APPLYING THE PUBLIC FORUM DOCTRINE TO

PUBLIC OFFICIAL AND CAMPAIGN SOCIAL MEDIA ACCOUNTS

by

SKYLAR NICHOLSON

(Under the Direction of Jonathan Peters)

ABSTRACT

A federal court ruled in the case *Knight First Amendment Institute v. Trump* that the @realDonaldTrump Twitter account was a designated public forum, and therefore it was a First Amendment violation for President Trump to block users from it on the basis of viewpoint. That action, among others, presented the issue of how courts rule on claims that certain social media accounts—to be clear: not the platforms themselves—are public forums under the First Amendment. This thesis explores that issue by evaluating, in the context of public-forum analysis, how courts have treated the personal accounts of public officials and how courts have treated the campaign accounts of individuals running for office, especially if the individual is a sitting public official. This thesis also offers, after that evaluation, several normative suggestions regarding how courts should treat such accounts.

INDEX WORDS: Public Forum, Social Media, State Action Doctrine, First Amendment Rights, Free Expression, Twitter, Facebook

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SKYLAR NICHOLSON

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SKYLAR NICHOLSON

Major Professor: Jonathan Peters

Committee: Charles Davis
Thomas Kadri

Electronic Version Approved:

Ron Walcott
Vice Provost for Graduate Education and Dean of the Graduate School
The University of Georgia
May 2022

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TABLE OF CONTENTS

Page

LIST OF FIGURES

Page

CHAPTER 1

Introduction to the Digital Public Forum

Through digital technology a person is able to connect, communicate, and see different views of society. Specifically, social media brings the outside world into closer reach from the convenience of an easy-to-use platform.[1] With that in mind, in 2009, Donald J. Trump invited more people into his life by establishing his first Twitter account: @realDonaldTrump. It was set up as a personal page where he shared his opinions and information about his business dealings, all before entering the political landscape and running for the presidency in 2016.[2] Then, after his inauguration, Trump had Twitter access to both the @realDonaldTrump and @POTUS accounts.

At the time he was elected, Trump's personal account had more than 50 million followers who generated thousands of replies to Trump's tweets.[3] Instead of transitioning to @POTUS, created and traditionally used for sitting presidents and strictly for official purposes, Trump continued primarily to use his personal account to promote his policy

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[1] Sara J. Benson, *@publicforum: The Argument for A Public Forum Analysis of Government Officials' Social Media Accounts*, 12 WASH. U. JURISPRUDENCE REV. 85 (2019).

[2] *Trump on Twitter: A history of the man and his medium*, BBC (December 12, 2016), https://www.bbc.com/news/world-us-canada-38245530.

[3] Hunter Schwarz, *Becoming President More Than Doubled Trump's Reach on Twitter*, CNN (January 27, 2017), https://www.cnn.com/2017/01/27/politics/trumps-first-week-in-twitter/index.html.

agenda, to communicate his positions on issues, and to engage with the public.[4] Trump was once quoted as saying that his account was "used as a channel for communicating and interacting with the public about his administration."[5]

Ultimately, Trump's personal account, while being used for official business, blocked seven people—preventing them from viewing the account—because of their criticism of Trump's actions and policies. This produced a 2017 suit in the U.S. District Court for the Southern District of New York, *Knight First Amendment Institute v. Trump,* in which a group of blocked users alleged that the account was a public forum and that blocking access to it was a violation of the First Amendment.[6]

Trump and his top aides continued through 2020 to block certain critics from @realDonaldTrump, as he was running for re-election and actively campaigning. As a result, the Knight Institute filed a second lawsuit against Trump, this one on behalf of other users who were blocked before the inauguration or not able to identify which tweet(s) had prompted their blocking.[7] The allegation, again, was that the blocking violated the First Amendment under a public-forum theory.

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[4] *See generally* Knight First Amendment Institute v. Trump, 953 F.3d 216 (2d. Cir. 2020); Knight First Amendment Inst. Columbia v. Trump, 928 F.3d 226 (2d. Cir. 2019); Knight First Amendment Institute v. Trump, 302 F.Supp.3d 541 (S.D.N.Y. 2018).

[5] Knight First Amendment Institute v. Trump, 302 F.Supp.3d 541, 552 (S.D.N.Y. 2018).

[6] *Id.*

[7] Knight First Amendment Institute v. Trump, No. 1:20-cv-05958 (S.D.N.Y.).

The plaintiffs prevailed in the first lawsuit on summary judgement,[8] later upheld by the U.S. Court of Appeals for the Second Circuit,[9] which subsequently denied *en banc* review.[10] In 2020, the U.S. Supreme Court vacated the judgment and remanded the case to the Second Circuit with directions to dismiss it as moot,[11] presumably because by then Trump was no longer president. In 2021, the second suit was also dismissed as moot,[12] seemingly for the same reason.

For context, public forums include spaces, such as public parks and sidewalks, that historically have been held open generally for people to engage in free expression, especially on matters of public concern.[13] These are called traditional public forums, and they enjoy the highest level of First Amendment protection.[14] Public forums also include public property, such as municipal theaters and rooms at state universities, that have been opened up by a government entity for expressive purposes.[15] These are called designated public forums, and as long as the government keeps them open, expression there receives

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[8] *Id*.

[9] Knight First Amendment Inst. Columbia v. Trump, 928 F.3d 226 (2d. Cir. 2019).

[10] Knight First Amendment Institute v. Trump, 953 F.3d 216 (2d. Cir. 2020).

[11] Biden v. Knight First Amendment Institute, 593 U.S. __ (2021).

[12] Knight First Amendment Institute v. Trump, No. 1:20-cv-05958 (S.D.N.Y.).

[13] Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939).

[14] EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS 11 (4th ed. 2011).

[15] Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983).

the same First Amendment protection as in traditional public forums.[16] One subtype is a limited forum, in which the government may limit access to a designated forum to certain classes or types of expression.[17] However, across all forum types, the government may not discriminate on the basis of viewpoint—that is, where the government uses its power to suppress or punish ideas that it disfavors.[18]

To be clear, Trump is not the only public official who has blocked users on the basis of their views and then faced legal problems because of it. The ACLU and the Knight Institute sued Texas Attorney General Ken Paxton in 2021 for blocking users, prompting him to unblock at least the plaintiffs in that action, [19] and Rep. Alexandria Ocasio-Cortez settled a suit in 2019 with a former Brooklyn lawmaker after blocking him from her @AOC account.[20] And in a 2021 case involving a state legislator, the U.S. Court of Appeals for the Eighth Circuit held that a Missouri representative was free to block users from her campaign account.[21]

These actions, among others, present the issue of how courts rule on claims that certain social media accounts—to be clear: not the platforms themselves—are public

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[16] VOLOKH, *supra* note 14, at 11.

[17] Good News Club v. Milford Central School, 533 U.S. 98 (2001).

[18] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

[19] Reese Oxner, *Texas Attorney General Ken Paxton agrees to stop blocking people on Twitter, ending lawsuit over First Amendment*, TEXAS TRIBUNE (July 12, 2021), https://www.texastribune.org/2021/07/12/paxton-twitter-lawsuit-blocked/.

[20] Michael Gold, *Ocasio-Cortez Apologizes for Blocking Critic on Twitter*, THE NEW YORK TIMES (November 4, 2019), https://www.nytimes.com/2019/11/04/nyregion/alexandria-ocasio-cortez-twitter-dov-hikind.html.

[21] Campbell v. Reisch, 986 F.3d 822 (8th Cir. 2021).

forums under the First Amendment. This thesis explores that issue by considering, in the context of public-forum analysis, how courts have treated the personal accounts of public officials and how courts have treated the campaign accounts of individuals running for office, especially if the individual is a sitting public official. This thesis also offers, after that evaluation, several normative suggestions regarding how courts should treat such accounts.

Right now the courts, at the federal and state levels, are in the very early stages of developing theoretical and doctrinal frameworks for analyzing such issues, even though the public forum doctrine stretches back many decades. The implications are significant because there is a growing number of public officials using social media of all kinds to share information with the public and, in turn, to enable members of the public to communicate with them about matters relating to the operations of government.[22] Put differently, social-media use by public officials has the potential—proven in some respects—to facilitate essential discourse among citizens who otherwise might not interact, as well as discourse between citizens and government.[23] Moreover, this interactivity can foster citizens' abilities to speak, to be heard, to associate with others, and to petition—all interests at the heart of the First Amendment.[24] As Justice Anthony

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[22] *Social Media for Public Officials 101*, KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY (January 15, 2020), https://knightcolumbia.org/content/social-media-for-public-officials-101.

[23] Tony Tran and Yael Bar-Tur, *Social Media in Government: Benefits, Challenges, and How it's Used*, HOOTSUITE (March 26, 2020), https://blog.hootsuite.com/social-media-government/.

[24] Somini Sengupta, *On Web, a Fine Line on Free Speech Across the Globe*, THE NEW YORK TIMES (Sept. 16, 2012), http://www.nytimes.com/2012/09/17/technology/on-theweb-a-fine-line-on-free-speech-across-globe.html.

Kennedy wrote in the 2017 case *Packingham v. North Carolina*: "[T]oday, one of the most important places to exchange views is cyberspace, particularly social media, which offers 'relatively unlimited, low-cost capacity for communication of all kinds.'"[25] He went on to call social media "the modern public square."[26]

The First Amendment: History and Theory

The First Amendment states that "Congress shall make no law … abridging the freedom of speech, or of the press."[27] It was ratified in 1791 as part of the Bill of Rights, and it was meant to safeguard certain basic civil liberties, entitling citizens in a democracy to hold the government accountable for its actions and to speak out on issues important to them without the fear of being censored or persecuted by the government.[28] The Supreme Court has recognized "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[29] that "public discussion is a political duty,"[30] and that "the central meaning of the First Amendment" is the right to criticize the government.[31]

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[25] Packingham v. North Carolina, 137 S.Ct. 1730, 1732 (2017).

[26] *Id.*

[27] U.S. Const. amend. 1.

[28] Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

[29] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[30] Whitney v. California, 274 U. S. 357, 375-376 (1927) (Brandeis, J., concurring).

[31] Sullivan, 376 U.S. at 273.

Generally, courts and constitutional scholars believe that Founding Era evidence does and should matter when interpreting the Constitution.[32] Thus, "accounting for the original meanings of speech and press freedoms would have profound consequences for First Amendment theory and doctrine. In terms of its consequences for theory, history undermines the notion that the First Amendment itself embraces a [single] particular rationale for protecting expression."[33] With that in mind, it is useful here to consider the First Amendment views of a selection of Supreme Court justices.

