state action, much less suggest that private online platforms are bound by the First Amendment. Appellants' First Amendment claim fails as a matter of law, and the District Court's dismissal should be affirmed.

ARGUMENT

I. APPELLANTS LACK STANDING TO BRING THEIR CLAIMS.

"[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review."

Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986) (quotation omitted). Whether a plaintiff has standing to sue is a "threshold jurisdictional question." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). To establish standing to sue, the plaintiff bears the burden of establishing (1) injury in fact; (2) causation; and (3) redressability. *See Johnson v. Comm'n on Presidential Debates*, 869 F.3d 976, 981 (D.C. Cir. 2017) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Appellants have not met their burden of pleading standing. As a threshold matter, Appellant Ms. Loomer makes no allegations of any action taken against her by Google or Apple and therefore clearly lacks standing to maintain suit against those Appellees for any non-conspiracy claim.

Both Appellants lack standing because they have alleged no facts suggesting that Appellees *caused* the claimed injuries. Rather, Appellants merely assert that their alleged injuries "simply cannot be a coincidence." ECF No. 28 ¶ 55. Freedom Watch, in particular, alleges only that subscribers to its YouTube channel have decreased "from over 70,000 to under 69,000." *Id.* ¶ 59. It alleges no other facts to support its conclusory assertion that Freedom Watch's growth on all of the Appellees' platforms "has come to a complete halt, and its audience based ad revenue generated has either plateaued or diminished." *Id.* ¶ 54. But most important, it alleges no action taken by any Appellee directed at Freedom Watch that caused

any supposed change in its advertising revenue. More than that is required for Appellants to meet their burden of pleading standing's causation element. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006) ("a party seeking federal jurisdiction cannot rely on such speculative inferences to connect his injury to the challenged actions of the defendant" (internal alterations and quotations omitted)); *Lujan*, 504 U.S. at 560 ("there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court" (quotations and alterations omitted)). Without any factual allegation that any Appellee terminated any of Freedom Watch's accounts or otherwise blocked any of its online content, Freedom Watch has not pled facts establishing any causation between its alleged injuries and any conduct engaged in by any Appellee.[2]

II. APPELLANTS' SHERMAN ACT CLAIMS WERE CORRECTLY DISMISSED.

Both of Appellants' Sherman Act claims were properly dismissed. ECF Nos. 44, 45. Appellants offered no plausible allegations of conspiracy to support their

[2] In its standing analysis, the District Court did not identify any allegations in Appellants' Amended Complaint that would establish causation. *See* ECF No. 44 at 5-6. The District Court found that the Amended Complaint "states that the cause of this decline is the conspiracy to suppress [Appellants'] content," (*id.* at 6) but the Amended Complaint makes no such allegation, and the page to which the District Court cited states only that the decline "cannot be a coincidence." ECF No. 28 ¶ 55.

allegations in Count 1 that Appellees conspired to "suppress politically conservative content" in violation of Sherman Act Section 1. *See* ECF Nos. 1, 28. Nor did they offer any plausible allegations to support their allegations in Count 2 that Appellees collectively monopolized some undefined market in violation of Sherman Act Section 2. *See id.* Nothing in Appellants' brief provides a basis for concluding otherwise. *See* generally App. Br. 8-15.

A. Appellants Offered No Plausible Allegations of Conspiracy.

"A plaintiff who brings suit under Section 1 of the Sherman Act [] has the burden to prove"—or, in this context, allege—"a conspiracy." *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479, 1489 (D.C. Cir. 1984). Conspiracy in the Sherman Act context means *agreement*, "a meeting of the minds in an unlawful arrangement." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (citation omitted). Under Rule 12(b)(6), this "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Bell Atl.*, 550 U.S. at 556-57. The Amended Complaint's fatal defect is its failure to provide any factual matter whatsoever supporting Appellants' alleged conspiracy. The District Court dismissed the claim for that reason, ECF No. 44 at 7-9, and this Court should affirm.

Appellants contest the ruling below on two alternative bases: that "the Amended Complaint expressly pleads the existence of such an agreement," App. Br.

9 (citing ECF No. 28 ¶ 82), and that Appellants have sufficiently alleged parallel conduct and relevant "plus factors" to establish a conspiracy. App. Br. 9-13. Both arguments fail.

"*Express pleading*." The Amended Complaint's "express" allegations of an agreement are nothing more than the type of rote, conclusory allegations that courts have repeatedly recognized as failing federal pleading requirements. The Amended Complaint alleges that Appellees "entered into an illegal agreement," but it contains no factual allegations supporting that assertion—such as allegations identifying when, where, or how such an agreement was made or who specifically entered into it. ECF No. 28 ¶ 82. As the District Court correctly determined, the Amended Complaint "offers only these conclusory statements to suggest the existence of such an agreement. It includes no allegations, for example, that any of the [Appellees] met or otherwise communicated an intent to collectively suppress conservative content." ECF No. 44 at 7.

A Sherman Act conspiracy claim requires allegations of specific facts "to suggest that an agreement was made." *Twombly,* 550 U.S. at 556. As *Twombly* makes clear, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. Instead, the "[f]actual allegations must be enough to raise a right to relief above the speculative level," by

setting forth the actual facts supporting a purported Section 1 agreement. *Id.* There are simply no such allegations in the Amended Complaint.

Parallel Conduct & "Plus Factors." Equally unavailing is Appellants' argument that the Amended Complaint sufficiently alleges parallel conduct combined with "plus factors." App. Br. 10. Even assuming *dubitante* that the Amended Complaint sufficiently alleges that Appellees engaged in parallel conduct, the law has long been clear that parallel conduct alone is insufficient to constitute prohibited concerted action. *E.g., Twombly*, 550 U.S. at 556-57 ("without more, parallel conduct does not suggest conspiracy"); *Kreuzer*, 735 F.2d at 1488 ("parallel behavior *alone* is insufficient evidence from which to infer a conspiracy"). As the *Twombly* Court explained, "when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." 550 U.S. at 557. Thus, a Section 1 plaintiff must offer additional "facts and circumstances (often referred to as 'plus factors') in combination with conscious parallelism to support an inference of concerted action." ANTITRUST LAW DEVS. 11 (AM. BAR ASS'N, 8th ed. 2017); 6 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1434 (4th ed. 2017).

