18-1691

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, REBECCA BUCKWALTER, PHILIP COHEN, HOLLY FIGUEROA, EUGENE GU, BRANDON NEELY, JOSEPH PAPP, NICHOLAS PAPPAS

Plaintiffs–Appellees

v.

DONALD J. TRUMP, in his official capacity as President of the United States, DANIEL SCAVINO, in his official capacity as White House Director of Social Media and Assistant to the President

Defendants–Appellants

SARAH HUCKABEE SANDERS, in her official capacity as White House Press Secretary

Defendant

On appeal from the United States District Court for the Southern District of New York — No. 1:17-CV-5205 (Buchwald, J.)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel certifies that Plaintiff–Appellee the Knight First Amendment Institute at Columbia University has no parent corporations and that no publicly held corporation owns 10 percent or more of its stock. The Knight Institute is a non-profit, non-partisan organization governed by a nine-member board of directors, five of whom are associated with Columbia University.

/s/ Jameel Jaffer
Jameel Jaffer

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INTRODUCTION

The President's Twitter account, @realDonaldTrump, has become an important source of news and information about the government, and an important forum for speech by, to, and about the President. The account is akin to a digital town hall, with the President speaking from the podium at the front of the room and assembled citizens responding to him and engaging with one another about the President's statements. In an effort to suppress dissent, the President ejected from this forum—"blocked"—the Individual Plaintiffs[1] and other Twitter users who criticized him or his policies. As the district court held, the same principles that would have rendered this conduct unconstitutional in a conventional town hall render it unconstitutional here.

The President and his aides use the @realDonaldTrump account as an extension of the presidency, and accordingly the account is attributable to the government and subject to the First Amendment. Moreover, because the account is a digital space in which the public at large can hear from the President about matters relating to government, respond directly to him, and engage with one another about the President's statements and policies, the account is properly understood to

[1] In this brief, "Individual Plaintiffs" refers to the seven people whose blocking from the @realDonaldTrump account initiated this lawsuit. "Plaintiffs" refers to all eight appellees listed in the caption, including the Knight First Amendment Institute at Columbia University ("Knight Institute").

encompass a designated public forum. As the district court held, Defendants' decision to exclude the Individual Plaintiffs from this forum simply because they criticized the President or his policies violated the "fundamental principle" of the First Amendment: that the government "may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys." *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring in part and concurring in the judgment).

This case concerns one Twitter account, albeit a particularly notorious one, but it raises issues of broad significance. "While in the past there may have been difficulty in identifying the most important places . . . 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." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)). Social media platforms like Twitter offer "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard," *id.* at 1737, in part because these platforms permit citizens to "petition their elected representatives and otherwise engage with them in a direct manner," *id.* at 1735. As public officials increasingly use social media as a means of speaking to and hearing from their constituents, it is imperative that the First Amendment be understood to

safeguard the right of citizens to participate freely in these new virtual forums, including by expressing criticism and dissent.

COUNTERSTATEMENT OF THE ISSUE[2]

Whether the President and his aides violated the First Amendment when they blocked Twitter users, based on their criticism of the President or his policies, from interacting with a Twitter account that Defendants use almost exclusively for communications relating to the President's office and official duties.

COUNTERSTATEMENT OF THE CASE

I. The Twitter platform.

Plaintiffs adopt the description of Twitter offered by Defendants in their Statement of the Case. *See* Appellants' Br. at 4–8; *see also* Joint Stipulation ("Stip.") ¶¶ 14–31 (A45–A54). Of particular relevance to this appeal is the interactivity of Twitter's platform. Twitter allows its users—roughly 70 million of whom are in the United States—"to post short messages, to repost or respond to others' messages, and to interact with other Twitter users in relation to those messages." Stip. ¶ 13 (A45). "The collection of replies and replies-to-replies [to a given tweet] is sometimes referred to as a 'comment thread.'" *Id*. ¶ 23 (A50). A comment thread

[2] Plaintiffs do not dispute the Statement of Jurisdiction and Statement of the Standard of Review offered by Defendants. Fed. R. App. P. 28(b); *see* Appellants' Br. at 3, 17–18.

may "reflect multiple overlapping 'conversations' among and across groups of users." *Id.* Twitter allows a user who wants to prevent another user from interacting with her account to "block" that other user. *Id.* ¶ 28 (A52). A blocked user "cannot see or reply to the blocking user's tweets, view the blocking user's list of followers or followed accounts, or use the Twitter platform to search for the blocking user's tweets." *Id.* It is President Trump's use of the blocking feature to suppress dissent that gives rise to this case.

