No. 20-197

IN THE
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

v.

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, ET AL.,
Respondents.

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

RESPONSE TO PETITIONERS' SUPPLEMENTAL BRIEF

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RESPONSE TO PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners[1] sought this Court's review of an appeals court decision holding that President Donald J. Trump's Twitter account, @realDonaldTrump, constituted a public forum, and that President Trump's practice of blocking critics from the account violated the First Amendment. Petitioners now argue that the case is moot because President Trump's term has ended, and they ask the Court to vacate the decision below on that ground.

Petitioners are right that the case is moot, but they are wrong about why. The case is moot because President Trump's repeated violation of Twitter's terms of service led that company to shut down his account on January 6, 2021, and to permanently ban him from its platform on January 8, 2021. Because it was President Trump's own voluntary actions that made the case moot, vacatur is inappropriate. Indeed, vacatur would be inappropriate even if Petitioners were correct that the case became moot only when President Trump left office. Even on that theory, this case is not one in which mootness resulted from "happenstance" beyond the control of the party seeking vacatur, and it is not one in

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[1] As Petitioners' supplemental brief correctly noted, President Biden and his staff have now been automatically substituted as defendants in this lawsuit. Pet. Supp. Br. at 3. For purposes of this brief, however—which responds to a supplemental brief filed on the eve of the inauguration—the term "Petitioners" continues to refer to former President Trump and former White House aide Dan Scavino.

which the equitable remedy of vacatur would serve the interests of fairness or justice.

1. Petitioners are not entitled to the extraordinary remedy of vacatur of the decision below pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), because this case became moot as a direct result of Petitioners' voluntary actions. "It is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). In assessing the appropriateness of vacatur upon a finding of mootness, "[t]he principal condition to which [this Court has] looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Id.* at 24; *see also id.* at 25 (noting that the "denial of vacatur is merely one application of the principle that '[a] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.'" (quoting *Sanders v. United States*, 373 U.S. 1, 17 (1963) (citing *Fay v. Noia*, 372 U.S. 391, 438 (1963))); *see also Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) ("Because this practice is rooted in equity, the decision whether to vacate turns on 'the conditions and circumstances of the particular case.'" (citation omitted)).

Here, the case became moot because of Petitioners' own actions. Over a period of four years, Petitioners repeatedly posted tweets to the @realDonaldTrump

account that pushed the boundaries of Twitter's Rules.[2] Twitter eventually began to flag some of Petitioners' tweets for violating its terms of service ("Rules"),[3] but left those tweets viewable under a policy that recognized the extraordinary public interest in the speech of world leaders.[4] On January 6, 2021, however, Twitter suspended the account after concluding that Petitioners were using the account to incite violence.[5] On that date, a large group of individuals gathered on the Ellipse of the National Mall to attend a rally in support of the President. Shortly after President Trump concluded his remarks to the crowd, hundreds of individuals proceeded to walk to the United States Capitol, where many of them then stormed, occupied, vandalized, and looted parts of the building, forcing lawmakers, staff, and journalists to seek safety, and disrupting a joint

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[2] Sara Morrison, *Facebook and Twitter Made Special World Leader Rules for Trump. What Happens Now?*, Vox (Jan. 20, 2021), https://www.vox.com/recode/22233450/trump-twitter-facebook-ban-world-leader-rules-exception.

[3] Twitter's Rules govern account-holders' use of the platform. *See Twitter Rules*, Twitter, Inc. https://help.twitter.com/en/rules-and-policies/twitter-rules.

[4] As a matter of policy, Twitter generally leaves the tweets of world leaders on its platform even when those tweets violate its Rules. *See World Leaders on Twitter: Principles & Approach*, Twitter, Inc. (Oct. 15, 2019), https://blog.twitter.com/en_us/topics/company/2019/worldleaders2019.html.

