

ARTICLE

FROM TOWN SQUARE TO TWITTERSPHERE: THE PUBLIC FORUM DOCTRINE GOES DIGITAL

DAWN CARLA NUNZIATO¹

Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media. The extent of public entitlement to participate in those means of communication may be changed as technologies change. . . .²

¹ William Wallace Kirkpatrick Research Professor of Law, The George Washington University Law School; Co-Director, Global Internet Freedom and Human Rights Project. I am very grateful to Alexia Khella and Ken Rodriguez for providing excellent research and library assistance in connection with this article, to Adam Wald and the editors of the Boston University Journal of Science and Technology Law for their thoughtful and careful editorial assistance, to Kierre Hannon for excellent administrative assistance, and to Deans Naomi Cahn and Blake Morant for support of my research.

² Denver Area Educ. Telecomm, Consortium v. F.C.C., 518 U.S. 727, 802-03 (1996) (Kennedy J., joined by Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citations omitted).

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INTRODUCTION

Government officials like President Donald J. Trump and Maryland Governor Larry Hogan are increasingly using popular social media sites like Twitter and Facebook to connect and interact with their constituents and to solicit public comment on matters of public importance – whether on officially-designated government platforms like <https://www.facebook.com/GovLarryHogan/>,³ or on unofficial platforms used for the same purposes like @realDonaldTrump on Twitter. In recent years, government officials have turned to social media platforms like Twitter and Facebook in place of, and in addition to, town halls and other real-space forums to solicit public participation in policy formulation and to engage with their constituents.

When interactions between government officials and their constituents occur in physical spaces such as town halls, those spaces fall comfortably within the scope of the First Amendment’s public forum doctrine — which provides strong protections for freedom of speech and assembly and which prohibits government officials from discriminating against or silencing speakers based on their viewpoint. However, when such interactions take place in cyberspace — for instance, on social media sites like Twitter and Facebook — the application of this doctrine becomes somewhat less clear. Social media sites like Twitter and Facebook are privately owned, which raises issues for the application of the First Amendment’s public forum doctrine. The public forum doctrine — which provides the greatest protection for free speech generally, as well as against content and viewpoint discrimination — traditionally applies to government-owned or controlled, rather than privately-owned or controlled, property. The private ownership of social media sites also raises issues for the application of the First Amendment’s state action doctrine, which provides that the restriction of speech by and through private actors does not implicate the First Amendment except in narrow, limited circumstances.

This Article examines whether and to what extent government officials’ use of social media sites to interact with their constituents constitutes a public forum and what this analysis means for the ability of government officials to block or censor constituents on their social media accounts, as President Donald Trump recently has done when blocking constituents with whom he disagrees on his @realDonaldTrump Twitter account. Similar issues have arisen in the context of Maryland Governor Larry Hogan’s and Virginia County Commissioner Phyllis Randall’s blocking of constituents on their Facebook pages in response to being asked challenging questions.⁴ The recent Supreme Court case of *Packingham v. North Carolina*⁵ sheds some light on the application of the public forum doctrine to social media sites and the use and misuse of such sites by government officials. In particular, Justice Kennedy’s opinion for the Court in *Packingham*

³ Governor Larry Hogan (@GovLarryHogan), FACEBOOK, <https://www.facebook.com/GovLarryHogan>. [https://perma.cc/VDE5-YVTN] (last visited Dec. 7, 2018).

⁴ See discussion *infra* Parts I, III.

⁵ *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

extends his functional, expansive conception of the public forum doctrine to non-traditional forums that function as forums for public discourse.⁶

Part I of this Article examines in detail the circumstances surrounding recent incidents in which government officials have blocked constituents from following them on Twitter and from commenting on their Facebook pages. Part II undertakes an analysis of the historical development of the public forum doctrine, its recent development in the digital age, as well as the government speech doctrine and the contrast between public forums and government speech. Part III applies the forum analysis developed in Part II to recent incidents in which government officials have blocked constituents from accessing their social media sites, with an in-depth analysis of the *Knight First Amendment Inst. v. Trump* case — involving President Trump’s Twitter account, and concludes that such social media sites constitute public forums in which viewpoint discrimination is illegal. Finally, Part IV provides suggestions to government officials for developing policies governing social media accounts that comply with the dictates of the First Amendment.

I. THE ISSUE: GOVERNMENT OFFICIALS’ ACTS OF BLOCKING CONSTITUENTS ON THE BASIS OF VIEWPOINT.

In recent years, government officials — at the local, state, and national levels — have increasingly turned to social media sites like Facebook and Twitter to communicate and interact with their constituents. According to the Congressional Research Service, virtually all members of Congress have at least one official congressional social media account,⁷ though officials utilize both official government and unofficial personal accounts for government purposes. For instance, Maryland Governor Larry Hogan created an official Facebook page to make announcements and to interact with his constituents.⁸ Additionally, Phyllis Randall, Chair-at-Large of the Loudoun County, Virginia Board of Supervisors, created an unofficial Facebook page for similar purposes.⁹ Perhaps most notably, President Donald Trump often chooses to interact with constituents and make announcements on a variety of government policies through his personal Twitter account, @realDonaldTrump, rather than through his official government twitter accounts, @POTUS and @WhiteHouse.¹⁰

As the Supreme Court recently recognized in *Packingham v. North Carolina*, social media sites are ideal forums for constituents to “petition their elected

⁶ *Id.* at 1735-36.

⁷ See JACOB R. STRAUS & MATTHEW E. GLASSMAN, CONG. RESEARCH SERV., SOCIAL MEDIA IN CONGRESS: THE IMPACT OF ELECTRONIC MEDIA ON MEMBER COMMUNICATIONS (2016).

⁸ Hogan, *supra* note 3.

⁹ Chair Phyllis J. Randall, FACEBOOK, <https://www.facebook.com/Chair-Phyllis-J-Randall-1726409590911855> [<https://perma.cc/ZFE2-3H72>] (last visited Sept. 15, 2018).

¹⁰ Donald J. Trump (@realDonaldTrump), TWITTER, <https://twitter.com/realDonaldTrump> [<https://perma.cc/EB3P-94NM>] (last visited Jan. 19, 2019).

representatives and otherwise engage with them in a direct manner.”¹¹ However, problems arise when government officials attempt to limit access and restrict such forums to those who agree with them, while banning those who challenge or disagree with them — as Governor Hogan, Chair Randall, and President Trump have each recently done.¹² Governor Hogan and Chair Randall blocked constituents who posted critical and challenging comments from their respective Facebook pages,¹³ while President Trump blocked citizens from following him on Twitter after they posted critical comments.¹⁴ In each case, the blocked users have sued the government officials who had blocked them, claiming that these platforms constituted public forums and that their having been blocked amounted to a violation of their First Amendment rights.¹⁵ The government officials at issue have responded (1) that their social media accounts do not constitute public forums; (2) that they are making personal not government use of such forums; (3) that, in the alternative, their speech is “government speech” immune from the dictates of the Free Speech Clause; and (4) that, in any case, they enjoy the discretion to block citizens’ access and to delete users’ posts from these accounts.¹⁶ Below, I turn to the details of each of these cases to develop a better understanding of the First Amendment interests at stake.

A. Maryland Governor Larry Hogan’s Acts of Blocking Constituents and Deleting Their Comments From His Official Facebook Page

Governor Larry Hogan’s official Facebook page, <https://www.facebook.com/GovLarryHogan>, serves as a means of “promot[ing] and disseminat[ing] information on Governor Hogan’s initiatives, events, and personal announcements” and as a “forum for constructive and respectful discussion with and among users.”¹⁷ Indeed, he uses this page as a vehicle to promote his

¹¹ *Packingham v. North Carolina*, 137 S. Ct 1730, 1735 (2017).

¹² See discussion *infra* Parts I, III. For the purposes of this article, a government official “blocks” a constituent in all instances of constituent blocking on the government officials’ social media sites, regardless of whether they or an individual that they empowered actually undertook the blocking.

¹³ See, e.g., Ovetta Wiggins & Fenit Nirappil, *Gov. Hogan’s Office Has Blocked 450 People From His Facebook Page in Two Years*, WASH. POST (Feb. 2, 2017), https://www.washingtonpost.com/local/md-politics/gov-hogans-office-has-blocked-450-people-from-his-facebook-page-in-two-years/2017/02/08/54a62e66-ed45-11e6-9973-c5efb7ccfb0d_story.html?utm_term=.a9e0287239ed [https://perma.cc/SBE9-GFGX].

¹⁴ See, e.g., Nancy Coleman, *It Doesn’t Take Much for Trump to Block You On Twitter*, CNN (June 9, 2017, 9:09 AM), <https://www.cnn.com/2017/06/09/politics/trump-twitter-block-users-trnd/index.html> [https://perma.cc/FG55-ZW8T].

¹⁵ See Complaint at 3, *Laurenson et al. v. Hogan*, No. 8:17 Civ. 02162-DKC (D. Md. Aug. 1, 2017); Complaint at 2-3, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 1:17 Civ. 05205).

¹⁶ See Motion of Government for Summary Judgment at 13-22, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205).

¹⁷ Exhibit A to Complaint, *Laurenson et al.*, No. 8:17 Civ. 02162-DKC.

positions on policy issues, to engage with his constituents, and to share information about his official activities as governor.¹⁸ While intended to allow Governor Hogan to communicate and interact directly with his constituents,¹⁹ his Facebook page was governed by a social media policy granting him the ability to delete constituent comments if they were “inappropriate” or not on-topic²⁰ as well as to delete comments and block constituents “at any time without prior notice or without providing justification.”²¹

Since establishing his official Facebook page, Governor Hogan has blocked over 450 people from accessing it — all after they had posted comments that he apparently viewed as challenging or critical of him.²² About half of those instances of blocking came in two waves — first, after the controversial 2015 death of Freddie Gray, which implicated the Baltimore Police Department, and second, after the protests responding to President Trump’s January 2017 executive order, known as the “Muslim ban” (President Trump’s “Executive Order” or the “Executive Order”).²³

In one such case Governor Hogan blocked Meredith Phillips, a Maryland citizen and former Democrat who crossed party lines to vote for the Republican Governor Hogan, after she posted to his Facebook page requesting that Governor Hogan make a public statement about President Trump’s Executive Order.²⁴ Concerned that Maryland residents had not heard from their Governor on the issue, Phillips’ first comment came two days after the Executive Order and was in response to Governor Hogan’s then-most-recent post.²⁵ In the post, she asked whether Governor Hogan planned to “speak out on the Muslim ban.”²⁶ A few hours later, she noticed that her comment had been deleted.²⁷ Shortly thereafter, Phillips re-posted her comment, adding that she “crossed party lines to vote for [Governor Hogan]” and that she hoped Governor Hogan would “stand up for all

¹⁸ Ovetta Wiggins, *Why Maryland Gov. Larry Hogan Uses Facebook Much More Than Twitter*, WASH. POST (Dec. 4, 2015), https://www.washingtonpost.com/local/md-politics/why-maryland-gov-larry-hogan-uses-facebook-much-more-than-twitter/2015/12/04/7762554a-87bd-11e5-be39-0034bb576eee_story.html?utm_term=.c86e897d0ce9 [https://perma.cc/QW9V-WMCP]

(“The governor views social media, especially Facebook, as a way to talk directly to the people of this state without the interference of traditional media,” Hogan spokesman Doug Mayer said . . . Hogan and his communications staff post to Facebook multiple times a day.”).

¹⁹ Hogan, *supra* note 3.

²⁰ Exhibit A to Complaint, *Laurenson et al. v. Hogan*, No. 8:17 Civ. 02162-DKC (filed on Aug. 1, 2017).

²¹ *Id.*

²² See Wiggins & Nirappil, *supra* note 13 (attributing half of the blocks to “hateful or racist” language, according to Hogan’s spokesman).

²³ *Id.*

²⁴ Complaint at 11, *Laurenson*, No. 8:17 Civ. 02162-DKC.

²⁵ *Id.* at 11-12.

²⁶ *Id.* at 11.

²⁷ *Id.*

Marylanders and not just those that agree with [him].”²⁸ A few hours after posting her second comment, it had likewise been deleted.²⁹ Phillips attempted to repost her comment for a third time, but was outright restricted from doing so.³⁰ Further, Phillips observed that while posts similar to hers were deleted from the page, posts ridiculing citizens who were concerned about the Executive Order were allowed to remain.³¹ Although Phillips later raised her concerns with the Governor’s Office, she remained indefinitely blocked from posting comments on Governor Hogan’s official Facebook page.³²

Molly Handley, a Maryland resident at the time in question, also had her comments on the Executive Order deleted from Governor Hogan’s Facebook page.³³ Soon after President Trump announced the Executive Order, Handley posted comments on the page requesting that Governor Hogan make a public statement regarding the ban and urging others to call and ask the governor about his position on the topic.³⁴ Governor Hogan deleted Handley’s comments on the same day that she had posted them, and like Phillips, she observed that the Governor had deleted other similar comments.³⁵

In another instance, Maryland resident James Laurenson posted several comments on Governor Hogan’s Facebook page in the fall of 2015 regarding the Syrian refugee crisis, urging the Governor to reconsider his request that the Obama Administration not allow Syrian refugees into Maryland.³⁶ In his comments, Laurenson stated that he opposed turning away Syrians, which ISIS might perceive as an anti-Arab and anti-Muslim position, and which they might use against the West.³⁷ Laurenson’s comments were deleted and he was blocked from posting any further comments on the page.³⁸

In blocking these constituents from his official Facebook page, Governor Hogan rendered them indefinitely unable to engage — not only in public debate with their fellow citizens, but with him, their elected representative — regarding matters of public importance.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 12.

³² *Id.* at 12-13.

³³ *Id.* at 14.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 9.

³⁷ *Id.*

³⁸ *Id.* at 10.

*B. Loudoun County, Virginia, Chair-at-Large Phyllis J. Randall's Act of
Deleting a Constituent's Critical Comments from her Unofficial
Facebook Page*

Phyllis Randall is the Chair-at-Large of the Loudoun County, Virginia, Board of Supervisors,³⁹ which is the branch of local government responsible for adopting policies and ordinances, as well as for appropriating funds for Loudoun County, Virginia.⁴⁰ After assuming the Chair position, Randall created a Facebook page entitled “Chair Phyllis J. Randall, Government Official,” so that she might address her constituents.⁴¹ In the “About” section of the page, she included her title, “Chair of the Loudoun County Board of Supervisors,” and provided links to Loudoun County’s official website featuring her profile.⁴² The Facebook page featured images of Randall in front of a United States flag with a plaque inscribed “Phyllis J. Randall Chair-At-Large.”⁴³ On the page, Randall expressly indicates that the page is a channel for her constituents to contact her.⁴⁴ More specifically, she states:

Everyone, could you do me a favor. I really want to hear from ANY Loudoun citizen on ANY issues, request, criticism, compliment, or just your thoughts. . . . I really try to keep back and forth conversations . . . on my county Facebook page.⁴⁵

Indeed, many of Randall’s posts on the page involve Randall’s work as Chair of the Loudoun County Board of Supervisors and are specifically addressed to her constituency.⁴⁶ Although Chair Randall sought to use this Facebook page as a platform for interacting with her constituents, she created the page outside of the County’s official channels so that she would not be constrained by the policies applicable to County social media websites.⁴⁷

In February 2016, Chair Randall participated in a real-space town hall discussion hosted by the Loudoun County Board of Supervisors and the Loudoun County School Board.⁴⁸ Brian Davison, a constituent and critic of Chair Randall, attended the panel discussion and anonymously submitted two questions for

³⁹ *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 707 (E.D. Va. 2017); *Board of Supervisors Chair Phyllis J. Randall*, LOUDOUN COUNTY VA., <https://www.loudoun.gov/2223/Chair-Phyllis-J-Randall> [<https://perma.cc/9LVR-QQPF>] (last visited Dec. 7, 2018).

⁴⁰ *Board of Supervisors*, LOUDOUN COUNTY VA., <https://www.loudoun.gov/bos> [<https://perma.cc/9LVR-QQPF>] (last visited Sept. 17, 2018).

⁴¹ *Davison*, 267 F. Supp. 3d at 707.

⁴² *Davison v. Loudoun Cty. Bd. of Supervisors*, 227 F. Supp. 3d 605, 610 (E.D. Va. 2017).

⁴³ *Id.*

⁴⁴ *Davison*, 267 F. Supp. 3d at 708.

⁴⁵ *Id.* at 709

⁴⁶ *See id.* (“Many—perhaps most—of the posts . . . are expressly addressed to . . . Defendant’s constituents.”).

⁴⁷ *See id.* at 707.

⁴⁸ *Id.* at 710.

discussion during the town hall. One of the questions Davison posed was selected for submission to the panel and concerned Chair Randall's proposal for an ethics pledge for public servants.⁴⁹ Specifically, Davison asked whether the country should require School Board members to take such a pledge.⁵⁰ Chair Randall answered the question, which she "did not 'appreciate'" and which she characterized as a "set-up question," but Davison found her answer to be inadequate.⁵¹ Dissatisfied with Chair Randall's answer, Davison issued the following tweet:

@ChairRandall 'set up question'? You might want to strictly follow FOIA [the Freedom of Information Act] and the COIA [the Conflicts of Interest Act] as well.⁵²

Later that evening, Randall posted about the panel discussion on her Facebook page.⁵³ Persistent in his criticisms of Randall, Davison posted a related comment on Chair Randall's Facebook page alleging corruption on the part of Loudoun County's School Board and conflicts of interest on the part of School Board members.⁵⁴ Chair Randall took issue with Davison's comments regarding Loudoun County School Board members and chose to delete not only Davison's comment, but her original post about the panel discussion as well.⁵⁵ In addition, Chair Randall chose to ban Davison from her Facebook page.⁵⁶ While Chair Randall subsequently chose to lift the ban on Davison's access to her Facebook page, she had opted to prevent Davison from contacting her through the page and from commenting in a manner accessible to all constituents following her on that page, for a period of twelve hours.⁵⁷

C. President Donald Trump's Acts of Blocking Individuals from Following his Twitter Account

President Donald Trump makes extensive use of Twitter and, in particular, of his Twitter account @realDonaldTrump (the "Unofficial Account"),⁵⁸ which is

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 710.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 710-11.