II. The @realDonaldTrump account.

President Trump operates and oversees the operation of a Twitter account with the handle "@realDonaldTrump." *Id.* ¶ 9 (A44). The webpage associated with the account indicates that the account is registered to Donald J. Trump, "45th President of the United States of America, Washington, D.C.," *id.* ¶ 35 (A54–A55), and the page often features images of President Trump performing his official duties, *id.* On June 2, 2017, for example, the page featured a photograph of President Trump in front of Air Force One, and on June 30, 2017, it featured a photograph of President Trump delivering remarks at the Department of Energy while flanked by Vice President Mike Pence and Secretary of Energy Rick Perry. *Id.* Ex. B at 6–7 (A144–

A145). In September 2017, the account had approximately 35 million followers. *Id.* ¶ 36 (A55). Today it has over 55 million.[3]

Since his inauguration in January 2017, President Trump has used the @realDonaldTrump account almost exclusively for communications relating to his office and his official duties. With the assistance of White House Social Media Director Daniel Scavino, *id.* ¶¶ 12, 39 (A45, A56), the President has used the account to announce nominations and appointments to senior governmental positions, announce and defend his administration's policies, conduct international diplomacy, and promote his administration's legislative agenda, *id.* ¶ 38 (A56). On June 7, 2017, for example, President Trump used the @realDonaldTrump account to announce, "for the first time, that he intended to nominate Christopher Wray for the position of FBI director," *id.*, and on July 26, 2017, President Trump used the account to announce a new policy to ban transgender individuals from serving in the military, *id.* ¶ 41 (A57–A58).

Tweets from the @realDonaldTrump account are widely understood to be official statements of the President. President Trump's aides have indicated that tweets from the @realDonaldTrump account should be understood as "official statements by the President of the United States," and they have cited tweets from

[3] *See* https://twitter.com/realDonaldTrump (last accessed Oct. 12, 2018).

the account in response to congressional inquiries. *Id.* ¶ 37 (A55–A56). The President himself has described his use of social media as "MODERN DAY PRESIDENTIAL." *Id.* Multiple federal courts have treated tweets from the account as official statements, and the National Archives and Records Administration has determined that tweets from the account must be preserved as presidential records. *Id.* ¶ 40 (A57).

III. The President's blocking of the Individual Plaintiffs from the @realDonaldTrump account.

The Individual Plaintiffs are seven individuals who were blocked from the @realDonaldTrump account because of opinions they expressed in replies to the President's tweets about official government matters. *Id.* ¶¶ 2–8, 46–54 (A43–A44, A60–A63).

- **Rebecca Buckwalter**, a writer and political consultant, was blocked by the President on June 6, 2017. *Id.* ¶¶ 2, 46 (A43, A60). That morning, President Trump tweeted, "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 winning WH." *Id.* ¶ 46 (A60). President Trump blocked Ms. Buckwalter after she replied, "To be fair you didn't win the WH: Russia won it for you." *Id.*

- **Philip Cohen**, a sociology professor at the University of Maryland, was blocked on June 6, 2017 after replying to a tweet from the President about an air traffic control initiative with a photograph of President Trump and the words "Corrupt Incompetent Authoritarian" superimposed on the photograph. *Id.* ¶¶ 3, 47 (A44, A60–A61).

- **Holly Figueroa**, a political organizer and songwriter, was blocked on May 28, 2017 after replying to one of the President's tweets with an image of the Pope looking incredulously at President Trump along with

the statement, "This is pretty much how the whole world sees you." *Id.* ¶¶ 4, 48 (A44, A61).

- **Eugene Gu**, a surgical resident at Vanderbilt University Medical Center, was blocked on June 18, 2017 after Dr. Gu responded to a tweet by President Trump discussing his approval rating by tweeting, "Covfefe: The same guy who doesn't proofread his Twitter handles the nuclear button." *Id.* ¶¶ 5, 49 (A44, A61).

