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.

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

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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Respondents sued President Donald J. Trump solely in his official capacity, asserting a constitutional right to interact directly with his personal social-media account through their own preferred accounts. The court of appeals held that such a right existed, reasoning that President Trump exercised the power of the United States government in blocking users based on viewpoint from his @realDonaldTrump account, thereby violating the First Amendment. As explained in the petition for a writ of certiorari, that decision was erroneous and worthy of this Court's review. At noon on January 20, 2021, however, President-elect Joseph R. Biden, Jr., will succeed to President Trump's role as defendant in this litigation. That transition will moot this case, as then-President Biden will have no ability to control the use of Donald J. Trump's personal Twitter account. Because this case warrants review but will become moot

pending such review, the Court should follow its established practice of granting certiorari and vacating the judgment below. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

A. This Case Warrants Further Review But Will Soon Be Moot

1. As described in the petition (Pet. 4-5), this case involves President Trump's use of the @realDonaldTrump account, a Twitter account that Donald J. Trump established as a private citizen in March 2009. In 2017, respondents brought this suit against President Trump and members of the White House staff, all in their official capacities, claiming that President Trump's decision to block accounts associated with the individual respondents from interacting with the @realDonaldTrump account was unconstitutional state action. See Pet. App. 37a. Blocking is a Twitter function available to all registered account holders. See *id.* at 134a.

The United States District Court for the Southern District of New York granted partial summary judgment for respondents and issued a declaratory judgment that "the blocking of the individual plaintiffs from the @realDonaldTrump account because of their expressed political views violates the First Amendment." Pet. App. 87a-88a. The United States Court of Appeals for the Second Circuit affirmed, concluding that President Trump's "use of the Account during his presidency" was "governmental" and that blocking the individual respondents from his account was state action violating the First Amendment. *Id.* at 12a-13a; see *id.* at 12a-15a.

At noon on January 20, 2021, President-elect Biden will take office as President Trump's successor. See

Amend. XX § 1. Because the @realDonaldTrump account belongs to Mr. Trump personally, he will continue to have control over that account after his term of office has ended, subject to Twitter's terms of service.[1]

After the inauguration, though, Mr. Trump will no longer be a party to this case, because respondents sued him only in his official capacity. In an official-capacity suit, the relief obtained by respondents "is only nominally against the official and in fact is against the official's office," meaning that when President Trump "leave[s] office, [his] successor[] automatically assume[s] [his] role in the litigation." *Lewis* v. *Clarke*, 137 S. Ct. 1285, 1292 (2017); see Sup. Ct. R. 35.3 ("When a public officer who is a party to a proceeding in this Court in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate and any successor in office is automatically substituted as a party."). Thus, after the inauguration, the district court's declaratory judgment that "the blocking of the individual plaintiffs from the @realDonaldTrump account" based on their viewpoints violates the First Amendment, Pet. App. 87a-88a, will run against then-President Biden, not against Donald J. Trump.

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[1] On January 8, 2021, Twitter announced that it had "permanently suspended" the @realDonaldTrump account on the ground that it had been used in violation of Twitter's terms of service. See Twitter, Inc., *Permanent Suspension of @realDonaldTrump*, https://blog.twitter.com/en_us/topics/company/2020/suspension.html. That action alone does not moot this case, because it could be reversed at any time by Twitter. See *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019 n.1 (2017). Twitter's power to unilaterally shut down the @realDonaldTrump account does, however, underscore the Second Circuit's error in holding that the account is a "public forum." See Pet. 23.

President Biden, however, will not have any control over the @realDonaldTrump account. Unlike the governmental Twitter accounts (such as @POTUS) over which he will assume control after his inauguration, the @realDonaldTrump account will not be transferred to his control, so President Biden will be unable to block or unblock the individual respondents or anyone else on that account. See Twitter, Inc., *What to expect on Twitter on US Inauguration Day 2021* (Jan. 14, 2021), https://blog.twitter.com/en_us/topics/company/2021/inauguration-2021.html ("As President-elect Biden is sworn in on January 20, 2021, Twitter will facilitate the transfer of institutional White House Twitter accounts, including: @WhiteHouse, @POTUS, @VP, @FLOTUS, and @PressSec."). Accordingly, this suit will become moot on January 20, 2021. See *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) ("A case becomes moot * * * 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'") (citation omitted); see also *Camreta* v. *Greene*, 563 U.S. 692, 711 (2011) (when "'the allegedly wrongful behavior could not reasonably be expected to recur,' we have no live controversy to review") (citation omitted).[2]