Appellants failed to plead sufficient "plus factors" to allow their Section 1 claim to proceed. Appellants rely on two alleged plus factors: "motive" and actions

"contrary to [Appellees'] economic self-interest." App. Br. 9-10. But Appellants failed to plead facts to support these plus factors and neither suffices to show that Appellees' purportedly parallel actions stemmed from conspiracy.

As to motive, the Amended Complaint includes nothing more than conclusory assertions that Appellees share a desire to "re-craft the nation into their leftist design," ECF No. 28 ¶ 15, and "to have installed [a] leftist government in the nation's capital and 50 states," App. Br. 10 (quoting ECF No. 28 ¶ 14). These conclusory assertions are not close to sufficient to prove "motive" or even suggest it. *See Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009) (Rule 12 requires a plaintiff to plead "nonconclusory factual allegation[s]" sufficient to "nudge its claims . . . across the line from conceivable to plausible."). And even if these allegations were not entirely conclusory, they nonetheless fail because Appellants assert no facts suggesting a motive for the Appellees *to conspire* to achieve their claimed objective. And even further, if Appellants had alleged such facts, the law is clear that, without more, motive is not a sufficient plus factor to suggest conspiracy. *See Apex Oil Co. v. DiMauro*, 822 F.2d 246, 259 (2d Cir. 1987) ("[A]ny motivation to [harm the plaintiff] gives rise to an inference of individual action which is equally as plausible as an inference of conspiracy."); *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194 (9th Cir. 2015) ("[C]ommon motive does not suggest an agreement.").

Appellants' assertion that Appellees have taken actions contrary to their individual self-interest also fails. App. Br. 10. To begin with, all Appellants allege is that it is in the *collective* self-interests of Appellees to suppress conservative content. *Id.* Specifically, Appellants assert only that "Appellees acted against their own economic self-interest" because "they are willing to lose revenue from conservative organizations and individuals." App. Br. 10 (citing ECF No. 28 ¶ 58). Those false allegations, even accepted as true, miss the point. The inquiry is not whether the activity is against collective self-interest; it is whether "the conduct would be in the parties' self-interests if they all agreed to act in the same way, but would be contrary to their self-interests if they acted alone." ANTITRUST LAW DEVS. 12; *cf. In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 907-08 (6th Cir. 2009) (explaining that the decision to adopt a policy "despite a natural inclination *not* to do so, was persuasive evidence of prior agreement"). The Amended Complaint contains nothing to that effect.

Moreover, as the District Court determined, Appellants have not even alleged actions contrary to *collective* self-interest. ECF No. 44. Plaintiffs in a refusal to deal case can always allege that the defendants were foregoing money the plaintiffs would have paid but for the refusal. *Id.* As the District Court explained, that is never enough:

> Losing revenue from certain organizations or individuals is not necessarily against the economic interests of any of the Platforms. The

> Amended Complaint does not allege that the Platforms' overall profitability decreased because of their actions. 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.

Id. at 8.

Appellants attack this common-sense conclusion by arguing that the District Court intruded into the jury's function of deciding contested facts. App. Br. 12-13. But it did no such thing. *See* ECF No. 44. Given the law's requirement that a plaintiff must allege plausible facts to withstand a motion to dismiss, the District Court was on firm ground in recognizing the absence of *any* factual allegations supporting the naked assertion that Appellees' activities resulted in losing money. *Id.* at 8. A complaint must allege sufficient facts and those facts must plausibly suggest a right to recover. *Twombly*, 550 U.S. at 554-59; *Iqbal*, 556 U.S. at 678. Appellants' Amended Complaint does neither.

B. Appellants Offered No Plausible Allegations of Monopolization.

Appellants' cause of action for collective monopolization likewise fails. ECF No. 28 ¶¶ 111-14. The Amended Complaint had no allegation of monopolization by any of the individual Appellees; no allegation of any relevant product or geographic market that had been monopolized; and no allegation of exclusionary conduct by any Appellee.

The District Court correctly dismissed the Section 2 claim for the basic reason that collective monopolization (absent conspiracy) is not an antitrust offense. Section 2 requires proof of monopolization by a *single firm*. ECF No. 44 at 9 (citing *City of Moundridge v. Exxon Mobil Corp.*, 471 F. Supp. 2d 20, 42 (D.D.C. 2007)); *see id.* at 42 ("Section 2 liability requires actual or attempted monopolization by one defendant."); *Arista Records LLC v. Lime Grp. LLC*, 532 F. Supp. 2d 556, 579 (S.D.N.Y. 2007) (collecting cases). Appellants cannot and do not argue otherwise on appeal. Instead, they argue that the Amended Complaint alleges (1) a conspiracy to monopolize and (2) that Facebook has a large share of "'social networking advertising revenue.'" App. Br. 13-15. Neither claim can carry the day.

The conspiracy to monopolize argument is meritless. No conspiracy to monopolize is alleged in the Amended Complaint. The claim instead is for collective monopolization only. And even if such a claim had been alleged, it would fail because Appellants failed to allege facts establishing a conspiracy, as explained in Part II.A above.

The argument regarding Facebook is also meritless. To begin, the Amended Complaint contains no claim that Facebook (or any other Appellee) individually monopolized any particular market. *See* ECF No. 44 at 9 ("[T]he Amended Complaint does not allege that any of the Platforms, acting individually, has monopolized or sought to monopolize any market. Rather, its legal claims focus on

the conduct of the Platforms acting together."). Even if the Amended Complaint could be read as alleging a Section 2 claim against Facebook alone, that claim would clearly fail federal pleading requirements. Appellants allege *no facts* to support any relevant product or geographic market. That deficiency means that Appellants have failed to plead three of the most essential elements of a Section 2 claim—product market, geographic market, and monopoly power (as power cannot be determined in the absence of a defined market). *See, e.g.*, *Ohio v. Am. Express*, 138 S. Ct. 2274, 2285 (2018) (antitrust plaintiff must prove a relevant market and market power); *Chapman v. N.Y. Div. for Youth*, 546 F.3d 230, 238-39 (2d Cir. 2008) (Rule 12(b)(6) dismissal for failure to allege relevant market). Appellants likewise allege *no facts* to suggest that Facebook's conduct qualifies as "exclusionary" under the law, another essential element. *See, e.g.*, *Dial A Car, Inc. v. Transp., Inc.*, 82 F.3d 484, 487-88 (D.C. Cir. 1996); *Verizon Commc'n, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004) (Section 2 requires proof of exclusionary conduct). Appellants thus fail to allege any of the essential elements of their claim, and the District Court was correct to dismiss it.

III. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DISMISSAL OF APPELLANTS' DCHRA CLAIM.

This Court also should affirm the dismissal of Appellants' DCHRA claim because, as the District Court correctly held, under long-standing D.C. Court of Appeals precedent, Appellees' "online services are not 'places of public

accommodation'" within the meaning of the DCHRA. *See* ECF No. 44 at 10-12. Alternatively, this Court may affirm dismissal because Appellants failed to plead facts establishing that Appellees engaged in any discriminatory practices.

A. Appellees' Online Platforms Are Not "Places of Public Accommodation" for Purposes of the DCHRA.

The DCHRA's "public accommodation" provision has never been applied to non-physical locations, and the only D.C. Court of Appeals case that squarely addressed this issue concluded that a voluntary membership organization was not a "place of public accommodation" because it did not operate from a physical location. *U.S. Jaycees*, 434 A.2d at 1381. Appellants and their amici (who have weighed in on the DCHRA issue) do not dispute any of the foregoing.

Instead, relying on (1) a misleading characterization of the legislative history, (2) a prior agency decision that does not control this case, and (3) other courts' interpretations of an unrelated federal statute (where courts have reached different results), Appellants attempt to rewrite the DCHRA's statutory definition to include Appellees' online platforms. But as the District Court correctly held, text and precedent control: this Court should affirm the District Court's holding that Appellees' online services are not "places of public accommodation" under the DCHRA.

1. The D.C. Court of Appeals Has Correctly Construed the DCHRA To Extend to Only Physical Locations.

The issue in this case—whether the DCHRA can be applied to non-physical locations such as online social media services—is resolved by the D.C. Court of Appeals' controlling decision in *U.S. Jaycees*. There, the D.C. Court of Appeals squarely rejected the argument that a "place of public accommodation" under the DCHRA could exist without an actual physical location. *U.S. Jaycees*, 434 A.2d at 1381–82. The issue before the court was whether a voluntary membership organization—which did not operate from a physical location within the District of Columbia—could be said to be a "place of public accommodation" under the DCHRA. *Id.* at 1381. The lower court had held that the organization qualified as a "place of public accommodation" because "'(I)t is not necessary that there be a building . . . in order to categorize an existing entity as a place of public accommodation.'" *Id.* (alterations in original).

The D.C. Court of Appeals reversed, holding that the organization was "beyond the reach of the Act" because it "does not operate from any particular place within the District of Columbia." *Id*. The court emphasized that the DCHRA "define[s] a 'place of public accommodation' as 'all places included in the meaning of such terms as . . . hotels . . . restaurants . . . barrooms . . . ice cream parlors . . . wholesale and retail stores . . . banks . . . insurance companies . . . hospitals . . . swimming pools . . . barber shops . . . theaters . . . recreation parks . . . public halls .

. . ," *id.* (quoting D.C. CODE 1978 Supp., s 6-2202(x)) (alteration in original). Observing that these are all physical places, the Court of Appeals held that it would "ignore the plain meaning of the statutory language" to construe the DCHRA as covering entities that did not operate from a physical location within the District. *Id.*

The same reasoning applies here. Appellees "do[] not operate [their platforms] from any particular place within the District of Columbia," *id.*, and likewise are "beyond the reach of the Act." *Id.* at 1381.

Notwithstanding the plain language of the DCHRA, the District of Columbia, appearing as an amicus, asserts that the statutory text embraces entities that do not have a physical location in the District. *See* D.C. Br. 6–8.[3] The District of Columbia provides no authority for the proposition that a *place* of public accommodation does not require an actual physical location from which a plaintiff is denied accommodation. Instead, it argues that various entities (including mail-order retailers) would have been covered by the statute notwithstanding that they had no physical location within the District in 1977. According to the District, that means

[3] The District argues that the movants in *U.S. Jaycees* did not "seriously contest the meaning of 'place of public accommodation.'" D.C. Br. 20. Not so. The plaintiffs in *U.S. Jaycees* "embrace[d] the reasoning employed by the trial court in its interpretation of the [DCHRA]" that a "place of public accommodation" does not need to have a "building," *U.S. Jaycees*, 434 A.2d at 1381, and even "refer[red] [the court] to decisions rendered by the New Jersey intermediate appellate court and the Massachusetts Commission Against Discrimination," which purportedly held that membership organizations constitute "places of public accommodation" under the respective state's anti-discrimination statutes, *id.* at 1382-83.

that "[t]he statutory text encompassed more than physical locations in 1977." *Id*. at 6. But this is question begging: the District supports its conclusion that those businesses would have been covered not with anything in the text of the DCHRA, but only with reference to *other* (non-D.C.) statutes that say nothing about what the DCHRA covers.

For example, *Burks v. Poppy Construction Company* involved the California Unruh Civil Rights Act, which, unlike the DCHRA, does *not* enumerate exemplary "places of public accommodation" that are all physical locations. That statute instead broadly applies to "all business establishments of every kind whatsoever." 370 P.2d 313, 315 (Cal. 1962). *Burks* applied that broad language to hold that a "place of public accommodation" did not have to be a "fixed location," and thus encompassed a construction company selling houses in a local neighborhood. *Id.* That application of plainly different language in plainly different circumstances has no bearing here.

U.S. Power Squadrons v. State Human Rights Appeal Board, 452 N.E.2d 1199 (N.Y. 1983), also is distinguishable. The court in that case applied the New York Human Rights Law to a male-only national organization and its three separately incorporated New York squadrons who engaged in public activities promoting safety and skill in boating in New York. The court explained that the New York statute covers "two concepts"—"the idea of public accommodation in the broad sense of providing conveniences and services to the public," and, separately, "the idea of

place." *Id*. at 1203. The court applied the *first* concept to conclude that the boating organization fell within the statutory definition, since the organization "systematically offer[ed] a service of accommodation to the public" by offering educational programs. *Id.* And it concluded that these services were offered from a place in New York based on the educational and other activities performed by the local squadrons in New York, regardless of whether the local squadrons had a "fixed place" where they always operated. Excluding women from participation in these activities that occurred in New York therefore was subject to the statute.