Justice William J. Brennan, Jr., in the 1989 case *Texas v. Johnson*, wrote that "if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[34] Justice Kennedy, in the 2002 case *Ashcroft v. Free Speech Coalition*, observed that "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end" and that "[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[35] Justice Potter Stewart, in dissent in the 1966 case *Ginzburg v. United States*, contextualized the First Amendment's purpose by commenting on what it prevents against, writing, "[C]ensorship reflects a

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[32] *See, e.g.,* Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 676 (1999); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990).

[33] Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE. L.J. (2017).

[34] Texas v. Johnson, 491 U.S. 397, 414 (1989).

[35] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002).

society's lack of confidence in itself. It is a hallmark of an authoritarian regime."[36] Finally, Justice Thurgood Marshall, in the 1972 case *Police Dept. of City of Chicago v. Mosley*, concluded:

> *[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. … [T]his forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'*[37]

Some scholars have traced the idea of free expression back to a term that originated with the legislative privilege of speech and debate.[4] More specifically, "[f]reedom of speech … had little history as an independent concept when the First Amendment was framed,"[38] requiring an effort to further define the scope of its promise and limits. That view, however, is not unanimous. As Professor Jud Campbell put it: "[F]or the Founders, … a 'freedom to do something' naturally alluded to natural rights, without any need for further clarification or consistent terminology."[39] James Madison's

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[36] Ginzburg v. United States, 383 U.S. 463 (1966) (Stewart, J., dissenting).

[37] Chicago Police Dept. v. Mosley, 408 U.S. 92,95-96 (1972).

[38] David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 487 (1983); *see also* Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 793 (2008) (agreeing with Anderson).

[39] Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE. L.J. (2017).

original draft of what would later become the First Amendment did, indeed, include a reference to "natural rights, retained—as Speech, Con[science]."[40] Professor Campbell's work found that "one draft mentioned 'certain natural rights' [and] … the right 'of [s]peaking, writing and publishing . . . with decency and freedom.'"[41]

Against that background, the First Amendment's philosophical roots run deep, and they are widely varied. The marketplace-of-ideas theory, for example, is basically an outgrowth of the writings of, among others, John Stuart Mill, who authored *On Liberty*, and John Milton, who authored *Areopagitica*, which stated: "[L]et Truth and falsehood grapple; whoever knew truth put to the worse in a free and open encounter?"[42] Meanwhile, the Meiklejohnian theory says that free expression is, most importantly, a means to self-government and that political expression is entitled to absolute protection.[43] Under the self-fulfillment theory, free expression is valuable and protected because of what it does for the individual, allowing him or her to speak out and achieve (or at least seek) self-actualization.[44] The checking-value theory recognizes that the government has a monopoly over raw power (through legitimized violence like the use of force), and thus

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[40] James Madison, *Notes for Speech in Congress* (June 8, 1789), in THE PAPERS OF JAMES MADISON 194 (Charles F. Hobson & Robert A. Rutland eds., 1979).

[41] Campbell, *supra* note 39, at 269.

[42] David L. Hudson, Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, HUMAN RIGHTS MAGAZINE (2018), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/in-the-age-of-socia-media-first-amendment/.

[43] *See generally* Meiklejohn, *supra* note 28.

[44] *See generally* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 785 (2nd ed. 1988); STEVEN SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 5 (1990).

the ordinary citizen must have the freedom to speak out in the course of holding the government to account for how it wields that power.[45] These are just some of the major theories that have come to explain and animate the First Amendment's role in our democracy.

Public Forums: Background

Public forums under the First Amendment are places where an individual can engage in expressive activity. The Supreme Court's seminal statement about them came in the 1939 case *Hague v. Committee for Industrial Organization*: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[46] Thus public forums have, since "ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."[47]

This perspective was something of a repudiation of the view once expressed by Oliver Wendell Holmes when he was a member of the Massachusetts Supreme Judicial Court, in the 1895 case *Massachusetts v. Davis*—in an era when state governments could regulate speech without confronting First Amendment concerns.[48] In that case, Holmes

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[45] *See generally* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

[46] 307 U.S. 496, 515 (1939).

[47] *Id.*

[48] Garrett Epps, *Trump's Grotesque Violation of the First Amendment*, THE ATLANTIC (June 2, 2020), https://www.theatlantic.com/ideas/archive/2020/06/trumps-grotesque-violation-first-amendment/612532/.

wrote that "the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."[49]

More recently, the Supreme Court decided the 1982 landmark case *Perry Education Association v. Perry Local Educators' Association*,[50] in which the justices clarified that public forums could be broken down into three different types: traditional, designated, and non-public. Each has, as noted briefly in the introduction, a unique definition and receives a different level of judicial scrutiny with respect to restrictions on expression.[51] Specifically, a traditional public forum is public property historically open to political speech and debate that includes such places as parks and sidewalks, as well as areas that are generally and freely accessible to the public.[52] A designated public forum, meanwhile, is public property that the government by policy or practice opens up for expressive activity, either by the public as a whole or by a class of people, in which case it is a limited forum.[53] Finally, a non-public forum is public property that may be closed to the exercise of First Amendment rights if the government determines that the exercise

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[49] *Id*.

[50] 460 U.S. 37 (1983).

[51] *See generally* Peter Jakab, *Public Forum Analysis After Perry Education Association v. Perry Local Educator's Association: A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property*, 54 FORDHAM L. REV. 549 (1986).

[52] *Hague v. Committee for Industrial Organization,* 307 U.S. 496, 515 (1939).

[53] Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993).

of such rights would be incompatible with normal uses of the property.[54] In some regards, public forum law reflects aspirational principles, as Professor Steven Gey once put it:

> *[I]n a perfect world, the First Amendment would reflect the same ideals as the hypothetically pure public forum described in Hague: a strong presumption in favor of unfettered speech, an equally strong presumption against government manipulation or control of debate and discussion, and a built-in tolerance for boisterous and even offensive expression.*[55]

Importantly, however, expression in traditional and designated public forums is subject to reasonable time, place, and manner regulations (e.g., prohibiting the use of sound amplifiers at night).[56] These are valid, as the Supreme Court held in the 1984 case *Clark v. Community for Creative Non-Violence*, "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication."[57] Further, the government is prohibited from engaging in viewpoint discrimination, which is the restriction of expression based on the views being conveyed (e.g., singling out a particular opinion or perspective on a subject for treatment unlike that

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[54] Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983); Adderley v. Florida, 385 U.S. 39 (1966).

[55] Steven Gey, *Reopening the Public Forum-From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1355, 1356 (1998).

[56] Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

[57] 468 U.S. 288, 293 (1982).

given to others).[58] The purpose is to ensure that "people aren't excluded from public discourse simply because their views are controversial or disagreeable to others" while also helping to "ensure that government officials don't insulate themselves from the opinions of the people whom they are supposed to represent."[59]

Equal access to public forums is a constitutional right, but how is it actually exercised and protected at a time when the public means of discussion are evolving and transitioning to digital spaces? This is especially important for expression about public affairs, because digital media enable direct communication between message senders and receivers without opinion-leader or other mediation.[60] Moreover, there is an interesting mix of public and private actors involved: government officials sending their speech through an architecture of privately owned websites, servers, routers, and backbones.[61]

Platforms and the State Action Doctrine

Public officials are, fundamentally, political actors: "individuals who have obtained at least some measure of political power … or authority in … society who engage in activities that can have a significant influence on decisions, policies, media

[58] Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L. A. L. REV. 67 (2007).

[59] *Social Media for Public Officials 101, supra* note 22.

[60] Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH. L. REV. 147, 149 (2011) ("Social media increase the number of individuals who can engage in unmediated communication.").

[61] David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 377 (2010).

coverage, and outcomes associated with a given conflict."[62] In contrast, a private actor is an individual or organization outside of the government that has no governmental powers or responsibilities (e.g., a social media platform).[63] Thus, when a public official uses a social media platform for governmental purposes, the official is "pursu[ing] traditionally 'public' ends through traditionally 'private' means."[64] This is notable, in part, because it raises the general rule that "the First Amendment governs only governmental limitations on speech"[65]—that is, a "threshold requirement that must be satisfied before triggering protection of our fundamental rights."[66] Platforms like Twitter and Facebook and YouTube are private entities, meaning they "can limit, control, and censor speech … more than governmental entities."[67] This is all because of the state action doctrine. As one commentator explained:

> *Though [the Internet's] architecture enables … users to speak online, it has also enabled companies like Google and Facebook to conduct "private worldwide speech 'regulation'" as they create and enforce their*

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[62] Jeffery M. Paige, *Political orientation and riot participation*, 36 AM. SOCIOLOGICAL REV. 810 (1971).

[63] *See generally* Sam Kamin, *The Private Is Public: The Relevance of Private Actors in Defining the Fourth Amendment*, 46 B.C. L. REV. 83 (2004).

[64] Robert C. Hockett and Saule T. Omarova, *"Private" Means to "Public" Ends: Governments as Market Actors*, 15 THEORETICAL INQUIRIES IN LAW 53, 53 (2014).

[65] Nyabwa v. Facebook, 2018 U.S. Dist. LEXIS 13981, Civil Action No. 2:17-CV-24, *2 (S.D. Tex.) (Jan. 26, 2018).

[66] Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1380 (2006).

[67] Hudson, *supra* note 42.

own rules regarding what types of user content are permissible on their platforms. Essentially, the companies are developing a de facto free speech jurisprudence, and in doing so they appear to be free to devise their content rules unconstrained by constitutional limits, including those imposed by the First Amendment. The basic reason: the companies are nongovernmental entities.[68]

The Bill of Rights and the Constitution, respectively, establish the basic structures of government and provide to citizens certain guarantees of individual rights in relation to actions by the government.[69] The Fourteenth Amendment protects citizens from actions by the states, and only in the rarest circumstances can any private action qualify as state action.[70] For example, as the Supreme Court noted in the 1991 case *Edmonson v. Leesville Concrete Company:* "[A]lthough the conduct of private parties lies beyond the Constitution's scope in most instances, government authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints."[71] There is historical precedent for that view.

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[68] Jonathan Peters, *The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application (or Lack Thereof) to Third-Party Platforms*, 32 BERKELEY TECH. L. J. 990, 991 (2018) (internal citations omitted).

[69] WILLIAM E. LEE, DAXTON R. STEWART, AND JONATHAN PETERS, THE LAW OF PUBLIC COMMUNICATION 5 (2020).

[70] Peters, *supra* note 68, at 999-1000.

