(ORDER LIST: 593 U.S.)

MONDAY, APRIL 5, 2021

ORDERS IN PENDING CASES

20M67 LYNN, MARY E. V. SAUL, COMM'R, SOCIAL SEC.

The motion for leave to file a petition for a writ of certiorari under seal is denied.

19-251) AMERICANS FOR PROSPERITY V. RODRIQUEZ, ATT'Y GEN. OF CA
)
19-255) THOMAS MORE LAW CENTER V. RODRIQUEZ, ATT'Y GEN. OF CA

The motion of petitioners for divided argument is denied. The motion of petitioners for enlargement of time for oral argument, and the motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument are granted, and the time is allotted as follows: 30 minutes for petitioners, 10 minutes for the Acting Solicitor General, and 30 minutes for respondent.

20-37) BECERRA, SEC. OF H&HS, ET AL. V. GRESHAM, CHARLES, ET AL.
)
20-38) ARKANSAS V. GRESHAM, CHARLES, ET AL.

Upon consideration of the motion of petitioners to vacate the judgments of the court of appeals and remand, to remove the cases from the March 2021 argument calendar, and to hold further briefing in abeyance, these cases are held in abeyance pending further order of the Court.

20-255 MAHANOY AREA SCHOOL DISTRICT V. B. L.

The motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument is granted.

20-334 SAN ANTONIO, TX V. HOTELS.COM, L.P., ET AL.

The motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument is denied.

20-440 MINERVA SURGICAL, INC. V. HOLOGIC, INC., ET AL.

The motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument is granted.

20-472 HOLLYFRONTIER CHEYENNE, ET AL. V. RENEWABLE FUELS ASSN., ET AL.

The motion of the Acting Solicitor General for divided argument is granted.

20-772 WATERFRONT COMM'N OF NY V. MURPHY, GOV. OF NJ, ET AL.

20-1034 GOLAN, NARKIS A. V. SAADA, ISACCO J.

The Acting Solicitor General is invited to file briefs in these cases expressing the views of the United States.

20-5904 TERRY, TARAHRICK V. UNITED STATES

The motions of the Acting Solicitor General for leave to file a brief out of time and for divided argument are granted.

CERTIORARI GRANTED

20-826 BROWN, ACTING WARDEN V. DAVENPORT, ERVINE

The petition for a writ of certiorari is granted.

CERTIORARI DENIED

19-1461 DALBERISTE, MITCHE A. V. GLE ASSOCIATES, INC.

20-83 JONES, JACOB, ET AL. V. KALBAUGH, WAYNE D.

20-551 VORIS, JACK W. V. UNITED STATES

20-753 CONFEDERATED TRIBES OF YAKAMA V. YAKIMA COUNTY, WA, ET AL.

20-872 DAVIS, SHANE V. CARROLL, MIKE, ET AL.

20-952 CONSTRUCTION COST DATA, ET AL. V. GORDIAN GROUP, INC., ET AL.

20-969 FREEDOM WATCH, INC., ET AL. V. GOOGLE INC., ET AL.

20-1015 ORTIZ, ALEXI V. WALSH, ALFRED D.

20-1020 OKORO, DONALD C. V. TEXAS

20-1024 YOUNG, GEOFFREY M. V. EDELEN, ADAM, ET AL.

20-1025 VEGA, JUAN F. V. MOODY, ATT'Y GEN. OF FL, ET AL.

20-1037 BOWLING, WANDA V. ROACH, JOHN

20-1064 JONES, LLOYD A. V. U.S. BANK, N.A., ET AL.

20-1068 SHOPHAR, JOREL V. JOHNSON COUNTY, KS, ET AL.

20-1073 DOES 1-10, JOHN V. HAALAND, DEBRA, ET AL.

20-1108 PONTILER S.A. V. OPI PRODUCTS INC., ET AL.

20-1135 JONES, ALEX E., ET AL. V. LAFFERTY, ERICA, ET AL.

20-1139 JONES, FLORENCE V. McDONOUGH, SEC. OF VA

20-1153 DEVINE, SUSAN E. V. ABSOLUTE ACTIVIST VALUE, ET AL.

20-1164 BOYD, DONALD E. V. JOHNSON, ADM'R, NJ, ET AL.

20-1189 HARDIN, BRIAN E. V. INDIANA

20-1191 SINGLETARY, ROBERT V. NELSEN, WARDEN, ET AL.

20-1211 SYNKLOUD TECHNOLOGIES, LLC V. ADOBE, INC.

20-1222 DALESSIO, JULIE V. UNIVERSITY OF WASHINGTON, ET AL.