- **Brandon Neely**, a police officer and veteran, was blocked by the President on June 12, 2017 after Neely responded to a tweet by President Trump relating to the opening of a new coal mine by tweeting, "Congrats and now black lung won't be covered under #TrumpCare." *Id.* ¶¶ 6, 50 (A44, A61–A62).

- **Joseph Papp**, an anti-doping advocate and author, was blocked on or about June 3, 2017 after replying to the President's tweet of his weekly video presidential address with a tweet that included, "#fakeleader." *Id.* ¶¶ 7, 51 (A44, A62).

- **Nicholas Pappas**, a comic and writer, was blocked on June 5, 2017 after he replied to the President's tweets about immigration by tweeting, "Trump is right. The government should protect the people. That's why the courts are protecting us from him." *Id.* ¶¶ 8, 52 (A44, A62).

As a result of being blocked from the @realDonaldTrump account, the Individual Plaintiffs "cannot view the President's tweets; directly reply to these tweets; or use the @realDonaldTrump webpage to view the comment threads associated with the President's tweets while they are logged in to their verified accounts." *Id.* ¶ 54 (A62–A63). They can "view tweets from @realDonaldTrump [only] when using an internet browser or other application that is not logged in to Twitter, or that is logged in to a Twitter account that is not blocked by @realDonaldTrump." *Id.* ¶ 55 (A63–A64). Further, the Individual Plaintiffs' ability

to participate in the comment threads by replying to the replies of other users is circumscribed. Although they "can view replies to @realDonaldTrump tweets, and can post replies to those replies, while logged in to the blocked accounts," they can do so only through "workarounds" which are "burdensome and . . . delay their ability to respond to @realDonaldTrump tweets." *Id.* ¶¶ 57–60 (A64–A66). Otherwise, they are required first to log out of their blocked accounts, navigate to the @realDonaldTrump webpage, identify replies to which they would like to respond, and log back into their accounts to reply to the repliers. "Because of the additional steps and time involved in using this method, some of the Plaintiffs have stopped replying to replies to @realDonaldTrump tweets altogether, while others reply less frequently than if they had not been blocked." *Id.* ¶ 58 (A65–A66).

IV. Procedural history.

A. Complaint and motions for summary judgment.

Plaintiffs filed this suit on July 11, 2017. In their Complaint, Plaintiffs alleged that the @realDonaldTrump account established a "public forum" and that Defendants' blocking of the Individual Plaintiffs from the account constituted viewpoint discrimination in violation of the First Amendment. Plaintiffs also alleged that Defendants' blocking of the Individual Plaintiffs from the account unconstitutionally infringed the Individual Plaintiffs' right to access governmental information and right to petition the government for redress of grievances, and

unconstitutionally infringed the Knight Institute's right to hear speech that the Individual Plaintiffs would have expressed had they not been blocked from the account. Plaintiffs sought declaratory and injunctive relief.[4]

The parties entered into a stipulation of facts on September 28, 2017. The stipulation states, among other things, that since his inauguration President Trump has used the @realDonaldTrump account to communicate with the public about his administration's policies and decisions, *id.* ¶ 38 (A56); that the President operates the account with the aid of Mr. Scavino, *id.* ¶¶ 12, 38–39 (A45, A56–A57); that the President has generally not sought to limit who can follow the account, *id.* ¶ 36 (A55); that the President has not sought to limit the kind of speech that users can post in reply to his tweets, *id.*; that the President and his aides have characterized tweets from the account as official statements of President Trump, *id.* ¶ 37 (A55–A56); that President Trump blocked the Individual Plaintiffs after they criticized the President or his policies in replies to tweets from the @realDonaldTrump account, *id.* ¶¶ 46–54 (A60–A63); and that, as a consequence of their having been blocked from the @realDonaldTrump account, the Individual Plaintiffs are burdened in their

[4] The Complaint also named as defendants the Acting White House Communications Director, Hope Hicks, Stip. ¶ 10 (A45), and the White House Press Secretary, Sarah Huckabee Sanders, *id.* ¶ 11 (A45). The district court dismissed these defendants after finding that Ms. Hicks had resigned from her official position, SA15 n.6, and that Ms. Sanders "does not have access to the @realDonaldTrump account." SA24 (quoting Stip. ¶ 11).

ability to view, directly reply to, or view the comment threads associated with, the President's tweets, *id.* ¶ 54 (A62–A63).