[71] Edmonson v. Leesville Concrete Company, 500 U.S. 614, 620 (1991).

As the state action doctrine evolved in the twentieth century, it came to apply to some private action. In the 1946 landmark case *Marsh v. Alabama*, the Supreme Court ruled that Alabama violated the First and Fourteenth Amendments by forbidding a Jehovah's Witness from distributing materials in a privately-owned town.[72] The justices said the company was so large and performing so many public functions that it had the characteristics of an actual town. In a more recent case, in 2019, *Manhattan Community Access Corp. v. Halleck,* the Supreme Court returned to its more formalist roots, deciding that "The Free Speech Clause … does not prohibit private abridgment of speech."[73] The reasoning was that "by enforcing that … boundary between the governmental and the private, the state-action doctrine protects a robust sphere of individual liberty."[74] Further, the majority quite clearly noted that "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."[75]

That is the current federal approach to state action and controls how the courts think, generally, about public forums in digital spaces.[76] And it may not be adequate to the current moment. As one commentator wrote: "[A] society that cares for the protection of free expression needs to recognize that the time has come to extend the reach of the First Amendment to cover these powerful, private entities that have ushered in a

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[72] Marsh v. Alabama, 326 U.S. 501 (1946).

[73] 139 S.Ct. 1921, 1928 (2019).

[74] *Id.*

[75] *Id.* at 1930.

[76] *See generally* Peters, *supra* note 58.

revolution in terms of communication capabilities."[77] This sets up nicely the question of how courts distinguish personal and professional uses of social media in the context of a claim that a public official's account is a public forum under the First Amendment—and how courts, in the same context, treat the campaign account of an individual running for office, especially if that individual is a sitting public official.

Examining Public Official and Campaign Accounts

Social media platforms came into popularity in the early 2000s[78] and lowered the barrier to entry for individuals to communicate interactively online, and in recent years government officials have been using social media to connect "at the local, state, and national level, [and they] have increasingly turned to … sites like Facebook and Twitter to communicate and interact with … constituents."[79] For example, according to the Congressional Research Service, at this point almost all members of Congress have a social media account that is used for official government purposes.[80] There has been growing scholarly interest in this phenomenon for more than 10 years. Professor Lyrissa Lidsky wrote in 2011 that "government social media use, even when motivated purely by self-interest, usually benefits citizens," adding that "[c]itizens benefit from receiving

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[77] Hudson, *supra* note 42.

[78] JOSE VAN DIJCK, THE CULTURE OF CONNECTIVITY: A CRITICAL HISTORY OF SOCIAL MEDIA 24 (2013).

[79] Dawn Nunziato, *From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital*, 25 B.U. J. SCI. & TECH. L. 1, 4 (2019).

[80] JACOB R. STRAUS AND MATTHEW E. GLASSMAN, CONG. RESEARCH SERV., R44509, SOCIAL MEDIA IN CONGRESS: THE IMPACT OF ELECTRONIC MEDIA ON MEMBER COMMUNICATIONS (May 26, 2016), https://fas.org/sgp/crs/misc/R44509.pdf.

government information quickly, cheaply and without distortion."[81] With that in mind, what are the legal implications of blocking a user from the personal account of a public official? Or from the campaign account of a person running for office, especially if that person is a sitting public official?

Courts are in the early stages of addressing these questions. There have been multiple high-profile cases in recent years that have made their way through the state and federal courts to produce published opinions. This thesis analyzes a selection of them in order to understand their results and reasoning, with a special focus on how they applied the public forum doctrine. The analysis searches for theoretical and doctrinal points of agreement and disagreement relevant to the research questions, discussed above, that are the lodestar of this thesis.

The opinions were located through the database LexisNexis, and specific search terms that were used include social media, Facebook, Twitter, public forums, and public officials. Cases decided between 2015 and 2021 were considered—chiefly to take into account how public forum analysis has been applied to social media uses by public officials in our modern political and media climate, and notably one in which the now-former president of the United States, Donald Trump, made high-profile uses of Twitter both before and after his election, for a mix of personal and official purposes. Below are short summaries of the opinions analyzed. They are discussed in detail in the following section.

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[81] Lyrissa Lidsky, *Government Sponsored Social Media and Public Forum Doctrine Under the First Amendment: Perils and Pitfalls*, 19 THE PUBLIC LAWYER 2, 3 (2011).

Knight First Amendment Institute v. Trump (U.S. Court of Appeals for the Second Circuit, 2019, and U.S. District Court for the Southern District of New York, 2018). As noted above, in 2017, the Knight Institute for the First Amendment sued President Trump for violating the First Amendment rights of seven individuals by blocking them from his @realDonaldTrump account.[82] The trial court ruled that Trump could not, on the basis of viewpoint, block the users from the account. Then, the Second Circuit affirmed and found that Trump's practice of blocking his critics was a form of unconstitutional viewpoint discrimination.[83] As the court reasoned: "[T]he First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise-open online dialogue because they expressed views with which the official disagrees."[84] Trump had argued that his tweets posted on the @realDonaldTrump account were forms of private speech. But the Second Circuit rejected that argument, holding, "By blocking the individual Plaintiffs and preventing them from viewing, retweeting, replying to, and liking his tweets, the President excluded the … Plaintiffs from a public forum, something the First Amendment prohibits."[85] Notably, when the U.S. Supreme Court declined to review the case, Justice Thomas wrote a concurring opinion in which he expressed his concern that "applying old doctrines to new digital platforms is rarely straightforward," adding, "[W]e will soon

[82] Knight First Amendment Institute v. Trump, 302 F.Supp.3d 541 (S.D.N.Y. 2018).

[83] Knight First Amendment Inst. Columbia v. Trump, 928 F.3d 226 (2d. Cir. 2019).

[84] *Id.* at 229.

[85] *Id.* at 233.

have … to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms."[86]

Davison v. Randall (U.S. Court of Appeals for the Fourth Circuit, 2019, and U.S. District Court for the Eastern District of Virginia, 2017). Phyllis Randall, the elected chair of the Loudon County Board of Supervisors, blocked one of her constituents, Brian Davison, from viewing or interacting with her "Chair Phyllis J. Randall" Facebook page, which she created for the stated purpose of allowing constituents to engage with her in a "back and forth conversation" on any topic.[87] Randall blocked Davison after he posted a critical comment on her page about a board meeting. She also deleted his comment, along with her post to which he had replied. Davison proceeded *pro se* in trial court and alleged that Randall violated his First Amendment rights.[88] The court ruled for Davison, finding that the block constituted viewpoint discrimination.[89] The Fourth Circuit affirmed, reasoning that Randall used the page as a "tool of governance" to "further her duties as a municipal official."[90] The court determined the page was a public forum under the First Amendment, observing (among other things) that "[a]n 'exchange of views' is precisely what Randall sought—and what in fact transpired."[91]

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[86] Biden v. Knight First Amendment Institute, 593 U.S. __ (2021) (Thomas, J., concurring).

[87] Davison v. Randall, 912 F.3d 666, 673 (4th Cir. 2019).

[88] *Id*.

[89] *Id.* at 676.

[90] *Id.* at 680.

[91] *Id.* at 682.

Campbell v. Reisch (U.S. Court of Appeals for the Eighth Circuit, 2021, and U.S. District Court for the Western District of Missouri, 2019). Missouri state representative Cheri Toalson Reisch blocked Mike Campbell from her Twitter account after he criticized her fitness for elected office.[92] Reisch argued at trial that the public forum doctrine and First Amendment did not apply because she ran her account in a private capacity: as a campaigner for office rather than the holder of one.[93] In contrast, Campbell argued that the court should follow the principles set out in *Knight First Amendment Institute v. Trump* and *Davison v. Randall* to conclude that Reisch had acted under the color of law. The trial court ruled for Campbell and ordered Reisch to stop blocking Campbell and others because of the viewpoint of their expression.[94] The Eighth Circuit reversed, concluding that she used the account "overwhelmingly for campaign purposes" (e.g., to solicit donations and encourage people to support her candidacy).[95] As the court put it:

> *In short, we think Reisch's Twitter account is more akin to a campaign newsletter than to anything else, and so it's Reisch's prerogative to select her audience and present her page as she sees fit…. Reisch's own First Amendment right to craft her campaign materials necessarily trumps Campbell's desire to convey a message on her Twitter page that she does*

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[92] Campbell v. Reisch, 986 F.3d 822 (8th Cir. 2021).

[93] Campbell v. Reisch, 367 F.Supp.3d 987 (W.D. Mo. 2019).

[94] *Id.*

[95] Campbell v. Reisch, 986 F.3d 822 (8th Cir. 2021).

not wish to convey, even if that message does not compete for room as it would, say, in a campaign newsletter.[96]

One commentator argued that the case opened up a circuit split over the circumstances in which public officials may ban constituents from their social media accounts, adding, "The fact-intensive inquiry conducted by the Eighth Circuit suggests that practitioners should argue extensively from the record" and not simply "cite [the] controlling precedent[s]."[97]

West v. Shea (U.S. District Court for the Central District of California, 2020). Lamar West is a software engineer who lives in Irvine, California, where Christina Shea is the mayor.[98] Shea has multiple Facebook accounts: one in her role as mayor, one titled "Christina Shea, Irvine City Mayor," and one with the features of both an official and a personal account.[99] The third account, at issue in this case, was accessible by the general public and allowed any user, regardless of whether s/he was one of Shea's friends, to see the content and to engage with it, including through the posting of comments.[100] The account had the largest audience of Shea's platforms, and West alleged that Shea used the account for official purposes: to share information regarding mayoral activities and

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[96] *Id.* at 827-828.

[97] Eric Xu, *Campbell v. Reisch: Blocking Constituents on Twitter*, JOLT DIGEST (Feb. 7, 2021), https://jolt.law.harvard.edu/digest/campbell-v-reisch-blocking-constituents-on-twitter.

[98] West v. Shea, 500 F. Supp. 3d 1079 (C.D. Cal. 2020).

[99] *Id*.

[100] *Id*.

positions and to communicate with constituents.[101] One day, Shea posted a message about George Floyd's murder and the Black Lives Matter movement, and West responded to it.[102] The mayor blocked West, among others, from the account, and they demanded that Shea unblock them and restore their posts.[103] Shea did not do so, and in fact she added a line in her profile saying "this is not a government page."[104] West then sued Shea and claimed that her actions constituted viewpoint discrimination and thus had violated the First Amendment, on the theory that her account was a public forum.[105] She denied it and then restricted the account so it would be accessible only to her friends, and she filed a motion to dismiss, which the trial court denied.[106] After that, the city of Irvine settled the claim for nearly $40,000.[107]

The goal in using the search terms and date range noted above, and in narrowing the field of the study to those four cases, is to allow for their close and careful evaluation. They are also representative in the sense that they raise the full range of issues raised by other cases in this area.