⁵⁵ *See id.* at 711.

⁵⁶ *Id.*

⁵⁷ *See id.*

⁵⁸ *See, e.g., Twitter: Most Followers*, FRIEND OR FOLLOW, <https://friendorfollow.com/twitter/most-followers/> [<https://perma.cc/TF8T-4H6J>] (last visited, Dec. 2, 2018) (indicating that the President has issued 39,878 tweets, which ranks third among the top 20 most followed Twitter accounts); Amanda Wills & Alysha Love, *All the President's Tweets*, CNN, <http://www.cnn.com/interactive/2017/politics/trump-tweets> [<https://perma.cc/38SX-SWKX>] (last updated Sept. 26, 2018).

his primary means of communicating with the public.⁵⁹ Although the Unofficial Account was created prior to his presidency (at which point his tweets focused on a variety of topics — like golf,⁶⁰ popular culture,⁶¹ and politics⁶²), President Trump now uses this account as his primary channel for communicating with the public about matters relating to his administration and presidency.⁶³ In fact, since his inauguration in January 2017, President Trump has predominantly used the Unofficial Account to communicate on matters relating to his presidency and administration.⁶⁴

⁵⁹ See, e.g., Mike Snider, *Is Trump's Blocking of Some Twitter Users Unconstitutional?*, USA TODAY (June 6, 2017, 3:26 PM), <https://www.usatoday.com/story/tech/news/2017/06/06/trumps-blocking-some-twitter-users-unconstitutional/102549854> [<https://perma.cc/7L8N-Q748>] (describing the President's use of the Unofficial Account as "unprecedented"). President Trump also makes limited use of other accounts — specifically @POTUS and @WhiteHouse. See Seth Fiegerman, *Twitter transfer of power: Trump gets @POTUS*, CNN: BUS. (Jan. 20, 2017, 2:24 PM), <https://money.cnn.com/2017/01/20/technology/donald-trump-twitter-potus/index.html> [<https://perma.cc/D77V-JVA6>] ("The Obama administration handed over the Twitter handles for official accounts like @POTUS, @FLOTUS, @VP, @WhiteHouse and @PressSec to the incoming Trump administration on Friday in the first Twitter transfer of power in U.S. history.")

⁶⁰ *Trump tweets support of Woods: 'He is very smart'*, GOLF CHANNEL (Aug. 27, 2018, 10:36 AM), <https://www.golfchannel.com/article/golf-central-blog/trump-tweets-support-woods-he-very-smart> [<https://perma.cc/F5U7-96NC>].

⁶¹ See, e.g., Monica Sisavat, *Here Are Those Tweets Donald Trump Wrote About Kristen Stewart and Robert Pattinson*, POPSUGAR (Feb. 5, 2017), <https://www.popsugar.com/celebrity/Donald-Trump-2012-Tweets-About-Kristen-Stewart-43112386> [<https://perma.cc/5WWU-QPXR>] (tracking a series of President Trump's Unofficial Account tweets commenting on *Twilight* star Kristen Stewart and her relationship with co-star Robert Pattinson).

⁶² Jason Kirk, *The 27 times Donald Trump tweeted about Barack Obama playing golf too much*, SBNATION (Feb. 3, 2018, 3:18 PM), <https://www.sbnation.com/golf/2017/3/27/15073086/donald-trump-tweets-barack-obama-golf> [<https://perma.cc/S4Y7-USG9>].

⁶³ See Robert Loeb, *Blocking Twitter Users from the Presidential Account*, LAWFARE (June 13, 2017, 5:31 PM), <https://www.lawfareblog.com/blocking-twitter-users-presidential-account-0> [<https://perma.cc/A4P9-EEHD>] ("The President . . . uses his @realDonaldTrump account to speak to matters as President of the United States. He speaks to acts of foreign countries, court decisions, legislative proposals, posts video of cabinet meetings, and expresses his views as President on a host of public policy issues . . . [T]his is not merely a personal social media account where Mr. Trump posts birthday greetings to friends and family.").

⁶⁴ See Alex Abdo, *@realDonaldTrump and the First Amendment*, KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY (June 19, 2017), <https://knightcolumbia.org/news/realdonaldtrump-and-first-amendment> [<https://perma.cc/F52J-298P>] ("The President uses the [Unofficial Account] almost exclusively to communicate about government affairs, including international affairs, economic policy, and appointments to senior government positions. This is not an account focused on personal interests, say, television, golf courses, or family.").

That President Trump intends for constituents to follow the Unofficial Account as a means of engaging with, and learning about, the President is evident from the account's structure. For instance, viewers learn that the Unofficial Account belongs to Donald Trump, "45th President of the United States of America, Washington, D.C.," and are greeted with heading images of President Trump performing his official duties.⁶⁵ Moreover, both of President Trump's official twitter accounts, @WhiteHouse and @POTUS,⁶⁶ indicate that people should follow the accounts "for the latest from President @realDonaldTrump and his Administration," suggesting that the Unofficial Account is the primary source of communications relating to the Trump Administration.⁶⁷

President Trump frequently tweets from his Unofficial Account to make announcements and to engage in advocacy efforts related to his administration and his presidency. Notably, he uses the Unofficial Account for these purposes far more frequently than he does either the @POTUS or @WhiteHouse accounts, and nearly as much as he does both of those accounts combined.⁶⁸ His former Press Secretary Sean Spicer stated that tweets from President Trump should be understood as "official statements by the President of the United States"⁶⁹ and his social media director Dan Scavino indicated that all three Twitter accounts associated with his presidency — @realDonaldTrump, @POTUS, and @WhiteHouse — are channels through which "President Donald J. Trump . . . communicat[es] with you, the American people!"⁷⁰

President Trump uses the Unofficial Account "to announce, describe, and defend his policies; to promote his Administration's legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; [and] to challenge media organizations whose coverage of his Administration he believes to be unfair."⁷¹ For example, President Trump used this account to announce his intention to nominate Christopher Wray for the position

⁶⁵ Donald J. Trump (@realDonaldTrump), *supra* note 10.

⁶⁶ See Fiegerman, *supra* note 59 and accompanying text.

⁶⁷ President Trump (@POTUS), TWITTER, <https://twitter.com/potus> [<https://perma.cc/SJ7G-CRSP>] (last visited Sept. 26, 2018) (linking to the Unofficial Account via the @POTUS account's description); The White House (@WhiteHouse), TWITTER, <https://twitter.com/WhiteHouse> [<https://perma.cc/3U8K-389U>] (last visited Sept. 26, 2018).

⁶⁸ As of this writing, President Trump's Unofficial Account has about 39,900 tweets, while the @POTUS account has about 4,600 tweets and the @WhiteHouse account has 6,186 tweets. Compare *supra* note 67, with FRIEND OR FOLLOW, *supra* note 58.

⁶⁹ Ali Vitali, *Trump's Tweets 'Official Statements,' Spicer Says*, NBC NEWS (June 6, 2017, 5:02 PM), <https://www.nbcnews.com/politics/white-house/trump-s-tweets-official-statements-spicer-says-n768931> [<https://perma.cc/3H6D-ZU5L>].

⁷⁰ Dan Scavino Jr. (@Scavino45), TWITTER (June 6, 2017, 3:39 PM), <https://twitter.com/scavino45/status/872221311090778114?lang=en> [<https://perma.cc/W26Q-Z7UK>].

⁷¹ Complaint at 14, Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 1:17 Civ. 05205).

of FBI director,⁷² as well as to remove both then-Secretary of State Rex Tillerson,⁷³ and then-Secretary of Veterans Affairs David Shulkin from their respective positions.⁷⁴ Moreover, President Trump used the Unofficial Account as a vehicle to announce that the United States Government would no longer accept or allow transgender individuals to serve in the military.⁷⁵

Significantly, even federal courts recognize tweets from the Unofficial Account as official statements by and from the President. For example, the U.S. Court of Appeals for the Ninth Circuit cited tweets from the President's Unofficial Account in striking down Executive Order 13,780, which temporarily blocked nationals of certain countries from entering the United States.⁷⁶ In

⁷² "I will be nominating Christopher A. Wray, a man of impeccable credentials, to be the new Director of the FBI. Details to follow." Donald J. Trump (@realDonaldTrump), TWITTER (June 7, 2017, 4:44 AM), <https://twitter.com/realdonaldtrump/status/872419018799550464?lang=en> [<https://perma.cc/JWH6-9EZR>].

⁷³ "Mike Pompeo, Director of the CIA, will become our new Secretary of State. He will do a fantastic job! Thank you to Rex Tillerson for his service!" Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 13, 2018 5:44 AM), https://twitter.com/realdonaldtrump/status/973540316656623616?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Cwterm%5E973540316656623616&ref_url=https%3A%2F%2Fmashable.com%2F2018%2F03%2F13%2Frex-tillerson-fired-twitter%2F [<https://perma.cc/8TM5-XCTQ>]

⁷⁴ "I am pleased to announce that I intend to nominate highly respected Admiral Ronny L. Jackson, MD, as the new Secretary of Veterans Affairs...." *immediately followed by* "...In the interim, Hon. Robert Wilkie of DOD will serve as Acting Secretary. I am thankful to Dr. Shulkin's service to our country and to our GREAT VETERANS!" Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 28, 2018, 2:31 PM), <https://twitter.com/realdonaldtrump/status/979108653377703936?lang=en> [<https://perma.cc/ZFZ4-U9M3>]; Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 28, 2018, 2:31 PM), <https://twitter.com/realdonaldtrump/status/979108846408003584> [<https://perma.cc/73UA-B9BB>] (ellipsis in the original).

⁷⁵ "After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow....." *immediately followed by* "...Transgender individuals to serve in any capacity in the U.S. Military." Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), https://twitter.com/realdonaldtrump/status/890193981585444864?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Cwterm%5E890193981585444864&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2017%2F11%2Fpricking-of-his-thumbs%2F544547%2F [<https://perma.cc/7WRL-TSM6>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), https://twitter.com/realdonaldtrump/status/890196164313833472?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Cwterm%5E890196164313833472&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2017%2F11%2Fpricking-of-his-thumbs%2F544547%2F [<https://perma.cc/2KA8-ZTAR>].

⁷⁶ See *Hawaii v. Trump*, 859 F.3d 741, 773 n.14 (9th Cir. 2017) (citing Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017, 6:20 PM), <https://twitter.com/realdonaldtrump/status/871899511525961728>).

addition, the United States Supreme Court recently referenced President Trump's tweets in its 5-4 decision upholding a revised "Muslim ban."⁷⁷

President Trump's Unofficial Account is generally accessible and open to the public, without regard to political affiliation, ideological position, or viewpoint.⁷⁸ President Trump has not (generally) limited who can access his account or what people can say in response to his tweets.⁷⁹ As of this date, his Unofficial Account has approximately 57.5 million followers⁸⁰ and those followers tend to comment heavily on its tweets.⁸¹ Aside from commenting on the President's tweets, followers are able to interact with and engage with the President via the Unofficial Account in a number of ways, including by viewing,⁸² retweeting, liking, and — most significantly for the purposes of this article⁸³ — replying to tweets. Accounts which the President blocks cannot engage in any of those actions.⁸⁴

The President's tweets from his Unofficial Account generally garner a substantial amount of engagement from members of the public, with typical

⁷⁷ In *Trump v. Hawaii*, both the majority and dissent refer to President Trump's tweets regarding the Muslim ban in analyzing the constitutionality of the Executive Order at issue. 138 S. Ct. 2392, 2417, 2437-3 (2018); See also Brian Fung, *The Supreme Court's Travel Ban Ruling Could Have Big Implications For Trump's Twitter Account*, WASH. POST (June 26, 2018), https://www.washingtonpost.com/technology/2018/06/26/supreme-courts-travel-ban-ruling-could-have-big-implications-trumps-twitter-account/?utm_term=.07adab122704 [https://perma.cc/S9MJ-UBB2] ("Both in the opinion and the dissents, the Justices consistently adopted the perspective that Trump's broadcasts on Twitter are an official reflection of the White House — not merely the personal feelings of a private individual, as the government has claimed elsewhere.").

⁷⁸ See Donald J. Trump (@realDonaldTrump), *supra* note 10.

⁷⁹ See *id.*

⁸⁰ *Id.*

⁸¹ See Ashley Hoffman, *President's Trump's Top Tweets of All Time Show a Stark Divide*, TIME (Apr. 28, 2017), <http://time.com/4758366/trump-most-popular-tweets-ever> [http://perma.cc/4T6Z-56DU] (tracking President Trump's most popular tweets).

⁸² While blocked viewers cannot view Unofficial Account tweets, see TWITTER HELP CTR., *infra* note 84 and accompanying text, individuals who do not follow the Unofficial Account and have not been blocked can see the Unofficial Account's content. See *About public and protected Tweets*, TWITTER HELP CTR., <https://help.twitter.com/en/safety-and-security/public-and-protected-tweets> [https://perma.cc/2C8K-LGWB] (last visited Dec. 2, 2018).

⁸³ See, e.g., Charlie Warzel, *Meet The People Who Battle To Be The Top Reply To A Trump Tweet*, BUZZFEED (June 9, 2017, 1:31 PM), https://www.buzzfeed.com/charliwarzel/troll-potusgrowthhack?utm_term=.eoV5gYveO#nivZP6gko [https://perma.cc/BEC5-3KCN] ("Most importantly, the top reply to a Trump tweet is guaranteed to get in front of hundreds of thousands of eyes.").

⁸⁴ See *How to Block Accounts on Twitter*, TWITTER HELP CTR., <https://help.twitter.com/en/using-twitter/blocking-and-unblocking-accounts> [https://perma.cc/7MVP-AR2L] (last visited July 15, 2018) (listing the actions that a blocked account cannot take).

responses numbering in the tens of thousands.⁸⁵ For example, within three hours of tweeting about the ban on transgender individuals in the military, the tweets announcing the change in policy received approximately 121,000 retweets, 382,000 likes, and 142,000 replies.⁸⁶ Replies to tweets on Twitter are iterative, and include replies to an initial tweet, as well as replies to replies. This interactive and iterative thread of commentary related to a particular tweet is called the “comment thread,” which includes multiple overlapping comments and responses among Twitter users. Each tweet from the President’s Unofficial Account engenders an extensive interactive response from members the public who follow the Unofficial Account, with thousands of retweets, likes, and replies composing an extensive and detailed iterative comment thread.⁸⁷ Among the 56 million individuals who follow the President on his Unofficial Account, many have responded to his tweets in a manner critical or questioning of the President

⁸⁵ E.g., Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 31, 2016, 5:17 AM), https://twitter.com/realDonaldTrump/status/815185071317676033?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E815185071317676033&ref_url=http%3A%2F%2Ftime.com%2F4758366%2Ftrump-most-popular-tweets-ever%2F [<http://perma.cc/L4Y3-LB5K>] (garnering over 131,000 retweets, over 332,000 likes, and over 76,000 comments on his tweet wishing a happy new year “to my many enemies and those who have fought me and lost so badly they just don’t know what to do”).

⁸⁶ See Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), https://twitter.com/realDonaldTrump/status/890193981585444864?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E890193981585444864&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2017%2F11%2Fpricking-of-his-thumbs%2F544547%2F [<http://perma.cc/D43Y-ZGB7>] (retweeted over 39,600 times; liked over 119,110 times; and replied to over 25,000 times); Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), https://twitter.com/realDonaldTrump/status/890196164313833472?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E890196164313833472&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2017%2F11%2Fpricking-of-his-thumbs%2F544547%2F [<http://perma.cc/B94R-FHKS>] (retweeted over 41,700 times; liked over 129,300 times; and replied to over 45,000 times); Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:08 AM), https://twitter.com/realDonaldTrump/status/890197095151546369?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E890197095151546369&ref_url=https%3A%2F%2Fwww.cnn.com%2F2017%2F07%2F26%2Fpolitics%2Ftrump-military-transgender%2Findex.html [<http://perma.cc/R4YU-DD3W>] (retweeted over 39,700 times; liked over 133,700 times; and replied to over 72,000 times).

⁸⁷ See, e.g., Warzel, *supra* note 83 (describing the way that Unofficial Account followers “race” to reply to one of President Trump’s tweets, because of the increase in followers on their own accounts that those replying experience).

and his policies. Several of those individuals were blocked from following the Unofficial Account shortly after posting their critical questions or replies.⁸⁸

One such individual, Joseph Papp, is a former professional road cyclist and current anti-doping advocate.⁸⁹ Prior to being blocked, Papp actively followed and engaged with the Unofficial Account, posting replies that appeared in President Trump's comment threads and were accessible by the millions who follow the President on the Unofficial Account.⁹⁰ Papp's replies had also been quoted in media articles describing citizen responses to Trump.⁹¹ On June 3, 2017, President Trump tweeted a video of his weekly presidential address.⁹² A few minutes later, Papp replied to this tweet with a pair of tweets that read:

Greetings from Pittsburgh, Sir⁹³ . . . [w]hy didn't you attend your #PittsburghNotParis rally in DC, Sir?⁹⁴

By the next day, President Trump had blocked Papp from following the Unofficial Account.⁹⁵

President Trump has likewise blocked Rebecca Buckwalter — a writer and political analyst whose articles have been published by media outlets such as The Atlantic, National Public Radio, and CNN — from following the Unofficial Account.⁹⁶ Buckwalter had been active in following President Trump on his Unofficial Account and frequently replied to his tweets.⁹⁷ Through her replies, Buckwalter had a voice in the Unofficial Account's comment threads that was accessible by the millions who follow the Unofficial Account.⁹⁸ On June 6, 2017, Buckwalter and President Trump engaged in the following exchange:

⁸⁸ See, e.g., Ashley Feinberg, *A Running List of People Donald Trump Has Blocked on Twitter*, WIRED (June 14, 2017, 3:38 PM), <https://www.wired.com/story/donald-trump-twitter-blocked> [<http://perma.cc/K8RH-MTU2>] (tracking the Twitter users that President Trump has blocked).

⁸⁹ See Complaint at 22, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 1:17 Civ. 05205).

⁹⁰ See Exhibit H to Joint Stipulation of Facts, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205).