[5] *Permanent Suspension of @realDonaldTrump*, Twitter, Inc. (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.html ("*Permanent Suspension of @realDonaldTrump*").

session of Congress that had convened to count Electoral College votes and certify the results of the 2020 U.S. Presidential Election.[6] As the attack continued, more than a dozen United States Capitol Police officers were injured.[7] Five individuals, including an officer with the Capitol Police, died.[8]

While the events of January 6 unfolded, Petitioners posted tweets on the @realDonaldTrump account that reiterated claims of a falsified election and expressed "love" for the rioters. Twitter removed three of those tweets after determining that they violated its Rules. Later the same day, after the Capitol had been secured, Twitter released a statement explaining its actions concerning the @realDonaldTrump account, stating that "[a]s a result of the unprecedented and ongoing violent situation in Washington, D.C., we have required the removal of [the] Tweets that were posted earlier today for repeated and severe violations of our Civic Integrity

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[6] *Today's Rampage at the Capitol, as It Happened*, N.Y. Times (Jan. 6, 2021), https://www.nytimes.com/live/2021/01/06/us/washington-dc-protests.

[7] Peter Hermann & Julie Zauzmer, *Beaten, Sprayed with Mace and Hit with Stun Guns: Police Describe Injuries to Dozens of Officers During Assault on U.S. Capitol*, Wash. Post (Jan. 11, 2021), https://www.washingtonpost.com/local/public-safety/police-capitol-injuires-trump/2021/01/11/ca68e3e2-5438-11eb-a08b-f1381ef3d207_story.html.

[8] Khadeeja Safdar, Erin Ailworth, & Deepa Seetharaman, *Police Identify Five Dead After Capitol Riot*, Wall St. J. (Jan. 8, 2021), https://www.wsj.com/articles/police-identify-those-killed-in-capitol-riot-11610133560.

policy."[9] It further stated that "This means that the account of @realDonaldTrump will be locked for 12 hours following the removal of these Tweets. If the Tweets are not removed, the account will remain locked."[10] It continued: "Future violations of the Twitter Rules, including our Civic Integrity or Violent Threats policies, will result in permanent suspension of the @realDonaldTrump account."[11]

After the temporary suspension ended, Petitioners continued to use the @realDonaldTrump account to tweet misinformation about the election. On January 8, 2021, Twitter announced that after a "close review of recent Tweets from the @realDonaldTrump account and the context around them," the company was permanently suspending the account.[12] The company's statement further explained: "In the context of horrific events this week, we made it clear on Wednesday that additional violations of the Twitter Rules would potentially result in this very course of action."[13]

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[9] Twitter Safety (@TwitterSafety), Twitter (Jan. 6, 2021, 7:02 PM), https://twitter.com/twittersafety/status/1346970431039934464.

[10] *Id.*

[11] Twitter Safety (@TwitterSafety), Twitter (Jan. 6, 2021, 7:02 PM), https://twitter.com/twittersafety/status/1346970432017031178.

[12] *Permanent Suspension of @realDonaldTrump.*

[13] *Id.*

In short, Petitioners' own actions caused this case to be moot, and for that reason, vacatur under *Munsingwear* would be inappropriate.[14]

3. Vacatur would be inappropriate even if Petitioners were correct that this case became moot only when President Trump left office. Vacatur is appropriate only when review of the decision below is precluded by events in which the party seeking vacatur played no role. But it would be odd in the extreme to suggest that President Trump's actions had no role in determining