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[101] *Id*.

[102] *Id*.

[103] *Id*.

[104] *Id*.

[105] *Id*.

[106] *Id*.

[107] Ben Brazil, *Irvine settles lawsuit that accused former Irvine mayor of violating a resident's 1st Amendment rights*, THE PILOT (Jan. 21, 2021), https://www.latimes.com/socal/daily-pilot/entertainment/story/2021-01-12/irvine-settles-lawsuit-that-accused-former-irvine-mayor-of-violating-a-residents-1st-amendment-rights.

CHAPTER 2

Analysis

This chapter examines four cases, with discussion of both their facts and their reasoning, going into greater detail than the prior chapter did: *Knight First Amendment Institute v. Trump, Davison v. Randall, Campbell v. Reisch,* and *West v. Shea.* Each one raises conceptually similar questions about how courts rule on claims that certain social media accounts—to be clear: not the platforms themselves—are public forums under the First Amendment.

Knight First Amendment Institute v. Trump

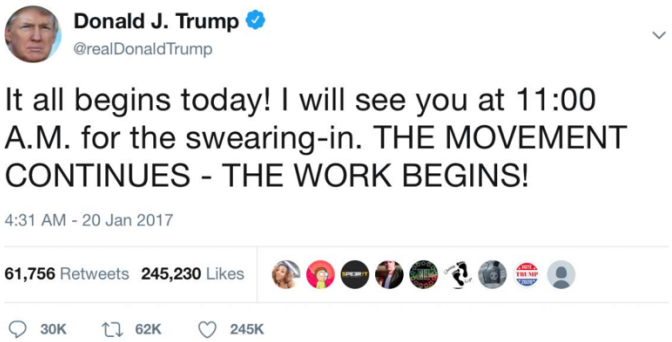
In 2017, as noted, Columbia University's Knight First Amendment Institute sued President Donald Trump and several of his top aides, including the White House press secretary and the White House director of social media, alleging the @realDonaldTrump account engaged in unconstitutional viewpoint discrimination by blocking users because the president did not like the views they expressed.[108] Judge Barrington D. Parker, of the Second Circuit, commented that the case arose from "the decision of the President to use a relatively new type of social media platform to conduct official business and to interact with the public."[109] This is notable because Trump established the account in 2009 as a

[108] *See generally* Knight First Amendment Institute v. Trump, 953 F.3d 216 (2d. Cir. 2020); Knight First Amendment Inst. Columbia v. Trump, 928 F.3d 226 (2d. Cir. 2019); Knight First Amendment Institute v. Trump, 302 F.Supp.3d 541 (S.D.N.Y. 2018).

[109] Knight First Amendment Inst. Columbia v. Trump, 928 F.3d 226, 229 (2d Cir. 2019).

private citizen, long before he was elected president.[110] He used the account to promote his brands, to offer criticism of various topics, and more broadly to add his voice to the public discourse.[111] After Trump's election as president, his use of the account, and that of his White House director of social media, involved the dissemination of information related to government affairs.[112] Indeed, he got an early start on his inauguration day.

Figure 1: Donald Trump's First Tweet Entering Role as President



This is a screenshot of the first tweet that President Trump sent out on the morning of his inauguration, January 20, 2017.

President Trump was quoted multiple times saying that Twitter was his means of communicating with the American people: "Twitter is a wonderful thing for me," he said, "because I get the word out. … I might not be here talking to you right now as president if I didn't have an honest way of getting the word out."[113] Another time he declared: "If I

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[110] *Trump on Twitter: A history of the man and his medium*, BBC (December 12, 2016), https://www.bbc.com/news/world-us-canada-38245530.

[111] *Id.*

[112] *Id.*

[113] Ed Pilkington, *Trump heaps praise on Twitter and denies using it to spread falsehoods*, THE GUARDIAN (March 15, 2017), https://www.theguardian.com/us-news/2017/mar/15/donald-trump-twitter-fox-news-interview-wiretapping.

don't tweet it, don't listen to my staff."[114] His account quickly attracted nearly 50 million followers and enabled him to have a direct line of communication with the general public at any moment.[115] Just a few days after taking office, Trump said: "When the media takes my message, knows what my message is, and then writes it purposely so it doesn't sound good, I'd rather do Twitter."[116] And his social media director, Daniel Scavino, once said Twitter "is an incredible way for [Trump] to communicate directly with the American people and the world 24 hours a day, seven days a week, right from his fingertips."[117]

The page was registered under his full name and official title: "Donald J. Trump" and "45th President of the United States of America, Washington D.C."[118] The account's header image featured photographs of the president performing official government roles and duties, such as signing and issuing executive orders, delivering remarks at the White House (either via uploaded videos or LIVE broadcasts), and meeting with other heads of state and foreign dignitaries.[119]

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[114] Michael Shear, Maggie Haberman, Nicholas Confessore, Karen Yourish, Larry Buchanan, and Keith Collins, *How trump reshaped the presidency in over 11,000 tweets*, THE NEW YORK TIMES (Nov. 2, 2019), https://www.nytimes.com/interactive/2019/11/02/us/politics/trump-twitter-presidency.html.

[115] *Trump on Twitter: A history of the man and his medium*, BBC (December 12, 2016), https://www.bbc.com/news/world-us-canada-38245530.

[116] Jonathan Lemire, *Analysis shows declining engagement with Trump's Tweets*, ASSOCIATED PRESS (April 29, 2017), https://apnews.com/article/8e181e9329ca444fafc490b16b787447.

[117] *Id*

[118] *Id*.

[119] *Trump on Twitter: A history of the man and his medium*, BBC (December 12, 2016), https://www.bbc.com/news/world-us-canada-38245530.

Figure 2: The @realDonaldTrump Twitter Account

This is a screenshot of President Trump's Twitter account showing his username, bio line, and campaign photos.

The National Archives and Records Administration (NARA) created an online archive of Trump's tweets as president.[120] NARA is an independent agency responsible for the preservation and documentation of government and historical records,[121] and it archived content from not only the @POTUS account but also the @realDonaldTrump account.[122] For context, Trump tweeted some 57,000 times while his @realDonaldTrump account was active,[123] and that included roughly 8,000 times during the 2016 presidential

[120] Quint Forgey, *National Archives can't resurrect Trump's tweets, Twitter says*, POLITICO (April 7, 2021), https://www.politico.com/news/2021/04/07/twitter-national-archives-realdonaldtrump-479743.

[121] *Id.*

[122] *Id.*

[123] Aamer Madhani and Jill Colvin, *A farewell to @realDonaldTrump, gone after 57,000 tweets*, ASSOCIATED PRESS (Jan. 8, 2021), https://apnews.com/article/twitter-donald-trump-ban-cea450b1f12f4ceb8984972a120018d5.

campaign and over 25,000 times during his presidency.[124] That is a 32 percent increase in Twitter content posted while president.

There were occasions when Trump explicitly said on Twitter that a particular post served as the official notification to Congress of some action he was taking. Consider, for example, this threat against Iran.

Figure 3: Donald Trump's Political Use of Tweets to Share Official Information

This is an example of how Trump used Twitter to make and disseminate official statements as president.

This type of post includes information not previously shared in other media and first announced on Twitter. Therefore, if you were not on Twitter, or were blocked from viewing Trump's account, then you were unable to learn directly of the news unless you were notified secondhand (e.g., through a news organization). This manner of delivering information to the public allowed Trump to route around the gatekeepers (e.g., journalists and editors) of traditional news organizations. Interestingly, journalists were often critical of Trump's press secretaries for holding few traditional briefings, but the press secretaries

[124] Maegan Vazquez, Christopher Hickey, Priya Krishnakumar, and Janie Boschma, *Donald Trump's presidency by the numbers*, CNN (Dec. 18, 2020), https://www.cnn.com/2020/12/18/politics/trump-presidency-by-the-numbers/index.html.

responded by saying that the press and general public had unprecedented access to Trump because he "communicates directly with the American people" through social media.[125]

For its part, the 2017 case involved seven plaintiffs: Phillip Cohen, Eugene Gu, Holly Figueroa, Nicholas Pappas, Joseph Papp, Rebecca Buckwalter-Poza, and Brandon Neely.[126] It is informative here to consider a selection of their stories and the impact that the @realDonaldTrump blocking had on them.

Figure 4: Notification that @realDonaldTrump Blocked Follower

This is a screenshot that a follower of @realDonaldTrump received once they were blocked from following his account.

"Being blocked by Trump diminished my ability to respond and engage in the political process," Philip Cohen, a professor of sociology at the University of Maryland,

[125] Jordyn Phelps, *Trump White House hasn't held a traditional press briefing in 6 months*, ABC NEWS (Sept. 11, 2019), https://abcnews.go.com/Politics/trump-white-house-held-traditional-press-briefing-months/story?id=65509975.

[126] Rebecca Pilar Buckwalter-Poza, Philip Cohen, Eugene Gu, Holly Figueroa, Nicholas Pappas, and Brandon Neely, *I Was Blocked by @Realdonaldtrump*, KNIGHT FIRST AMENDMENT INSTITUTE (Mar. 25, 2019), https://knightcolumbia.org/content/i-was-blocked-realdonaldtrump.

said. "There has been measurable impact on my ability to be heard."[127] On June 6, 2017, @realDonaldTrump blocked Cohen after Trump tweeted: "#ICYMI Announcement of Air Traffic Control Initiative . . . Watch," with a link to an official statement.[128] Cohen replied with the comment: "Corrupt Incompetent Authoritarian. And then there are the policies. Resist."[129] Cohen was then blocked.[130]

Another user, Nicholas Pappas, who is verified on Twitter as a comedy writer, said he joined the lawsuit because: "I've never been more scared for our constitutional rights than I am today. I joined … because it's not just me whose voice has been stifled. Dissent as a whole is under threat."[131] On June 5, 2017, @realDonaldTrump blocked Pappas after Trump tweeted: "The Justice Dept. should ask for an expedited hearing of the watered-down Travel Ban before the Supreme Court—& seek much tougher version," adding, "In any event we are EXTREME VETTING people coming into the U.S. in order to keep our country safe. The courts are slow and political!"[132] Pappas replied: "Trump is

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[127] *Id.*

[128] Knight First Amendment Institute v. Trump, 953 F.3d 216 (2d. Cir. 2020); Knight First Amendment Inst. Columbia v. Trump, 928 F.3d 226 (2d. Cir. 2019); Knight First Amendment Institute v. Trump, 302 F.Supp.3d 541 (S.D.N.Y. 2018).

