[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 19-7030

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

FREEDOM WATCH, INC., *et al.*,
APPELLANTS,

V.

GOOGLE, INC., *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF APPELLEES AND AFFIRMANCE

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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: Freedom Watch, Inc.; Laura Loomer; Google LLC; Facebook, Inc.; Twitter, Inc.; Apple Inc.; Lawyers' Committee for Civil Rights Under Law; Washington Lawyers' Committee for Civil Rights and Urban Affairs; the District of Columbia; the Chamber of Commerce of the United States of America; and the National Federation of Independent Business.

2. *Ruling under Review*.—The rulings under review are the district court's Memorandum Opinion Granting Defendants' Motion to Dismiss (Dkt. No 44); and 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.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amici curiae* the Chamber of Commerce of the United States of America and the National Federation of Independent Business state that they are, respectively, the world's largest business federation and the nation's leading small business association. They have no parent corporations, and no publicly held company holds 10% or greater ownership in either.

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

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* Authorities upon which *amici curiae* chiefly rely are marked with an asterisk.

Constitutional Provisions and Statutes

Other Authorities

STATEMENT OF IDENTITIES AND INTERESTS OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") and the National Federation of Independent Business (the "NFIB") are the world's largest business federation and the nation's leading small business association. They regularly file *amicus* briefs in cases that raise issues of concern to the business community. In particular, they regularly file to oppose litigants' attempts to evade the legislative process by requesting that courts rewrite statutes, and to misapply the Constitution to private businesses. They file here by leave of the Court.[1]

The Chamber represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. A primary function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts.

The NFIB is the nation's leading small business association, representing members in the District of Columbia and all 50 state capitals. Founded in 1943 as a non-profit, non-partisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses.

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[1] No party or party's counsel authored this brief in whole or in part. No party, no party's counsel, and no person other than *amici*, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

ARGUMENT

Neither the District of Columbia Human Rights Act nor the First Amendment regulates appellees' privately operated online platforms. A ruling concluding otherwise would both misread the law and have unacceptable national and local consequences.

I. THE D.C. HUMAN RIGHTS ACT APPLIES TO PHYSICAL "PLACES OF PUBLIC ACCOMMODATION," NOT VIRTUAL ONES.

The Council of the District of Columbia made clear in the text of the District of Columbia Human Rights Act ("DCHRA") that it meant to regulate physical "place[s] of public accommodation," not online platforms or other fora for interaction that are not physical places that accommodate the public. The D.C. Court of Appeals has recognized as much in an authoritative decision, *United States Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. 1981). *See Novak v. Capital Mgmt. & Dev. Corp.*, 452 F.3d 902, 907 (D.C. Cir. 2006) (explaining that this Court's duty "is to achieve the same outcome [that] would result if the District of Columbia Court of Appeals considered this case"). This Court should follow the text and that decision, for the reasons appellees describe and the further reasons below.

In relying on the *amicus* briefs of the District of Columbia and the Lawyers' Committee for Civil Rights Under Law *et al.* ("Lawyers' Committee"), appellants essentially request that this Court rewrite the statute for policy reasons. The Court should reject that approach and affirm the dismissal of appellants' DCHRA claim.

If the statute is to be extended beyond physical "place[s] of public accommodation," it is the legislature that should do so, after full consideration of the nationally and locally important issues such an extension would implicate.

A. The statutory text and binding precedent establish that appellees' online platforms are not "places of public accommodation" under the DCHRA.

The DCHRA does not purport to reach every public and private interaction. It instead addresses only discrete categories of discrimination—for instance, in employment, housing, and educational institutions. *E.g.*, D.C. Code §§ 2-1402.11, 2-1402.21, 2-1402.41. It thus does not allow suit regarding every conceivable charge of discrimination involving business or commerce. Rather, as relevant, it regulates discriminatory "den[ials] [of] the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any *place of public accommodations*." D.C. Code § 2-1402.31(a)(1) (emphasis added). The statutory text and D.C. Court of Appeals precedent both support the district court's straightforward holding that "the alleged place of public accommodation must be a physical location." ECF No. 44, at 11.