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[14] Petitioners argue, relying on the voluntary cessation doctrine, that Twitter's suspension of the @realDonaldTrump account did not moot the case because Twitter could reverse its decision at any time. Pet. Supp. Br. 3 n.1 (citing *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017)). But the voluntary cessation doctrine applies when the *defendant* has voluntarily ceased to engage in the challenged practice—not when, as here, a third party causes the defendant to stop doing so. *E.g.*, *Trinity Lutheran Church*, 137 S. Ct. at 2019 n.1 (finding that the case was not mooted solely because the state, the original defendant, had decided to stop enforcing the policy that the plaintiffs had challenged); *see also Friends of the Earth, Inc. v. Laidlaw Env't Services (TOC), Inc.*, 528 U.S. 167, 189 (2000) (explaining that in narrow circumstances a case can be mooted "by the defendant's voluntary conduct" (emphasis added) (quotation marks omitted)). The "principle" of the voluntary cessation doctrine aims to ensure that "a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001); *see also United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (explaining the purpose of the voluntary cessation doctrine is to avoid "leav[ing] the defendant free to return to his old ways" (internal quotation marks and alterations omitted)). The doctrine is inapplicable here.

the outcome of the election. *Cf. Karcher v. May*, 484 U.S. 72, 82 (1987) (rejecting the argument that "the happenstance of [a] loss of official status ... renders [a] judgment unreviewable.").

In any event, Petitioners have failed to demonstrate that vacatur is required to prevent unfairness to Petitioners or to their successors in the new administration. Petitioners' brief concedes that nothing in the Second Circuit's decision will prejudice former President Trump or Mr. Scavino. Pet. Supp. Br. at 6 (noting that after the inauguration, the Second Circuit's judgment is "harmful no longer to President Trump"). Petitioners are justified in so conceding, both because former President Trump and Mr. Scavino no longer operate the @realDonaldTrump account and because as private citizens they are no longer subject to First Amendment constraints or lawsuits. Nor would there be any prejudice to President Biden, or to the office of the presidency, if the decision below were left in place. Neither President Biden nor his staff have control of the @realDonaldTrump account. If President Biden and his staff were to use another personal account for official business, the Second Circuit's decision in this case would not be preclusive because any new case would involve a different set of operative facts.

Petitioners argue that allowing the judgment to stand would be "deeply problematic" because the judgment "exposes federal and state employees to constitutional liability." *Id.* This concern is misplaced. The Second Circuit's fact-bound determination that Petitioners' operation of the @realDonaldTrump account reflected state action (and was thus constrained

by the First Amendment) expressly did not pre-ordain the result of any future lawsuit involving other public officials and other accounts that may be used in different ways.[15]

4. Nor, finally, would vacating the Second Circuit's judgment serve the public interest. *Bancorp*, 513 U.S. at 26-27 ("As always when federal courts contemplate equitable relief, our holding must also take account of the public interest."). "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Id.* (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)).

Here, the public interest in preventing impermissible viewpoint discrimination in government-operated social media accounts weighs heavily in favor of keeping the Second Circuit's judgment in place. As the Court has recognized, social media platforms like Twitter offer "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard," in part because these platforms permit citizens to "engage with [their elected representatives] in a direct manner." *Packingham v. North Carolina*, 137 S. Ct.

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[15] Petitioners argue that the automatic substitution of President Biden as a defendant in this case shows that the Second Circuit erred in its state action analysis. Petitioners are incorrect. Indeed, their theory would make it impossible for anyone ever to sue a public official for using private property to engage in state action.

1730, 1735, 1737 (2017). Protecting these increasingly important virtual public forums from impermissible viewpoint discrimination is necessary to preserve them as sites of open civic discourse. The Second Circuit's opinion, although not pre-ordaining the outcome of any future case involving a public official's decision to block individuals from his or her account, provides a sensible framework that is of value to the legal community and the public. Indeed, many other courts have referenced or relied on the Second Circuit's framework in analyzing similar cases. *See* Br. Opp. 12-15. Given the important First Amendment principles served by the keeping the Second Circuit's judgment in place, and the lack of any prejudice to Petitioners or the new administration in doing so, the equities demand that Petitioners' request to vacate the lower court's judgment be denied.

CONCLUSION

For these reasons, the petition for writ of certiorari, and Petitioners' request that the Court vacate the Second Circuit's judgment, should be denied.

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