Defendants moved for summary judgment on October 13, 2017, and Plaintiffs cross-moved for summary judgment on November 3, 2017. *See* Pls.' Cross-Mot. Summ. J. & Opp. to Defs.' Mot. Summ. J. (Nov. 3, 2017), ECF No. 43; Defs.' Mem. of Law in Supp. of Mot. Summ. J. (Oct. 13, 2017), ECF No. 35.

B. The district court's decision.

On May 23, 2018, the district court granted Plaintiffs' motion and denied Defendants' motion, declaring that "the blocking of the individual plaintiffs from the @realDonaldTrump account because of their expressed political views violates the First Amendment." SA73–SA74. The district court held that the "interactive space" associated with each tweet from the @realDonaldTrump account constituted a "public forum" for First Amendment purposes—a forum "in which other users may directly interact with the content of the tweets by, for example, replying to, retweeting, or liking the tweet." SA41.[5] The district court found that "the President

[5] What the district court deemed the "interactive space" is a part of what is commonly called a "comment thread," which refers to the collection of replies to a tweet and replies-to-replies. Stip. ¶ 23 (A50). The district court concluded that the replies-to-replies that follow an initial reply are not part of the public forum because Defendants lacked control over "subsequent dialogue in the comment thread." SA50. Plaintiffs submit that the public forum extends not only to what the district court termed "interactive space" but to the entirety of the comment threads. The question is academic here, however, because the Individual Plaintiffs have been blocked from

presents the @realDonaldTrump account as being a presidential account as opposed to a personal account, and more importantly, uses the account to take actions that can be taken only by the President as President." SA44–SA45. Therefore, "because the President and Scavino use the @realDonaldTrump account for governmental functions," they exercise governmental control over the relevant aspects of the account, including the blocking function, which prevents other Twitter users from participating in the interactive space associated with the President's tweets. SA49–SA50. The district court also determined that the interactive space associated with the President's tweets is a designated public forum because it is consistent with expressive activities and because the President and his staff hold the @realDonaldTrump account open to the public at large without restrictions on a social media platform that is undeniably compatible with expressive activity. SA61–SA62. The district court rejected the Defendants' argument that speech within the interactive space is government speech that is not subject to the rule of viewpoint neutrality, concluding that the "replies to the President's tweets remain the private speech of the replying user." SA56.

Having held that Defendants had created a public forum in the interactive space of the @realDonaldTrump account, the district court concluded that, by

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a public forum even under the district court's theory, as the district court made clear. SA67–SA69.

blocking the Individual Plaintiffs from accessing that forum, Defendants had "indisputably" engaged in viewpoint discrimination. SA63. This holding was based on the uncontested fact that the Individual Plaintiffs were blocked only after posting tweets that criticized President Trump or his policies. *Id.* The district court also held that Defendants' unlawful blocking of the Individual Plaintiffs from the @realDonaldTrump account violated the Knight Institute's right to read their dissenting views in the "interactive space" associated with the account. SA34–SA36, SA68.[6]

On June 4, 2018, Defendants filed their notice of appeal. *See* Defs.' Notice of Appeal (June 4, 2018), ECF No. 73. On the same day, Defendants unblocked the Individual Plaintiffs from the @realDonaldTrump account.

SUMMARY OF ARGUMENT

The President and his aides have opted to use the @realDonaldTrump account as an instrument of governance. The account is a forum in which private citizens can hear from the President about matters relating to government, respond to him directly, and engage with one another about his and his administration's statements

[6] The district court rightly held that all of the Plaintiffs had standing to sue the President and Mr. Scavino, SA74, and it concluded that although "injunctive relief may be awarded in this case . . . declaratory relief is likely to achieve the same purpose," SA73. Defendants have not pursued their challenge to Plaintiffs' standing on appeal. As noted below, Defendants unblocked the Individual Plaintiffs from the @realDonaldTrump account after the district court issued declaratory relief.

and policies. Having elected to use the account in this way, Defendants are bound by the First Amendment. The district court correctly held that the @realDonaldTrump account encompasses a designated public forum and that Defendants violated the First Amendment when they blocked the Individual Plaintiffs from the account because of their expressed political viewpoints.