1. Text.

Like this Court, the D.C. Court of Appeals recognizes that "[t]he words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them." *Peoples Drug Stores, Inc. v. District of Columbia*,

470 A.2d 751, 753 (D.C. 1983) (en banc). The key word "place" means a *physical* location, just as when the DCHRA was enacted. *See, e.g.*, Merriam-Webster, *Place*, https://www.merriam-webster.com/dictionary/place (last visited Feb. 6, 2020); Webster's New Collegiate Dictionary 876 (1977). No one disputes that this is at least its ordinary meaning.

The DCHRA's definition of "place of public accommodations" only reinforces that the Council employed this ordinary meaning. That definition begins by re-emphasizing that the term includes "all *places* included in the meaning of such terms as" those that follow, and no entities that are not "places." D.C. Code § 2-1401.02(24) (emphasis added). It then lists more than fifty examples—each and every one a physical place that ordinarily would accommodate the public. *Id.* (listing examples like inns, restaurants, and stores).[2] Again like this Court, the D.C. Court

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[2] These listed examples are:

> inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest; restaurants or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectioneries, soda fountains and all stores where ice cream, ice and fruit preparation or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores, and establishments dealing with goods or services of any kind, including, but not limited to, the credit facilities thereof; banks, savings and loan associations, establishments of mortgage bankers and brokers, all other

of Appeals recognizes "the doctrines of *noscitur a sociis* and *ejusdem generis*." *In re Greenspan*, 910 A.2d 324, 340 (D.C. 2006). Even if the meaning of the word "place" were not plain, its meaning in context would "take color" from the list and be restricted to the particular sense of physical places. *Id.* The text thus provides firm guidance that, even if presented the issue anew, the D.C. Court of Appeals would agree with the district court that appellees' online platforms are not places of public accommodation under the DCHRA.

Appellants do not analyze the statutory language at all, but rely on the arguments of the District and the Lawyers' Committee. There is, however, no merit to how appellants' *amici* try to strip the "place" requirement out of the DCHRA. They contend, for instance, that appellees' online platforms are "place[s] of public accommodation" because that term's definition mentions "establishments dealing

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> financial institutions, and credit information bureaus; insurance companies and establishments of insurance policy brokers; dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments; barber shops, beauty parlors, theaters, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiards and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls and public elevators of buildings and structures, occupied by 2 or more tenants, or by the owner and 1 or more tenants.

D.C. Code § 2-1401.02(24).

with goods or services of any kind." *E.g.*, District Br. 6; Lawyers' Committee Br. 19. That approach is backwards. The DCHRA makes clear that not all such "establishments" qualify, but only those that are "places" first; an entity does not become a "place" merely because it could be described as an "establishment." D.C. Code § 2-1401.02(24). Moreover, especially in context, the word "establishment" itself means a physical space, not a virtual one. *See, e.g.*, Merriam-Webster, *Establishment*, https://www.merriam-webster.com/dictionary/establishment (last visited Feb. 6, 2020) (defining the word as relevant as "a place of business or residence with its furnishings and staff").

Nor, similarly, can the word "place" itself be thought to encompass all "businesses and service-providers as entities." *E.g.*, District Br. 8. That usage would be awkward enough in isolation. More importantly, that is plainly not how the Council intended to use the word in the DCHRA. Had it meant to regulate all businesses, it would have said so, rather than defeating that understanding by limiting the scope of the relevant provision to places of public accommodation.

In the end, it is notable how appellants and their *amici* provide no principle for separating businesses that qualify as "place[s] of public accommodations" from ones that do not. While they believe that websites, apps, and mail-order businesses are "places" (*e.g.*, Lawyers' Committee Br. 22; District Br. 6), they never explain what characteristics determine whether a business's means of interacting with the

public should be treated as a "place" or how any definition they would propose could be clearly administered. The only principle that has been presented is the one that the district court articulated and the plain text demands: a place of accommodation must be a *physical* place that accommodates the public.

2. Precedent.

Even if the text left room for doubt, precedent has eliminated it. Understandably, and authoritatively, the D.C. Court of Appeals in *United States Jaycees* interpreted the provision at issue to exclude non-physical locations. As the district court and appellees have explained, the Court of Appeals held that it would "ignore the plain meaning of the statutory language" to construe the DCHRA as covering virtual platforms that did not operate from a physical location within the District. 434 A.2d at 1381; *see* Appellees' Br. 18-19; ECF No. 44, at 11-12.