20-1228 JAYE, CHRIS A. V. USDC ND IA

20-1232 IBSA INSTITUT BIOCHIMIQUE V. TEVA PHARMACEUTICALS USA, INC.

20-1249 DUBIN, GARY V. V. OFFICE OF DISCIPLINARY COUNSEL

20-6294 SEALEY, RICHARD V. FORD, WARDEN

20-6507 BERRY, DARRELL, ET UX. V. WELLS FARGO BANK, N.A., ET AL.

20-6604 GRANT, MARK T. V. ROANOKE, VA

20-6891 KNIGHT, RONALD V. FL DOC, ET AL.

20-6899 HUDSON, CYNTHIA V. LUMPKIN, DIR., TX DCJ

20-6965 MILLER, BRADLEY B. V. DUNN, VIRGINIA T.

20-6970 MAXWELL, CHARLES V. OHIO

20-6990 SMITH, ALLYN A. V. ARIZONA

20-7003 KUDLA, JUSTIN A. V. MINNESOTA

20-7011 SAISI, HEMMINGWAY M. V. MURRAY, CAROLYN, ET AL.

20-7014 BRUZZONE, MICHAEL A. V. INTEL CORPORATION, ET AL.

20-7016 BRUINS, ANDREW D. V. WHITMAN, ASSOC. WARDEN, ET AL.

20-7017 BEYER, DENNIS M. V. TEXAS

20-7022 TRUJILLO, AMADO R. V. HOUSTON, ACTING WARDEN

20-7023 PARKER, RAEVON T. V. APPLE INC.

20-7027 KYNAST, SUSANNE S. V. FLORIDA

20-7074 NAVE, JIMMY L. V. VANIHEL, WARDEN

20-7097 SWEAT, ALREE B. V. LAS CRUCES, NM, ET AL.

20-7098 REYES, HERMINIO N. V. GEORGIA

20-7105 HARRIS, DEYOE R. V. UNIV. OF AZ POLICE DEPT., ET AL.

20-7127 PONTEFRACT, CLYDE V. UNITED STATES, ET AL.

20-7133 REED, ANTHONY V. PAYNE, DIR., AR DOC

20-7134 SHUHAIBER, FADEEL V. IL DOC

20-7136 STANFORD, JAMES R. V. PARAMO, WARDEN

20-7152 HOOK, BRIAN V. INDIANA

20-7169 NUNLEY, LAWRENCE V. BROWN, RICHARD

20-7172 CONSTANTIN, DAKOTA M. V. FLORIDA

20-7173 DEPAULA, VENECIA V. FLORIDA

20-7175 ELKINS, TIMOTHY W. V. GUINN, TONY, ET AL.

20-7257 KNOX, TITO V. MAGERA, ELIZABETH, ET AL.

20-7265 LINDSEY, JONATHAN V. ILLINOIS

20-7288 CAM, NAZARI V. V. OREGON

20-7306 MADRID, AGUSTIN V. UNITED STATES

20-7319 JOHNSON, JAMAA I. V. UNITED STATES

20-7322 COFFEE, KELSEY V. V. UNITED STATES

20-7324 TRAYWICKS, MALCOLM E. V. UNITED STATES

20-7325 TODD, ERIC V. UNITED STATES

20-7333 MARTINEZ, NOLBERTO V. WARDEN, FCC COLEMAN

20-7336 TILLMAN, DONOVAN J. V. FLORIDA

20-7340 WELSHANS, CHRISTOPHER V. UNITED STATES

20-7362 BRAYE, CHARLES V. UNITED STATES

20-7363 BUTLER, LERONE B. V. UNITED STATES

20-7365 BROUNT, RONALD V. FROSH, ATT'Y GEN. OF MD

20-7369 HICKMON, ANTONIA J. V. UNITED STATES

20-7381 WILKERSON, LARRY V. UNITED STATES

20-7383 ZAMORA-SUAREZ, JORGE V. UNITED STATES

20-7385 KAETZ, WILLIAM F. V. UNITED STATES

20-7388 DE LA TORRE, ALEJANDRO V. UNITED STATES

20-7389 UDOH, EMEM U. V. DOOLEY, WARDEN

20-7390 UDOH, EMEM U. V. KNUTSON, WARDEN

20-7393 COLEMAN, EDWARD V. UNITED STATES

20-7398 JOKHOO, KHEMALL V. VELAQUEZ-AGUILU, LOLA

20-7399 CLANCY, JENITA V. AUSTIN, SEC. OF DEFENSE

20-7402 BROWNRIDGE, SYLAS G. V. UNITED STATES

20-7412 GARDNER, ANTHONY W. V. UNITED STATES

20-7416 HERMAN, JAMES L. V. UNITED STATES

20-7422 LITTLE, ANTUAN V. V. CROMWELL, DAN

20-7423 CRUZ, JOSE J. V. UNITED STATES

20-7425 CRAIG, CORNELIUS K. V. MATEVOUSIAN, WARDEN

20-7430 TORRES, CARLOS V. UNITED STATES

The petitions for writs of certiorari are denied.