[129] *Id*.

[130] *Id*.

[131] Buckwalter-Poza et al., *supra* note 126.

[132] Knight First Amendment Institute v. Trump, 953 F.3d 216 (2d. Cir. 2020); Knight First Amendment Inst. Columbia v. Trump, 928 F.3d 226 (2d. Cir. 2019); Knight First Amendment Institute v. Trump, 302 F.Supp.3d 541 (S.D.N.Y. 2018).

right. The government should protect the people. That's why the courts are protecting us from him."[133] Pappas was then blocked.[134]

Eugene Gu, a resident in general surgery at Vanderbilt University Medical Center and the CEO of Ganogen Research Institute, was blocked June 18, 2017, after he replied to @realDonaldTrump's tweet that "[t]he new Rasmussen Poll, one of the most accurate in the 2016 Election, just out with a Trump 50% Approval Rating. That's higher than O's #'s!"[135] Gu replied: "Covfefe: The same guy who doesn't proofread his Twitter handles the nuclear button."[136] He was then blocked.[137] "My Twitter following is relatively small, but because my tweets show up in the comment threads under the president's tweets and can be seen by his millions of followers, my replies could gain traction," Gu said. "It felt like a national forum or city council meeting where the content of your speech mattered more than who you were."[138]

Joseph Papp, a former professional road cyclist and current antidoping advocate, was blocked June 3, 2017, after the @realDonaldTrump account tweeted a video of the

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[133] *Id*.

[134] *Id*.

[135] Knight First Amendment Institute v. Trump, 953 F.3d 216 (2d. Cir. 2020); Knight First Amendment Inst. Columbia v. Trump, 928 F.3d 226 (2d. Cir. 2019); Knight First Amendment Institute v. Trump, 302 F.Supp.3d 541 (S.D.N.Y. 2018).

[136] *Id*.

[137] *Id*.

[138] Buckwalter-Poza et al., *supra* note 126.

president's weekly address."[139] Papp responded in a series of tweets that read: "Greetings from Pittsburgh, Sir" and "Why didn't you attend your #PittsburghNotParis rally in DC, Sir? #fakeleader."[140] Papp was then blocked.[141] He later said: "As a registered Republican for 10 years, I didn't join this lawsuit for political reasons, nor did I try to troll or provoke the president. I wanted to partake in the conversation. Being blocked … might be a badge of honor for some people, but when it happened to me, I only felt a deep sense of unease. Everyone being able to see the president's tweets feels vital to democracy."[142]

Each of these users expresses, in different ways, the impact that the blocking had on them, and there is no way to know exactly how many other users @realDonaldTrump blocked. It is significant that at the time all seven plaintiffs were blocked, a White House social media team had full access to @realDonaldTrump and the ability to post from it.[143] This helped the plaintiffs show that Trump was not using the account in only a personal capacity. In a 3-0 decision, the Second Circuit affirmed the district court's holding that Trump's practice of blocking critics violated the First Amendment.[144] The panel made it clear that it was not deciding whether an elected official could violate the Constitution by

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[139] Knight First Amendment Institute v. Trump, 953 F.3d 216 (2d. Cir. 2020); Knight First Amendment Inst. Columbia v. Trump, 928 F.3d 226 (2d. Cir. 2019); Knight First Amendment Institute v. Trump, 302 F.Supp.3d 541 (S.D.N.Y. 2018).

[140] *Id.*

[141] *Id*.

[142] Buckwalter-Poza et al., *supra* note 126.

[143] Knight First Amendment Inst. Columbia v. Trump, 928 F.3d 226, 232 (2d. Cir. 2019).

[144] *Id*. at 229.

excluding users from a wholly private social media account, or whether privately owned social media companies are bound by the First Amendment in policing their platforms. Rather, the panel concluded more narrowly that "the First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise-open online dialogue because they expressed views with which the official disagrees."[145]

The District Court had held that the "interactive space" associated with Trump's tweets constituted a public forum for First Amendment purposes because it was a forum "in which other users may directly interact with the content of the tweets by … replying to, retweeting or liking the tweet."[146] The District Court reasoned that "there can be no serious suggestion that the interactive space is incompatible with expressive activity" and that the president and his aides hold the account open to the public on an easily accessible social media platform.[147] The District Court also found that Trump presented the account as a presidential one and used it "to take actions that can be taken only by the President as President."[148] Moreover, the District Court held, "because the President and [his social media [team]" use the @realDonaldTrump account for governmental functions," they control the account's blocking function.[149] All of which meant that @realDonaldTrump

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[145] *Id*.

[146] Knight First Amendment Institute v. Trump, 302 F.Supp.3d 541, 566 (S.D.N.Y. 2018).

[147] *Id*. at 574-75.

[148] *Id*. at 567.

[149] *Id*. at 569.

was a public form, and by blocking users because of their expressed political views, the government had engaged in viewpoint discrimination.[150]

In affirming, the Second Circuit observed that the central question to be resolved was "whether, in blocking the [plaintiffs] from the interactive features of the account, the President acted in a governmental capacity or as a private citizen."[151] The appellate panel, answering the question, found that after taking office the president had consistently "used [@realDonaldTrump] as an important tool of governance and executive outreach."[152] The panel noted that Trump's tweets usually produced "an extraordinarily high level of public engagement," that the account's public presentation had "all the trappings of an official, state-run account," and that the account was "one of the White House's main vehicles for conducting official business."[153]

The Second Circuit explained that a public forum does not have to be "spatial or geographic" and that "the same principles are applicable" to a metaphysical forum, citing the 1995 case *Rosenberger v. Rector and Visitors of the University of Virginia*.[154] Courts consider the government's "policy and practice," along with "the nature of the property and its compatibility with expressive activity," to determine whether a public forum has been created.[155] The Second Circuit noted that opening a communication instrumentality

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[150] *Id*. at 577.

[151] Knight First Amendment Inst. v. Trump, 928 F.3d 226, 234 (2d. Cir. 2019).

[152] *Id*. at 236.

[153] *Id*. at 231-232.

[154] 515 U.S. 819, 830 (1995).

[155] Cornelius v. NAACP Leg. Def. Fund, 473 U.S. 788, 802 (1985).

"for indiscriminate use by the general public" creates a public forum,[156] and in this case the panel found that @realDonaldTrump was intentionally opened for public discussion when Trump, upon taking office, "used the account as an official vehicle for governance and made its interactive features accessible to the public without limitation."[157] Thus, the account was a public forum, meaning that governmental viewpoint discrimination is not permitted there.[158] The Second Circuit acknowledged that while Trump is "not required to listen, once he opens up the interactive features of his account to the public at large, he is not entitled to censor selected users because they express [disagreeable] views."[159] By blocking the plaintiffs and thus "preventing them from viewing, retweeting, replying to, and liking his tweets," Trump unconstitutionally excluded them from a public forum.[160] In closing, the panel wrote:

> *The irony in all of this is that we write at a time in the history of this nation when the conduct of our government and its officials is subject to wide-open, robust debate. This debate encompasses an extraordinarily broad range of ideas and viewpoints and generates a level of passion and*

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[156] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

[157] Knight First Amendment Inst. Columbia v. Trump, 928 F.3d 226, 237 (2d. Cir. 2019).

[158] Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992).

[159] Knight First Amendment Inst. Columbia v. Trump, 928 F.3d 226, 238 (2d. Cir. 2019).

[160] *Id*. at 238.

> *intensity the likes of which have rarely been seen. This debate, as uncomfortable and as unpleasant as it frequently may be, is nonetheless a good thing. In resolving this appeal, we remind the litigants and the public that if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less.*[161]

Importantly, however, the Second Circuit also noted that "not every social media account operated by a public official is a government account," adding that "[w]hether First Amendment concerns are triggered when a public official uses his account … will in most instances be a fact-specific inquiry."[162] The panel said the outcome of such inquiries would be "informed by how the official describes and uses the account; to whom features of the account are made available; and how others, including government officials and agencies, regard and treat the account."[163] As discussed above, the Second Circuit later denied *en banc* review,[164] and in 2020 the U.S. Supreme Court vacated the judgment and remanded the case with directions to dismiss it as moot,[165] because by then Trump was no longer president.

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[161] *Id*. at 240.

[162] *Id*. at 236.

[163] *Id*.

[164] Knight First Amendment Institute v. Trump, 953 F.3d 216 (2d. Cir. 2020).

[165] Biden v. Knight First Amendment Institute, 593 U.S. __ (2021).

Davison v. Randall

This case is important because it marked the first time a federal appeals court addressed how the public-forum doctrine applies to social media accounts operated by public officials.[166] As noted previously, Phyllis Randall was the elected chair of the Loudon County Board of Supervisors, and she blocked one of her constituents, Brian Davison, from viewing or interacting with her "Chair Phyllis J. Randall" Facebook page, which she created for the stated purpose of allowing constituents to engage with her in a "back and forth conversation" on any topic.[167] In the domain fields of her page, Randall identified herself as a "government official," and the main link in her bio section called up the county government website, all while her official county email and phone number were available on the page, too.[168]

Randall went to great lengths to promote the page in her newsletter and in printed materials in her physical office.[169] She used the account to share updates about actions taken by the Board of Supervisors, such as new funding initiatives, proclamations, and fiscal-year budgets.[170] She also interacted with user comments and encouraged users to

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[166] Davison v. Randall, 912 F.3d 666 (4th Cir. 2019); *see also* Katie Fallow and Ella Solovtsova Epstein, *Fourth Circuit Holds That Blocking on Public Official's Social Media Page Violates First Amendment*, MLRC MEDIA LAW LETTER (February 2019), https://s3.amazonaws.com/kfai-documents/documents/e80ff03dc9/MLRC_MediaLaw Letter_Davison.pdf.

[167] Davison v. Randall, 912 F.3d 666, 673 (4th Cir. 2019).