Appellants present no basis to depart from *United States Jaycees*, and their reliance on the District and the Lawyers' Committee is again unavailing. Contrary to their contentions (*e.g.*, District Br. 16-22; Lawyers' Committee Br. 21-22), the holding there was not tentative, not limited to the precise facts there at issue, and not susceptible to being overcome by an administrative decision—let alone one that did not even discuss the relevant issue. *Cf. Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 69-70 (3d Cir. 1999) (recognizing that holdings in preliminary-injunction appeals retain binding effect when they are not tentative in nature), *cited*

in District Br. 17; *Sibley Mem'l Hosp. v. D.C. Dep't of Emp't Servs.*, 711 A.2d 105, 108 (D.C. 1998) (recognizing that deference is due an agency's statutory interpretation only "when the record provides some evidence that [it] considered the language, structure, or purpose of the statute when selecting an interpretation").

Moreover, even if the relevant language in *United States Jaycees* were only dictum, it would remain the best judicial guidance on how to read the DCHRA. This Court's "role … is to decide a case as [it] think[s] a D.C. court would decide it. Clues, leanings, dicta, and textual references are all legitimate sources from which to glean such a course." *Young v. Up-Right Scaffolds, Inc.*, 637 F.2d 810, 814 (D.C. Cir. 1980) (citation omitted); *see, e.g.*, *Hartke v. McKelway*, 707 F.2d 1544, 1550-51 (D.C. Cir. 1983) (applying D.C. Court of Appeals dictum). Especially given how *United States Jaycees* accords with the statutory text, the Court should uphold the district court's ruling as to the scope of the DCHRA.

B. The national and local implications if the DCHRA is expanded to reach online platforms underscore how any expansion should come from the legislature.

The district court properly acknowledged that "any decision to extend the coverage of existing laws to [these platforms] must be made elsewhere." ECF 44, at 12. Indeed, the reasons for adhering faithfully to the legislature's intent apply with special force in this case. The Council of the District of Columbia would have

wanted to maintain the prerogative to determine whether and, if so, how the DCHRA should be extended to online platforms like those appellees operate.

To begin, the legislative history makes express that the Council "inten[ded] to continue to legislate," aware that it might need to amend the DCHRA "in the future" to address "unanticipated and presently unknown forms of discrimination." Appellees' Br. 24-25 (quoting the relevant committee report and related correspondence) (appellees' emphasis omitted). The Council did so, moreover, knowing that the DCHRA addressed only specific forms of discrimination—even while articulating the ultimate goal of eliminating discrimination more broadly. D.C. Code § 2-1401.01. Especially given this deliberately incremental approach, the hypothetical instances of discrimination that appellants' *amici* present as reasons to extend the scope of the statute (*e.g.*, District Br. 12-13; Lawyers' Committee Br. 4-5) are properly directed to the Council, not this Court. The Council chose to draw lines as to what allegations of discrimination would be actionable, and to keep for itself the authority to redraw those lines when and if appropriate.

Such a decision, of course, should be made with the legislature's unique abilities to investigate, evaluate policy choices and trade-offs, and craft exceptions. While acts of discrimination along the lines that appellants' *amici* depict would be deplorable (and bad business), a legislature could collect and weigh evidence as to how frequently such discrimination actually occurs and whether expanding litigation

through a private right of action ultimately would be good policy. *See Coates v. Elzie*, 768 A.2d 997, 999 (D.C. 2001) (recognizing that the decision whether to create a private right of action is reserved to the legislature). It could consider, among other things, how the costs of complying with regulations and defending against plaintiffs' lawyers often must be passed on to consumers, and can stifle job growth and innovation. *See Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 189 (1994). Even when cases have no merit, businesses can be subjected to harassment and *in terrorem* settlement demands, especially in class actions. *See Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 163 (2008); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-58 (2007).

The Council would, moreover, need to carefully craft any new website antidiscrimination rules such that they do not exceed its territorial authority over the District under both the D.C. Code and the U.S. Constitution. According to the Code, the Council lacks authority to "[e]nact any act … which is not restricted in its application exclusively in or to the District." D.C. Code § 1-206.02. The dormant Commerce Clause likewise prohibits the District and all States from regulating commerce occurring outside their borders. *See Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 198-99 (D.C. Cir. 1996) (applying dormant Commerce Clause principles to the District). Imposing new local regulations on websites will thus increase compliance costs as

businesses face a patchwork of potentially inconsistent regulation by the District, the fifty states, and tens of thousands of local government units. The Council could well conclude that expanding the DCHRA to websites is not worth these compliance costs, especially because it will be difficult (if not impossible) to limit such an expansion to the District's territory. And even a properly territorially bounded website regulation will, as a practical matter, pressure businesses nationwide to conform to District law. The Council may not want to effectively impose its policy choice on the entire nation.