Here, by contrast, the online services at issue are not physically located in the District of Columbia. Moreover, the D.C. Court of Appeals determined in *U.S. v. Jaycees* that the DCHRA does not extend to entities that do not offer the relevant service from a physical location but that nonetheless engage in organizational activities in the District of Columbia.

The District also argues that *Pool & Geller v. Boy Scouts of Am.*, Nos. 93-030-(PA) & 93-031-(PA) (D.C. Comm'n on Human Rights June 18, 2001) *("Pool & Geller")*, a subsequently-overruled administrative decision by the D.C. Office of Human Rights, "superseded" *U.S. Jaycees*. D.C. Br. 22; *see also id.* at 14–16 (arguing that *Pool & Geller* is "'binding' on the D.C. Court of Appeals" and therefore "governs here as well"). As a preliminary matter, *Pool & Geller* did not purport to overrule, or even discuss, *U.S. Jaycees*; nor did it consider the physical

location holding in *U.S. Jaycees*. Instead, the opinion arose in the limited context of the interpretation and application to the Boy Scouts of a 1987 DCHRA amendment, which added "clubs and institutions" to the definition of "place of public accommodation." *See Pool & Geller* at 49-54. Nowhere did *Pool & Geller* discuss the physical location requirement, much less contemplate extending this requirement beyond the 1987 DCHRA amendment to the broader definition suggested by Appellants and amici.

In any event, *Pool & Geller* could not "supersede" the holding of *U.S. Jaycees*. Agency interpretation cannot displace "a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005); *see also Timus v. D.C. Dep't of Human Rights*, 633 A.2d 751, 758 (D.C. 1993) ("'[T]he court . . . must give effect to the unambiguously expressed intent of [the legislature].'" (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984))). Courts "are not obliged to stand aside and affirm an administrative determination which reflects a misconception of the relevant law or a faulty application of the law, as [the D.C. Court of Appeals] is the final authority on issues of statutory construction." *Kelly v. D.C. Dep't Emp't Servs.*, 214 A.3d 996, 1000–01 (D.C. 2019) (citation and internal quotation marks omitted). Here, even assuming that *Pool & Geller* interprets the

definition of public accommodation to include something other than actual, physical spaces, that agency interpretation is "foreclosed," *National Cable*, 545 U.S. at 982, by the D.C. Court of Appeals' holding in *U.S. Jaycees*.[4] *U.S. Jaycees* is the controlling precedent, and this Court should not defer to *Pool & Geller*.

In sum, the argument offered by Appellants and their amici that the DCHRA's definition of "public accommodation" does not require a physical location is exactly the position that the D.C. Court of Appeals rejected in *U.S. Jaycees*, 434 A.2d at 1381 (rejecting trial court's holding that "'it is not necessary that there be a building . . . in order to categorize an existing entity as a place of public accommodation'"). That ruling controls this case and requires affirmance of the District Court's holding that Appellees' platforms are not places of public accommodation. *Id.*

2. Legislative Purpose Does Not Support Expansion of the Statutory Definition.

Confronted with the plain meaning of DCHRA's statutory definition, as confirmed by the D.C. Court of Appeals' undisturbed precedent in *U.S. Jaycees*, amici urge the Court to broadly construe the statutory definition consistent with the statutory purpose. D.C. Br. 4–5, 9–10, 12–14; Lawyers' Committee Br. 6–7. At the

[4] The District suggests that *Pool & Geller*'s rejection of a physical location requirement is "at minimum, a reasonable reading of the statute" because the D.C. Court of Appeals reversed *Pool & Geller* solely on First Amendment grounds. D.C. Br. 16. Quite plainly, however, the fact that a court reverses a lower court decision on one ground does not mean that the court found other undiscussed parts of the lower court's opinion were reasonable, much less correct.

outset, resort to legislative history is unnecessary because the statutory language is unambiguous. *See Goldring v. District of Columbia*, 416 F.3d 70, 57 (D.C. Cir. 2005) ("Legislative history is irrelevant to the interpretation of an unambiguous statute." (citing *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808-09 n.3 (1989))). But even the legislative history does not support amici. Both amici place heavy emphasis on the DCHRA's first provision, which states that the Council's "intent" was "to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit." D.C. Br. 12 (quoting D.C. CODE § 2-1401.01). The amici's reliance on the statement of intent is misplaced, and their understanding of the legislative history is incomplete.

In enacting the DCHRA, the D.C. Council expressly recognized that the above-quoted statement of intent is *not* enforceable and does not expand upon the statutory text. In the words of the Legislative Report,

> [The statement of intent] is not enforceable, nor does it's [sic] broadness expand the unlawful practices [sic] specified in Sub-Part B. Rather Sec. 1.1 is included as a statement of *our intent to continue to legislate against all forms of discrimination* and our commitment to keep Title 34 up-to-date as future forms of such discrimination come to the Council's attention.

D.C. CITY COUNCIL COMM. ON EDUC. & YOUTH AFFAIRS, LEGISLATIVE REPORT ON TITLE 34, THE HUMAN RIGHTS LAW, at 3 (Oct. 15, 1973) (emphasis added). Indeed, in response to Mayor-Commissioner Walter E. Washington's concern that "the broad language of section 1.1 . . . will not . . . provide persons with sufficient notice

as to what they can or cannot do," Letter from Walter E. Washington, Mayor-Commissioner to John A. Nevious, Chairman, D.C. Council (Aug. 6, 1973) (on file with author), the Council clarified as follows:

> It is not, however, an enforceable section and cannot be used to enforce against forms of discrimination not already specified in the "Prohibited Practices" chapters. It is rather a statement of our intent to follow up this regulation in the future with further amendments if necessary, which speak in unanticipated and presently unknown forms of discrimination.

LYNN SCHOLZ, D.C. CITY COUNCIL MEMORANDUM, PROPOSED DRAFT CLARIFICATIONS, TITLE 34, at 3 (Oct. 11, 1973).

Therefore, contrary to the amici's contention, the statement of intent does not extend the reach of the statute beyond the plain meaning of the statutory text; rather, it reflects the legislature's expectation that it might act in the future to legislatively expand the DCHRA beyond its existing statutory scope. For example, the 1987 DCHRA Amendment added new categories, i.e. "clubs and institutions," to the definition of "public accommodation," thus leading to the OHR's inclusion of Boy Scouts within the definition. *See supra* Part III.A.1. Yet, to date, the legislature has never amended the DCHRA to cover online platforms.