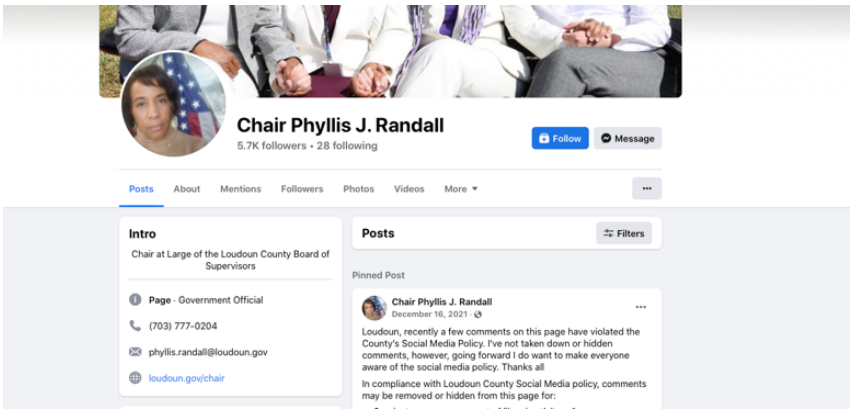
[168] *Id*.

[169] *Id*. at 675.

[170] *Id*.

voice their opinions and concerns.[171] For example, Randall once said on the page that she wanted to "hear from any Loudon citizen on any issues, request, criticism, complement or just your thoughts."[172] She also said she preferred to use Facebook for such conversations because are "Foiable," meaning that they are subject to disclosure under a public-records law.[173]

Figure 5: Phyllis J. Randall Facebook Page



This is what Phyllis J. Randall's Facebook page looked like at the time of the complaint.

On February 3, 2016, Davison attended a Loudoun town hall meeting that included School Board members and Randall.[174] Davison submitted a question implying that certain board members had acted unethically.[175] Randall answered the question but said she did not "appreciate" it.[176] Then, while the meeting was still going on, Davison

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[171] *Id*. at 674-675.

[172] *Id*. at 673.

[173] *Id*.

[174] *Id*. at 675.

[175] *Id*.

[176] *Id*.

tagged Randall and tweeted: "@ChairRandall 'set up question'? You might want to strictly follow FOIA and the COIA as well."[177] Later that night, Randall posted about the meeting on her Facebook page, and in response Davison commented on what she said.[178] Neither one remembers exactly what Davison commented, but Randall testified that the content contained "accusations" regarding School Board members and their families that suggested that they had been "taking kickback money."[179] Randall, who said she did not know if that was true, decided the post was "probably not something [she] want[ed] to leave" on her Facebook page, so she deleted the whole post, which included her original post regarding the meeting, Davison's comment and the replies to it, and all other public comments.[180] Randall also blocked Davison's account from her Facebook page.[181] The next day, Randall reconsidered and unblocked Davison's account, but Davison initiated a lawsuit in the U.S. District Court for the Eastern District of Virginia, proceeding *pro se*, to allege that Randall violated his First Amendment rights, claiming that the blocking of his account constituted governmental viewpoint discrimination in a public forum.[182]

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[177] *Id*.

[178] *Id*.

[179] *Id*.

[180] *Id*.

[181] *Id*.

[182] *Id*.

After a bench trial, the District Court issued a memorandum opinion and order awarding judgment for Davison under the First Amendment.[183] The Court acknowledged first that were some indications that Randall's Facebook page was private: "Defendant's enumerated duties do not include the maintenance of a social media website. The website in question will not revert to the County when Defendant leaves office … , and much of Defendant's social media activity takes place outside of … her office and normal working hours."[184] Those indications, however, were not determinative. The District Court went on to find that Randall's actions "arose out of public, not personal, circumstances" and that Randall acted under color of law in maintaining her Facebook page and in banning Davison from it, observing that the "page was born out of, and is inextricably linked to, the fact of [Randall's] public office."[185] The Court also noted that Randall "used it as a tool of governance" by interacting with constituents and promoting events related to her work.[186] With that in mind, the District Court found that Randall had established a public forum and that it did not even matter which kind, because viewpoint discrimination is not permissible in any forum.[187] So the Court entered a declaratory judgment, accordingly, to resolve the "uncertainty regarding the legal status of [Randall's Facebook page]."[188]

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[183] Davison v. Loudoun Cty. Bd. of Supervisors, 267 F.Supp.3d 702, 714-18 (E.D. Va. 2017).

[184] *Id*. at 712.

[185] *Id*.

[186] *Id*. at 713.

[187] *Id*. at 717.

[188] *Id*. at 723.

On appeal, Randall argued that the District Court erred in concluding that she acted under color of law when she blocked Davison's account and in concluding that the blocking violated the First Amendment. The Fourth Circuit held, first, that Randall acted under color of law, reasoning that she had created and administered the Facebook page to "further her duties as a municipal official" and had used it to provide information to the public about her official activities, while at the same time soliciting input from the public on policy issues.[189] The panel put it this way: "A private citizen could not have created and used the … Facebook page in such a manner."[190] Then, on the issue of whether the page constituted a public forum, the Fourth Circuit walked through the relevant case law defining a public forum generally, ultimately holding that the page "bear[s] the hallmarks of a public forum"—for basically the same reasons discussed above.[191]

The Fourth Circuit said that even accepting just for the sake of argument that Randall's page is private property, the Supreme Court "never has circumscribed forum analysis solely to government-owned property,"[192] and in fact the Supreme Court has held that private property can constitute a public forum were the government retained "substantial control over the property."[193] The panel found that Randall, acting under color of law, retained and exercised such control over the Facebook page.[194] She created

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[189] Davison v. Randall, 912 F.3d 666, 680 (4th Cir. 2019).

[190] *Id*. at 681.

[191] *Id*. at 682.

[192] *Id*. at 683.

[193] *Id*.

[194] *Id*.

it and designated it as belonging to a "governmental official," and she "clothed the page in the trappings of her public office."[195] She also chose, as the panel pointed out, to list her official contact information on the page, and she enjoyed "complete control over the aspect of the [page] giving rise to Davison's challenge because … [she] had authority to ban [other] Facebook profiles or Pages."[196] The Fourth Circuit thus found that Randall's page was a public form and, like the District Court, said it did not need to determine what kind of forum—because viewpoint discrimination is forbidden in all forums. As the panel put it: "Put simply, Randall unconstitutionally sought to 'suppress' Davison's opinion that there was corruption on the School Board. That Randall's action targeted comments critical of the … members' official actions and fitness for office renders the banning all the more problematic as such speech 'occupies the core of the protection afforded by the First Amendment.'"[197]

Campbell v. Reisch

Cheri Toalson Reisch created a Twitter account in 2015, at the same time she announced she would run for state representative.[198] Her first tweet read: "I am proud to announce my candidacy to represent Missouri's 44th District. Let's work together & create opportunities for jobs and education" (her handle was @CheriMO44).[199] She went

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[195] *Id*.

[196] *Id*. at 684.

[197] *Id*. at 688.

[198] Campbell v. Reisch, 986 F.3d 822, 823 (8th Cir. 2021).

[199] Campbell v. Reisch, No. 2:18-CV-4129-BCW, 2019 WL 3856591, at 2 (W.D. Mo. Aug. 16, 2019).

on to use the account to seek support and financial contributions during her campaign,[200] and ultimately, in the first ten months of 2016, Reisch posted dozens of tweets about her campaign, often using the hashtags #MO44 and #TeamCheri.[201] She eventually won the election and announced it on Twitter on November 8, 2016.[202] In her first year and a half in office, Reisch "routinely tweeted or retweeted about her work as a state representative and posted pictures of herself on the House floor or standing with other elected officials," and she used her account to engage in "discourse about political topics and/or to indicate her position relative to other government officials."[203]

Figure 6: Cheri Toalson Reisch's Twitter Account

This is Reisch's Twitter account where she identified herself as a state representative and showcased photos working in her official capacity on the Missouri House floor.

On June 22, 2018, when Reisch was running for reelection, she tweeted about her appearance at a farm bureau event, saying, "Sad my opponent put her hands behind her

[200] *Id.*

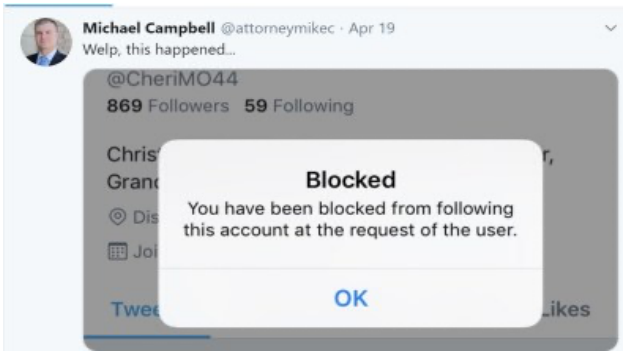
[201] *Id.*

[202] *Id.*

[203] *Id.* at 3.

back during the Pledge," referring to her political opponent Maren Jones, who was also at the event.[204] The next day, one of Reisch's fellow lawmakers tweeted about it, writing, "Maren's father was a Lieutenant in the Army. Two of her brothers served in the military. I don't question [Maren's] patriotism. That's a low blow and unacceptable from a member of the … delegation."[205] Mike Campbell, one of Reisch's constituents, then retweeted that response on his own page.[206] He later received a message that Reisch had blocked him (he did not know it at the time, but she had also blocked at least 123 other Twitter users), and he even tweeted a screenshot of it.

Figure 7: Blocked: Michael Campbell's Account



A screenshot showing that Campbell was blocked by Twitter user @CheriMO44, which was Reisch's account.

Campbell sued Reisch in the U.S. District Court for the Western District of Missouri, where he sought declaratory and injunctive relief against under 42 U.S.C. § 1983.[207] Specifically, Campbell wanted a declaration that Reisch's blocking was "a

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.* at 1.

viewpoint-based restriction of speech in a designated public forum" in violation of the First Amendment, along with a permanent injunction barring Reisch from continuing to block Campbell and other Twitter users based on the viewpoint of their speech.[208] The District Court held that Campbell had been deprived of a constitutional right, insofar as the speech at issue was protected and expressed in a public forum.[209]

The Court, relying on the *Trump* cases, found that Reisch's account was subject to forum analysis because the government effectively controls the account: "Even though [Reisch] does not control the functions available on Twitter, [she] has control over the use of those functions, including the block function, which ultimately allows [Reisch]to curate the interactive space on her account. Consequently, [Reisch] controls access to the interactive space of her tweets."[210] The District Court said that such control equates to government control because the creation of Reisch's account "coincided with the start of her campaign for state representative," and her Twitter handle, @CheriMO44, referenced Reisch's role as a state representative as well as her district.[211] The Court also noted that the account's "personal references" were "overshadow[ed]" by its various "government associations,"[212] and ultimately the Court deemed Reisch's account to be a designated public forum.[213] Against that background, the District Court then held that Campbell's

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[208] *Id*.

[209] *Id*. at 4-5.