The First Amendment applies here because of the way in which the President and his aides use the account. As the district court observed, President Trump uses @realDonaldTrump, "often multiple times a day, 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; to challenge media organizations whose coverage of his Administration he believes to be unfair"; and even sometimes "to announce matters related to official government business before those matters are announced to the public through other official channels." SA10 (quoting Stip. ¶ 38). Defendants' assertion that the @realDonaldTrump account is "purely private" is belied by the mountain of undisputed evidence in the record demonstrating that the President and his aides use the account as an instrument of governance.

Because of the nature of the @realDonaldTrump account and the way in which Defendants use it, the comment threads associated with the account constitute a designated public forum. As the district court observed, the government creates a

designated public forum when it opens a space for speech by the public at large without restriction as to subject matter or speaker. The comment threads associated with the @realDonaldTrump account constitute a public forum because they are compatible with expressive activity—indeed, their very purpose is to facilitate expressive activity—and because Defendants have not sought to restrict who may participate in them, or what topics can be discussed there. Because the comment threads constitute a designated public forum, Defendants' decision to block the Individual Plaintiffs from the account based on their viewpoints was unconstitutional.

Defendants' arguments to the contrary are unpersuasive. Defendants' contention that the public forum doctrine is inapplicable to forums established by the government on private property is foreclosed by precedent. And their argument that the @realDonaldTrump account is "government speech" mistakes the part for the whole: While the President's tweets are government speech, the millions of replies (and replies-to-replies) posted by ordinary citizens are not government speech, and no one would mistake them for it. City council meetings, school board meetings, and town halls also encompass both government speech and private expression, but it is well-established that all of these can be—and often are—public forums under the First Amendment.

The district court's public forum ruling was correct, but this Court could affirm on two other grounds as well. First, Defendants' blocking of the Individual Plaintiffs from the @realDonaldTrump account unconstitutionally infringes the Individual Plaintiffs' ability to access information that Defendants have made generally available to the public. The First Amendment bars Defendants from burdening the Individual Plaintiffs' access to generally available governmental information solely because they have criticized the President or his policies. Second, by blocking the Individual Plaintiffs from the account, Defendants unconstitutionally deny the Individual Plaintiffs access to a generally available channel for petitioning the government for redress of grievances. *See Packingham*, 137 S. Ct. at 1735 (noting the role of Twitter as a channel through which citizens exercise rights protected by the Petition Clause). Having made this channel available to the public at large, the First Amendment bars Defendants from closing it to the Individual Plaintiffs based on their viewpoints.

For all of these reasons, the decision below should be affirmed.

ARGUMENT

I. The @realDonaldTrump account reflects state action and accordingly is subject to the First Amendment.

A. The @realDonaldTrump account is controlled by the government and used for official government purposes.

The Supreme Court has said that ostensibly private conduct should be understood to reflect state action where the conduct is "fairly attributable" to the government. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295–96 (2001); *West v. Atkins*, 487 U.S. 42, 49 (1988). The analysis is flexible rather than formalistic. *Brentwood Acad.*, 531 U.S at 295 ("[N]o one fact can function as a necessary condition across the board for finding state action . . . ."). The core question in any given case is whether there is a sufficiently "close nexus between the [government] and the challenged action." *Id.* (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

Applying the Supreme Court's framework, this Court has said that "there is no bright line test for distinguishing 'personal pursuits' from activities taken under color of law." *Pitchell v. Callan*, 13 F.3d 545, 548 (2d Cir. 1994).[7] What matters is "the nature of the officer's act," not simply whether the officer is on or off duty or using government rather than private property. *Id.*; *see Monsky v. Moraghan*, 127

[7] The state action and the "under color of state law" analyses are interchangeable. *West*, 487 U.S. at 49.

F.3d 243, 246 (2d Cir. 1997); *see also United States v. Giordano*, 442 F.3d 30, 43 (2d Cir. 2006) (Sotomayor, J.). In general, a government employee who acts in her official capacity or in furtherance of her official responsibilities is a state actor for purposes of enforcing constitutional rights. *West*, 487 U.S. at 50.