⁹¹ See Complaint, *Knight First Amendment Inst.*, *supra* note 89.

⁹² See Donald J. Trump (@realDonaldTrump), TWITTER (June 3, 2017, 12:53 PM), <https://twitter.com/realDonaldTrump/status/871087981225926656> [<http://perma.cc/ZLY5-A682>].

⁹³ Joe Papp (@joepabike), TWITTER (June 3, 2017, 12:36 PM), <https://twitter.com/joepabike/status/871088288202928128> [<http://perma.cc/PEM6-9A7S>];

⁹⁴ Joe Papp (@joepabike), TWITTER (June 3, 2017, 12:39 PM), <https://twitter.com/joepabike/status/871089057098551296> [<http://perma.cc/Z63G-ZFKF>].

⁹⁵ Complaint, *supra* note 89, at 22.

⁹⁶ *Id.* at 17.

⁹⁷ See Exhibit C to Joint Stipulation of Facts, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205).

⁹⁸ See *id.*

@realDonaldTrump: Sorry folks, but if I would have relied on the Fake News of CNN, NBC, ABC, CBS washpost or nytimes, I would have had ZERO chance of winning WH.⁹⁹

@rpbp (Buckwalter): To be fair you didn't win the WH: Russia won it for you.¹⁰⁰

Buckwalter's reply tweet received nearly ten thousand likes and nearly thirty-five hundred retweets.¹⁰¹ Shortly thereafter, President Trump had blocked her from following the Unofficial Account.¹⁰²

Brandon Neely, a police officer and Iraq War Veteran¹⁰³ with 10,850 followers on Twitter,¹⁰⁴ was likewise an avid follower of the President's Unofficial Account and frequently engaged with President Trump and other followers of the President via the Unofficial Account.¹⁰⁵ Neely's comments on the President's tweets were frequently among those tweets appearing at the top of Unofficial Account comment threads.¹⁰⁶ On June 12, 2017, President Trump and Neely engaged in the following exchange:

@realDonaldTrump: Congratulations! 'First new Coal Mine of Trump Era Opens in Pennsylvania' [President Trump appended a link to a Fox News article about the mine's opening].¹⁰⁷

@BrandonTXNeely: Congrats and now black lung won't be covered under #TrumpCare.¹⁰⁸

⁹⁹ Donald J. Trump (@realDonaldTrump), TWITTER (June 6, 2017, 5:15 AM), <https://twitter.com/realdonaldtrump/status/872064426568036353?lang=en> [http://perma.cc/2WLL-ESP2].

¹⁰⁰ RPBP (@rpbp), TWITTER (June 6, 2017, 5:16 AM), <https://twitter.com/rpbp/status/8720647230843330> [http://perma.cc/86ZV-7SDS].

¹⁰¹ *Id.*

¹⁰² Complaint at 17, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205).

¹⁰³ Complaint at 21, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205).

¹⁰⁴ Brandon Neely (@BrandonTXNeely), TWITTER, https://twitter.com/BrandonTXNeely?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor [https://perma.cc/75UC-A9GT] (last visited Dec. 7, 2018).

¹⁰⁵ See Exhibit G to Joint Stipulation of Facts, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205) (listing tweets and replies from Brandon Neely's Twitter, @BrandonTXNeely).

¹⁰⁶ See Complaint at 21, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205).

¹⁰⁷ Donald J. Trump (@realDonaldTrump), TWITTER (June 12, 2017, 10:59 AM), <https://twitter.com/realdonaldtrump/status/874325287143604224?lang=en> [http://perma.cc/XT7W-S7MW].

¹⁰⁸ Brandon Neely (@BrandonTXNeely), TWITTER (June 12, 2017, 11:00 AM), <https://twitter.com/BrandonTXNeely/status/874325611334029313> [http://perma.cc/2T98-M9TW].

Neely's reply drew a fair amount of attention, receiving 3,181 likes and 338 retweets.¹⁰⁹ The next day, on June 13, 2017, Neely learned that he too had been blocked from following the President on his Unofficial Account.

In addition to Papp, Buckwalter and Neely, President Trump has blocked many other of Unofficial Account Twitter followers after those individuals utilized the platform to voice their criticisms of the President.¹¹⁰ As a result, these

¹⁰⁹ *See id.*

¹¹⁰ Four other individuals — who had similarly posted critical questions and comments in response to the Unofficial Account tweets and who the President likewise subsequently blocked — joined Buckwalter, Papp, and Neely in bringing suit to challenge the President's constituent-blocking on his Unofficial Account. Complaint at 3-4, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205).

Philip Cohen, a sociology professor at University of Maryland College Park and avid follower of the President's Unofficial Account, was blocked after responding to the President's having tweeted "#ICYMI [in case you missed it]: Announcement of Air Traffic Control Initiative. . . Watch [providing a link to an announcement of an Air Traffic Control Initiative]" with the words "Corrupt Incompetent Authoritarian. And then there are the policies. Resist" overlaid on a banner of the President. *Id.* at 18; Exhibit D to Joint Stipulation of Facts, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205) (listing tweets and replies from Professor Cohen's Twitter account, @familyunequal); Donald J. Trump (@realDonaldTrump), TWITTER (June 6, 2017, 5:44 PM), <https://twitter.com/realdonaldtrump/status/872253002266161153?lang=en> [<https://perma.cc/R5CM-8DCE>]; Philip N Cohen (@familyunequal), TWITTER (June 6, 2017, 5:45 PM), <https://twitter.com/familyunequal/status/872253179915841536> [<https://perma.cc/B2QU-BW4R>]. Professor Cohen's reply tweet received over 300 likes and 35 retweets. Complaint at 18, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205). Shortly after Professor Cohen tweeted his reply, President Trump blocked him from following the Unofficial Account. *Id.*

Holly Figueroa, a national political organizer and songwriter, was an avid follower of the President on his Unofficial Account. *See id.* at 19; Exhibit E to Joint Stipulation of Facts, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205) (listing tweets and replies from Holly Figueroa's Twitter account, @AynRandPaulRyan). Many of her replies to the President's tweets garnered thousands of likes and retweets and appeared at or near the top of the Unofficial Account's comment threads. *See* Complaint at 19, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205). On May 28, 2017, the President addressed the terrorist attack in Manchester, England, by tweeting "British Prime Minister May was very angry that the info the U.K. gave to the U.S. about Manchester was leaked. Gave me full details!" Donald J. Trump (@realDonaldTrump), TWITTER (May 28, 2017, 7:43 AM), <https://twitter.com/realdonaldtrump/status/86884025227674113?lang=en> [<https://perma.cc/55Z7-75NT>]. In response to the President's tweet, Ms. Figueroa replied with her own tweet — containing a picture of the Pope looking incredulously at the President and stating, "This is pretty much how the whole world sees you" — which in turn received 15,000 likes. Holly Figueroa O'Reilly BWCS (@AynRyanPaulRyan), TWITTER (May 28, 2017, 7:53 AM), https://twitter.com/AynRandPaulRyan/status/868842669069422592?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E868842669069422592&ref_url=https%3A%2F%2Fwww.cnn.com%2F2018%2F05%2F23%2Fread-the-tweets-that-got-these-people-blocked-on-twitter-by-president-donald-trump.html [<https://perma.cc/2R2F-QWHG>]. Hours later, Ms. Figueroa learned that

blocked individuals can no longer interact or engage with the President himself through his preferred method of communicating with his constituents,¹¹¹ nor can

President Trump had blocked her from following his Unofficial Account. Complaint at 19, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205).

Eugene Gu, a resident in general surgery, was an avid follower of the President's Unofficial Account, with some of his replies to @realDonaldTrump receiving thousands of likes and appearing on "Twitter Moments," Twitter's encapsulation of current events that incorporate particularly popular tweets. *Id.* at 20; Exhibit F to Joint Stipulation of Facts, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205) (listing tweets and replies from Eugene Gu's Twitter account, @eugenegu). On June 28, 2017 at 4:02 am, the President tweeted "The 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 [referring to President Barack Obama's] #'s!" Donald J. Trump (@realDonaldTrump), TWITTER (June 18, 2017, 4:02 AM), <https://twitter.com/realdonaldtrump/status/876394578777174021?lang=en> [<https://perma.cc/5EBX-EEPG>]. In response to the President's tweet, Gu replied: "Covfefe: The same guy who doesn't proofread his Twitter handles the nuclear button," which received 2,900 likes and 239 retweets. Eugene Gu, MD (@eugenegu), TWITTER (June 18, 2017, 4:12 AM), <https://twitter.com/eugenegu/status/876397178780078081> [<https://perma.cc/4W48-ZLD8>] (referring to the President's unexplained tweet from May 31, 2017, which read in full: "Despite the constant negative press covfefe."). *See also*, Matt Flegenheimer, *What's the 'Covfefe'? Trump Tweet Unites a Bewildered Nation*, N.Y. TIMES (May 31, 2017, 4:00 AM), <https://www.nytimes.com/2017/05/31/us/politics/covfefe-trump-twitter.html> [<https://perma.cc/N4ES-55JS>]. Shortly thereafter, President Trump has likewise blocked Gu from following the Unofficial Account. Complaint at 20, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205).

Nick Pappas, a comic and writer and former avid follower of the President's Unofficial Account, authored replies to the President's tweets that have received thousands of likes and retweets. *Id.* at 22; Exhibit I to Joint Stipulation of Facts, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205) (listing tweets and replies from Nick Pappas's Twitter, @Pappiness). On June 5, 2017, the President tweeted "The Justice Dept. should ask for an expedited hearing of the watered down Travel Ban before the Supreme Court - & seek much tougher version!" and "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!" Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:37 AM), <https://twitter.com/realdonaldtrump/status/871677472202477568?lang=en> [<https://perma.cc/BB3M-9WV6>]; Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:44 AM), <https://twitter.com/realdonaldtrump/status/871679061847879682?lang=en> [<https://perma.cc/53UT-Q46N>]. In response, Pappas replied, "Trump is right. The government should protect the people. That's why the courts are protecting us from him." Nick Jack Pappas (@Pappiness), TWITTER (June 5, 2017, 3:50 AM), <https://twitter.com/Pappiness/status/871680720707747840> [<https://perma.cc/N8MS-D2FW>]. This tweet received 395 retweets and 1,181 likes. Complaint at 23, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205). Within a few hours of replying to the President, Mr. Pappas learned that he was blocked from following the Unofficial Account. *Id.*

¹¹¹ *See, e.g.*, Nicholas Carr, *Why Trump Tweets (And Why We Listen)*, POLITICO (Jan. 26, 2018), <https://www.politico.com/magazine/story/2018/01/26/donald-trump-twitter-addiction-216530> [<https://perma.cc/RC4Q-2FYS>] (analyzing President Trump's "fixation" with Twitter).

they participate in the wide-ranging policy discussions that the President's tweets engender.¹¹² If blocked individuals hope to form a part of the *vox populi*, they must resort to other forums — which are likely to be neither as highly followed nor as relevant to discussions regarding President Trump's presidency and administration,¹¹³ and do not foster civic debate in the same way that the President's tweets from his Unofficial Account do.¹¹⁴

D. Lawsuits Challenging Government Officials' Blocking of Users from Social Media Forums

In each of the cases described above, citizens responded to their elected officials having blocked them from engaging in public discourse on those officials' social media forums by bringing suit and claiming that the officials in question violated their First Amendment rights.

In their suit against Governor Hogan, Maryland citizens claimed that the comment space on Governor Hogan's Facebook page constituted a public forum for speech and that the Social Media Policy which permitted the Governor to block citizens who had questioned or criticized his policies, and which he used to block those citizens, constituted illegal viewpoint discrimination within a public forum.¹¹⁵ Similarly, in his suit against the Loudoun County Board of Supervisors, Virginia citizen Brian Davison claimed that the comment space on Chair Randall's Facebook page constituted a public forum for speech and that her act of blocking him based on his criticisms constituted illegal viewpoint discrimination within that public forum.¹¹⁶ Additionally, the seven Twitter users who President Trump blocked from accessing his Unofficial Account also claimed that the interactive space therein constituted a public forum and that barring their access

¹¹² See TWITTER HELP CTR., *supra* note 82 (listing the actions that a blocked account cannot take, which include viewing Unofficial Account tweets and replying to both Unofficial Account tweets and other followers' comments to those tweets).

¹¹³ See FRIEND OR FOLLOW, *supra* note 58 (indicating that President Obama's account is the only Twitter account that is both more followed than the Unofficial Account and related to politics, and further that President Obama has issued fewer than half the amount of tweets from his account than President Trump has from the Unofficial Account).

¹¹⁴ See Cross-Motion of Plaintiff for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment at 14, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205); TWITTER HELP Ctr., *supra* note 82 (listing the actions that a blocked account cannot take).

¹¹⁵ See Complaint at 3, *Laurenson et al. v. Hogan*, No. 8:17 Civ. 02162-DKC (D. Md. Aug. 1, 2017) (alleging that Governor Hogan, through the social media policy "engag[ed] in unconstitutional viewpoint discrimination to remove certain ideas or perspectives from a broader public debate").

¹¹⁶ Complaint at 7, *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. 2017) (No. 1:16-CV-932).

to that space amounted to unconstitutional discrimination based on their viewpoints.¹¹⁷

In response, the government officials accused of violating their constituents First Amendment rights through social media blocking assert that the forums at issue are not public forums under the public forum doctrine.¹¹⁸ Instead, the officials maintain that they operate these accounts in their personal capacity rather than in their official governmental capacity, and that they therefore enjoy the First Amendment right to delete comments and/or block individuals from these forums.¹¹⁹ In the alternative, the officials argue that if these sites are deemed “governmental,” their speech constitutes “government speech,” which is immune from scrutiny under the Free Speech Clause.¹²⁰

Before analyzing these cases in greater detail, below I examine the historical development, evolution, and importance of the public forum doctrine in First Amendment jurisprudence, as well as the recently developed government speech doctrine, under which government expression is immune from scrutiny under the Free Speech Clause.

II. THE DEVELOPMENT AND EVOLUTION OF THE PUBLIC FORUM DOCTRINE

A. *The Roots of the Doctrine*

The First Amendment public forum doctrine dictates that the government must facilitate speech by ensuring that certain forums are available for

¹¹⁷ See Complaint at 2-3, Knight First Amendment Inst., 302 F. Supp. 3d 541 (No. 17 Civ. 05025).

¹¹⁸ See Memorandum of Law in Support of Motion for Summary Judgment at 18, Knight First Amendment Inst., 302 F. Supp. 3d 541 (No. 17 Civ. 05205); Defendants’ Memorandum in Support of Motion to Dismiss at 14, *Davison*, 267 F. Supp. 3d 702 (No. 1:16-CV-932). Governor Hogan opted to settle the suit against him, but denied violating his constituents’ constitutional rights. Michael Dresser, *Maryland, ACLU settle lawsuit over deleted comments on Gov. Hogan’s Facebook page*, BALT. SUN (Apr. 2, 2018), <https://www.baltimoresun.com/news/maryland/politics/bs-md-aclu-hogan-facebook-20180402-story.html> [<https://perma.cc/FPT9-GRVU>] (reporting that the Governor’s spokesperson referring to the suit as “frivolous and politically motivated” and that “[u]nder the settlement, the governor’s office continues to deny any liability or violations of the plaintiffs’ constitutional rights.”).

¹¹⁹ See Memorandum of Law in Support of Motion for Summary Judgment at 11, Knight First Amendment Inst., 302 F. Supp. 3d 541 (No. 17 Civ. 05205) (classifying President Trump’s Twitter use as an official’s “routine[] engage[ment] in personal conduct that is not an exercise of state power”); Defendants’ Memorandum in Support of Motion to Dismiss at 6, *Davison*, 267 F. Supp. 3d 702 (No. 1:16-CV-932) (challenging the assertion that Randall’s Facebook page is a public forum and arguing that “[j]ust because an individual happens to be a Board member . . . does not mean that their Facebook page becomes a public forum, limited or otherwise”).

¹²⁰ Memorandum of Law in Support of Motion for Summary Judgment at 15, Knight First Amendment Inst., 302 F. Supp. 3d 541 (No. 17 Civ. 05205).

uncensored discussion, debate, and exercise of First Amendment freedoms.¹²¹ Under this doctrine, the government must facilitate speech without discrimination on the basis of viewpoint within places that are traditionally devoted to or are otherwise well-suited to the exercise of such freedoms — such as public parks, sidewalks and streets.¹²² The government must also facilitate speech without regard to viewpoint within places that it controls and has opted to hold open for expression, regardless of whether those places are government-owned or privately-owned.¹²³

Since the Supreme Court’s adoption of the public forum doctrine in its 1939 *Hague v. Committee for Industrial Organization* decision,¹²⁴ the state and its actors¹²⁵ have been constitutionally required to facilitate speech — and to refrain from suppressing speech on the basis of viewpoint — within such forums.¹²⁶ When the government does seek to restrict speech within such forums, the public forum doctrine imposes exacting standards on the government speech restrictions in question.¹²⁷

Those standards, and the public forum doctrine writ large, exist in recognition of the important democratic function that such public places serve in facilitating the exchange of ideas and expression.¹²⁸ As the Supreme Court has recognized, the availability of forums in which individuals have the meaningful right and opportunity to express themselves is, and has been from time immemorial, central to achieving this end — and thus central to freedom of expression and to democratic self-government.¹²⁹ Ensuring that individuals can communicate with

¹²¹ See, e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (“In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed.”).

¹²² See, e.g., *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (“A basic rule, for example, is that a street or park is a quintessential forum for the exercise of First Amendment rights.”).

¹²³ See *id.*; *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (holding that a private theater leased by the government was a public forum).

¹²⁴ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

¹²⁵ See *infra* text accompanying notes 131-135.

¹²⁶ See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (explaining that the State is forbidden from “exercis[ing] viewpoint discrimination, even when the limited public forum is one of its own creation.”).

¹²⁷ See *id.* (“The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”).

¹²⁸ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (identifying public forums as “essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.”).