2. That this case will become moot upon President Biden's inauguration underscores the fundamental flaw with the court of appeals' decision: the blocking of the

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[2] Moreover, even if the declaratory judgment were interpreted to apply to President Biden's own personal Twitter account—though neither the text of the judgment nor any rule or precedent of which the government is aware supports such a construction—there appear to be "no concrete plans" that would lead to the recurrence of the challenged conduct on President Biden's personal Twitter account. *Already*, 568 U.S. at 95; cf. *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 159 (2014) (requiring a "credible threat" to support standing for a pre-enforcement challenge).

individual respondents was not an official state action that can be redressed by the Office of the President.

As the petition explains (Pet. 12), the First Amendment "is a restraint on government action, not that of private persons." *Columbia Broad. Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 114 (1973) (opinion of Burger, C.J.). As a result, a federal official's actions implicate the First Amendment only when he exercises "power 'possessed by virtue of [federal] law,'" such that his actions are "'made possible only because [he] is clothed with the authority of [federal] law.'" *West* v. *Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States* v. *Classic*, 313 U.S. 299, 326 (1941)). President Trump did not exercise such a power when he blocked the individual respondents' accounts on Twitter. If he had, then President Biden would have that same power extended to him under federal law upon his inauguration. That President Biden will be powerless to control the @realDonaldTrump account thus confirms the error in the opinion below, which should not be allowed to stand without this Court's review.

B. The Judgment Below Should Be Vacated As Moot Under *Munsingwear*

When, as here, a case merits review but becomes moot "while on its way [to this Court] or pending [a] decision on the merits," the Court's "established practice" is to "vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39; see *id.* at 39 n.2. The Court has followed that approach in "countless cases." *Great W. Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979) (per curiam). As this Court recently confirmed, vacatur under *Munsingwear* is available if a case becomes "moot before certiorari" when the decision below would have been worthy of further review

absent mootness. *Azar* v. *Garza*, 138 S. Ct. 1790, 1793 (2018) (per curiam); see *Camreta*, 563 U.S. at 713 (explaining that vacatur under *Munsingwear* is appropriate when the court of appeals' decision was independently "appropriate for review").

The equitable remedy of vacatur is amply warranted here. This case will become moot "due to circumstances unattributable to any of the parties"—namely, the election outcome. *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 23 (1994) (citation omitted). Such "vagaries of circumstance" warrant vacatur, because neither the Office of the President nor anyone else should continue to be governed by a precedential decision that might not have survived this Court's review but for "mootness by happenstance." *Id.* at 25 & n.3.

That is particularly true because allowing the decision below to stand would be harmful, no longer to President Trump, but to the Presidency itself and to other governmental officials. *Munsingwear* explained that "a judgment, unreviewable because of mootness," should not be permitted to "spawn[] any legal consequences." 340 U.S. at 41; see *Camreta*, 563 U.S. at 713. Several aspects of the court of appeals' opinion would be deeply problematic if the decision were to remain on the books. As the petition explained (Pet. 27-29), the decision below blurs the lines between governmental and personal actions. It exposes federal and state employees to constitutional liability when using their own personal property to speak about their jobs to persons of their own choosing, and thereby limits the ways in which public officials "may act in a personal capacity in all aspects of their life, online or otherwise." Pet. App. 118a-119a (Park, J., dissenting from the denial of rehearing en banc). And "[t]he key facts in this case" in particular—

"that the President had a personal Twitter account, that he used it to tweet on matters relating to his office, and that the public was able to comment on his tweets—are not unique." *Id.* at 118a (Park, J., dissenting from the denial of rehearing en banc). The Second Circuit's errors are thus likely to affect future cases. Vacatur will "'clear[] the path for future relitigation'" of these important constitutional questions in similar cases "by eliminating a judgment the loser was stopped from opposing on direct review." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded with instructions for the declaratory judgment to be vacated and the case dismissed.

Respectfully submitted.

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