Further, the Council would have to consider how expanding the DCHRA as written would encourage forum shopping, making the District a center for litigation. Witness, for instance, the thousands of suits that plaintiffs' lawyers have been filing annually under the Americans with Disabilities Act to challenge whether websites and apps are sufficiently accessible to the disabled, even though it is unsettled whether that Act allows such suits. *See* UsableNet, *2019 ADA Web Accessibility and App Lawsuit Recap Report* (Dec. 18, 2019), *available at* https://blog.usablenet.com/usablenet-releases-its-2019-ada-web-accessibility-and-app-lawsuit-report. If the DCHRA starts to cover online platforms like those at issue here and continues to offer litigants compensatory and punitive damages, injunctive relief, and a class-action remedy, D.C. Code §§ 2-1403.7, 2-1403.16; *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 372 (D.C. 1993), plaintiffs' lawyers predictably will flock

to the District whenever they can conjure even any tenuous connection with this jurisdiction.

That is especially clear because, as appellants' *amici* note, the DCHRA is uniquely broad in terms of how many and what types of protected characteristics it covers. *E.g.*, Lawyers' Committee Br. 7, 9. While their hypothetical cases focus on characteristics more commonly addressed in other antidiscrimination statutes, like race, sex, age, and disability, this *actual* case gives a taste of what will come if the Court holds that the DCHRA covers allegations that online platforms discriminate with regard to "actual or perceived … political affiliation," not to mention "personal appearance," "source of income," "place of residence or business," and much more.[3] This Court should not impute to the Council the extraordinary but unspoken intent to require the District's courts to adjudicate highly politicized cases about whether national websites, including those operated by national media, supposedly discriminate based on political affiliation—especially given the First Amendment concerns, discussed further below, if the Council really did mean to police political speech in this manner.

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[3] The "place of public accommodations" provision lists the covered characteristics as "the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual." D.C. Code § 2-1402.31(a).

At minimum, the Council would need to consider whether to include any reasonable exceptions before extending the DCHRA. Antidiscrimination statutes commonly include exceptions, and the DCHRA is no different. *See, e.g.*, D.C. Code §§ 2-1401.03, 2-1402.12, 2-1402.24, 2-1402.42. Indeed, its definition of "place of public accommodations" itself contains exceptions showing how carefully the Council controlled the statute's intended scope. D.C. Code § 2-1401.02(24) (excepting "public halls and public elevators of buildings and structures" occupied just by an owner or a single tenant, and certain "distinctly private" clubs and institutions). The fact that the Council would wish to consider exceptions before extending the DCHRA is illustrated by the Lawyers' Committee's reliance on an article, written by its president and counsel signing its brief, that calls for national legislation to extend public-accommodations laws into cyberspace but recognizes the need for exceptions at least to protect small businesses, for whom defending even a single lawsuit can have a ruinous financial impact no matter whether the suit has any merit. Lawyers' Committee Br. 2 (citing Kristen Clarke & David Brody, *It's Time for an Online Civil Rights Act*, The Hill (Aug. 3, 2018), *available at* https://thehill.com/opinion/civil-rights/400310-its-time-for-an-online-civil-rights-act); *cf.* 42 U.S.C. § 2000e(b) (defining an "employer" subject to Title VII as one that, among other things, has fifteen or more employees). Just the same here, if the DCHRA is

to be extended, it should be through a proper legislative process, not judicial rewriting of a clear statute.

II. THE FIRST AMENDMENT DOES NOT APPLY TO PRIVATE COMPANIES.

There is also no merit to appellants' request that this Court apply the First Amendment to appellees' online platforms. That request is foreclosed by controlling precedent, for the reasons appellees provide and the further reasons below. And accepting it would have unacceptable consequences.