Under this framework, the @realDonaldTrump account plainly reflects state action. To begin, the webpage associated with @realDonaldTrump bears all the indicia of an official account. The page is registered to Donald J. Trump, "45th President of the United States of America, Washington, D.C." Stip. ¶ 35 (A54–A55). Since the inauguration, the account's header photographs have been images associated with the President's official duties. They have shown the President signing an executive order in the Oval Office, delivering official remarks at the White House and other locations, and meeting with the Pope, heads of state, and other foreign dignitaries. *Id*. ¶ 35 & Ex. B (A54–A55, A139–A52).

As the account's webpage would lead one to expect, President Trump uses the account almost exclusively to communicate and interact with the public about matters relating to his office and his official actions—for example, to announce nominations and appointments, announce or defend government policies, report on meetings with foreign leaders, and promote the administration's legislative agenda. *Id*. ¶ 38 (A56). For example:

- On June 7, 2017, the White House used the account to announce for the first time that the President would nominate Christopher Wray for the position of FBI Director. *Id*. & Ex. A at 39 (A110).

- On June 22, 2017, the White House used the account to declare that the President did not possess tapes of conversations with former FBI Director James Comey. *Id*. & Ex. A at 35 (A106).

- On July 26, 2017, the White House used the account to announce that the President would ban transgender individuals from serving in the military. *Id*. ¶ 41 (A57–A58).

- On July 28, 2017, the White House used the account to inform the public that the President had fired his first chief of staff, Reince Priebus, and replaced him with then–Secretary of Homeland Security General John F. Kelly. *Id*. Ex. A at 22 (A93).

- On August 7, 2017, the White House used the account to inform the public about the President's discussions with the South Korean president concerning North Korea's nuclear program. *Id*. Ex. A at 19 (A90).

- On September 5, 2017, the White House used the account to announce the President's decision to "allow[] Japan & South Korea to buy a substantially increased amount of highly sophisticated military equipment from the United States." *Id*. Ex. A at 9 (A80).

- On September 21, 2017, the White House used the account to announce a new executive order aimed at denuclearization of North Korea. *Id*. Ex. A at 2 (A73).

As the district court observed, "the @realDonaldTrump account has been used in the course of the appointment of officers (including cabinet secretaries), the removal of officers, and the conduct of foreign policy, Stip. ¶ 38—all of which are squarely executive functions." SA44.

The participation of White House aides in the day-to-day operation of the @realDonaldTrump account is further evidence that the account is being used as an extension of the presidency. Mr. Scavino, the White House Social Media Director, "assists President Trump in operating the @realDonaldTrump account, including by drafting and posting tweets to the account." Stip. ¶ 39 (A56); *see also id.* ¶ 12 (A45) ("Mr. Scavino posts messages on behalf of President Trump to @realDonaldTrump and other social media accounts, including @POTUS and @WhiteHouse."). "President Trump also sometimes dictates tweets to Mr. Scavino, who then posts them on Twitter," and "President Trump and/or Mr. Scavino sometimes retweet the tweets of those who participate in comment threads associated with the @realDonaldTrump account." *Id.* ¶ 39 (A56). Official staff involvement is not limited to Mr. Scavino, as "[o]ther White House aides besides Mr. Scavino will, in certain instances, also suggest content for @realDonaldTrump tweets." *Id.*

In a variety of contexts, the President and his aides have said that tweets from the @realDonaldTrump account should be understood as official statements of the President. On July 2, 2017, the President tweeted, "My use of social media is not Presidential—it's MODERN DAY PRESIDENTIAL." *Id.* ¶ 37 (A55–A56). On June 6, 2017, then–White House Press Secretary Sean Spicer stated at a press conference that President Trump's tweets should be considered "official statements by the President of the United States." *Id.* Defendant Scavino has promoted

@realDonaldTrump, @POTUS, and @WhiteHouse equally as channels through which "President Donald J. Trump . . . [c]ommunicat[es] directly with you, the American people!" *Id.* The @WhiteHouse account directs Twitter users to "Follow for the latest from @POTUS @realDonaldTrump and his Administration," and tweets from @realDonaldTrump are frequently retweeted by @POTUS and @WhiteHouse (and vice versa). *Id*. The White House also responded to a request for official White House records from the House Permanent Select Committee on Intelligence by referring the Committee to the President's "statement" made on Twitter on June 22, 2017. *Id.* The Department of Justice has stated in court filings that "[t]he government is treating" certain tweets from @realDonaldTrump "as official statements of the President of the United States." Defs.' Suppl. Submission 2, *James Madison Project v. Dep't of Justice*, No. 1:17-cv-00144 (D.D.C. Nov. 13, 2017), ECF No. 29.