20-733 RICKMON, TERRILL A. V. UNITED STATES

The petition for a writ of certiorari is denied. Justice

Barrett took no part in the consideration or decision of this petition.

20-1018 LA REAL ESTATE APPRAISERS BD. V. FTC

The motion of the Federation of State Medical Boards for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

20-1067 ROSAS, MARIA M. V. ADVOCATE HEALTH, ET AL.

20-1134 MYERS, JOHN V. NEAL, SUPT., IN

20-7015 BURTON, SABINA L. V. BD. OF REGENTS UNIV. OF WI

The petitions for writs of certiorari are denied. Justice Barrett took no part in the consideration or decision of these petitions.

20-7266 MARTIN, KEVIN L. V. CAPRON, CATHLEEN, ET AL.

20-7267 MARTIN, KEVIN L. V. CAPRON, CATHLEEN, ET AL.

The motions of petitioner for leave to proceed *in forma pauperis* are denied, and the petitions for writs of certiorari are dismissed. See Rule 39.8. Justice Barrett took no part in the consideration or decision of these motions and these petitions.

MANDAMUS DENIED

20-1052 IN RE CHRISTOPHER G. BAYLOR

20-7013 IN RE WILLIAM M. WINDSOR

20-7346 IN RE DAVID A. DIEHL

The petitions for writs of mandamus are denied.

REHEARING DENIED

20-6263 ABDULRAZZAK, HAIDER S. V. FLUKE, WARDEN, ET AL.

The petition for rehearing is denied.

ATTORNEY DISCIPLINE

D-3074 IN THE MATTER OF DISCIPLINE OF CHARLES L. MORGAN, JR.

Charles L. Morgan, Jr., of Charlotte, North Carolina, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

D-3075 IN THE MATTER OF DISCIPLINE OF MARK A. HOFFMAN

Mark A. Hoffman, of Lederach, Pennsylvania, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

D-3076 IN THE MATTER OF DISCIPLINE OF ALBERT MICHAEL SARDELLA

Albert Michael Sardella, of Coatesville, Pennsylvania, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

D-3077 IN THE MATTER OF DISCIPLINE OF MICHAEL CHARLES ADGES

Michael Charles Adges, of Garden City, New York, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

D-3078 IN THE MATTER OF DISCIPLINE OF RICHARD P. CARO

Richard P. Caro, of Santa Rosa Beach, Florida, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he

should not be disbarred from the practice of law in this Court.

D-3079 IN THE MATTER OF DISCIPLINE OF MICHAEL F. FASANARO

Michael F. Fasanaro, of Virginia Beach, Virginia, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

D-3080 IN THE MATTER OF DISCIPLINE OF KENNETH STEVEN KAUFMAN

Kenneth Steven Kaufman, of Potomac, Maryland, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

SUPREME COURT OF THE UNITED STATES

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL. *v.* KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 20–197. Decided April 5, 2021

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit with instructions to dismiss the case as moot. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

JUSTICE THOMAS, concurring.

When a person publishes a message on the social media platform Twitter, the platform by default enables others to republish (retweet) the message or respond (reply) to it or other replies in a designated comment thread. The user who generates the original message can manually "block" others from republishing or responding.

Donald Trump, then President of the United States, blocked several users from interacting with his Twitter account. They sued. The Second Circuit held that the comment threads were a "public forum" and that then-President Trump violated the First Amendment by using his control of the Twitter account to block the plaintiffs from accessing the comment threads. *Knight First Amdt. Inst. at Columbia Univ.* v. *Trump*, 928 F. 3d 226 (2019). But Mr. Trump, it turned out, had only limited control of the account; Twitter has permanently removed the account from the platform.

Because of the change in Presidential administration, the Court correctly vacates the Second Circuit's decision. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). I

write separately to note that this petition highlights the principal legal difficulty that surrounds digital platforms—namely, that applying old doctrines to new digital platforms is rarely straightforward. Respondents have a point, for example, that some aspects of Mr. Trump's account resemble a constitutionally protected public forum. But it seems rather odd to say that something is a government forum when a private company has unrestricted authority to do away with it.