A. Precedent makes plain that the First Amendment does not apply to appellees' online platforms.

"It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976); *accord Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019); *see* U.S. Const. amend. I ("*Congress* shall make no law … abridging the freedom of speech … ." (emphasis added)). The First Amendment was created by Framers who feared "silence coerced by law" and "the occasional tyrannies of governing majorities" that might be tempted to "discourage thought" through "fear of punishment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (quoting *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)). They therefore drafted a constitutional

amendment that would make free speech a "fundamental principle of the American government." *Id.*

They did not draft the First Amendment to restrict the conduct of private entities. After all, companies lack the government's incentive to "discourage thought" in order to protect political power, and they lack the government's ability to back up their regulations through "fear of punishment" by imprisonment or civil fines. *Id.* Indeed, far from being regulated by the First Amendment, companies enjoy its protection from improper government regulation. The Supreme Court has recognized, for example, that "[f]or corporations, as for individuals, the choice to speak includes within it the choice of what not to say." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986).

Flouting the uniform message of this text, history, and precedent, appellants contend that the First Amendment extends to appellees' online platforms here. This is wrong. There is no state action, or even any alleged, because appellees exercise no "power[] traditionally exclusively reserved to the State." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974). They may therefore regulate speech on their private platforms without being subject to constitutional scrutiny. "[W]hen 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." *Halleck*, 139 S. Ct. at 1930 (2019).

B. Applying the First Amendment to private entities would have disastrous consequences.

Holding that the First Amendment applies to private companies that operate online platforms would lead to a raft of harmful consequences. It would hurt companies by forcing them to align with views that they or their customers find objectionable. And it would hurt the public by providing fewer opportunities for speech, not more.

To begin, subjecting private companies to constitutional restraint under the First Amendment would unfairly restrict their ability to control what happens on the platforms they own and operate. When the First Amendment applies, an entity is generally barred from imposing viewpoint-based restrictions on content. *See, e.g.*, *Hudgens*, 424 U.S. at 520. Applying such a limit to a private company would severely curtail the company's capacity to police speech it finds objectionable, a result that is both unlawful and deeply unfair to the affected businesses. A company's forced association with views to which it objects will lead to financial and reputational harms. For example, a company that has built a reputation on civility and decency may be forced to allow users to post content that is vulgar or offensive. A business that caters to all ages may be required to permit user-content that is unsuitable for young viewers. And, more generally, any company might be forced to host material that undermines its mission or values.

The compelled association with objectionable views will drive off audiences and thereby decrease a company's customer base and resulting revenues. More subtly, this forced association may alter the host company's reputation, a particularly grave result given that companies rely on their reputations to draw in new customers and retain old ones. *See* Deloitte, *Global Survey on Reputation Risk*, 2 (2015), *available at* https://www2.deloitte.com/content/dam/Deloitte/za/Documents/risk/NEWReputationRiskSurveyReport_25FEB.pdf (stating that, on average, more than twenty five percent of a company's market value can be attributed to its reputation). Loyal customers who chose a company because of its values will take their business elsewhere when they see those values impugned by material in a company-sponsored space. That may lead to tarnished brands, lost revenue, and, for publicly traded companies, lowered stock prices. *See id.* at 7. In short, companies' reputations—and in turn their bottom lines—will suffer if they are forced to put their weight behind all speakers, regardless of their viewpoint.

Harm will also befall the public. Subjecting private companies to constitutional scrutiny will make companies hesitant to allow users to post content and will ultimately lead to "less speech, not more," a result at odds with the First Amendment. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 680 (1998); *see also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 592 (1980) ("[T]he best test of truth is the power of the thought to get itself

accepted in the competition of the market … .” (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting))).

Many companies will stop operating forums where users post content if they cannot retain some control over what appears on them. Likewise, businesses will be deterred from opening new forums for sharing content because of the costs associated with potential First Amendment challenges. Ultimately, this will lead to a decrease in privately sponsored forums for speech. *See Ark. Educ. Television Comm’n*, 523 U.S. at 681 (“Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other,” a company may decide that “the safe course is to avoid controversy, and by so doing diminish the free flow of information and ideas.” (internal quotation marks and ellipses omitted)). None of this is warranted under the First Amendment, and so appellants’ arguments should be rejected.

CONCLUSION

The Court should affirm the judgment of the district court dismissing appellants' complaint.

Dated: February 6, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the text of this brief was prepared using Times New Roman, 14-point font, and contains 4,204 words.

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CERTIFICATE OF SERVICE

I hereby certify that, on February 6, 2020, I electronically filed and served this brief on all registered counsel in this case through the Court's CM/ECF system.

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