¹²⁹ See *id.* at 513 (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1875)) (regarding protecting the right to peaceably petition the government as “an attribute of national citizenship”).

and reach out to their fellow citizens, both to broad general audiences as well as to relevant specific audiences, is crucial to the preservation of our democracy.¹³⁰

The Supreme Court first championed the virtues of the public forum in *Hague v. Committee for Industrial Organization*.¹³¹ This case centered on a dispute between members of the Committee for Industrial Organization (“CIO”) — now a part of the AFL-CIO — and Jersey City, New Jersey.¹³² Members of the CIO sought to conduct informational outreach to Jersey City workers in various public venues within the City to distribute pamphlets regarding the purposes and benefits of the National Labor Relations Act.¹³³ CIO members repeatedly sought permission from the City to lease the city hall to conduct public meetings and distribute their pamphlets in city streets and other similar public places.¹³⁴ However, the City repeatedly refused, and when CIO members continued attempting to express their message in these public places, the mayor ordered them arrested and ferried out of the City on boats bound for New York.¹³⁵

CIO members brought suit, claiming that the City violated their First Amendment rights.¹³⁶ In response, the City argued that, just like a private property owner who wishes to exclude people from his or her home, the City has an absolute right to exclude whichever citizens it chose from City property, for any reason.¹³⁷ The CIO contended that the City was chargeable with different duties than those of a private owner of property including the duty to facilitate the expression of members of the public on matters of public importance.¹³⁸

The Supreme Court agreed.¹³⁹ In ushering in the modern public forum doctrine, the Court explained that for our form of democratic self-governance to thrive, citizens must enjoy meaningful opportunities to express themselves and meaningful venues in which to do so:

The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. . . . Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom.¹⁴⁰

¹³⁰ See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

¹³¹ *Hague*, 307 U.S. at 496.

¹³² *Id.* at 501.

¹³³ *Id.* at 501-02.

¹³⁴ *Id.* at 502-03.

¹³⁵ *Id.* at 501.

¹³⁶ *Id.*

¹³⁷ *Id.* at 514.

¹³⁸ *Id.* at 514-16; Respondents’ Brief at 58-59, *Hague*, 307 U.S. 496 (No. 651).

¹³⁹ *Hague*, 307 U.S. at 514-16.

¹⁴⁰ *Id.* at 513 (internal quotations omitted).

The Court rejected Jersey City's claim that its right to exclude was as absolute as that of a private property owner and adopted the public forum doctrine, charging the government with the obligation to facilitate speech without discrimination on certain types of property:

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. Such use . . . has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions . . . must not, in the guise of regulation, be abridged or denied.¹⁴¹

Accordingly, in *Hague*, the Court imposed on government actors the obligation not to discriminate against, and to accord the widest possible latitude to, speech within "traditional public forums," — *i.e.*, property like streets and parks that has "immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions."¹⁴² Within these "traditional public forums," individuals are guaranteed not just the theoretical right, but also the meaningful opportunity, to express themselves.

Eight months after the *Hague* decision, the Supreme Court solidified its newly-articulated public forum doctrine in *Schneider v. State*.¹⁴³ In *Schneider*, individuals who had handed out leaflets publicizing a protest while on a public street were convicted of violating a municipal ordinance prohibiting such distribution.¹⁴⁴ The municipality defended the ordinance on the grounds that it was designed to prevent littering and that there were other venues available to the speakers to disseminate their message,¹⁴⁵ but the Court rejected that argument and explained that the government has an obligation to facilitate speech within places that are well-suited to it.¹⁴⁶ Justice Roberts wrote:

The streets are *natural and proper places* for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.¹⁴⁷

¹⁴¹ *Id.* at 515-16.

¹⁴² *Id.* at 515.

¹⁴³ 308 U.S. 147, 160 (1939).

¹⁴⁴ *Id.* at 155-56.

¹⁴⁵ *Id.* at 155-56.

¹⁴⁶ *See id.* at 160 ("Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated").

¹⁴⁷ *Id.* (emphasis added).

In both *Hague* and *Schneider*, the Supreme Court underscored the importance that the unrestricted, uncensored free flow of information serves in our system of democratic self-government. As the right to engage in such speech is “so vital to the maintenance of democratic institutions” and is implied in “the very idea of government, republic in form,” the government may not restrict the exercise of free speech on such property.¹⁴⁸

Not all public property enjoys public forum status, however. Government-owned office buildings, state prisons, and places that the government does not hold open for, or traditionally use for, expressive purposes are not considered public forums for the purposes of the public forum doctrine, and thus are not places in which the state is obligated to facilitate citizens’ free speech rights.¹⁴⁹ But, the Constitution affords all speakers the right to express themselves within government-owned property that has traditionally been available for expressive purposes — like public parks, streets, and sidewalks — or within property that the government has made available for expressive purposes.¹⁵⁰ It is within these public forums that citizens enjoy the fullest and most meaningful protection of their right to free expression.¹⁵¹ The government is required to permit speech within such forums¹⁵² — regardless of the content of such speech or the viewpoint of the speaker — and any restrictions on speech within such forums are subject to the strictest judicial scrutiny.¹⁵³ The mandate that the government preserve forums for the nondiscriminatory exercise of the right of free speech provides a crucial safeguard for free expression. Speakers can enter traditional public forums like public parks, streets, and sidewalks, and express themselves with the assurance that the forum owner cannot censor their speech on the basis of viewpoint or subject matter.¹⁵⁴

¹⁴⁸ *Id.* at 161; *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 513 (1939).

¹⁴⁹ In particular, authoritarian government forums, like prisons, military bases, and schools, are generally considered non-public forums. *See, e.g.*, *Greer v. Spock*, 424 U.S. 828, 838 (1976) (holding that a military base is not a public forum); *Adderley v. Florida*, 385 U.S. 39, 41 (1966) (holding that the curtilage of a county jail is not a public forum).

¹⁵⁰ *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (recognizing traditional public fora as “places which by long tradition or by government fiat have been devoted to assembly and debate”). Within a designated public forum devoted to particular subjects, however, the government may impose restrictions limiting expression to the particular subject matter(s) for which the forum is designated. *See infra* text accompanying notes 157-164.

¹⁵¹ *See Perry Educ. Ass’n*, 460 U.S. at 45 (describing the State’s right to limit expressive activity in traditional public fora as “sharply circumscribed”).

¹⁵² *See id.*

¹⁵³ *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (requiring “exacting scrutiny” for “facially content-based restriction[s] on political speech in a public forum”).

¹⁵⁴ *See Perry Educ. Ass’n*, 460 U.S. at 45 (prohibiting states from “prohibit[ing] all communicative activity”).

After its inception in the mid-twentieth century, the public forum doctrine became more complex. Recent Supreme Court cases have categorized physical spaces as follows: (1) traditional public forums; (2) designated public forums (both of general purpose and limited purpose); and (3) nonpublic¹⁵⁵ forums.¹⁵⁶

“Traditional” public forums include streets, sidewalks, parks and other places that “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 discerning public questions.”¹⁵⁷ The Court has recently made clear that traditional public forums are limited to streets, sidewalks, and parks and that it will not readily expand the category.¹⁵⁸

¹⁵⁵ The category of nonpublic forums includes places like military bases, jail grounds, and federal workplaces, that the government owns but which it has not opened up for expressive activity on the part of the public. *See, e.g., id.*, at 46-47 (classifying a school mail facility as a nonpublic forum).

¹⁵⁶ In *Perry*, the Court provided an especially clear overview of its recent public forum jurisprudence, explaining:

At one end of the spectrum are streets and parks, which 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. . . . In these [traditional public forums or] quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. . . . The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. . . . A second category [designated public forums] consists of public property which the State has opened for use by the public as a place for expressive activity. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Although a State is not required to indefinitely retain the open character of the facility, as long as it does so, it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. . . . Public property which is not, by tradition or designation, a forum for public communication [the category of nonpublic forums] is governed by different standards. . . . In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.

Perry Educ. Ass’n, 460 U.S. at 45-46.

¹⁵⁷ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

¹⁵⁸ *See, e.g., Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998) (“The Court has rejected the view that traditional public forum status extends beyond its historic confines.”). Recent cases have also made clear that not all expressive activity within a public street, sidewalk, or park will be treated the same under the public forum doctrine. *See, e.g., Pleasant Grove City v. Sumnum*, 555 U.S. 460, 464 (2009). Rather, the Court will consider the nature and the type of access sought within the forum at issue. *See infra* Part II.B.

“Designated public forums” consist of government-owned or government-controlled property that has not “immemorially” been used for expressive purposes, but which the government has held open and designated as a place for public expressive activity.¹⁵⁹ The government may choose, for example, to open property within a public school,¹⁶⁰ public university meeting facilities,¹⁶¹ or privately-owned municipal theaters leased by the government¹⁶² as forums for expression — both generally and for expression on certain designated subjects. Within a *general-purpose* designated public forum, the government may not discriminate on the basis of the content and/or subject matter of, or on the basis of the viewpoint expressed by, the speech at issue.¹⁶³ Within a *limited-purpose* designated public forum, also known as a “limited public forum,” once the government has defined the subject matter limitations of the forum — for example, by limiting the forum to speech on social, civic, and recreational topics¹⁶⁴ — the government may restrict the forum to speech concerning those subjects.¹⁶⁵

¹⁵⁹ *Perry Educ. Ass’n*, 460 U.S. at 45.

¹⁶⁰ *See City of Madison Joint Sch. Dist. v. Wisc. Emp’t Relations Comm’n*, 429 U.S. 167, 176 (1976) (“[W]hen the [school] board sits in public meetings to conduct public business and hear the views of citizens, [it may not] discriminate between speakers on the basis of their employment, or the content of their speech”).

¹⁶¹ *See Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (“Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms”).

¹⁶² *See Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (concluding that the auditoriums at issue “were public forums designed for and dedicated to expressive activities”).

¹⁶³ *See Perry Educ. Ass’n*, 460 U.S. at 46 (requiring states that choose to indefinitely retain the open character of the facility to do so “by the same standards as apply in a traditional public forum”).

¹⁶⁴ *See, e.g., Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387 (1993) (school district restricted the use of school property after school hours to social, civic, and recreational uses of such property).

¹⁶⁵ *See Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992) (describing the regulation of designated public forums as “subject to the same limitations as that governing a traditional public forum.”). Members of the Court have had a difficult time agreeing upon what constitutes a permissible subject matter or content restriction and what constitutes an impermissible viewpoint restriction within limited public forums. In *Rosenberger v. Rector & Visitors of Univ. of Va.*, for example, the forum at issue was the University’s funding scheme for student publications, which authorized payment from the Student Activities Fund for costs associated with the printing of student publications, but prohibited payment from the Fund for the costs of printing any publication that “primarily promote[d] or manifest[ed] a particular belief in or about a deity or an ultimate reality.” 515 U.S. 819, 836 (1995). Under this scheme, the University denied funding to a student publication called “Wide Awake: A Christian Perspective at the University of Virginia,” which offered a “Christian perspective” on issues including racism, crisis pregnancy, homosexuality, and eating disorders, and which subsequently sued, alleging that the denial amounted to a violation of the First Amendment. *Id.* at 826-27. The Justices agreed that the funding scheme constituted a limited public forum

However, beyond such permissible subject-matter restrictions, regulation of limited public forums is subject to the same stringent limitations as those governing a traditional public forum, and viewpoint discrimination is strictly prohibited.¹⁶⁶

Thus, within both traditional public forums, such as streets, sidewalks, and parks, and within designated public forums, such as public meeting places devoted to expression on particular subjects, individuals enjoy their most robust rights of free expression. Government restrictions on speech within both types of public forums are subject to the most stringent scrutiny. Speech restrictions will not stand unless they serve compelling government interests and are the least restrictive means of serving those interests. Within such forums, the government generally may not discriminate on the basis of content,¹⁶⁷ and absolutely may not discriminate on the basis of viewpoint.

In circumstances where it is unclear whether the government has designated a public forum by opening up a nontraditional forum for public discourse, courts will look predominantly to two factors: (1) the policy and practice of the government or the government official with respect to its use of the property; and (2) the nature of the property at issue and the compatibility of the property with expressive activity.¹⁶⁸ Although the government will frequently have the incentive to argue that it did not open up the property at issue at all, or for the type of speech that the petitioner seeks to engage in, courts generally will look not just to the government's claims on this issue but to objective factors surrounding the policy and practice of the government, the nature of the property, and its compatibility with expressive activity.

For example, in the case of *City of Madison, Joint School District #8 v. Wisconsin Employment Relations Commission*, the School Board and the City of Madison, Wisconsin, maintained that they had opened up a public forum that was limited in scope and that they were justified in limiting petitioner's speech

for private speech, but disagreed as to whether limiting funding solely to those student publications that did not "primarily promote or manifest a particular belief in or about a deity or an ultimate reality" constituted a permissible subject matter/topic restriction or an impermissible viewpoint restriction. *Id.* at 836. In the Opinion of the Court, Justice Kennedy explained that this restriction amounted to viewpoint discrimination, because it was the publication's religious perspective, rather than the subjects it discussed, that triggered the University's funding denial. *Id.* at 834. In his dissent, Justice Souter construed the scheme as a permissible subject matter restriction excluding "the entire subject matter of religious apologetics," not an impermissible restriction on the basis of viewpoint, and concluded that if the school's policy "amounts to viewpoint discrimination, the Court has all but eviscerated the line between viewpoint and content." *Id.* at 896-98 (Souter, J., dissenting).

¹⁶⁶ *Id.*

¹⁶⁷ Content or topic based restrictions are permitted only where necessary to confine the limited purpose designated public forum to the limited purpose for which it was created. *See, e.g., id.* at 829 (explaining that "the necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for . . . the discussion of certain topics").

¹⁶⁸ *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

on the grounds that it was outside that limited scope.¹⁶⁹ The Court disagreed, holding that as the meeting was open to the public, the Board of Education could not discriminate against speakers on the basis of their viewpoint.¹⁷⁰ In that case, the school board and the City of Madison had convened a public meeting with a broad agenda, which included labor and employment matters, and invited all members of the public to attend.¹⁷¹ During the meeting in question, the Board sought to silence the speech of an individual who, despite not being his collective bargaining unit's exclusive representative, intended to speak on collective bargaining matters.¹⁷² While recognizing that the School Board was entitled to conduct private meetings that were not open to the public and to limit the agenda of its meetings, the Court explained that once the Board opened its meetings to the public for direct citizen involvement — and sat to “conduct public business and hear the views of its citizens” — it could neither silence a speaker “seeking to express his views on an important decision of the government,” nor discriminate among speakers based on their viewpoint, the content of their speech, or the nature of their employment.¹⁷³ The Court observed that “to permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees.”¹⁷⁴ Justice Brennan, in his concurrence, emphasized that it was constitutionally impermissible for the government to allow for selective exclusions from open public forums, explaining that, in the case at bar, “the state body has created a public forum dedicated to the expression of views by the general public” and that “once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.”¹⁷⁵

Similarly, in the case of *Widmar v. Vincent*, while the government maintained that it had opened up a public forum of a limited scope, not including religious purposes, the Court held that objective factors supported the conclusion that the forum was not so limited.¹⁷⁶ In that case, the University of Missouri at Kansas City had adopted the policy and practice of making its meeting facilities generally available to all registered student groups, but then sought to limit the facilities' use to non-religious purposes and discussions.¹⁷⁷ The Court found that the University's policy evidenced a clear intent to create a public forum for use by all registered student groups, and therefore held that the university could not

¹⁶⁹ 429 U.S. 167, 172 (1976).

¹⁷⁰ *Id.* at 175.

¹⁷¹ *Id.* at 171.

¹⁷² *Id.* at 173.

¹⁷³ *Id.* at 175.

¹⁷⁴ *Id.* at 175-76.

¹⁷⁵ *Id.* at 179 (Brennan, J., concurring) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)).

¹⁷⁶ *Widmar v. Vincent*, 454 U.S. 263, 277 (1981).

¹⁷⁷ *See id.* at 265.

withhold access from student groups and speakers based on the desire to use this generally open forum to engage in religious discussion.¹⁷⁸

*B. The Public Forum Doctrine in Modernity: Justice Kennedy and
“Metaphysical” Public Forums*

The Supreme Court has emphasized that, in evaluating a petitioner’s First Amendment claims under the public forum doctrine, the court must look not just to the physical forum at issue, but also to the nature of petitioner’s desired access.¹⁷⁹ For example, in *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, the NAACP challenged its exclusion from the “Combined Federal Campaign” — an annual charitable fund-raising drive conducted through the voluntary efforts of public federal employees during work hours and in the workplace.¹⁸⁰ In evaluating the NAACP’s claims, the Court emphasized that rather than seeking access to the federal workplace itself, the NAACP sought access in the form of inclusion as a choice in the Combined Federal Campaign’s fund-raising drive.¹⁸¹ Likewise, in *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, the Court examined petitioners’ request to access a public school’s internal mail system in order to distribute literature.¹⁸² The Court focused its First Amendment analysis on the fact that petitioner sought access to the internal mail system, rather than to the public school property itself.¹⁸³ Similarly, in *Pleasant Grove City, Utah v. Summum*, petitioners sought access to a public park — which is the paradigm of a public forum — yet the access sought was for the purpose of installing a permanent monument, rather than for the purposes of speaking or assembly.¹⁸⁴

Perry represents the Supreme Court’s willingness to recognize that facilitating speech means extending the public forum doctrine beyond the traditional conception of a meeting space. Indeed the Court has made clear that non-physical spaces can constitute public forums, and has explained that public forums may also include virtual or “metaphysical” forums, like funding and solicitation

¹⁷⁸ *Id.* at 277.

¹⁷⁹ *See generally*, *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985).

¹⁸⁰ *Cornelius*, 473 U.S. at 790, 793.

¹⁸¹ *Id.* at 801.

¹⁸² *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 39 (1983).

¹⁸³ *Id.* at 46-47.