[210] *Id*. at 6.

[211] *Id*.

[212] *Id*.

[213] *Id*. at 6-7.

blocking constituted viewpoint discrimination and therefore violated his constitutional rights—on the conclusion that Reisch blocked Campbell "based on his expressive activity in critique of [Reisch]."[214] Thus, the District Court granted declaratory and injunctive relief to Campbell.

The Eighth Circuit reversed.[215] The panel reasoned that Reisch's account was "fundamentally different" from those at issue in the *Trump* and *Davison* cases, which also were not "concerned with distinguishing an official page from a campaign page," so they "do not offer much guidance."[216] The Court noted that Reisch's account was created when she was a private person ("someone who isn't a public official cannot create an official governmental account") and that she used it "overwhelmingly for campaign purposes."[217] Reisch's election did not alter the account's basic character, the Court said, emphasizing that the "overall theme of Reisch's tweets—that's she's the right person for the job—largely remained the same after her electoral victory."[218] Reisch's tweets often "harkened back to promises she made on the campaign trail," even if she did occasionally use the account to "provide updates on where certain bills were in the legislative process or the effect certain recently enacted laws had had on the state."[219] To the Eighth Circuit those tweets were consistent with her campaign purposes because they showed voters that

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[214] *Id*. at 8.

[215] Campbell v. Reisch, 986 F.3d 822 (8th Cir. 2021).

[216] *Id*. at 826.

[217] *Id*.

[218] *Id*.

[219] *Id*.

"she was actively advancing her legislative agenda and fulfilling campaign promises."[220] Moreover, the panel dismissed the account's "trappings" (e.g., the Twitter handle and the photos at the top of the page showing Reisch on the House floor), saying that the "Twitter page of a political candidate does not convert itself into an official page just because the candidate chooses a handle that reflects the office she is pursuing … or because she posts a photo of herself working at the job she was elected to perform and hopes to be elected to perform again."[221] In closing, the panel concluded:

> *In short, we think Reisch's Twitter account is more akin to a campaign newsletter than to anything else, and so it's Reisch's prerogative to select her audience and present her page as she sees fit. … Reisch's own First Amendment right to craft her campaign materials necessarily trumps Campbell's desire to convey a message on her Twitter page that she does not wish to convey. … While Reisch's posts open up an interactive space where Twitter users may speak, that doesn't mean that Reisch cannot control who gets to speak or what gets posted. It's her page to manage as she likes.*[222]

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[220] *Id*.

[221] *Id*. at 827.

[222] *Id*. at 827-828.

Judge Jane Kelly dissented. She reasoned that Reisch's election *did* change how Reisch used the account.[223] Judge Kelly pointed out that between January 2017 and February 2019 (when Reisch was in office), she did not tweet a single request for campaign donations or make any reference to her campaign hashtag, #TeamCheri.[224] Most of Reisch's tweets and retweets in that time period reported on new laws and/or provided information about the legislature's work and Reisch's own official activities.[225] Reisch also interacted with constituents and Missouri residents on the page, and Judge Kelly, referring to the page's "trappings of … public office," said Reisch's "persistent invocation of her position as an elected official overwhelmed any implicit references one might perceive to her campaign or future political ambitions."[226]

And although the panel concluded that Reisch's tweets were simply "show[ing] voters that she was ... fulfilling campaign promises," Judge Kelly said that does not mean "an official whose challenged conduct is closely related to her official responsibilities cannot act 'under color of … law' [just] because her actions simultaneously further personal goals or motives." Judge Kelly added: "Indeed, it seems that the statements of lawmakers carrying out their official duty to communicate information to constituents will … often harken back to some campaign promise or another, so this factor does not merit the outsized importance the court places on it."[227] Finally, concluding that Reisch

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[223] *Id*. at 828.

[224] *Id*.

[225] *Id*. at 829.

[226] *Id*.

[227] *Id*.

was acting under color of law, Judge Kelly also concluded that Reisch engaged in viewpoint discrimination and, in turn, violated the First Amendment.[228]

West v. Shea

Christina Shea, the mayor of Irvine, California, was up for reelection in 2020.[229] At the time, she had multiple Facebook accounts: one in her role as mayor, one titled "Christina Shea, Irvine City Mayor," and one with the features of both an official and a personal account.[230] The third account, at issue in this case, was accessible by the general public and allowed any user, even one not a Facebook friend of Shea, to see the content and engage with it, including through the posting of comments.[231] Shea used the account to post photos of herself with her grandchildren and dogs, and the profile identified Shea as a realtor, with no links to Irvine government websites.[232] However, Shea did use the account sometimes to share information regarding mayoral activities and positions and to communicate with constituents.[233] In June of 2020, in the wake of the murder of George Floyd, as street protests were raging nationwide, Shea posted on this Facebook account about the Black Lives Matter movement.[234]

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[228] *Id*. at 830-831.

[229] West v. Shea, 500 F. Supp. 3d 1079 (C.D. Cal. 2020).

[230] *Id*. at 1082-1083.

[231] *Id*. at 1085.

[232] *Id*.

[233] *Id*.

[234] *Id*. at 1084.

Figure 8: Christina Shea's Facebook Post

This is the Facebook post Christina Shea posted about the Black Lives Matter movement.

Lamar West, a software engineer and constituent of Shea, was one of over 100 people who commented on the post, saying, "Like other educated people have mentioned it's okay for you to support the movement and not defund the police but you don't want to do either. I can hear the racist ancestors of yours in this post and it's sickening. Enjoy your position while it lasts."[235] Shea did not respond to West's comment, but she did respond to some of the other negative comments on her post.[236] Shortly thereafter, Shea blocked West (among other users) from her account.[237] West and others then contacted Shea to demand that she unblock them and restore their posts, but Shea did not do so, and in fact she deleted her original post and added a statement in the "info" box of her profile stating: "[T]his is not a government page."[238] West sued Shea in the U.S. District Court for the Central District of California, alleging that Shea's account was a public forum and

[235] *Id*. at 1083.

[236] *Id*.

[237] *Id*. at 1084.

[238] *Id*.

that she committed viewpoint discrimination in violation of the First Amendment.[239] Shea filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), which tests the legal sufficiency of a plaintiff's claims.

Ruling on the motion to dismiss, the District Court addressed several issues, among them: whether Shea's account was a public forum and whether Shea was acting under color of law when she blocked West.[240] Shea argued that her account was not a public forum because of several facts noted above: her posts included photos of herself with her grandchildren and dogs, and the profile identified Shea as a realtor, with no links to Irvine government websites.[241] The District Court, unpersuaded, pointed out that West was able to present evidence that the profile was easily accessible by the general public and that Shea used the account to conduct some official business—and that Shea's other two Facebook accounts had fewer followers and friends than this account ("A reasonable inference … is that Defendant used [this one] for her official business, even though she also had other ways of reaching her constituents on Facebook.").[242] The District Court added that even if Shea's account were a non-public forum, as Shea argued, West had sufficiently alleged that his expression was suppressed because Shea disagreed with his views.[243] That is significant, the Court said, because governmental restrictions on speech, even in non-public forums, must not be "an effort to suppress expression merely because

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[239] *Id*.

[240] *Id*. at 1085.

[241] *Id*.

[242] *Id*.

[243] *Id*. at 1085-1086.

public officials oppose the speaker's view."[244] The Court also found that Shea was acting under color of law when she blocked West, reasoning that West had sufficiently alleged as much because he provided examples of posts in which Shea clearly "described actions she took as mayor, including ordinances she co-authored, ceremonies she officiated, and meetings she attended," as well as interactions with constituents.[245] Citing *Davison*, the District Court observed that other courts have relied on such factors to find "state action with regard to social media profiles," and therefore the Court denied Shea's motion to dismiss.[246]

In the end, the city of Irvine settled the claim for nearly $40,000 (plus $80,000 in attorney's fees).[247] West celebrated the settlement as "a huge step in the right direction," adding, "Public officials need to be held accountable for their actions especially when they affect our constitutional rights. I'd like to urge all the young, black, people of color, residents of Irvine and other cities to continue fighting injustices wherever they may exist."[248] For her part, Shea was unmoved. She said she "did the right thing" and that West "didn't win the case." She explained: "He didn't win anything. He just wanted to

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[244] *Id*. at 1086.

[245] *Id*.

[246] *Id*.

[247] Ben Brazil, *Irvine settles lawsuit that accused former Irvine mayor of violating a resident's 1st Amendment rights*, THE PILOT (Jan. 21, 2021), https://www.latimes.com/socal/daily-pilot/entertainment/story/2021-01-12/irvine-settles-lawsuit-that-accused-former-irvine-mayor-of-violating-a-residents-1st-amendment-rights.

[248] *Id*.

get this attorney paid off, obviously. That's why that was settled."[249] Shea also said she disagreed with the decision to settle.[250] It was out of her hands, though, because she lost her reelection bid, and the city's new administration chose to settle and released a sharp statement about it one day after the new mayor was sworn in.[251] It was a strong rebuke of Shea's actions, reading in part:

> *[T]his whole situation could have been avoided had former Mayor Shea not blocked the users and deleted the posts. The City of Irvine holds itself to high standards. It encourages robust discussion of important public issues, and it disapproves of actions that silence the voices of those with opposing points of view.*

The statement also said that the city of Irvine "holds itself to high standards" and that "[p]utting aside the question of what is 'legal,' the City believes that … Shea's actions did not meet the City's standards and expectations."[252] That prompted Shea to respond: "If I had not lost the election, I would have pursued this case to the end."[253]

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[249] *Id*.

[250] *Id*.

[251] *Id*.

[252] *Id*.

[253] *Id*.

CHAPTER 3

Conclusion

The way government officials and ordinary citizens alike exercise the right to free speech and engage with others in the marketplace of ideas has fundamentally changed.[254] "Having dramatically lowered the barriers to public participation, the Internet has helped elected officials reach and communicate with constituents in real time and has amplified citizens' voices."[255] This has "wrought a transformative shift in American public life."[256] Exchanges that once generally occurred in public squares (and in spaces like newspaper op-ed pages) are increasingly occurring on social media platforms. Public officials at all levels of the government, from local lawmakers to the president of the United States, are using social media to conduct official business and to showcase, often in the context of a reelection campaign, what they're doing in office. Similarly, candidates for elected office are using social media during campaigns to connect with voters and to raise awareness of their positions and the interests they will serve if elected. Against that background, this thesis explored the question of how courts distinguish certain uses of social media in the

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[254] Nathan Honeycutt, *Political Intolerance Among University Faculty Highlights Need For Viewpoint Diversity*, FORBES (November 21, 2016), https://perma.cc/96NR-URD3.