The disparity between Twitter's control and Mr. Trump's control is stark, to say the least. Mr. Trump blocked several people from interacting with his messages. Twitter barred Mr. Trump not only from interacting with a few users, but removed him from the entire platform, thus barring *all* Twitter users from interacting with his messages.[1] Under its terms of service, Twitter can remove any person from the platform—including the President of the United States—"at any time for any or no reason." Twitter Inc., User Agreement (effective June 18, 2020).

This is not the first or only case to raise issues about digital platforms. While this case involves a suit against a public official, the Court properly rejects today a separate petition alleging that digital platforms, not individuals on those platforms, violated public accommodations laws, the First Amendment, and antitrust laws. Pet. for Cert., O. T. 2020, No. 20–969. The petitions highlight two important facts. Today's digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties. We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.

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[1] At the time, Mr. Trump's Twitter account had 89 million followers.

I

On the surface, some aspects of Mr. Trump's Twitter account resembled a public forum. A designated public forum is "property that the State has opened for expressive activity by part or all of the public." *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U. S. 672, 678 (1992). Mr. Trump often used the account to speak in his official capacity. And, as a governmental official, he chose to make the comment threads on his account publicly accessible, allowing any Twitter user—other than those whom he blocked—to respond to his posts.

Yet, the Second Circuit's conclusion that Mr. Trump's Twitter account was a public forum is in tension with, among other things, our frequent description of public forums as "government-controlled spaces." *Minnesota Voters Alliance* v. *Mansky*, 585 U. S. ___, ___ (2018) (slip op., at 7); accord, *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 469 (2009) ("government property and . . . government programs"); *Arkansas Ed. Television Comm'n* v. *Forbes*, 523 U. S. 666, 677 (1998) ("government properties"). Any control Mr. Trump exercised over the account greatly paled in comparison to Twitter's authority, dictated in its terms of service, to remove the account "at any time for any or no reason." Twitter exercised its authority to do exactly that.

Because unbridled control of the account resided in the hands of a private party, First Amendment doctrine may not have applied to respondents' complaint of stifled speech. See *Manhattan Community Access Corp.* v. *Halleck*, 587 U. S. ___, ___ (2019) (slip op., at 9) (a "private entity is not ordinarily constrained by the First Amendment"). Whether governmental use of private space implicates the First Amendment often depends on the government's control over that space. For example, a government agency that leases a conference room in a hotel to hold a public hearing about a proposed regulation cannot kick participants out of the hotel simply because they express concerns about the

new regulation. See *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 547, 555 (1975). But government officials who informally gather with constituents in a hotel bar can ask the hotel to remove a pesky patron who elbows into the gathering to loudly voice his views. The difference is that the government controls the space in the first scenario, the hotel, in the latter. Where, as here, private parties control the avenues for speech, our law has typically addressed concerns about stifled speech through other legal doctrines, which may have a secondary effect on the application of the First Amendment.

A

If part of the problem is private, concentrated control over online content and platforms available to the public, then part of the solution may be found in doctrines that limit the right of a private company to exclude. Historically, at least two legal doctrines limited a company's right to exclude.

First, our legal system and its British predecessor have long subjected certain businesses, known as common carriers, to special regulations, including a general requirement to serve all comers. Candeub, Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230, 22 Yale J. L. & Tech. 391, 398–403 (2020) (Candeub); see also Burdick, The Origin of the Peculiar Duties of Public Service Companies, Pt. 1, 11 Colum. L. Rev. 514 (1911). Justifications for these regulations have varied. Some scholars have argued that common-carrier regulations are justified only when a carrier possesses substantial market power. Candeub 404. Others have said that no substantial market power is needed so long as the company holds itself out as open to the public. *Ibid.*; see also *Ingate* v. *Christie*, 3 Car. & K. 61, 63, 175 Eng. Rep. 463, 464 (N. P. 1850) ("[A] person [who] holds himself out to carry goods for everyone as a business . . . is a common carrier"). And this Court long ago suggested that regulations like those placed on common

carriers may be justified, even for industries not historically recognized as common carriers, when "a business, by circumstances and its nature, . . . rise[s] from private to be of public concern." See *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 411 (1914) (affirming state regulation of fire insurance rates). At that point, a company's "property is but its instrument, the means of rendering the service which has become of public interest." *Id.,* at 408.