The enacting legislature expressly provided that it "inten[ded] to follow up their regulation in the future with further amendments" in case of "unanticipated and presently unknown forms of discrimination," PROPOSED DRAFT CLARIFICATION,

TITLE 34, at 3.[5] *See Sorrells v. Garfinckel's*, 565 A.2d 285, 289 (D.C. 1989) ("Insofar as [Plaintiff's] concerns are unprotected by the [DCHRA], that is the result of the way the Act is written. We cannot rewrite it or extend its coverage beyond the limits set by the legislature."). This, of course, has not happened in the case of online platforms like Appellees. As the District effectively acknowledges, therefore, the statute as written does not cover online platforms. This Court is obliged to enforce it as written—just as the District Court did.

3. The ADA's Definition of "Public Accommodation" Has No Relevance to the DCHRA.

Finally, Appellants (as they did in the District Court) rely extensively on other courts' interpretations of the "public accommodations" definition in the Americans with Disabilities Act ("ADA"). App. Br. 16–17. The District Court correctly rejected these arguments. The ADA is a completely different statute from the DCHRA: it has different language and different goals and was enacted by a different legislature. Any

[5] The District also cites a number of cases advocating for a broad interpretation of the DCHRA. However, these same cases recognize that a broad interpretation of the statute cannot create a new protected class or prohibit a new form of discriminatory practice. *See, e.g.*, *Estenos v. PAHO/WHO FCU*, 952 A.2d 878, 887 (D.C. 2008) ("That does not mean, however, that this court will create new protected classes not identified by the legislature."); *Exec. Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 732 (D.C. 2000) ("[W]e have noted that the Council did not intend the DCHRA to prohibit every discriminatory practice.").

other court's interpretation of that statute must yield to the D.C. Court of Appeals' interpretation of the DCHRA in *U.S. Jaycees*.

In any event, the case law is far from clear that the ADA reaches as far as Appellants suggest. The District Court correctly observed that while some courts have interpreted the ADA broadly, others "have also held that 'public accommodations' under the ADA are limited to physical spaces." ECF No. 44 11; *see also Williams v. Savage*, 569 F. Supp. 2d 99, 110 n.8 (D.D.C. 2008) ("Insurance policies are not physical locations and, therefore, are not places of public accommodation under the ADA."); *Fennell v. Aetna Life Ins. Co.*, 37 F. Supp. 2d 40, 44 (D.D.C. 1999); *Treanor v. Wash. Post Co.,* 826 F. Supp. 568, 569 (D.D.C. 1993). Indeed, a number of courts have expressly held that the ADA does not apply to online services with no physical location. *See, e.g.*, *Cullen v. Netflix*, Inc., 600 F. App'x 508, 509 (9th Cir. 2015); *Earll v. eBay, Inc.*, 599 F. App'x 695, 696 (9th Cir. 2015). The District Court therefore was correct to conclude that "[t]he applicability of an unsettled interpretation about an unrelated statute is unclear." ECF No. 44 at 11.

4. Interpreting the DCHRA to Apply to Online Platforms Raises Serious First Amendment Concerns.

One additional reason not to interpret the DCHRA to apply to online platforms is that doing so would raise serious constitutional issues that this Court ordinarily avoids where a case can be resolved on other grounds. *See Syracuse Peace*

Council v. F.C.C., 867 F.2d 654, 657 (D.C. Cir. 1989) (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring)). If the statute were interpreted to apply to non-physical spaces like the internet, that interpretation would present real vagueness concerns, in contrast to the clarity of both the statutory language and the case law focusing on physical location. Moreover, as other courts have recognized, the First Amendment protects Appellees' decisions about how to select, sort, and display content on their platforms. *See e-ventures Worldwide, LLC v. Google, Inc.*, 2017 U.S. Dist. LEXIS 88650, at *10-11 (M.D. Fla. Feb. 8, 2017) (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991, 995 (S.D. Tex. 2017); *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 441 (S.D.N.Y. 2014); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–30 (D. Del. 2007). Construing the DCHRA to reach alleged political-content decisions made by online platforms would impinge on those decisions and raise serious questions as to whether such restrictions could be imposed consistently with the First Amendment. This Court can and should avoid addressing this First Amendment issue because, as the District Court found, the DCHRA is best read (and has been authoritatively interpreted) as not applying to the activity alleged in this case—and because, as discussed below, Appellants simply failed to state a viable claim under the statute even if it did apply to online services with no real-world location.

5. This Court Should Not Certify the Question to the D.C. Court of Appeals.

Amici propose that if this Court is in doubt about the proper interpretation of the DCHRA, it should certify the question to the D.C. Court of Appeals. D.C. Br. 22–25; Lawyers' Committee Br. 29–30. As both amici recognize, however, the propriety of certification depends on whether "'District of Columbia law is genuinely uncertain.'" D.C. Br. 23 (quoting *Companhia Brasileira Carbureto de Calicio v. Applied Indus. Materials Corp.*, 640 F.3d 369, 373 (D.C. Cir. 2011)); *accord* Lawyers' Committee Br. 29. There is no such uncertainty here. The controlling precedent of *U.S. Jaycees* held that the "plain meaning of the statutory language" mandates a "place of public accommodation" to have a physical location. And nothing in subsequent case law from that Court suggests any wavering from that position.

The most amici can offer is that the D.C. Court of Appeals "might decide that it no longer feels bound by an earlier decision." D.C. Br. 24 (internal quotation marks omitted). Yet "the possibility that the D.C. Court of Appeals might reverse its previous course if presented with the question anew does not render the question 'genuinely uncertain.'" *Metz v. BAE Sys. Tech. Sols. & Servs. Inc.*, 774 F.3d 18, 24 (D.C. Cir. 2014); *see also Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 129 (D.C. Cir. 2012) ("Certification based on the possibility that the D.C. Court of Appeals might adopt additional exceptions to its general rule, then, has no logical stopping

point[,] . . . because state courts always *might* choose to create new exceptions to their general rules.").