¹⁸⁴ *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009).

schemes,¹⁸⁵ the airwaves,¹⁸⁶ cable television,¹⁸⁷ and more recently, Internet forums for expression as well.¹⁸⁸ For example, in *Rosenberger v. Rectors and Visitors of the University of Virginia*, Justice Kennedy made clear that the funding scheme through which the University of Virginia authorized the payment of outside contractors who printed a variety of student publications constituted a limited public forum, within which viewpoint discrimination was prohibited.¹⁸⁹

Justice Kennedy's interpretation of the public forum doctrine has been particularly sensitive to the importance of the evolution of the doctrine in light of modern developments and new forums for expression. His opinion in the case of *International Society for Krishna Consciousness v. Lee* is illustrative.¹⁹⁰ In that case, members of the International Society for Krishna Consciousness (ISKCON) challenged a regulation through which the Port Authority of New York and New Jersey (the "Port Authority") prohibited the repetitive distribution of literature and the solicitation of funds within the airport terminals.¹⁹¹ ISKCON sought a declaratory judgment affirming that the regulation violated its members' First Amendment right to engage in the religious practice of San-kirtan, which involves public dissemination of literature and solicitation of funds, and which ISKCON had chosen to practice in the New York area's three major airports.¹⁹² The airports at issue served the public, including 100 million passengers annually¹⁹³ and were owned and managed by the Port Authority, a public entity.¹⁹⁴

ISKCON advanced a functional interpretation of the public forum doctrine, contending that transportation nodes such as rail and bus stations, wharves, and ports such as Ellis Island historically served as important forums for

¹⁸⁵ See, e.g., *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995) (holding that a university funding scheme for student publications constituted a limited purpose designated public forum, in which viewpoint discrimination was prohibited).

¹⁸⁶ See, e.g., *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 680 (1998) (suggesting that if televised political debate had an "open-microphone format," it would constitute a designated public forum).

¹⁸⁷ See, e.g., *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 774-75 (1996) (Souter, J., concurring) (finding that public access channels, which were channels that were available at low or no cost to members of the public, constituted designated public forums, and therefore cable operators' speech restrictions within such forums were subject to stringent scrutiny).

¹⁸⁸ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (identifying cyberspace as "the most important place . . . for the exchange of views.").

¹⁸⁹ 515 U.S. at 830 (designating the student activity fund as a forum, despite being "a forum more in the metaphysical than in a spatial or geographic sense").

¹⁹⁰ See 505 U.S. 672 (1992).

¹⁹¹ *Id.* at 675-76.

¹⁹² *Id.* at 674-75.

¹⁹³ *Id.* at 674.

¹⁹⁴ See *id.* at 675.

expression.¹⁹⁵ Chief Justice Rehnquist, writing for the majority, rejected this functional interpretation of the doctrine in favor of a narrower reading, and found that, “given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having ‘immemorially ... time out of mind’ been held in trust and used for purposes of expressive activity,” and thus did not constitute a traditional public forum.¹⁹⁶ Furthermore, the Chief Justice opined that airport terminals did not constitute “designated public forums” because the government owner contested their use for expressive purposes, and thus had not “intentionally opened [the space] to such [expressive] activity.”¹⁹⁷ Chief Justice Rehnquist failed to recognize that, given the nature of adversarial litigation, government actors accused of violating First Amendment rights under the public forum doctrine frequently maintain that they did not create a “designated public forum.”¹⁹⁸

Justice Kennedy, writing for himself and Justices Blackmun, Stevens and Souter, criticized the Chief Justice’s miserly interpretation of the public forum doctrine, on the grounds that it left “almost no scope for the development of new public forums absent the rare approval of the government.”¹⁹⁹ He explained that unless the Court undertook an objective, functional inquiry — based on the actual characteristics and uses of the property — effectuating the underlying purposes of the public forum doctrine would not be possible.²⁰⁰ Justice Kennedy maintained that under such an inquiry, the Court should conceptualize open public spaces and thoroughfares suitable for discourse as public forums — whatever their historical pedigree — and that absent such a functional interpretation, the public forum doctrine “retains no relevance in times of fast-changing technology.”²⁰¹ Justice Kennedy’s rejection of Chief Justice Rehnquist’s strict “traditionality” inquiry thus served to advance a functional, evolving interpretation of the public forum doctrine, which recognized that open spaces in which members of the public have extended contact with one another, and which, like streets, have areas that are “open to the public without restriction” fall within the scope of the First Amendment’s protection.²⁰²

¹⁹⁵ *Id.* at 681.

¹⁹⁶ *Id.* at 680 (quoting *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515 (1939)).

¹⁹⁷ *Id.* at 680-81

¹⁹⁸ *See, e.g., id.* at 678. Having concluded that the airport terminals were non-public forums, Rehnquist evaluated the Port Authority’s ban on distribution of literature and solicitation of funds under a “reasonableness” standard, under which the bans were readily upheld. *See id.* at 683, 685 (“The inconvenience to passengers and the burdens on Port Authority officials flowing from solicitation activity may seem small, but viewed against the fact that ‘pedestrian congestion is one of the greatest problems facing the three terminals,’ the Port Authority could reasonably worry that even such incremental effects would prove quite disruptive.”).

¹⁹⁹ *Id.* at 695 (Kennedy, J., concurring).

²⁰⁰ *See id.* at 695.

²⁰¹ *Id.* at 697.

²⁰² *See id.* at 698, 700.

Justice Kennedy further criticized Chief Justice Rehnquist's "designated public forum" analysis²⁰³ as permitting government "restrict[ion of] speech by fiat."²⁰⁴ Chief Justice Rehnquist's failure to "recognize the possibility that new types of government property may be appropriate forums for speech [would] lead to a serious curtailment of our expressive activity,"²⁰⁵ and allow the government to easily evade its affirmative obligations under the First Amendment. As Justice Kennedy explained:

[U]nder the Court's view, the authority of the government to control speech on its property is paramount, for in almost all cases the critical step in the Court's analysis is a classification of the property that turns on the government's own definition or decision, unconstrained by an independent duty to respect the speech its citizens can voice there. . . .

The Court's approach is contrary to the underlying purposes of the public forum doctrine. The liberties protected by our doctrine . . . are essential to a functioning democracy. . . . Public places are of necessity the locus for discussion of public issues, as well as protest against arbitrary government action. At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places. The recognition that certain government-owned property is a public forum provides open notice to citizens that their freedoms may be exercised there without fear of a censorial government, adding tangible reinforcement to the idea that we are a free people. . . . [T]he policies underlying the [public forum] doctrine cannot be given effect unless we recognize that open, public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property.²⁰⁶

Justice Kennedy continued to develop his evolving, functional view of the public forum doctrine in *Denver Area Educational Telecommunications Consortium v. FCC*.²⁰⁷ In *Denver Area*, the Court evaluated, among other orders, an FCC order permitting cable operators to prohibit patently offensive or indecent programming on "public access channels" — channels that were available at low or no cost to members of the public.²⁰⁸ In Justice Kennedy's view, these public

²⁰³ See *id.* at 697 ("The requirements for such a designation are so stringent that I cannot be certain whether the category has any content left at all. In any event, it seems evident that under the Court's analysis today few, if any, types of property other than those already recognized as public forums will be accorded that status.").

²⁰⁴ *Id.* at 693-94.

²⁰⁵ *Id.* at 698.

²⁰⁶ *Id.* at 695-97.

²⁰⁷ 518 U.S. 727 (1996). In *Denver Area*, both the plurality, made up of Justices Breyer, Stevens, O'Connor, and Souter, and the dissent, made up of Justices Thomas and Scalia and Chief Justice Rehnquist, refused to characterize the forum at issue as a public forum. *Id.* at 729, 731.

²⁰⁸ See *id.* at 732, 734-36.

access channels met the definition of a “designated public forum” — “property that the State has opened for expressive activity by part or all of the public”²⁰⁹ — and as a result, cable operators’ government-authorized speech restrictions within such forums were subject to stringent scrutiny.²¹⁰

Justice Kennedy explained that the cable operators’ nominally-private ownership of these forums did not insulate them from the reach of the public forum doctrine: “[p]ublic access channels . . . are public fora even though they operate over property to which the cable operator holds title.”²¹¹ Second, he explained, in providing public access channels under their franchise agreements:

[C]able operators therefore are not exercising their own First Amendment rights. [Rather,] [t]hey serve as conduits for the speech of others. . . . Treating [public] access channels as public fora does not just place a label on them It defines the First Amendment rights of speakers seeking to use the channels. When property has been dedicated to public expressive activities, by tradition or government designation, access is protected by the First Amendment.²¹²

Justice Kennedy went on to argue that the FCC’s authorizing statute incorporated the public forum doctrine’s underlying purpose — to ensure open, nondiscriminatory access to public means of communication — and that the public forum doctrine must meaningfully extend to new media:

Giving Government free rein to exclude speech it dislikes . . . would have pernicious effects in the modern age. Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media. The extent of public entitlement to participate in those means of communication may be changed as technologies change; and in expanding those entitlements the Government has no greater right to discriminate on suspect grounds than it does when it effects a ban on speech against the backdrop of the entitlements to which we have been more accustomed.²¹³

He concluded that in order for the First Amendment to remain meaningful in the modern era, the public forum doctrine must extend to new technologies, so as to prevent the government — and those empowered to operate public forums

²⁰⁹ *Id.* at 791 (Kennedy, J., joined by Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *ISKCON*, 505 U.S. at 678).

²¹⁰ *See* *Denver Area Educ. Telecomm. Consortium*, 518 U.S. at 794 (quoting *ISKCON*, 505 U.S. at 678) (“Regulations of speech content in a designated public forum, whether of limited or unlimited character, are ‘subject to the highest scrutiny’ and ‘survive only if they are narrowly drawn to achieve a compelling state interest.’”).

²¹¹ *Id.* at 792.

²¹² *Id.* at 793-94.

²¹³ *Id.* at 802-03 (citations omitted).

on its behalf — from discriminatorily exercising their power against disfavored expression.²¹⁴

Justice Kennedy continued to develop his expansive, functional view of the public forum doctrine in the 2017 case of *Packingham v. North Carolina*.²¹⁵ In that case, Lester Packingham — an individual who, as a 21-year-old, had sex with a thirteen year-old girl and was subsequently required to register as a sex offender — challenged a North Carolina law prohibiting registered sex offenders from any and all use of social media sites like Twitter and Facebook.²¹⁶ Packingham created a Facebook account using a pseudonym — in violation of the state law — and posted a message praising God and Jesus after a state court dismissed a traffic ticket against him.²¹⁷ After police identified him as the creator

²¹⁴ See *id.* at 787; *id.* at 776-77 (Souter, J., concurring) (“[A]s broadcast, cable, and the cybertechnology of the Internet and the World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others.”).

²¹⁵ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

²¹⁶ See *id.* at 1734. See also N.C. GEN. STAT. § 14-202.5 (a) (2015) (making it a felony for a registered sex offender to “access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain person Web pages”). The North Carolina statute defined “commercial social networking Web site” as a website that:

- (1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site;
- (2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges;
- (3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.
- (4) Provides users or visitors . . . mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

Id. at § 14-202.5 (b). But see N.C. GEN. STAT. § 14-202.5 (c) (1)-(2) (2015) (exempting both websites that “[p]rovid[e] only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform” and websites that have as their “primary purpose the facilitation of commercial transactions involving goods or services between [their] members or visitors.”).

²¹⁷ Packingham, who had created a Facebook account under the pseudonym “J.R. Gerrard,” was relieved to learn that a state court had dismissed a traffic ticket against him and in response logged onto his Facebook page and posted the following statement:

Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent. . . . Praise be to GOD, WOW! Thanks JESUS!

Packingham, 137 S. Ct. at 1734. A police officer investigating registered sex offenders suspected to be violating the state law at issue discovered that Packingham’s traffic citation had been dismissed around the time of this Facebook post. *Id.* The officer obtained a search

of the pseudonymous Facebook account, Packingham received a felony conviction and a suspended prison sentence for his violation of the state law.²¹⁸ Packingham challenged the law, claiming it violated his First Amendment rights.²¹⁹

In the Opinion of the Court, Justice Kennedy struck down the state law's broad prohibition on access to social media sites by registered sex offenders, explaining that social media sites like Facebook and Twitter serve important free speech functions and that prohibiting registered sex offenders — of whom there were 20,000 in the State and whose legal status as sex offenders could endure for upwards of 30 years — impermissibly thwarted those important free speech functions.²²⁰ Justice Kennedy focused in particular on the important functions served by the public forum doctrine, explaining that “[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.”²²¹

While acknowledging the Court's past difficulties in determining which venues beyond “traditional” public forums should be considered public forums, Justice Kennedy explained that the emergence of the Internet, and social media in particular, simplified such inquiries:

While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace — the ‘vast democratic forums of the Internet’ in general, and social media in particular.²²²

He went on to identify Facebook and Twitter as significant social media forums, and characterized Twitter in particular as a forum where “users can petition their elected representatives and otherwise engage with them in a direct manner,” as “Governors of all 50 States and almost every Member of Congress” employ it as a forum in which to engage with constituents.²²³

Justice Kennedy noted that social media sites — like traditional public forums such as streets, sidewalks, and parks — offer “relatively unlimited, low-cost capacity for communication of all kinds,” where users can “engage in a wide array of protected First Amendment activity on topics ‘as diverse as human thought.’”²²⁴ Social media platforms, he explained, “allow[] users to gain access to information and communicate with one another about it on any subject that might come to mind . . . [and constitute] principal sources for knowing current events, . . . speaking and listening in the modern public square, . . . exploring the vast realms of human thought and knowledge, . . . [and are] perhaps the most

warrant and determined that Packingham was the author of the above post on Facebook, which led to Packingham's conviction for violating the state statute. *Id.*

²¹⁸ *Id.* at 1733-34.

²¹⁹ *Id.* at 1734.

²²⁰ *See id.* at 1734, 1737-38.

²²¹ *Id.* at 1735.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 1735-36 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997)).

powerful mechanisms available to a private citizen to make his or her voice heard.”²²⁵ In summary, Justice Kennedy observed that the Internet in general and social media in particular have “vast potential to alter how we think, express ourselves, and define who we want to be.”²²⁶ In light of the important role social media serves in advancing free speech values, the state law’s sweeping ban on registered sex offenders’ access to social media platforms — forums that are “integral to the fabric of modern society and culture” — could not withstand constitutional scrutiny.²²⁷

C. Public Forums on Privately-Owned Property

Although public forums generally involve government-owned property, the Court has made clear that the government need not own a space for the space to constitute a public forum; rather, a public forum can exist where the underlying property is privately-owned but under government control.²²⁸ If the government seeks to regulate private property that it has opened up and designated for use as a public forum, then such regulation must be consistent with the strictures of the First Amendment in general and the strictures of the public forum doctrine in particular.²²⁹

For example, in *Southeastern Promotions v. Conrad*, the Court held that the City of Chattanooga, Tennessee could not censor a production of the musical “Hair” based on its disapproval of its content — despite the production’s being performed in a privately-owned theatre — because the theatre, which was under long-term lease to the city, was “designed for and dedicated to expressive activities”²³⁰ and was therefore a designated public forum.²³¹

²²⁵ *Id.* at 1737.

²²⁶ *Id.* at 1736.

²²⁷ *Id.* at 1738.

²²⁸ *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515-16. The *Hague* Court explained: *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. . . . [Accordingly, the] privilege of a citizen of the United States to use the streets and parks for communication of views on national questions . . . must not, in the guise of regulation, be abridged or denied.*

Id. (emphasis added).

²²⁹ *See id.*

²³⁰ *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975). *See also* *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985) (stating that, in order to invoke the public forum doctrine, “a speaker must seek access to public property *or to private property dedicated to public use.*”) (emphasis added).

²³¹ *Se. Promotions*, 420 U.S. at 547-48, 555-56, 562 (holding that the City of Chattanooga municipal board’s rejection of a petition seeking to stage the musical “Hair” at a city-leased theater, on the grounds that the production would not be “in the best interest of the community,” was unconstitutional because the theater was a designated public forum, notwithstanding the fact that the theater itself was privately owned).

Similarly, in his concurring opinion in *Denver Area*, Justice Kennedy explained that privately-owned but government controlled cable stations, which the government had opened up for use by the public, constituted designated public forums in which government regulation was subject to strict scrutiny.²³² He rejected the argument that the FCC could permit cable operators to regulate “indecent” and “obscene” programming on public access channels — without regard to the First Amendment — merely because the channels themselves were privately-owned and the individuals who were restricting speech were non-governmental actors.²³³ Rather, Justice Kennedy explained that the FCC order imposed impermissible content-based restrictions within a designated public forum:

Public fora do not have to be physical gathering places, nor are they limited to property owned by the government. Indeed, in the majority of jurisdictions, title to some of the most traditional of public fora, streets and sidewalks, remains in private hands. Public access channels are analogous; they are public fora even though they operate over property to which the cable operator holds title.²³⁴

Accordingly, Justice Kennedy made clear that government restrictions imposed on privately-owned property can constitute impermissible speech restrictions within a designated public forum, regardless of the fact that the forum is privately owned.

In summary, from its initial inception in the mid-twentieth century to its complex development and evolution over the next century, the public forum doctrine has expanded to encompass not just physical property owned by the government, but also “metaphysical” forums — including Internet forums — that are owned *or controlled* by government officials. As a result of this evolution, the public forum doctrine continues to be a vibrant and essential doctrine for the protection of speech against censorship by government officials in new mediums opened up by government officials for expressive purposes.

D. The Government Speech Doctrine: Distinguishing “Government Speech” from Public Forums for Private Speech

In several recent cases, the Supreme Court has distinguished situations wherein the government has established public forums for speech — in which individuals enjoy the robust protections of the public forum doctrine discussed above — from situations in which the government itself is speaking — in which the protections of the First Amendment’s Free Speech Clause do not apply. In a

²³² See *Denver Area Educ. Telcomms. Consortium v. FCC*, 518 U.S. 727, 780, 793, 795 (1996) (Kennedy, J., concurring).

²³³ See *id.* at 732-33, 737 (majority opinion).