This latter definition of course is hardly helpful, for most things can be described as "of public interest." But whatever may be said of other industries, there is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers. Candeub 398–405. Telegraphs, for example, because they "resemble[d] railroad companies and other common carriers," were "bound to serve all customers alike, without discrimination." *Primrose* v. *Western Union Telegraph Co.*, 154 U. S. 1, 14 (1894).[2]

In exchange for regulating transportation and communication industries, governments—both State and Federal—have sometimes given common carriers special government favors. Candeub 402–407. For example, governments have tied restrictions on a carrier's ability to reject clients to "immunity from certain types of suits"[3] or to regulations that make it more difficult for other companies to compete with the carrier (such as franchise licenses). *Ibid.* By giving

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[2] This Court has been inconsistent about whether telegraphs were common carriers. Compare *Primrose*, 154 U. S., at 14, with *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 605 (1926). But the Court has consistently recognized that telegraphs were at least analogous enough to common carriers to be regulated similarly. *Primrose*, 154 U. S., at 14.

[3] Telegraphs, for example, historically received some protection from defamation suits. Unlike other entities that might retransmit defamatory content, they were liable only if they knew or had reason to know that a message they distributed was defamatory. Restatement (Second) of Torts §581 (1976); see also *O'Brien* v. *Western Union Tel. Co.*, 113 F. 2d 539, 542 (CA1 1940).

these companies special privileges, governments place them into a category distinct from other companies and closer to some functions, like the postal service, that the State has traditionally undertaken.

Second, governments have limited a company's right to exclude when that company is a public accommodation. This concept—related to common-carrier law—applies to companies that hold themselves out to the public but do not "carry" freight, passengers, or communications. See, *e.g., Civil Rights Cases*, 109 U. S. 3, 41–43 (1883) (Harlan, J., dissenting) (discussing places of public amusement). It also applies regardless of the company's market power. See, *e.g.,* 78 Stat. 243, 42 U. S. C. §2000a(a).

B

Internet platforms of course have their own First Amendment interests, but regulations that might affect speech are valid if they would have been permissible at the time of the founding. See *United States* v. *Stevens*, 559 U. S. 460, 468 (2010). The long history in this country and in England of restricting the exclusion right of common carriers and places of public accommodation may save similar regulations today from triggering heightened scrutiny—especially where a restriction would not prohibit the company from speaking or force the company to endorse the speech. See *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 684 (1994) (O'Connor, J., concurring in part and dissenting in part); *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 88 (1980). There is a fair argument that some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated in this manner.

1

In many ways, digital platforms that hold themselves out to the public resemble traditional common carriers.

Though digital instead of physical, they are at bottom communications networks, and they "carry" information from one user to another. A traditional telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way. And unlike newspapers, digital platforms hold themselves out as organizations that focus on distributing the speech of the broader public. Federal law dictates that companies cannot "be treated as the publisher or speaker" of information that they merely distribute. 110 Stat. 137, 47 U. S. C. §230(c).

The analogy to common carriers is even clearer for digital platforms that have dominant market share. Similar to utilities, today's dominant digital platforms derive much of their value from network size. The Internet, of course, is a network. But these digital platforms are networks within that network. The Facebook suite of apps is valuable largely because 3 billion people use it. Google search—at 90% of the market share—is valuable relative to other search engines because more people use it, creating data that Google's algorithm uses to refine and improve search results. These network effects entrench these companies. Ordinarily, the astronomical profit margins of these platforms—last year, Google brought in $182.5 billion total, $40.3 billion in net income—would induce new entrants into the market. That these companies have no comparable competitors highlights that the industries may have substantial barriers to entry.

To be sure, much activity on the Internet derives value from network effects. But dominant digital platforms are different. Unlike decentralized digital spheres, such as the e-mail protocol, control of these networks is highly concentrated. Although both companies are public, one person controls Facebook (Mark Zuckerberg), and just two control Google (Larry Page and Sergey Brin). No small group of people controls e-mail.

Much like with a communications utility, this concentration gives some digital platforms enormous control over speech. When a user does not already know exactly where to find something on the Internet—and users rarely do—Google is the gatekeeper between that user and the speech of others 90% of the time. It can suppress content by deindexing or downlisting a search result or by steering users away from certain content by manually altering autocomplete results. Grind, Schechner, McMillan, & West, How Google Interferes With Its Search Algorithms and Changes Your Results, Wall Street Journal, Nov. 15, 2019. Facebook and Twitter can greatly narrow a person's information flow through similar means. And, as the distributor of the clear majority of e-books and about half of all physical books,[4] Amazon can impose cataclysmic consequences on authors by, among other things, blocking a listing.

It changes nothing that these platforms are not the sole means for distributing speech or information. A person always could choose to avoid the toll bridge or train and instead swim the Charles River or hike the Oregon Trail. But in assessing whether a company exercises substantial market power, what matters is whether the alternatives are comparable. For many of today's digital platforms, nothing is.