The District also suggests that "genuine uncertainty" is created by the New York and Connecticut high courts' "reject[ion] [of] a physical location requirement under their similar antidiscrimination laws." D.C. Br. 24. Not so. The New York court held only that "[t]he place of the public accommodation need not be a *fixed location*," finding it sufficient that the "petitioners' meetings and activities occur" at various public places in New York, including "public waterways, public parks and public marinas"—all real, physical spaces. *U.S. Power Squadrons*, 452 N.E.2d at 1204 (emphasis added). That conclusion does not implicate online platforms. The Connecticut court was interpreting a Connecticut statute which "abandoned its laundry list approach" of defining "public accommodation"—the approach of the DCHRA—and instead used the "general definition" of "'any establishment which caters or offers its service or facilities or goods to the general public. '" *Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm'n on Human Rights & Opportunities*, 528 A.2d 352, 358 (Conn. 1987) (citation omitted). Neither decision is inconsistent with

the D.C. Court of Appeals' holding in *U.S. Jaycees* or renders application of the DCHRA "genuinely uncertain."[6]

B. The Court May Affirm on the Separate Ground that Appellants Failed To Adequately Plead Unlawful Discrimination.

Finally, this case would be a particularly poor vehicle for certification because Appellants will not prevail on their DCHRA claim in any event. Even if the statute could be read to apply to online platforms, Appellants' DCHRA claim would fail because they failed to adequately plead unlawful discrimination. To state a claim of discrimination under the DCHRA, Appellants must establish that: (1) they are members of a protected class; (2) they suffered adverse actions; and (3) the unfavorable actions give rise to an inference of discrimination. *McCaskill v. Gallaudet Univ.*, 36 F. Supp. 3d 145, 152 (D.D.C. 2014). "A claim of discrimination under DCHRA requires a plaintiff to show a nexus between his disparate treatment and his [protected traits]." *Ihebereme v. Capital One, N.A.*, 730 F. Supp. 2d 40, 53 (D.D.C. 2010). Additionally, Appellants "must prove intentional discrimination." *Mazloum v. D.C. Metro. Police Dep't*, 522 F. Supp. 2d 24, 41 (D.D.C. 2007) (citation

[6] In any event, Appellants could not support their contention that other courts' interpretations of unrelated statutes renders "genuinely uncertain" application of a D.C. law. Appellants' only authority is *Owens v. Republic of Sudan*, 864 F.3d 751 (D.C. Cir. 2017). However, in *Owens*, "the D.C. Court of Appeals ha[d] yet to render a decision on the matter," and therefore, the court was "genuinely uncertain whether the D.C. Court of Appeals" would follow other state courts. *Id.* at 812. That is not the situation here.

omitted); *see* D.C. CODE § 2-1402.31(a) (requiring the adverse action to be "wholly or partially for a discriminatory reason based on" the protected traits). Appellants have not pled facts to support intentional discrimination against Freedom Watch or Ms. Loomer by any Appellee.

1. Appellants Failed To Plead Unlawful Discrimination As to Freedom Watch.

Freedom Watch's discrimination claim is premised upon the allegation that its growth on Appellees' platforms has "come to a complete halt, and its audience base and revenue generated has either plateaued or diminished" after the election of President Donald Trump. ECF No. 28 ¶ 54; *see also id.* ¶ 57. Notably, however, Freedom Watch does not allege that Appellees have terminated Freedom Watch's accounts on their platforms or that Appellees have suppressed or censored any specific content created and distributed by Freedom Watch for any reason (much less a discriminatory one) on YouTube, Facebook, or Twitter. To the contrary, Freedom Watch alleges that it maintains an active YouTube channel, Facebook page, Twitter account, and an Apple Podcast, and boasts that its "YouTube videos often reach over 100,000, with a substantial 'like' to 'dislike' ratio." *Id.* ¶¶ 51–52, 59. The Amended Complaint offers no factual allegations as to any action taken by an Appellee against Freedom Watch, alleging only that its YouTube subscriber base

has declined "from over 70,000 to under 69,000." *Id.* ¶ 59.[7] These allegations do not establish that any Appellee actually took "adverse action" against Freedom Watch.

These allegations also fail to support a plausible claim that any unspecified adverse action Appellees might have taken was based upon discrimination due to Freedom Watch's political affiliation.[8] By the statute's own terms, "'political affiliation' means the state of belonging to or endorsing any political party." D.C. CODE § 2-1401.02(25). Freedom Watch must therefore sufficiently allege that any specific adverse "action was based on [its] affiliation with" a political party, rather than based on "'political reasons' or [its] 'politics generally.'" *Blodgett v. Univ. Club*, 930 A.2d 210, 221–22 (D.C. 2007); *see McCaskill,* 36 F. Supp. 3d at 153–54 (dismissing plaintiff's DCHRA claim because even though "[plaintiff's] political stance on an issue generated the controversy," plaintiff only "alleges that the university discriminated against her because of her actions . . . and not because of

[7] Freedom Watch assumes that this decline is "evidence that YouTube is suppressing and censoring Freedom Watch's content to prevent it from obtaining new subscribers, or even removing Freedom Watch's subscribers unilaterally." ECF No. 28 ¶ 60. But Appellants do not identify any content suppressed or subscriber removed by YouTube. And their Complaint offered no allegations whatsoever regarding the viewership of Freedom Watch's Facebook page, Twitter account or Apple podcasts.

[8] The Amended Complaint also alleges that "the founder and chairman and general counsel of Freedom Watch is also of Jewish origin," *id.*, but does not connect Mr. Klayman's "Jewish origin" to any unspecified adverse action against Freedom Watch based on religious affiliation.

her membership in any group, let alone any political party"); *Fantasia v. Office of Receiver of Commc'n on Mental Health Servs.*, 2001 U.S. Dist. LEXIS 25858, at *22 (D.D.C. Dec. 21, 2001) (dismissing plaintiff's DCHRA claim because the DCHRA "protects individuals only from discrimination based on partisan political affiliation").