[255] Brief of Amici Curiae First Amendment Legal Scholars in Support of Plaintiffs' Motion for Summary Judgment, in Knight First Amendment Institute at Columbia University, et al., v. Donald J. Trump, et al. (S.D.N.Y. 2017), https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/02/knight-amicus-brief.pdf

[256] *Id*.

context of a claim that a person's account is a public forum under the First Amendment. More specifically, this thesis explored how courts treat the personal account of a public official and how courts treat the campaign account of a person who is running for office, especially if that person is a sitting public official.

In the case *Knight First Amendment Institute v. Trump*, the District Court focused on whether Trump's personal account was interactive and easily accessible by the general public, also noting that Trump presented the account as a presidential one and used it for "governmental functions"[257] and "to take actions that can be taken only by the President as President."[258] The Second Circuit found that after taking office Trump had consistently used the account "as an important tool of governance and executive outreach,"[259] and the panel said the account's public presentation had "all the trappings of an official, state-run account."[260] The Second Circuit also found that @realDonaldTrump was opened up for public discussion as soon as Trump, upon taking office, "used the account as an official vehicle for governance and made its interactive features accessible to the public without limitation."[261] Importantly, however, the Second Circuit also held that "not every social media account operated by a public official is a government account," adding, "Whether First Amendment concerns are triggered when a public official uses his account … will in

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[257] Knight First Amendment Institute v. Trump, 302 F.Supp.3d 541, 569 (S.D.N.Y. 2018).

[258] *Id*. at 567.

[259] Knight First Amendment Inst. Columbia v. Trump, 928 F.3d 226, 236 (2d. Cir. 2019).

[260] *Id*. at 231-232.

[261] *Id*. at 237.

most instances be a fact-specific inquiry" that should be "informed by how the official describes and uses the account; to whom features of the account are made available; and how others, including government officials and agencies, regard and treat the account."[262]

In the *Davison v. Randall* case, the District Court acknowledged some indications that Randall's page was private: "[Her] enumerated duties do not include the maintenance of a social media website. The website … will not revert to the County when Defendant leaves office … , and much of [her] social media activity takes place outside of … her office and normal working hours."[263] Those indications, however, were not dispositive. The District Court found that Randall's social media activity "arose out of public, not personal, circumstances" because the "page was born out of, and is inextricably linked to, the fact of [Randall's] public office."[264] The District Court also noted that Randall "used it as a tool of governance" by interacting with constituents and promoting her work.[265] The Fourth Circuit focused on the fact that Randall had created and administered the Facebook page to "further her duties as a municipal official" and had used it to provide information to the public about her official activities.[266] She designated it as belonging to a "governmental official" and "clothed the page in the trappings of her public office."[267]

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[262] *Id*. at 236.

[263] Davison v. Randall, 912 F.3d 666, 712 (4th Cir. 2019).

[264] *Id*.

[265] *Id*. at 713.

[266] *Id*. at 680.

[267] *Id*.

In the *Campbell v. Reisch* case, the District Court found that Reisch's account was subject to forum analysis because the government effectively controlled it, in the sense that her control equated to government control because the account's creation "coincided with the start of her campaign," and her Twitter handle referenced Reisch's role as a state representative and her district.[268] The Court also reasoned that the account's "personal references" were "overshadow[ed]" by its "government associations."[269] In contrast, the Eighth Circuit held Reisch used the account "overwhelmingly for campaign purposes" and noted that her election did not alter the account's basic character (the "overall theme of Reisch's tweets—that's she's the right person for the job—largely remained the same after her electoral victory.").[270] To the Eighth Circuit such tweets were consistent with Reisch's campaign purposes because they showed voters that "she was … advancing her legislative agenda and fulfilling campaign promises."[271] The panel also dismissed the account's "trappings" as not indicative of Reisch's actual use of the account.[272] In closing, the panel said Reisch's account was "more akin to a campaign newsletter than to anything else."[273] Judge Kelly, in dissent, said Reisch used the account for official business and referred to the page's "trappings," saying that "persistent invocation of her position as an

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[268] Campbell v. Reisch, No. 2:18-CV-4129-BCW, 2019 WL 3856591, at 6 (W.D. Mo. Aug. 16, 2019).

[269] *Id*.

[270] Campbell v. Reisch, 986 F.3d 822, 826 (8th Cir. 2021).

[271] *Id*.

[272] *Id*. at 827.

[273] *Id*. at 827-828.

elected official overwhelmed" any implicit campaigning that was occurring.[274] She also said it did not make sense to conclude that a public official can't conduct public business and campaign at the same time: "Indeed, it seems that the statements of lawmakers carrying out their official duty to communicate information to constituents will … often harken back to some campaign promise or another, so this factor does not merit the outsized importance the court places on it."[275]

In the *West v. Shea* case, the District Court found that Shea's account was a public forum because the profile was easily accessible by the general public, and Shea used it to conduct some official business—and her other two accounts had fewer followers and friends ("A reasonable inference … is that [Shea] used [this one] for her official business, even though she also had other ways of reaching her constituents on Facebook.").[276] The Court also found that Shea acted under color of law when she blocked West, pointing to posts in which Shea "described actions she took as mayor, including ordinances she co-authored, ceremonies she officiated, and meetings she attended," as well as interactions with constituents.[277] The Court observed that other courts have relied on such factors to find "state action with regard to social media profiles."[278]

First, taking those cases together to consider what would be the best approach normatively with respect to how courts *should* treat the personal account of a public

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[274] *Id*.

[275] *Id*.

[276] West v. Shea, 500 F. Supp. 3d 1079, 1085 (C.D. Cal. 2020).

[277] *Id*.

[278] *Id*.

official, the starting point is to recognize that there is no established bright-line rule, and in the absence of one it would be best to consider various factors in determining whether a particular public official's personal account is subject to forum analysis. In *Davison*, the Fourth Circuit reasoned that Randall used the page in question as a "tool of governance" to "further her duties as a municipal official."[279] Whether an account is used as a "tool of governance" should be determined using a five-factor test. The factors should include the trappings of the account (e.g., how the public official is identified in the bio, any links to government websites in the bio, any photos in the bio or header areas that depict the public official conducting government business, and any language stating that the account is dedicated to governmental or personal purposes); to whom the account and its contents are accessible (e.g., the general public or only friends); how the public official uses the account (e.g., to conduct official business, to post about official business, and to interact with constituents); when the account was created (e.g., when the public official was a private citizen, when s/he was running for elected office, after s/he assumed elected office); how other parties, including public officials and government agencies, regard the account and its content (e.g., seeing the content as directives or orders or as official statements); and who has access to post from the account (e.g., only the public official, the public official and a governmental social media or communications team, etc.). If the account is found to be a "tool of governance," then it should be treated as a public forum under the First Amendment.

Second, taking those same cases together to consider what would be the best approach normatively with respect to how courts *should* treat the campaign account of a

[279] *Id.* at 680.

person who is running for office, the starting point here is to state that *Reisch* got it wrong, at least as it concerned a public official running for reelection. It is a "fiction that politicians in office can segregate their time between official … and reelection work," as one legal commentator put it, because there "there is no principled way to distinguish … a politician's official social media account and a separate campaign account.[280] The basic reason is that they "have the same objective—to raise public awareness of the politician's great work on behalf of the politician's constituents—and … the same effect of boosting an incumbent over challengers."[281] And as the *Reisch* dissent put it, "the [social media content] of lawmakers carrying out their official duty to communicate information to constituents will … often harken back to some campaign promise or another."[282] Plus, the *Reisch* panel's analogy to a newsletter is inapt, because a newsletter lacks the interactive features of social media, which have greater capabilities to connect people in real time.

For these reasons, there should be a rule that the campaign account of a public official running for reelection is subject to forum analysis under the various factors outlined above for determining whether a public official's personal account is subject to forum analysis, and the rule should include an irrebuttable presumption that all content reasonably related to their position and work as a public official will be construed as part of their official duties. The presumption should be irrebuttable because that would protect

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[280] Venkat Balasubramani, *Politician Can Block Constituents at Twitter–If It's a "Campaign" Account–Campbell v. Reisch*, TECHNOLOGY & MARKETING LAW BLOG (Jan. 28, 2021), https://blog.ericgoldman.org/archives/2021/01/politician-can-block-constituents-at-twitter-if-its-a-campaign-account-campbell-v-reisch.htm.

[281] Campbell v. Reisch, 986 F.3d 822, 829 (8th Cir. 2021).

[282] *Id*.

the largest amount of speech. However, if the person campaigning is *not* a sitting public official (instead, s/he is a private person running for office), then that person's social media activities would not subject the account to forum analysis. This would prevent the exception from swallowing the rule and would, in its own way, underline the point that the social media accounts of public officials, as public forums, occupy a special place in First Amendment law and in the marketplace of ideas.[283]

Outside the law, technological intervention may be needed. For example, social media companies could provide a solution—to some of these problems, at least—if they refined and expanded their criteria for "public official" accounts, if they compelled that designation where appropriate, and if they made it impossible for those accounts to block followers. Beyond that, individual users could take better advantage of the existing tools and features on the platforms to draw clear lines between personal and official accounts. At the very least, if a public official wishes to have a personal social media presence, then s/he should create two different pages with explicitly separate purposes. For example, in the case of Facebook that would mean one private profile and one public page, and in the case of Twitter that would mean one public and one with all tweets set to private (if an account is protected on Twitter, the tweets are not visible to the general public and may be seen only by users the account holder has approved). In summary, depending on the platform, there are technical ways to differentiate public and private communications. Just as government officials are required to separate email accounts, phone accounts, and electronic devices in the workplace context, social media separation can and should be

[283] *Snepp v. United States*, 444 U.S. 507 (1980).

achieved within the platforms themselves to make consistent the distinction that exists for other forms of technology.

Social media platforms are not going anywhere. Public officials' social pages encourage real-time dialogue on social and political issues, giving Americans access to a recourse to "petition their elected representatives and otherwise engage with them in a direct manner."[284] We must continue to critically consider new tools, including the employment of deliberately separate pages or accounts, to help solve these issues as we also explore the best doctrinal approach to protect public discourse and free expression on social media. It is crucial to hold government officials accountable for their exercises and projections of public power when they restrict the public's free expression anywhere and by any medium, including through companies like Twitter and Facebook, where so much public discussion occurs today about all manner of matters of public concern.

[284] Packingham v. North Carolina, 137 S.Ct. 1730, 1735 (2017).

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