²³⁴ *Id.* at 791-92 (Kennedy, J., concurring) (emphasis added) (citations omitted).

line of cases beginning in 1991 with *Rust v. Sullivan*,²³⁵ the Court has made clear that when the government or government officials are speaking, the mandates of the public forum doctrine, including the prohibition on viewpoint discrimination, do not apply. The Court has since expanded the “government speech” category — under which the government may discriminate on the basis of viewpoint — to include cases in which the government itself is the speaker, as well as instances in which the government is transmitting a message through private speakers.²³⁶

As cases like *Pleasant Grove City, Utah v. Summum* illustrate, the distinction between government speech and government creation of a public forum for the speech of others is not always clear.²³⁷ In that case, Summum, a religious organization, sought to erect a stone monument in a public park in Pleasant Grove City, Utah.²³⁸ The monument at issue contained the Seven Aphorisms of Summum, which the organization believes were inscribed on the tablet God gave to Moses on Mount Sinai.²³⁹ At the time of Summum’s request to install the monument, Pioneer Park contained fifteen monuments, eleven of which private organizations had donated, including a monument to the Ten Commandments.²⁴⁰ After the City of Pleasant Grove refused to allow Summum to erect their desired monument in the park, Summum sued, claiming that in permitting other

²³⁵ 500 U.S. 173 (1991). *Rust* involved a challenge to a set of 1988 regulations issued under Title X of the Public Health Service Act of 1970, which imposed a “gag rule” that prohibited Title X project grantees from, *inter alia*, providing counseling concerning the use of abortion or providing referral for abortion as a method of family planning — even upon request from patients. *Id.* at 178-80. Title X grantees challenged these regulations, claiming that the “gag rule” violated their First Amendment rights and amounted to illegal viewpoint discrimination within a designated public forum. *See id.* at 181. The Court, in a 5-4 opinion, upheld the regulations and held that the government could constitutionally decide to “selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way.” *Id.* at 193. Although, at the time, the Court did not characterize *Rust* as a case involving government speech, the Court explained in subsequent cases that “the counseling activities of the doctors under Title X amounted to government speech” and that “viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker or instances, like *Rust*, in which the government used private speakers to transmit information pertaining to its own program.” *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (citations omitted).

²³⁶ *See id.* at 541 (explaining that “viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker or . . . in . . . which the government used private speakers to transmit specific information pertaining to its own program,” and stating that “when the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.”).

²³⁷ 555 U.S. 460, 464 (2009).

²³⁸ *Id.* at 464-65.

²³⁹ *See id.* at 464-66.

²⁴⁰ *Id.*

organizations to erect monuments in the park, but refusing to permit Summum to likewise erect their own monument, the City was discriminating on the basis of viewpoint in a public forum, and thus had violated the organization's First Amendment rights.²⁴¹

The lower court applied the public forum doctrine and found for Summum.²⁴² The Supreme Court, however, unanimously ruled in favor of the City and held that forum analysis was inappropriate.²⁴³ The Court held that, in deciding which permanent monuments were to be displayed on public property, the City was engaging in government speech, rather than impermissibly discriminating on the basis of viewpoint within a public forum for private speech.²⁴⁴ While acknowledging the status of public parks as traditional public forums, which individuals have a right to access for purposes such as delivering speeches as well as holding marches and demonstrations, the Court explained that forum analysis did not apply to the specific type of access sought here: access to erect a permanent monument in a physically limited space.²⁴⁵ The Court indicated that the relevant inquiry was whether the forum could accommodate requests of the sort from "a large number of public speakers without defeating the essential function" of the forum at issue, and concluded that it could not:

The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program. For example, a park can accommodate many speakers and, over time, many parades and demonstrations . . . By contrast, public parks can accommodate only a limited number of permanent monuments . . . It is hard to imagine how a public park could be opened for the installation of permanent monuments by every person or group wishing to engage in that form of expression . . . [Indeed,] if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations . . . and application of forum analysis would lead almost inexorably to the closing of the forum.²⁴⁶

Holding that the selection of which permanent monuments to allow in a public park constituted government speech, the Court concluded that the City's selection decision was not subject to scrutiny under the Free Speech Clause.²⁴⁷

²⁴¹ See *id.* at 466, 473.

²⁴² *Id.* at 464.

²⁴³ See *id.*

²⁴⁴ *Id.* at 472.

²⁴⁵ *Id.* at 466, 478, 480.

²⁴⁶ *Id.* at 478-80.

²⁴⁷ *Id.* at 481. The Court explained, "the City's decision to accept certain privately donated monuments while rejecting [Summum's] is best viewed as a form of government speech. As a result, the City's decision is not subject to the Free Speech Clause." *Id.* The Court held,

The Court adopted a similar approach in analyzing a state program for specialty license plates in its recent *Walker v. Texas Div., Sons of Confederate Veterans, Inc.* decision.²⁴⁸ In *Walker*, the Sons of Confederate Veterans, a non-profit organization that works to preserve the memory and reputation of soldiers who fought for the Confederacy in the Civil War — applied to the Texas Department of Motor Vehicles (“TDMV”) seeking recognition and issuance of a new specialty license plate design featuring the Confederate battle flag.²⁴⁹ Although the Department had approved hundreds of other specialty license plates — including a “Buffalo Soldiers” license plate that certain Native Americans found offensive and objected to — the TDMV refused to approve the proposed plate on the grounds that it was potentially offensive to others, pursuant to a policy permitting it to “refuse to create a new specialty license plate . . . if the design might be offensive to any member of the public.”²⁵⁰ The Sons of the Confederate Veterans organization sued the state, claiming that in creating the specialty license plate program and approving hundreds of other plates with a variety of messages, some of which were considered offensive, it had opened up a public forum for speech.²⁵¹ The Supreme Court disagreed.²⁵² Relying heavily on its *Summum* decision, it concluded by a 5-4 vote that in selecting which plates to approve and which to reject, the state, through the TDMV, was exercising government speech and thus had not created a public forum in which it was required to operate in a viewpoint neutral manner.²⁵³

In adopting the government speech framework, the *Walker* Court primarily looked to three factors. First, the Court explained that license plates, like permanent monuments in public parks, “long have communicated messages from the States.”²⁵⁴ Second, the Court explained that license plates, like permanent monuments in public parks, are “often closely identified in the public mind with the [State]” because they serve as a form of a government ID.²⁵⁵ Third, the Court observed that the State maintained direct control over the messages its specialty license plates conveyed.²⁵⁶ In the majority’s view, all three factors pointed to the conclusion that the messages on the specialty license plates constituted government speech, not private speech within a designated public forum opened up by the government, and therefore that the strictures of the Free Speech Clause did

however, that the City’s decisions must comply with the Establishment Clause of the First Amendment. *Id.* at 468.

²⁴⁸ 135 S. Ct. 2239 (2015).

²⁴⁹ *Id.* at 2245.

²⁵⁰ *Id.* at 2244-45, 2258.

²⁵¹ *See id.* at 2245.

²⁵² *Id.* at 2250-51.

²⁵³ *Id.* at 2246-47.

²⁵⁴ *Id.* at 2248.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 2249.

not apply.²⁵⁷ The four dissenting Justices criticized the majority's decision and warned that the government speech doctrine, if applied too broadly, could swallow up the First Amendment's crucial protections for unpopular speech.²⁵⁸

In subsequent cases, the Court has made clear that the *Walker* decision constituted the outer limits of the government speech doctrine and re-emphasized the dangers that an overly broad application of the government speech doctrine pose to free speech. For instance, in the recent case of *Matal v. Tam*, the Supreme Court unanimously rejected the government's argument that the U.S. Patent and Trademark Office acted constitutionally in applying the Lanham Act's Disparagement Clause when it refused to register "The Slants" as a mark for an Asian-American rock band on the grounds that it was disparaging toward persons of Asian descent.²⁵⁹ The government argued that its selection of which marks to register constituted government speech, and that its selection decisions were therefore not subject to scrutiny under the Free Speech Clause.²⁶⁰ The Supreme Court disagreed, holding that the Trademark Office's refusal to register the mark at issue amounted to illegal viewpoint discrimination against private speech, not government speech immune from scrutiny under the Free Speech Clause.²⁶¹ In so doing, the Court cautioned against the government's proposed "huge and dangerous" expansion of the government speech doctrine.²⁶²

²⁵⁷ *See id.* The Court emphasized that the Establishment Clause was still relevant in analyzing whether government speech ran afoul of the First Amendment, for example, in cases where the government adopted a religious message on a specialty license plate.

²⁵⁸ *See id.* at 2254 (Alito, J., dissenting). Justice Alito criticized the majority's characterization of the specialty license plate program as government speech instead of a limited public forum and claimed that the majority's approach severely limited the First Amendment's protections for unpopular viewpoints:

The Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing. Under our First Amendment cases, the distinction between government speech and private speech is critical. The First Amendment does not regulate government speech, and therefore when government speaks, it is free to select the views that it wants to express . . . By contrast, in the realm of private speech or expression, government regulation may not favor one speaker over another . . . Unfortunately, the Court's decision categorizes private speech as government speech and thus strips it of all First Amendment protection . . . This capacious understanding of government speech takes a large and painful bite out of the First Amendment.

Id. at 2254-55 (citations omitted, internal quotation marks omitted).

²⁵⁹ 137 S. Ct. 1744, 1751, 1760 (2017). The Disparagement Clause of the Lanham Act of 1946 prohibits the registration on the Principal Register of trademarks that "consist[] of or comprise[] immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." 15 U.S.C. § 1052(a).

²⁶⁰ *Id.* at 1757.

²⁶¹ *Id.* at 1760.

²⁶² *Id.* ("For if the registration of trademarks constituted government speech, other systems of government registration could easily be characterized in the same way."); *see also* Steven

[W]hile the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.²⁶³

III. FORUM ANALYSIS OF GOVERNMENT OFFICIALS' ACTS OF BLOCKING CONSTITUENTS ON SOCIAL MEDIA SITES

A. Introduction

Having explored the contours of the modern public forum and government speech doctrines, I now apply these doctrines to government officials who have blocked their constituents on social media and restricted those constituents from accessing the Officials' accounts. Both Loudoun County Chair-At-Large Phyllis Randall and Maryland Governor Larry Hogan blocked constituents on Facebook pages that they had dedicated to government purposes.²⁶⁴ Governor Hogan did so pursuant to an official government social media policy, which provided that he had established his Facebook page to serve as a “forum for constructive and respectful discussion with and among users” and that he was permitted to delete constituent comments “at any time . . . without providing justification.”²⁶⁵ Governor Hogan put this policy into effect against constituents who utilized the page to question or criticize his policies.²⁶⁶ Chair Randall operated an unofficial Facebook page and unilaterally decided to block a constituent comment — without acting pursuant to a government social media policy.²⁶⁷

In both cases, government officials blocked constituents and removed their comments because of the viewpoint that the constituent had expressed.²⁶⁸ Governor Hogan's case ended in settlement, with the Governor's administration

G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1311 (2010) (claiming that courts must “restrict the application of the government speech doctrine to situations where the exercise of free speech rights by private citizens would thwart the government's ability to communicate with the public.”).

²⁶³ *Matal*, 137 S. Ct. at 1758.

²⁶⁴ See discussion *supra* Part I.D.

²⁶⁵ Exhibit A to Complaint, *Laurenson et al. v. Hogan*, No. 8:17 Civ. 02162 (D. Md. Aug. 1, 2017).

²⁶⁶ See Complaint at 3, *Laurenson et al. v. Hogan*, No. 8:17 Civ. 02162 (D. Md. Aug. 1, 2017).

²⁶⁷ See *Davison v. Loudoun Cnty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 715 (E.D. Va. May 10, 2017).

²⁶⁸ See *Davison*, 267 F. Supp. 3d at 715; Complaint at 3, *Laurenson*, No. 8:17 Civ. 02162 (D. Md. Aug. 1, 2017).

agreeing to bring its social media policy into compliance with the dictates of the First Amendment.²⁶⁹ Chair Randall's case is ongoing, as I discuss below.

B. County Commissioner Randall's Unofficial Facebook Page as Public Forum: Davison v. Loudoun County Board of Supervisors

The parties to *Davison v. Loudoun County Board of Supervisors* primarily dispute whether Chair Phyllis Randall's unofficial Facebook page — a page on which Chair Randall blocked her constituent Brian Davison after he posted a critical comment — constituted a public forum for purposes of the First Amendment.²⁷⁰ Chair Randall argues that in creating her unofficial Facebook page, she did not create a public forum.²⁷¹ Instead, she maintains that the Facebook page is her own private speech forum — on which she need not adopt someone else's comments — or, in the alternative, that speech on her Facebook page is government speech and thus immune from scrutiny under the Free Speech Clause.²⁷² Chair Randall further argues that the public forum doctrine only applies to publicly-owned property and is thus inapplicable to privately-owned websites like Facebook, whose own content removal guidelines and First Amendment rights are also at stake.²⁷³ In response, her blocked constituent, Davison, argues that regardless of whether Chair Randall's Facebook page is unofficial, it

²⁶⁹ *Laurenson v. Hogan*, ACLU MARYLAND, <https://www.aclu-md.org/en/cases/laurenson-v-hogan> [<https://perma.cc/39GV-VBCW>] (last visited July 28, 2018) (“The ACLU reached a settlement in the case that includes a new social media policy that will govern Gov. Hogan’s Facebook page, mandates the creation of a second Facebook page dedicated to providing a public forum where constituents can raise a host of issues for the governor’s attention, and creates an appeals process for constituents who feel their comments have been improperly deleted, or that they have been wrongfully blocked.”). *Compare Office of the Governor Social-Media Policy*, OFFICE OF GOVERNOR LARRY HOGAN, <http://governor.maryland.gov/wp-content/uploads/2018/03/social-media-policy.pdf> [<https://perma.cc/KN53-WS2K>] (last visited Sept. 25, 2018), with Exhibit A to Complaint, *Laurenson et al. v. Hogan*, No. 8:17 Civ. 02162-DKC (filed on Aug. 1, 2017) (removing language permitting the Governor to restrict access to his accounts without notice and justification, and inserting language such as “[t]he Office of the Governor does not discriminate based on viewpoint, but may remove Comments and restrict access to users for violating this Policy.”).

²⁷⁰ See *Davison v. Loudoun Cnty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 711 (E.D. Va. May 10, 2017).

²⁷¹ Defendant’s Informal Opening Brief at 7, *Davison*, 267 F. Supp. 3d 702 (No 1:16 CV-932).

²⁷² See *id.* at 7-10.

²⁷³ See *id.* at 7-8. See also Defendant’s Memorandum In Support of Motion For Summary Judgment at 17, *Davison*, 267 F. Supp. 3d 702 (No. 1:16 Civ-932) (“Facebook . . . retains control of Facebook page content by imposing specific terms and conditions. . . . As conceded by Davison, due to Facebook’s internal software, anyone can mark his postings as spam which would cause Facebook to suppress his comments, without any action taken by the government . . . It is Facebook’s created software which allows this to occur and to which Davison objects.”).

nonetheless constitutes a government-run and government-controlled forum — on which Randall expressly invited constituents to comment on any and all manner of subjects — and on which Chair Randall thereby created a designated public forum, in which she may not engage in viewpoint discrimination.²⁷⁴

In analyzing whether Chair Randall’s Facebook page was personal or governmental, the court first looked to whether her actions in connection with the page had a sufficiently close nexus to the state such that, considering the totality of the relevant circumstances, they might be fairly treated as the actions of the government itself.²⁷⁵ The court observed that certain facts weighed in favor of considering the Facebook page as Randall’s private speech.²⁷⁶ For example, Chair Randall’s official duties as County Commissioner do not include the maintenance of a social media site and the Facebook page at issue will not revert to the county government when Randall leaves office.²⁷⁷ Further, the court recognized that Chair Randall does not use government-issued electronic devices to maintain the Facebook page and that much of her Facebook activity generally takes place outside of her physical government office and outside of her official working hours.²⁷⁸

However, other factors tending to show that Chair Randall’s Facebook page had a sufficiently close nexus with the state to be fairly deemed “governmental” ultimately persuaded the court.²⁷⁹ First, and most importantly, Chair Randall used her Facebook page as a tool of governance and as a vehicle to engage with constituents regarding her official government activities.²⁸⁰ In fact, she expressly requested that constituents use her Facebook page as a channel to have “back and forth constituent conversations” with her, and the content on her page was predominantly related to her official government actions and duties.²⁸¹ Moreover, Randall’s Facebook page bore indicia that it was governmental rather than personal.²⁸² For example, the page identified Chair Randall by her governmental title, Facebook designated it as belonging to a government official, and it listed Chair Randall’s official email address, telephone number, and web address.²⁸³ Furthermore, Chair Randall was motivated to block Davison from the page

²⁷⁴ See Second Amended Complaint at 8, *Davison*, 267 F. Supp. 3d 702 (No 1:16 CV-932).

²⁷⁵ See *Davison*, 267 F. Supp. 3d at 720 (“[T]his case concerns apparently private actions that have a sufficiently close nexus with the State to be fairly treated as the actions of the State itself.”) (quotations omitted).

²⁷⁶ See *id.* at 712.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ See *id.* at 713 (describing Randall’s actions as arising “out of public, not personal, circumstances”).

²⁸⁰ See *id.*

²⁸¹ *Id.*

²⁸² *Id.* at 714.

²⁸³ *Id.*

because he criticized her colleagues in the Loudoun County government.²⁸⁴ The court found that this censorial motive related to the conduct of Chair Randall's official government duties.²⁸⁵

In considering the totality of the circumstances, the court concluded that Chair Randall's operation of her Facebook page was governmental — not private — action.²⁸⁶ Ultimately, the court concluded that based on the multifactor designated public forum analysis, the page constituted a designated public forum for expression.²⁸⁷ In doing so, the court observed that the government may open a forum for speech by creating a website on which private viewers can “express opinions or post information” or alternatively where the government “invite[s] or allow[s] private persons to publish information or their positions.”²⁸⁸

The court determined that Chair Randall had done just that.²⁸⁹ Citing the Supreme Court's decision in *Packingham v. North Carolina*, the court held that “[w]hen one creates a Facebook page, one generally opens a digital space for the exchange of ideas and information.”²⁹⁰ It noted that in expressly soliciting comments from her constituents, Chair Randall had explicitly invited public comment on her Facebook page.²⁹¹ Specifically, Randall invited her constituents to initiate and engage in “back and forth conversations” with her on “ANY issues” on the page.²⁹² The court properly held that in issuing this open invitation, Chair Randall had designated “a place or channel of communication for use by the public,” and created a public forum for speech.²⁹³ As Chair Randall “allowed virtually unfettered discussion” and “affirmatively solicited comments from her constituents” on her Facebook page, she created a public forum for private speech that was subject to the strictures of the First Amendment.²⁹⁴ Therefore, Chair Randall's act of deleting Davison's comments as a result of her taking umbrage with his views on her fellow County officials constituted illegal

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *See id.* at 718.