If the analogy between common carriers and digital platforms is correct, then an answer may arise for dissatisfied platform users who would appreciate not being blocked: laws that restrict the platform's right to exclude. When a platform's unilateral control is reduced, a government official's account begins to better resemble a "government-controlled spac[e]." *Mansky*, 585 U. S., at ___ (slip op., at 7); see also *Southeastern Promotions*, 420 U. S., at 547, 555

[4] As of 2018, Amazon had 42% of the physical book market and 89% of the e-book market. Day & Gu, The Enormous Numbers Behind Amazon's Market Reach, Bloomberg, Mar. 27, 2019.

(recognizing that a private space can become a public forum when leased to the government). Common-carrier regulations, although they directly restrain private companies, thus may have an indirect effect of subjecting government officials to suits that would not otherwise be cognizable under our public-forum jurisprudence.

This analysis may help explain the Second Circuit's intuition that part of Mr. Trump's Twitter account was a public forum. But that intuition has problems. First, if market power is a predicate for common carriers (as some scholars suggest), nothing in the record evaluates Twitter's market power. Second, and more problematic, neither the Second Circuit nor respondents have identified any regulation that restricts Twitter from removing an account that would otherwise be a "government-controlled space."

2

Even if digital platforms are not close enough to common carriers, legislatures might still be able to treat digital platforms like places of public accommodation. Although definitions between jurisdictions vary, a company ordinarily is a place of public accommodation if it provides "lodging, food, entertainment, or other services to the public . . . in general." Black's Law Dictionary 20 (11th ed. 2019) (defining "public accommodation"); accord, 42 U. S. C. §2000a(b)(3) (covering places of "entertainment"). Twitter and other digital platforms bear resemblance to that definition. This, too, may explain the Second Circuit's intuition. Courts are split, however, about whether federal accommodations laws apply to anything other than "physical" locations. Compare, *e.g., Doe* v. *Mutual of Omaha Ins. Co.*, 179 F. 3d 557, 559 (CA7 1999) (Title III of the Americans with Disabilities Act (ADA) covers websites), with *Parker* v. *Metropolitan Life Ins. Co.*, 121 F. 3d 1006, 1010–1011 (CA6 1997) (en banc) (Title III of the ADA covers only physical places); see also 42 U. S. C. §§2000a(b)–(c) (discussing "physica[l]

locat[ions]").

Once again, a doctrine, such as public accommodation, that reduces the power of a platform to unilaterally remove a government account might strengthen the argument that an account is truly government controlled and creates a public forum. See *Southeastern Promotions*, 420 U. S., at 547, 555. But no party has identified any public accommodation restriction that applies here.

II

The similarities between some digital platforms and common carriers or places of public accommodation may give legislators strong arguments for similarly regulating digital platforms. "[I]t stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of" digital platforms. *Turner*, 512 U. S., at 684 (opinion of O'Connor, J.). That is especially true because the space constraints on digital platforms are practically nonexistent (unlike on cable companies), so a regulation restricting a digital platform's right to exclude might not appreciably impede the platform from speaking. See *id.,* at 675, 684 (noting restrictions on one-third of a cable company's channels but recognizing that regulation may still be justified); *PruneYard*, 447 U. S., at 88. Yet Congress does not appear to have passed these kinds of regulations. To the contrary, it has given digital platforms "immunity from certain types of suits," Candeub 403, with respect to content they distribute, 47 U. S. C. §230, but it has not imposed corresponding responsibilities, like nondiscrimination, that would matter here.

None of this analysis means, however, that the First Amendment is irrelevant until a legislature imposes common carrier or public accommodation restrictions—only that the principal means for regulating digital platforms is through those methods. Some speech doctrines might still

apply in limited circumstances, as this Court has recognized in the past.

For example, although a "private entity is not ordinarily constrained by the First Amendment," *Halleck*, 587 U. S., at ___, ___ (slip op., at 6, 9), it is if the government coerces or induces it to take action the government itself would not be permitted to do, such as censor expression of a lawful viewpoint. *Ibid.* Consider government threats. "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 68 (1963). The government cannot accomplish through threats of adverse government action what the Constitution prohibits it from doing directly. See *ibid.*; *Blum* v. *Yaretsky*, 457 U. S. 991, 1004–1005 (1982). Under this doctrine, plaintiffs might have colorable claims against a digital platform if it took adverse action against them in response to government threats.