There is nothing like that here. The Complaint contains no factual allegations that Freedom Watch actually "belong[s] to or endors[e] any political party," D.C. CODE § 2-1401.02(25), that Appellees "perceive[d]" Freedom Watch as "belonging to or endorsing any political party," *id.* §§ 2-1401.02(25), 2-1402.31(a), or that any alleged adverse actions had a nexus to Freedom Watch's affiliation with any political party. Nor could Freedom Watch rely on the conclusory assertion that Appellees "are discriminating against Plaintiffs because of its [sic] perceived conservative advocacy which is perceived by them to further the interests of what is perceived to be an affiliated Republican Party," ECF No. 28 ¶ 118, where there is no factual allegation whatsoever that Appellees perceived Freedom Watch to be affiliated with the Republican Party or that the purported adverse action had a nexus to a perceived affiliation with the Republican Party. *See Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" do not count as well-pleaded facts sufficient to withstand a motion to dismiss). At most, Freedom Watch alleges that its "conservative advocacy," ECF

No. 28 ¶ 52, led to purported adverse actions by Appellees. *Generally id.* ¶¶ 51–62. However, this alleged discrimination based on "political reasons," "politics generally," or "political stance" is insufficient to sustain an action under the DCHRA. *McCaskill*, 36 F. Supp. 3d at 153–54; *Blodgett*, 930 A.2d at 221–22.

2. Appellants Failed To Plead Unlawful Discrimination As to Ms. Loomer.

Ms. Loomer does not allege that either Google or Apple took any action against her; therefore, she plainly has no claim under the DCHRA against either of those Appellees. Ms. Loomer's allegations against Facebook and Twitter fare no better.

As a threshold matter, the DCHRA does not apply to a dispute between non-District residents involving alleged discriminatory conduct that occurred outside the District of Columbia. *See Powell v. Am. Airlines, Inc.*, 2018 U.S. Dist. LEXIS 85869, at *3-4 (D.D.C. May 21, 2018) (the DCHRA does not apply unless discriminatory action occurred or was felt in the District); *Webster v. Potter,* 185 F. Supp. 3d 74, 77 (D.D.C. 2016) (same); *Cole v. Boeing Co.*, 845 F. Supp. 2d 277, 284 (D.D.C. 2012) ("The DCHRA is not extraterritorial; it does not and cannot secure an end to discrimination in jurisdictions outside of the District of Columbia."); *Monteilh v. AFSCME, AFL-CIO*, 982 A.2d 301, 304-05 (D.C. 2009) (the DCHRA applies to claim for employment discrimination only if employer made discriminatory decision in the District of Columbia or its effects were felt there). Ms. Loomer is a resident

of Florida, and Twitter and Facebook are incorporated in Delaware with headquarters in California. ECF No. 28 ¶¶ 6, 8, 9. Under the facts pleaded, no alleged discrimination occurred with regards to Ms. Loomer in a place of public accommodation in the District of Columbia, and the DCHRA therefore does not apply.

Ms. Loomer also fails to plead facts plausibly suggesting that the alleged actions taken against her by Facebook and Twitter were based on her political affiliation or religion. Ms. Loomer alleges (falsely) that Facebook banned her for 30 days, ECF No. 28 ¶ 69, but she does not identify any content that she posted on Facebook that resulted in the alleged ban, or any factual basis to assert that the purported ban was motivated by her political affiliation or religion. Similarly, Ms. Loomer does not allege that any action by Twitter was "wholly or partially for a discriminatory reason" that is redressable by the DCHRA. D.C. CODE § 2-1402.31(a). Indeed, Ms. Loomer does not dispute that her conduct violated Twitter's Terms of Service, which do not discriminate based on political or religious affiliation. Because Ms. Loomer has not adequately pled facts demonstrating that her Twitter account was suspended because she is Jewish, her DCHRA claim against Twitter should be dismissed.

IV. THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' FIRST AMENDMENT CLAIMS FOR LACK OF STATE ACTION.

It is black-letter law, recently reaffirmed by the Supreme Court, that the First Amendment's "Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech." *Halleck*, 139 S. Ct. at 1928; *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) ("[T]he constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."). In only "a few limited circumstances" can a private entity qualify as a state actor. *Halleck*, 139 S. Ct. at 1928. "[S]tate action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)); *accord Williams v. United States*, 396 F.3d 412, 414 (D.C. Cir. 2005) (same).

Appellants' First Amendment claim runs afoul of these established principles. Appellees are private companies, not state actors. Facebook, Google, Apple, and Twitter operate private online platforms, and Appellants have not even tried to allege that the government was involved in any way with Appellees' private choices about what content may be posted on their platforms or who may use their services. Neither in their Amended Complaint nor in their arguments do Appellants offer any theory as to how Appellees' editorial actions may be treated as actions taken by the

government. Without that, as the District Court concluded, there is no basis for any First Amendment claim. ECF No. 44 at 12-15.

Appellants ignore the unbroken line of cases holding that private online platforms—specifically including Appellees—are not state actors and that have consistently rejected similar efforts to hold those platforms liable under the First Amendment. *Howard v. Am. Online, Inc.*, 208 F.3d 741, 754 (9th Cir. 2000) (claims that AOL was a "quasi-public utility" or "public trust" were "insufficient to hold that AOL is an 'instrument or agent' of the government"); *Prager Univ. v. Google LLC*, 2018 U.S. Dist. LEXIS 51000, at *26 (N.D. Cal. Mar. 26, 2018) (dismissing First Amendment claim against Google and YouTube and explaining that "courts have declined to treat . . . private social media corporations, as well as online service providers, as state actors.").[9] There is no basis for a different result here.

[9] *See also, e.g.*, *Green v. YouTube, LLC*, 2019 U.S. Dist. LEXIS 55577, at *10 (D.N.H. Mar. 13, 2019) (dismissing First Amendment claims against YouTube for lack of state action); *Ebeid v. Facebook, Inc.*, 2019 U.S. Dist. LEXIS 78876, at *15-16 (N.D. Cal. May 9, 2019) (dismissing constitutional claim against Facebook for failure to establish that Facebook is a state actor); *Davison v. Facebook, Inc.*, 370 F. Supp. 3d 621, 629 (E.D. Va. 2019) (same); *Fehrenbach v. Zeldin*, 2018 U.S. Dist. LEXIS 132992, at *4-9 (E.D.N.Y. Aug. 6, 2018) (same); *Nyabwa v. FaceBook*, 2018 U.S. Dist. LEXIS 13981, at *1-2 (S.D. Tex. Jan. 26, 2018) (same); *Shulman v. Facebook.com*, 2017 U.S. Dist. LEXIS 183110, at *8-9 (D.N.J. Nov. 6, 2017) (same); *Casterlow-Bey v. Google Internet Search Engine Co.*, 2017 U.S. Dist. LEXIS 176156, at *1 (W.D. Wash. Sept. 26, 2017 (Google "is not a state actor and so is not liable under § 1983")), report and recommendation adopted, 2017 U.S.