²⁸⁸ *Id.* at 716 (quoting *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275, 284 (4th Cir. 2008)).

²⁸⁹ *Id.*

²⁹⁰ *Id.* (citing *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017)).

²⁹¹ *Id.* (referring to Chair Randall's post to the page, which stated: “Everyone, could you do me a favor. I really want to hear from ANY Loudoun citizen on ANY issues, request, criticism, compliment, or just your thoughts”).

²⁹² *Id.*

²⁹³ *Id.* (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

²⁹⁴ *Id.*

viewpoint discrimination within a public forum.²⁹⁵ The Fourth Circuit Court of Appeals has since upheld this decision.²⁹⁶

C. The President's Twitter Account as Public Forum: Knight Institute v. Donald J. Trump

In *Knight First Amendment Inst. v. Trump*, seven individuals — all of whom the President blocked from following his Unofficial Account on Twitter — sued, claiming that the President and other responsible government officials violated the blocked constituents' First Amendment rights.²⁹⁷ The parties to this case primarily dispute whether the interactive space within President Trump's Unofficial Account on Twitter constitutes a public forum within which viewpoint discrimination is illegal.²⁹⁸

On one hand, the Knight First Amendment Institute (the "Institute"), which represents the seven blocked individuals, contends that the Unofficial Account constitutes state action, not President Trump's private action.²⁹⁹ Further, the Institute contends that such state action does not constitute government speech that is immune from the strictures of the Free Speech Clause, but rather that the interactive space associated with this account constitutes a designated public forum within which the President may not engage in viewpoint discrimination.³⁰⁰

On the other hand, President Trump and the other named defendants (collectively "defendants") argue that the Unofficial Account constitutes private speech, thereby entitling the President to say whatever he wants and to block whatever comments and whichever persons he so chooses. Moreover, defendants argue that were the court to find that blocking on the Unofficial Account constitutes state action, rather than private action, then President Trump's use of the Unofficial Account constitutes government speech and is thus immune from analysis under the Free Speech Clause.³⁰¹ I explore each of these claims in detail below.

²⁹⁵ *Id.* at 716-17.

²⁹⁶ See generally *Davison v. Randall*, Nos. 17-2002, 17-2003, 2019 U.S. WL 114012 (4th Cir. Jan. 7, 2019).

²⁹⁷ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 549 (S.D.N.Y. 2018).

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 564.

³⁰⁰ See Cross-Motion of Plaintiff for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment at 12-22, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 1:17 Civ. 05205).

³⁰¹ See Motion of Gov't for Summary Judgment at 10-22, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205). The defendants also contend that the Knight Institute does not have standing to bring the lawsuit, because it has not suffered a concrete and particularized injury in fact that can be traced to the challenged actions of the President, and that the court cannot issue equitable relief against the President. See *id.* at 5-7. See also *Knight First Amendment Inst.*, 302 F. Supp. 3d at 563-64 (rejecting challenges to the Knight Institute's standing).

First, in *Knight First Amendment Inst. v. Trump*, both sides agree that the 140 (now 280) characters that make up each tweet that the President issues from his Unofficial Account constitute private speech that the President retains his own First Amendment rights in — that is, in composing his tweets, he may say what he wants, even if that means he discriminates on the basis of viewpoint.³⁰² Plaintiffs do not seek to regulate the content or viewpoint of the tweets themselves.³⁰³ Rather, the disputed issue involves the interactive space associated with the Unofficial Account, wherein Twitter users interact with the President and with one another in response to the President's tweets.³⁰⁴ As both sides stipulate: "Twitter is called a 'social' media platform in large part because of comment threads, which reflect multiple overlapping 'conversations' among and across groups of users."³⁰⁵ Plaintiffs claim that they have a right to access this interactive space — without regard to whether the President does or does not approve of their respective viewpoints — because it constitutes a government-controlled, designated public forum for speech, within which viewpoint discrimination is prohibited.³⁰⁶

Accordingly, the central issue in *Knight Institute* is whether the interactive space associated with the President's Unofficial Account on Twitter constitutes a designated public forum in which viewpoint discrimination is prohibited.³⁰⁷ President Trump and his co-defendants argue that the interactive space associated with the Unofficial Account constitutes private action, not state action.³⁰⁸ Like Chair Randall, defendants argue that President Trump's operation of the Unofficial Account is not action traceable to his official powers because: (1) he does not operate the account by virtue of federal law; (2) his use of the account

³⁰² See Motion of Gov't for Summary Judgment at 14, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205); Cross-Motion of Plaintiff for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment at 26, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205).

³⁰³ See Cross-Motion of Plaintiff for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment at 26-7, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205). *Id.* at 20 ("The mere fact that @realDonaldTrump's tweets constitute government speech does not mean that the comment threads associated with his tweets are something other than a public forum.").

³⁰⁴ *Knight First Amendment Inst.*, 302 F. Supp. 3d at 566.

³⁰⁵ *Id.* at 551.

³⁰⁶ Cross-Motion of Plaintiff for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment at 22, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205).

³⁰⁷ See *Knight First Amendment Inst.*, 302 F. Supp. 3d at 549.

³⁰⁸ Motion of Gov't for Summary Judgment at 11, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205) ("[T]he President's use of his personal Twitter account is among the 'acts of officers in the ambit of their personal pursuits [that] are plainly excluded' from state action.") (quoting *Pitchell v. Callan*, 13 F.3d 545, 548 (2d Cir. 1994)).

is not a right conferred by the presidency; and (3) the Unofficial Account itself was created before he became President.³⁰⁹

Defendants contend that President Trump's decisions regarding which voices to allow in the interactive space associated with his Unofficial Account are akin to the President's decisions regarding whom to interact with in real space — which is a matter of private, not state, action.³¹⁰ Further, defendants contend that Twitter, a private entity, granted them the power and enabled them to block constituents from the interactive space associated with the Unofficial Account — and thus that Twitter's structural rules and regulations, not the President, govern the space.³¹¹ Accordingly, defendants claim that decisions regarding the contours of and access to the interactive space associated with the Unofficial Account are the result of *private* actions — the private actions of Donald J. Trump not clothed in the official powers of the presidency and of Twitter, a private company.³¹²

Furthermore, defendants argue that in the alternative, if the decisions regarding the contours of the interactive space associated with the Unofficial Account are considered public speech, they should be considered government speech — immune from analysis under the Free Speech Clause (including the public forum doctrine).³¹³ Defendants analogize the President's decisions regarding who is allowed to follow him on Twitter to the government's decisions in *Sumnum* regarding which privately donated monuments to allow in a public park.³¹⁴ As in *Sumnum*, discussed above, defendants argue that the President's choices regarding conversations in response to his tweets constitute government speech.³¹⁵

Finally, defendants argue that the interactive space associated with the Unofficial Account is not a public forum because it is property controlled by Twitter, a private company, not property that is owned and controlled by the government.³¹⁶ They further claim that President Trump has not intentionally opened up this space for public discourse, as is necessary to create a designated public forum.³¹⁷ Rather, defendants argue, President Trump's Unofficial Account and the interactive space associated with it are instances of the President's speech in a privately run and privately controlled forum, and are therefore not subject to analysis under the public forum doctrine.³¹⁸

³⁰⁹ *Id.* at 12.

³¹⁰ *Id.* at 13 (analogizing President Trump's choice of what Twitter accounts to follow and block to his decision of "what newspapers to pick up [and] what news programs to watch").

³¹¹ *Id.* at 13-4.

³¹² *See id.* at 12.

³¹³ *See id.* at 14-5.

³¹⁴ *See id.* at 15.

³¹⁵ *See* discussion *supra* Part II.D.

³¹⁶ *See* Motion for Gov't for Summary Judgment at 20, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 1:17 Civ. 05205).

³¹⁷ *See id.* at 18.

³¹⁸ *See id.* at 14.

The court began its examination of the plaintiffs' public forum claims and defendant's defenses by focusing on the nature of the access sought by plaintiffs and the type of space to which they sought access.³¹⁹ The court explained that consideration of the speakers' desired access was a threshold inquiry in analyzing the plaintiff's public forum claims.³²⁰ The court found that, like the access sought by the plaintiffs in *Cornelius v. NAACP*³²¹ and *Perry Education Association*,³²² the plaintiffs in the instant case sought access that was narrow and specific in scope. In particular, the access sought by the plaintiffs was not the right to access the President's Unofficial Account as a whole, which would necessarily include the right to decide the content of the President's tweets³²³ and/or the right to decide whom the President follows through his Unofficial Account.³²⁴ Rather, the plaintiffs sought the narrow and specific right to express themselves within the interactive space associated with each of the President's tweets by replying to, retweeting, and/or liking those tweets and otherwise participating in the account's interactive space — a right enjoyed by the 57.5 million other individuals who follow the President on his Unofficial Account.³²⁵ Thus, the court appropriately narrowed the relevant inquiry and found that the proper subject of the forum analysis was not the Unofficial Account as a whole, but the interactive space associated with each of the President's tweets from this account — the space that allows for the President's 56 million Twitter followers to engage and interact with, comment on, praise, criticize, expound upon, and accept or reject his statements.³²⁶

The court then examined whether this specific forum — the interactive space associated with each of the President's tweets from his Unofficial Account — constituted a government-controlled forum.³²⁷ The court first rejected defendants' claim that because Twitter, a private company, owned the underlying

³¹⁹ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 565 (S.D.N.Y. 2018).

³²⁰ *Id.*

³²¹ *See Cornelius v. NAACP Legal Def. & Edu. Fund*, 473 U.S. 788, 801 (1985) (addressing access to the Combined Federal Campaign).

³²² *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46-47 (1983) (addressing access to the interschool mail system and teacher mailboxes in the Perry Township schools).

³²³ The court explained, not surprisingly, that the content of each tweet from the Unofficial Account fell comfortably within the category of government speech, since these tweets consist solely of the speech of the President (or other government officials who help him craft such tweets). *Id.* at 571. However, the court went on to determine that the same could not be said of the interactive space for replies and retweets associated with each tweet sent from the Unofficial Account, as discussed below. *Id.* at 572.

³²⁴ *See id.* at 566.

³²⁵ *See* Complaint at 25, 27-8, 30, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205). *See also* Donald J. Trump (@realDonaldTrump), *supra* note 10.

³²⁶ *Knight First Amendment Inst.*, 302 F. Supp. 3d at 566.

³²⁷ *See id.* at 566-70.

forum, and because that forum was not a physical space, it did not constitute a public forum for purposes of the First Amendment.³²⁸ While recognizing that many of the Supreme Court’s public forum cases involved government-owned physical property like streets, parks, and public school facilities, the court explained that public forums have also included privately owned and government-controlled forums.³²⁹ The court correctly held that a forum’s underlying form of ownership is not dispositive;³³⁰ rather, the relevant inquiry concerns the entity that is exercising control over access to the forum.³³¹ In addition, the court explained that it was irrelevant that the forum under consideration — the interactive space associated with President Trump’s Unofficial Account — did not have a physical situs because, as the Supreme Court has repeatedly explained, a public forum may “lack a physical situs”³³² yet may be “a forum more in the metaphysical sense than in a spatial or geographic sense.”³³³ Accordingly, the court held that the non-physical forum at issue in the case was government-controlled.³³⁴ While recognizing that Twitter controls the basic features of its platform, the court found that President Trump, along with the government officials working under his direction, exercise control over the specific forum at issue — the Unofficial Account — including control over which of his 56 million followers he

³²⁸ See *id.* at 566; see also Motion of Gov’t for Summary Judgment at 19, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (No. 1:17 Civ. 05205).

³²⁹ See *Knight First Amendment Inst.*, 302 F. Supp. 3d at 566 (citing *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975)) (finding that a privately-owned theater space constituted a public forum — notwithstanding the fact that the city did not own the forum — because it was under government control). See also, *supra* Part II.C.

³³⁰ It is worthwhile to recall language from the Supreme Court’s seminal public forum case, in which it instructed that the issue of who held formal title to the property at issue was not dispositive:

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. . . . [Therefore.] the privilege of a citizen of the United States to use the streets and parks for communication of views on national questions . . . must not, in the guise of regulation, be abridged or denied.

Hague v. Comm. For Indus. Org., 307 U.S. 496, 515-16 (1939) (emphasis added).

³³¹ *Id.* at 566 (quoting *Cornelius v. NAACP Legal Def. & Edu. Fund*, 473 U.S. 788, 800 (1985) (“This requirement of governmental control, rather than complete governmental ownership, is . . . consistent with forum analysis’s focus on ‘the extent to which the Government can control access’ to the space and whether that control comports with the First Amendment.”)).

³³² *Id.* (quoting *Cornelius*, 473 U.S. at 801).

³³³ *Id.* (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995)).

³³⁴ *Id.*

bars from participation in the interactive space associated with the President's tweets.³³⁵

The court next considered whether the government-controlled forum at issue — the interactive space associated with each of the President's tweets from his Unofficial Account — was subject to forum analysis under the First Amendment or instead constituted government speech and was thus immune from such an analysis.³³⁶ In analyzing this issue, the court turned to the central cases of *Pleasant Grove v. Summum*,³³⁷ *Walker v. Sons of the Confederate Veterans*,³³⁸ and *Matal v. Tam*,³³⁹ in which the Supreme Court found the following factors to be most relevant: (1) whether the forum was constrained by inherent selectivity and scarcity, including whether a public forum classification would “lead almost inexorably to the closing of the forum”³⁴⁰ or whether the forum was “capable of accommodating a large [amount of speech] without defeating its essential function”;³⁴¹ (2) whether the speech within the forum was “closely identified in the public mind with the government”;³⁴² and (3) whether the government maintained control over the speech in the forum.³⁴³

Applying the first factor — whether the forum was constrained by inherent selectivity and scarcity — the court properly held that the forum composed of the interactive space associated with each Presidential tweet was not inherently selective or scarce.³⁴⁴ This forum was distinctly unlike the forum to which plaintiffs sought access in *Summum* — namely, access to a public park for the purpose of donating and erecting permanent monuments — where such access, if granted to all who seek it out, would “almost inexorably lead to the closing of the forum.”³⁴⁵ Unlike that right of access, the plaintiffs in *Knight First Amendment Inst.* requested access to a forum capable of accommodating — and which regularly does accommodate — a virtually unlimited amount of speech in the form of replies and retweets.³⁴⁶

³³⁵ See *id.* at 566-67 (“[T]hey control the content of the tweets. . . and they hold the ability to prevent, through blocking, other Twitter users . . . from accessing the @realDonaldTrump timeline.”).

³³⁶ See *id.* at 570.

³³⁷ 555 U.S. 460 (2009).

³³⁸ 135 S. Ct. 2239 (2015).

³³⁹ 137 S. Ct. 1744 (2017).

³⁴⁰ *Knight*, 302 F. Supp. 3d at 571.

³⁴¹ *Id.* at 570.

³⁴² *Id.* at 571.

³⁴³ *Id.*

³⁴⁴ *Id.* at 572.

³⁴⁵ *Pleasant Grove v. Summum*, 555 U.S. 460, 480 (2009).

³⁴⁶ See *Knight First Amendment Inst.*, 302 F. Supp. 3d at 573. The record showed that each tweet from @realDonaldTrump regularly engenders tens of thousands and upwards of hundreds of thousands of replies and retweets. Stipulation at 41-43, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 17 Civ. 5205).

In considering the second factor — whether the speech in the forum was closely identified in the public mind with the government — the court properly found that while the public identified the President’s tweets with the President himself, the same could not be said for the interactive space, including individuals’ replies, retweets, likes, etc., associated with each Presidential tweet.³⁴⁷ Notably, each reply to a Presidential tweet is associated and displayed with the replying user’s account information, including the picture, name, and Twitter handle, and is not endorsed by the government.³⁴⁸ Unlike the specialty license plates involved in the *Walker* case — which were a form of official state identification, and bore both the specialty message and the name “TEXAS,”³⁴⁹ — and unlike the permanent monuments accepted for public display in *Sumnum*,³⁵⁰ the reply tweets and other responses and interactions at issue in the *Knight First Amendment Inst. v. Trump* case are not associated in the public’s mind with the government.³⁵¹ Rather, the speech at issue is more akin to the speech at issue in *Matal v. Tam*³⁵² — trademarks that private entities create and seek to register with the U.S. Patent and Trademark Office for the purpose of securing legal rights to those trademarks — which the Court found (1) was associated with private speakers in the public mind, not with the government; and (2) was private speech not government speech.³⁵³

Finally, the court examined the third factor: whether the government maintained control over the speech in the forum.³⁵⁴ The court observed that the replying user herself controls each reply tweet to a presidential tweet, such that no other Twitter user — including the President — can alter the content of any reply.³⁵⁵ The court observed that the defendants maintain no control over individual reply tweets, but rather can only control such tweets by utilizing their

³⁴⁷ See *Knight First Amendment Inst.*, 302 F. Supp. 3d at 572.

³⁴⁸ See *id.* (emphasizing the “prominence” of the replying user’s account information in the replying tweet).

³⁴⁹ See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248 (2015) (emphasizing the clear “governmental nature of the plates”).

³⁵⁰ See *Sumnum*, 555 U.S. at 472 (finding that the City’s decisions regarding which public monuments to accept and which to reject constituted government speech).

³⁵¹ See *Knight First Amendment Inst.*, 302 F. Supp. 3d at 572 (“[T]he reply is unlikely to be ‘closely identified in the public mind’ with the [original] sender, even when the sender of the tweet being replied to is a governmental one.”) (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017)).

³⁵² 137 S. Ct. 1744 (2017).

³⁵³ See *id.* at 1760. Notably, the Supreme Court in *Matal* warned against the government’s attempt to extend the government speech doctrine to an ever broader array of circumstances, which would have the effect of diminishing the protections of the Free Speech Clause. *Id.* at 1748. (“If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.”).