But no threat is alleged here. What threats would cause a private choice by a digital platform to "be deemed . . . that of the State" remains unclear. *Id.*, at 1004.[5] And no party

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[5] Threats directed at digital platforms can be especially problematic in the light of 47 U. S. C. §230, which some courts have misconstrued to give digital platforms immunity for bad-faith removal of third-party content. *Malwarebytes*, *Inc.* v. *Enigma Software Group USA, LLC*, 592 U. S. ___, ___–___ (2020) (THOMAS, J., statement respecting denial of certiorari) (slip op., at 7–8). This immunity eliminates the biggest deterrent—a private lawsuit—against caving to an unconstitutional government threat.

For similar reasons, some commentators have suggested that immunity provisions like §230 could potentially violate the First Amendment to the extent those provisions pre-empt state laws that protect speech from private censorship. See Volokh, Might Federal Preemption of Speech-Protective State Laws Violate the First Amendment? The Volokh Conspiracy, Reason, Jan. 23, 2021. According to that argument, when a State creates a private right and a federal statute pre-empts that state law, "the federal statute is the source of the power and authority by which any private rights are lost or sacrificed." *Railway Employees* v.

has sued Twitter. The question facing the courts below involved only whether a government actor violated the First Amendment by blocking another Twitter user. That issue turns, at least to some degree, on ownership and the right to exclude.

* * *

The Second Circuit feared that then-President Trump cut off speech by using the features that Twitter made available to him. But if the aim is to ensure that speech is not smothered, then the more glaring concern must perforce be the dominant digital platforms themselves. As Twitter made clear, the right to cut off speech lies most powerfully in the hands of private digital platforms. The extent to which that power matters for purposes of the First Amendment and the extent to which that power could lawfully be modified raise interesting and important questions. This petition, unfortunately, affords us no opportunity to confront them.

Hanson, 351 U. S. 225, 232 (1956); accord, *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 614–615 (1989).

SUPREME COURT OF THE UNITED STATES

JASON SMALL *v.* MEMPHIS LIGHT, GAS & WATER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 19–1388. Decided April 5, 2021

The petition for a writ of certiorari is denied.

JUSTICE GORSUCH, with whom JUSTICE ALITO joins, dissenting from the denial of certiorari.

For over a decade, Jason Small worked as an electrician at Memphis Light, Gas & Water. Then an on-the-job injury forced him into a new role as a dispatcher. This job came with a different schedule and mandatory overtime duties. Sometimes the new hours conflicted with Mr. Small's religious obligations, like worship services on Sunday mornings. So Mr. Small asked his employer to place him on reduced pay temporarily while he sought reassignment to a different position with a more conducive schedule. The company had a history of offering this same accommodation to other employees, including those removed from their positions for unsatisfactory job performance. But when it came to Mr. Small, the company balked.

That left Mr. Small to make the dispatcher role work as best he could. For a period, things went smoothly enough. Mr. Small even used his vacation days when necessary to attend church. Eventually, though, a problem arose. Mr. Small asked to use some of his vacation time on Good Friday. At first, the company agreed. Then it backtracked, canceling his vacation request. When Mr. Small went to church anyway, the company suspended him for two days without pay.

In response, Mr. Small filed suit seeking a ruling that the company's conduct violated Title VII. That federal statute prohibits discrimination on the basis of race, color, religion,

sex, and national origin, and requires employers to afford requested religious accommodations unless doing so would impose an "undue hardship" on them. 78 Stat. 253, 255, 42 U. S. C. §§2000e(j), 2000e–2(a). At no point in the litigation did anyone suggest that Mr. Small's requested accommodation—reduced pay while he sought reassignment—would have imposed a significant hardship on his employer. Yet both the district court and Sixth Circuit rejected Mr. Small's claim all the same.

The courts explained that *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63 (1977), tied their hands. There, this Court dramatically revised—really, undid—Title VII's undue hardship test. *Hardison* held that an employer does not need to provide a religious accommodation that involves "more than a *de minimis* cost." *Id.*, at 84. So Mr. Small's requested accommodation might not have imposed a significant hardship on his employer. The company may extend poorly performing employees the very same relief Mr. Small sought. But the company had no obligation to provide Mr. Small his requested accommodation because doing so would have cost the company something (anything) more than a trivial amount. See *Small* v. *Memphis Light, Gas & Water*, 952 F. 3d 821, 825 (CA6 2020) (*per curiam*).