Appellants rely entirely on the Supreme Court's decision in *Packingham v. North Carolina*. App. Br. 17-19. But *Packingham* did not involve claims against a private party, and that case did nothing to change the law of state action. *Packingham* instead addressed a classic instance of state action: the enactment of a ***state criminal statute*** that made it unlawful for registered sex offenders to access social media websites. 137 S. Ct. at 1732. In striking down that statute, the Court addressed only whether the First Amendment restricted the power of ***state governments*** to limit access to online platforms. *Id.* at 1738. Nothing in *Packingham* suggests that the First Amendment limits the rights of private parties to regulate content on their platforms or make decisions about who may use their services.

That is why courts, including the District Court here, have consistently held that *Packingham* creates no basis for any First Amendment claim against private online service providers. ECF No. 44 at 13 (*Packingham* "did not create a new cause

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Dist. LEXIS 175302 (W.D. Wash. Oct. 23, 2017); *Kim v. Apple, Inc.*, 2014 U.S. Dist. LEXIS 91522, at *5 (D.D.C. July 7, 2014) ("to the extent that plaintiff invokes the First Amendment in his complaint, the Court notes that the First Amendment does not apply to a private entity like Apple, Inc."), *aff'd* 582 F. App'x 3 (D.C. Cir. 2014); *Young v. Facebook, Inc.*, 2010 U.S. Dist. LEXIS 116530, at *5-8 (N.D. Cal. Oct. 25, 2010) (Facebook is not a state actor); *Jayne v. Google Internet Search Engine Founders*, 2007 U.S. Dist. LEXIS 71954, at *3 & n.4 (M.D. Pa. Sept. 27, 2007) (dismissing with prejudice civil rights claim against Google because "[t]here is no valid assertion that [Google's actions are] somehow a violation of the law or the Constitution"), *aff'd*, 263 F. App'x 268 (3d Cir. 2008); *Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 436, 441-45 (E.D. Pa. 1996) ("AOL is not a state actor" and "there has been no state action by AOL's activities").

of action against a private entity for an alleged First Amendment violation."); *accord Prager Univ.*, 2018 U.S. Dist. LEXIS 51000, at *24 (explaining that "*Packingham* did not, and had no occasion to address whether private social media corporations like YouTube are state actors that must regulate the content of their websites according to the strictures of the First Amendment"); *Nywabwa*, 2018 U.S. Dist. LEXIS 13981, at *2 (holding that *Packingham* "did not declare a cause of action against a private entity such as FaceBook for a violation of the free speech rights protected by the First Amendment").

While relying on *Packingham*, which does not help their argument, Appellants ignore *Manhattan Community Access Corp. v. Halleck*, which defeats it by confirming that there can be no viable First Amendment claims in this case. *Halleck* held that a private corporation that operated public access channels on a cable system was not a state actor bound by the First Amendment. 139 S. Ct. at 1926. In so doing, the Court reaffirmed the importance of a strict state-action rule: "By enforcing that constitutional boundary between the governmental and the private, the state-action doctrine protects a robust sphere of individual liberty." *Id*. at 1928. *Halleck* then went on to specifically reject the argument, a version of which Appellants press here, that operating a widely used forum for speech by others is a public function that amounts to state action. *Cf.* App. Br. 19 (arguing that Appellees

should be treated as state actors because the "Internet has overtaken physical public spaces in the traditional sense as the chosen forum for public debate and discourse").

The problem with that argument, the Supreme Court explained, is that "it mistakenly ignores the threshold state-action question." *Halleck*, 139 S. Ct. at 1930. When the *government* provides a forum for speech, the First Amendment applies. But "when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion over the speech and speakers in the forum." *Id*. "In short, merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints." *Id*.

Continuing in the same vein, Appellants make a misguided policy argument that treating Appellees as "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." App. Br. 20. This flies in the face of decades of case law, reaffirmed by *Halleck*, that private property owners, no matter their social importance, are not the government and are not subject to the constitutional constraints that limit governmental regulation of speech. 139 S. Ct. at 1298-29 (explaining that in determining when something is a public function under the state action doctrine, "it is not enough that the function serves the public good or

the public interest in some way"). Absent an actual "nexus" with the operations or functions of the government, there is no state action and no basis for subjecting a private party to the dictates of the First Amendment. *Brentwood*, 531 U.S. at 295. Nothing like that is alleged here, nor could it be.

Not only is Appellants' argument wrong on the law, it also misunderstands the relevant public policy. Expanding the scope of the First Amendment to override the self-regulatory decisions of private platforms would sweep aside all manner of valuable content-regulation routinely performed by Appellees and other similar services. It would call into constitutional question the actions that such providers routinely take to restrict access to or remove broad swaths of objectionable content, from pornography to hateful and abusive cyber-bullying. And it would invert the relevant constitutional protections, as the First Amendment has long been understood to *protect*—not limit—the editorial judgments of private parties who provide forums for speech, including online services. *See, e.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 570 (1995); *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014). The Supreme Court's observations in *Halleck* apply equally here:

> [T]o hold that private property owners providing a forum for speech are constrained by the First Amendment would be "to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." The Constitution does not

> disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property.

Halleck, 139 S. Ct. at 1931 (quoting *Hudgens v. NLRB*, 424 U.S. 507, 517 (1976)). That principle governs this case. Appellees do not become state actors merely because their private platforms are sites for public discussion and debate. *Prager Univ.*, 2018 Dist. LEXIS 51000, at *24 (rejecting argument that online platforms "should be treated as state actors subject to First Amendment scrutiny merely because they hold out and operate their private property as a forum for expression of diverse points of view"). The District Court correctly dismissed Appellants' First Amendment claims.

CONCLUSION

For the reasons set forth herein, the Court should affirm dismissal of Appellants' Amended Complaint and enter judgment for Appellees.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the text for Appellees' Corrected Answering Brief was prepared using Times New Roman, 14-point font, and contains 10,574 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31th day of January 2020, I electronically served and filed the foregoing document with the Clerk of the Court by using the CM/ECF system. I also certify that the foregoing will be served on counsel for all participants in this case via the CM/ECF system and U.S. Mail.

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