³⁵⁴ See *Knight First Amendment Inst.* 302 F. Supp. 3d at 572.

³⁵⁵ See *id.*

power to block users entirely from following the President on his Unofficial Account.³⁵⁶ Unlike the State of Texas in the *Walker* case — which exercised “sole control over the design, typeface, color, and alphanumeric pattern,” and legally maintained final approval authority over all specialty license plates in the state³⁵⁷ — the *Knight First Amendment Inst.* defendants’ power is either total or absent. Ultimately, the court determined that — as neither the President nor any government official has the ability to control the replies, retweets, or other speech in the interactive space associated with each presidential tweet — the element of government control of was completely lacking from the forum at issue.³⁵⁸

After assessing the three factors — whether the relevant forum was constrained by inherent selectivity and scarcity, whether the speech within the forum was closely identified in the public mind with the government, and whether the government maintained control over the speech in the forum — the court concluded that the interactive space associated with each presidential tweet constituted a type of public forum for private speech subject to the constraints of the Free Speech Clause, not government speech immune from such constraints.³⁵⁹

Having concluded that the interactive space associated with the President’s Unofficial Account was not government speech and was thus properly subject to forum analysis under the Supreme Court’s First Amendment jurisprudence, the court then considered whether that interactive space was a traditional public forum, a designated public forum, or a nonpublic forum.³⁶⁰ As the Supreme Court has strictly limited the traditional public forum to its historical confines — *i.e.*, public streets, sidewalks, and parks — the court quickly moved to an examination of whether the forum at issue fell within the second or third type of forums.³⁶¹

The Supreme Court has instructed that, in distinguishing designated public forums from nonpublic forums, courts must “look to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.”³⁶² A number of factors support an inference of the requisite government intent on this point, including the government’s policy, past practice, the nature of the property, and its

³⁵⁶ *See id.*

³⁵⁷ *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2249 (2015) (“Texas law provides that the State ‘has sole control over the design, typeface, color, and alphanumeric pattern for all license plates.’ The Board must approve every specialty plate design proposal before the design can appear on a Texas plate.”) (citing § 504.005; 43 Tex. Admin. Code §§ 217.45(i)(7)–(8), 217.52(b)).

³⁵⁸ *See Knight First Amendment Inst.*, 302 F. Supp. 3d at 572.

³⁵⁹ *See id.*

³⁶⁰ *See id.* at 573–74.

³⁶¹ *See id.*

³⁶² *Id.* at 574 (quoting *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

compatibility with expressive activity.³⁶³ Applying these factors, the court concluded that the government intended to open up the interactive space associated with each presidential tweet as a designated public forum.³⁶⁴ The court explained that (1) absent the President's blocking, this interactive space was generally available to the public without limitation; (2) the Unofficial Account was expressly designated as a means of communication with the American public at large; and (3) the interactive space at issue was fully compatible with a substantial amount of expressive activity.³⁶⁵ As the Supreme Court recently recognized in *Packingham v. North Carolina*, social media sites like Twitter are the modern-day mediums through which citizens can "petition their elected representatives and otherwise engage with them in a direct manner."³⁶⁶ Accordingly, the court held that the interactive space associated with the President's tweets on his Unofficial Account constituted a designated public forum for expression.³⁶⁷

Having determined that the interactive space at issue constituted a designated public forum, the court readily determined that the President's blocking of the plaintiffs from following the Unofficial Account on the basis on their viewpoint was unconstitutional.³⁶⁸ The Supreme Court has repeatedly and unequivocally held that viewpoint discrimination directed against speech that is otherwise permissible within a designated public forum is unconstitutional.³⁶⁹ The court explained that there was no conceivable way to interpret the President's actions — blocking of the plaintiffs after they criticized him and/or his policies — as anything other than viewpoint discrimination, which is flatly illegal within a designated public forum.³⁷⁰ The court therefore awarded the plaintiffs the declaratory relief they sought and ordered the President and his co-defendants to cease their viewpoint-motivated blocking of the plaintiffs.³⁷¹

³⁶³ See *Cornelius*, 473 U.S. at 802.

³⁶⁴ See *Knight First Amendment Inst.*, 302 F. Supp. 3d at 574-75.

³⁶⁵ See *id.* at 574.

³⁶⁶ 137 S. Ct. 1730, 1735 (2017).

³⁶⁷ See *Knight First Amendment Inst.*, 302 F. Supp. 3d at 575.

³⁶⁸ See *id.*

³⁶⁹ See *id.* See also *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) ("When government creates such a forum . . . 'viewpoint discrimination' is forbidden."); *Rosenberger v. Rector Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30 (1995); discussion *supra* Part II.B.

³⁷⁰ See *Knight First Amendment Inst.*, 302 F. Supp. 3d at 575.

³⁷¹ See *id.* at 579. Although the plaintiffs also sought injunctive relief in the form of a court order mandating that the President unblock the plaintiffs from the Unofficial Account, the court declined to award such relief — in part because it concluded that declaratory relief was likely to achieve the same result as injunctive relief, and in part because declaratory relief would be less intrusive on the prerogative of the executive and would thus be less likely to raise separation of powers concerns. See *id.*

IV. LET THEM SPEAK THEIR MINDS IN THE DIGITAL TOWN HALL: HOW
GOVERNMENT OFFICIALS CAN CRAFT CONSTITUTIONAL SOCIAL MEDIA
POLICIES

As the discussions of Governor Hogan, Chair Randall, and the President Trump's cases illustrate, courts should, and likely will, view government officials' social media sites — which facilitate comments, questions, and debate from and amongst the public at large — as designated public forums under the First Amendment, within which viewpoint discrimination by government officials is flatly prohibited. This means that deleting a constituent's critical comments is unconstitutional. This also means that blocking an individual from such forums is likely to be impermissible. However, government officials can craft policies that constitutionally prohibit certain speech under certain circumstances, including those in which (1) the forum is a *limited* public forum — *i.e.*, a forum limited to discussion by certain classes of speakers or regarding certain subjects and where the speaker or speech falls outside these limits; or (2) if the speech itself is not protected by the First Amendment. I discuss each of these possibilities below.

Although it may be constitutionally permissible in certain circumstances for a government official to prohibit certain speech on the official's social media site, courts will most likely find that it is never constitutionally permissible to outright block an individual from such a social media site that is open to the public, even if that individual has posted off-topic or illegal speech in the past. Such an act of blocking would amount to a prior restraint on that individual's future speech, which is presumptively unconstitutional.³⁷² Although courts have upheld limited restrictions on individuals' future speech — such as judicially imposed gag-orders where necessary to ensure a fair trial³⁷³ and content-neutral, time, place, or manner injunctions preventing repeat offenders from once again violating the law³⁷⁴ — courts have never upheld the wholesale blocking of an individual from speaking in a traditional or designated public forum.³⁷⁵ Therefore, blocking an individual from a government official's social media site will likely never pass constitutional muster.

³⁷² See *Rosenberger*, 515 U.S. at 830 (“Viewpoint discrimination . . . is presumed impermissible when directed against speech otherwise within the forum's limitations.”).

³⁷³ See, *e.g.*, *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976).

³⁷⁴ See, *e.g.*, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 757 (1994) (upholding certain content-neutral provisions of a state court injunction that prohibited particular anti-abortion protestors from demonstrating and engaging in other advocacy efforts near abortion clinics and the homes of clinic employees); *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 361 (1997) (upholding certain content-neutral provisions of state court injunction issued against fifty individuals and three organizations, including fixed buffer zones which prohibited demonstrating within fifteen feet of abortion clinic doorways, parking lots, and driveways).

³⁷⁵ See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 501-03 (1939) (rejecting Jersey City's attempt to prohibit a labor union from speaking within the entirety of a city).

If a government official opens up her social media site for questions and comments on all subjects related to governance, a court would likely view that site as a general purpose designated public forum and would strictly scrutinize any effort to prohibit speech within that forum on the basis of content or viewpoint. As discussed above, courts will subject speech limitations within such general purpose designated public forums to the same scrutiny as speech restrictions within traditional public forums.³⁷⁶ However, when the government creates or designates a public forum by opening it up for speech, it does not have to open it up for the discussion of all subjects.³⁷⁷ The government can create a limited-purpose designated public forum — or a “limited public forum” — dedicated only to the discussion of certain topics and/or available only to a certain classes of speakers.³⁷⁸

For example, a school district can constitutionally limit after-school use of school property to social, civic, educational, and recreational uses, while prohibiting use of the same property for political or commercial purposes.³⁷⁹ Likewise, a city council can create an open microphone opportunity during a council meeting and allow speakers to address any issue on the council’s agenda, but prohibit discussion of topics that are not on the council’s agenda.³⁸⁰ A state university

³⁷⁶ See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-6 (1983). The *Perry* court explained:

In [traditional public forums or] quintessential public forums. . . for the State to enforce a content-based exclusion, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. [Similarly,] the Constitution forbids a State to enforce certain exclusions from a [designated public] forum generally open to the public even if it was not required to create the forum in the first place. . . . Although a State is not required to indefinitely retain the open character of the facility, as long as it does so, it is bound by the same standards as apply in a traditional public forum. . . . a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.

Id. (citations omitted).

³⁷⁷ See *Cornelius v. NAACP Legal Def. & Edu. Fund*, 473 U.S. 788, 806 (1985) (“Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”) (citing *Perry Educ. Ass’n*, 460 U.S. at 49).

³⁷⁸ See *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993) (describing a limited public forum as “open only for designated purposes”).

³⁷⁹ See *id.* at 393-94 (holding that while it is constitutional to create a designated public forum with such limited purposes as social, civic, and recreational uses, it is unconstitutional to prohibit religious uses of such property). See also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108-09 (2001) (holding that while it is constitutional to create a designated public forum with such limited purposes as instruction in education, learning, the arts, social, civic, recreational, and entertainment uses pertaining to the community welfare, it is unconstitutional to prohibit the use of the property for religious purposes).

³⁸⁰ Cf. *City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp’t Relations Comm’n*, 429 U.S. 167, 175-76 (1976) (rejecting a state instrumentality’s attempt to restrict speech in a limited-

can open up its classrooms for use by student organizations but not by outside community groups.³⁸¹ Such topic-based or speaker-based restrictions within limited-purpose public forums are constitutional, so long as any prohibitions on speech within the limited public forum are also reasonable in light of the purposes and subjects of the forum and are not based on viewpoint. By expressly creating such a limited-purpose public forum, government officials would be empowered to prohibit speech falling outside the scope of the specific, designated topics. Therefore, a government official could open up a Facebook page or Twitter account's forums to speech on political and public interest topics, while prohibiting commercial advertisements or solicitation by constituents, for example, within that forum.

In addition, when government officials use social media sites that invite questions, comments, and debate by constituents and members of the public, they are constitutionally permitted to prohibit speech falling outside the protections of the First Amendment, including speech that amounts to a true threat,³⁸² speech that constitutes fighting words,³⁸³ speech that is obscene,³⁸⁴ and speech that

purpose public forum where that speech was within the scope of the topics to which that forum was dedicated).

³⁸¹ See *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (finding that a University policy evincing a clear intent to create a public forum for use by all registered student groups rendered the University unable to restrict a student group's religious speech within a public forum).

³⁸² True threats — statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals — are not protected by the First Amendment. See, e.g., *Virginia v. Black*, 538 U.S. 343, 359 (2003). However, courts are more likely to hold that threatening speech referencing a government official is mere “political hyperbole” and therefore protected speech, instead of an unprotected true threat. See *Watts v. United States*, 394 U.S. 705, 708 (1969) (defendant's statement “If they ever make me carry a rifle the first man I want to get in my sights is [President Lyndon B. Johnson]” was not a true threat within the meaning of a statute that made it a crime to knowingly and willfully threaten the life of the President, but was rather a “kind of political hyperbole” and a “crude offensive method of stating political opposition to the President.”). For a recent controversy regarding speech that was allegedly threatening to the President of the United States, consider the uproar over comedian Kathy Griffin's picture of herself holding a replica of President Trump's decapitated head. See William Cummings, *Did Kathy Griffin Break the Law with her Photo of a Decapitated Trump?*, USA TODAY (May 31, 2017, 3:19 PM), <https://www.usatoday.com/story/news/nation/2017/05/31/did-kathy-griffin-break-law-her-photo-decapitated-trump/356840001/> [<https://perma.cc/HRH7-NQ4X>].

³⁸³ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573-74 (1942) (holding that “fighting words” — words that “men of common intelligence would understand to be words likely to cause an average addressee to fight” — were not protected by the First Amendment).

³⁸⁴ The Supreme Court set forth the following three-part definition of obscene speech, which is outside the protection of the First Amendment:

- (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to prurient interest; (b) whether the work depicts

contains child pornography.³⁸⁵ While it seems unlikely that either obscenity or child pornography would regularly appear on a government official's social media site,³⁸⁶ and while fighting words appears to be an anachronism,³⁸⁷ it is not unrealistic to expect that speech arguably amounting to true threats would be posted in an online forum,³⁸⁸ in which case the government official hosting the forum may constitutionally prohibit such speech.

However, pursuant to the prior restraint doctrine, the ultimate determination of the illegality of any such post must await a judicial determination, since speech cannot constitutionally be censored by a government official prior to a judicial determination of its illegality.³⁸⁹ Under the prior restraint doctrine, any restriction on or censorship of speech by a government official that precedes a judicial determination of the speech's illegality constitutes a prior restraint on

or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973). Obscenity prosecutions that do not also involve child pornography prosecutions are relatively rare. See Neil A. Lewis, *A Prosecution Tests the Definition of Obscenity*, N.Y. TIMES (Sept. 28, 2007), <https://www.nytimes.com/2007/09/28/us/28obscene.html> [<https://perma.cc/XF4N-H2JW>] (fewer than two dozen federal obscenity prosecutions have been brought that did not also involve child pornography).

³⁸⁵ New York v. Ferber, 458 U.S. 747, 764 (1982) (finding that child pornography, defined as visual depictions of minors engaged in sexual activity, was outside the protection of the First Amendment).

³⁸⁶ While unlikely, it is possible that obscene or pornographic content might appear on a government official's social media site, as in the recent case when Senator Ted Cruz tweeted a link to a pornographic site. See Ed O'Keefe & Avi Selk, *After @tedcruz liked a porn tweet, Sen. Ted Cruz blamed it on a staffer's 'honest mistake'*, WASH. POST (Sept. 13, 2017), <https://www.washingtonpost.com/news/powerpost/wp/2017/09/12/after-tedcruz-liked-a-porn-tweet-sen-ted-cruz-blamed-a-staffing-issue/> [<https://perma.cc/CM3N-UDSS>].

³⁸⁷ Although the Supreme Court has repeatedly stated that fighting words are outside the protection of the First Amendment, since its 1942 decision in *Chaplinsky*, the Court has never since held that any speech actually fell within this category of unprotected speech. See, e.g., Snyder v. Phelps, 562 U.S. 442, 443 n.3, 454, 458 (2011) (reiterating that the category of "fighting words" is outside the protection of the First Amendment, but holding that Westboro Baptist Church's speech at military funeral — including the use of posters with the words "God Hates Fags" and "God Hates You" — did not fall within this category).

³⁸⁸ See Desmond U. Patton et al., *Tweets, Gangs, and Guns: A Snapshot of Gang Communications in Detroit*, 32 VIOLENCE AND VICTIMS 919, 921 (2017) (discussing gang activity on the Internet and on social media, including threats of violence).

³⁸⁹ As I have explored in detail elsewhere, any restraint on speech that is imposed by a government official prior to a judicial determination of the speech's illegality constitutes a prior restraint on speech that is presumptively unconstitutional. See, e.g., Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Dawn Carla Nunziato, *How (Not) To Censor: Procedural First Amendment Values and Internet Censorship Worldwide*, 42 GEO. J. INT'L L. 1123, 1142 (2011).

speech, and is presumptively unconstitutional.³⁹⁰ Therefore, even if the government official believes that the speech at issue on his or her social media account constitutes an unprotected true threat or falls within one of the other categories of unprotected speech discussed above, if the official were to remove the speech before securing a judicial determination of the speech's illegality, the official would have imposed an illegal prior restraint.³⁹¹ Accordingly, government officials have very limited authority to remove speech within the designated public forums that their social media sites constitute.

CONCLUSION

When government officials like Maryland Governor Larry Hogan and President Donald J. Trump use social media sites like Facebook and Twitter to engage and interact with their constituents on matters related to their governance, they create modern-day public forums for speech. Although the media through which these interactions take place is of recent vintage, the American legal system has recognized from time immemorial that providing for interactions between those who govern and those who are governed is vital to our democracy. Such interactions form the heart of our system of democratic self-government and must continue to be protected from censorship in the digital age, which is why viewpoint discrimination within such forums is flatly unconstitutional under the Supreme Court's well-developed public forum jurisprudence.

Despite the modern-day context inherent in political engagement on social media, the interactions themselves between those who govern and those who are governed remain at the core of the First Amendment's protections for free speech. The Court's explanation of this point remains as important today as when the Court ushered in the public forum doctrine eighty years ago:

The very idea of a government, republican in form, implies a right on the part of its citizens to [consult] in respect to public affairs and to petition for a redress of grievances . . . Such use of [public forums] has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use [public forums] for communication of views on national questions . . . must not . . . be abridged or denied.³⁹²

Whether public forums occur in the town square or in the Twittersphere, these forums remain vital to our system of democratic self-government and courts must continue to protect them from government censorship in the digital age.

³⁹⁰ *Id.* at 70.

³⁹¹ *See, e.g.*, *New York Times, Co. v. United States*, 403 U.S. 713, 715 (1971) (Black, J., concurring) (per curiam) (striking down Nixon Administration's injunctions which prohibited the *New York Times* and *Washington Post*'s publication of portions of *The Pentagon Papers* and stating that "every moment's continuance of the injunctions against these newspapers [prior to judicial determination of the publication's illegality] amounts to a flagrant, indefensible, and continuing violation of the First Amendment.").

³⁹² *Hague v. Comm. for Indus. Org.*, 307 U.S. 494, 513-16 (1939).