Now, Mr. Small asks us to hear his case and I would grant his petition for review. *Hardison*'s *de minimis* cost test does not appear in the statute. The Court announced that standard in a single sentence with little explanation or supporting analysis. Neither party before the Court had even argued for the rule. *Patterson* v. *Walgreen Co.*, 589 U. S. ___, ___ (2020) (ALITO, J., concurring in denial of certiorari). Justice Marshall highlighted all these problems at the time, noting in dissent that the *de minimis* cost test cannot be reconciled with the "plain words" of Title VII, defies "simple English usage," and "effectively nullif[ies]" the statute's promise. *Hardison*, 432 U. S., at 88, 89, 93, n. 6 (Marshall, J., dissenting).

Nor has time been kind to *Hardison*. In the intervening years, Congress has adopted additional civil rights laws using the "undue hardship" standard. And when applying each of those laws, courts are far more demanding. The Americans with Disabilities Act of 1990 (ADA) requires a covered employer to accommodate an employee's "known physical or mental limitations" unless doing so would impose an "undue hardship." 104 Stat. 332, 42 U. S. C. §12112(b)(5)(A). The Uniformed Services Employment and Reemployment Rights Act (USERRA) obliges an employer to restore a returning United States service member to his prior role unless doing so would cause an "undue hardship." 38 U. S. C. §§4303(10), 4313(a)(1)(B), (a)(2)(B). And the Affordable Care Act (ACA) provides that a covered employer must provide a nursing mother with work breaks unless doing so would impose an "undue hardship." 124 Stat. 577, 29 U. S. C. §207(r)(3). Under all three statutes, an employer must provide an accommodation unless doing so would impose "significant difficulty or expense" in light of the employer's financial resources, the number of individuals it employs, and the nature of its operations and facilities. See ADA, 42 U. S. C. §12111(10)(A) (added 1990); USERRA, 38 U. S. C. §4303(15) (added 1994); ACA, 29 U. S. C. §207(r)(3) (added 2010); cf. 11 U. S. C. §523(a)(8); 28 U. S. C. §1869(j).

With these developments, Title VII's right to religious exercise has become the odd man out. Alone among comparable statutorily protected civil rights, an employer may dispense with it nearly at whim. As this case illustrates, even subpar employees may wind up receiving more favorable treatment than highly performing employees who seek only to attend church. And the anomalies do not end there. Under the ADA, an employer may be required to alter the snack break schedule for a diabetic employee because doing so would not pose an undue hardship. *Spiteri* v. *AT & T Holdings, Inc.*, 40 F. Supp. 3d 869, 878 (E. D. Mich. 2014).

Yet, thanks to *Hardison*, at least one court has held that it would be an undue hardship to require an employer to shift a meal break for Muslim employees during Ramadan. *EEOC* v. *JBS USA, LLC*, 339 F. Supp. 3d 1135, 1181 (D. Colo. 2018). With *Hardison*, uneven results like these have become increasingly commonplace. See Brief for Muslim Advocates et al. as *Amici Curiae* 21–22 (collecting examples).

Not even Mr. Small's employer tries to defend this state of affairs. The company candidly acknowledges that *Hardison* "very likely is not the best possible gloss" on Title VII's language. Brief in Opposition 23. Two of the three judges on the panel below agreed, writing separately to explain their view that *Hardison* "rewr[o]te [the] statute." *Small*, 952 F. 3d, at 826–829 (Thapar, J., joined by Kethledge, J., concurring). Yet, today, this Court refuses even to entertain the question. It's a struggle to see why.

Maybe the most charitable explanation for the Court's inaction has to do with issue preservation. But if that's the worry, there is no reason for it. Both the district court and the court of appeals expressly passed on the question whether Mr. Small's employer violated Title VII by denying his requested accommodation. That is all our precedent demands. *United States* v. *Williams*, 504 U. S. 36, 41–43 (1992). The district court ruled that "placing Mr. Small back in the reassignment pool on reduced pay to wait for a job with hours more in line with [his] religious obligations would . . . place more than a de minimis burden on" the company. App. to Pet. for Cert. 35a. For that reason, the court said, the company "sufficiently satisfied its obligation to demonstrate . . . [an] undue hardship." *Ibid.* While two members of the Sixth Circuit panel assigned to Mr. Small's case doubted *Hardison*, none doubted what it required. Because his requested accommodation involved "more than [a] de minimis" cost, the court held, the company didn't have to provide it. *Small*, 952 F. 3d, at 825 (*per curiam*) (citing

circuit precedent following *Hardison*).

I cannot see what more we could reasonably require. Mr. Small insisted that his requested accommodation would not cause an undue hardship under Title VII. Both the district court and court of appeals rejected the argument relying expressly on *Hardison*. There is no barrier to our review and no one else to blame. The only mistake here is of the Court's own making—and it is past time for the Court to correct it.