Other components of the government have also treated tweets from the @readlDonaldTrump as official statements. The National Archives and Records Administration, for example, has advised the White House that the President's tweets from @realDonaldTrump, like those from @POTUS, are official records that must be preserved under the Presidential Records Act. Stip. ¶ 40 (A57). And multiple federal courts have similarly concluded that tweets from the @realDonaldTrump account must be viewed as official statements. *See, e.g.*, *Hawaii v. Trump*, 859 F.3d

741, 773 n.14 (9th Cir.), *vacated on other grounds*, 138 S. Ct. 377 (2017) (taking judicial notice of a tweet from the @realDonaldTrump account and pointing to "the White House Press Secretary's confirmation that the President's tweets are 'considered official statements by the President of the United States'" (citation omitted)); *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 319 F. Supp. 3d 70, 79 (D.D.C. 2018) (relying on a tweet from the @realDonaldTrump account as evidence of the President's official agenda regarding alleged voter fraud); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 436 (E.D.N.Y. 2018) (holding that a tweet from the @realDonaldTrump account undercut the government's purported compelling interest in rescinding the DACA program); *see also Batalla Vidal*, 279 F. Supp. 3d at 428 n.10 (characterizing another tweet from the @realDonaldTrump account as reflecting the views of the Trump administration); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 182–83 (D.D.C. 2017) (relying on @realDonaldTrump tweets in striking down President Trump's proposed ban on transgender individuals from military service).

For all of these reasons, the district court was correct to conclude that the @realDonaldTrump account is subject to the First Amendment. And focusing on the specific conduct Plaintiffs complain of here—the President's decision to block the Individual Plaintiffs from the @realDonaldTrump account—only confirms this conclusion. Each of the Individual Plaintiffs was blocked after responding critically

to tweets about the President's official actions or policies. *See, e.g.*, Stip. ¶¶ 5, 49 (A44, A61) (Plaintiff Dr. Gu was blocked after responding to a tweet by President Trump discussing his approval rating by tweeting, "Covfefe: The same guy who doesn't proofread his Twitter handles the nuclear button."); *id.* ¶¶ 6, 50 (A44, A61–A62) (Plaintiff Neely was blocked after Neely responded to a tweet by President Trump relating to the opening of a new coal mine by tweeting, "Congrats and now black lung won't be covered under #TrumpCare."). There is a "close nexus," in other words, between Defendants' official status and the actions Plaintiffs challenge. *Brentwood*, 531 U.S. at 295 (stating that state action exists where "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself'" (quoting *Jackson*, 419 U.S. at 351)); *see also Rossignol v. Voorhaar*, 316 F.3d 516, 524 (4th Cir. 2003) ("[I]t is clear that if a defendant's purportedly private actions are linked to events which arose out of his official status, the nexus between the two can play a role in establishing that he acted under color of state law.").[8]

[8] The district court rested its conclusion that the @realDonaldTrump account is subject to the First Amendment on its finding that the account's interactive space is a government-controlled public forum. SA41–SA50. The district court was justified in doing so. As this Court recently explained, "[b]ecause facilities or locations deemed to be public forums are usually operated by governments, determining that a particular facility or location is a public forum usually suffices to render the challenged action taken there to be state action subject to First Amendment limitations." *Halleck v. Manhattan Cmty. Access Corp.*, 882 F.3d 300, 306–07 (2d Cir. 2018), *cert. granted* (U.S. Oct. 12, 2018) (No. 17-1702). Whether the Court

B. Defendants' argument that the @realDonaldTrump account is a purely personal account is without merit.

Defendants challenge the district court's reasoning principally by arguing that certain of the facts that the court relied on—e.g., the fact that the website associated with the account identifies the account holder as the "45th President of the United States of America," and the fact that the President uses the account to discuss matters relating to government—are not independently sufficient to establish that the account reflects state action. Appellants' Br. at 21–22. But the district court did not find (and Plaintiffs did not argue) that those facts, in isolation, are sufficient to support this conclusion. Rather, the court concluded that the facts *taken together* are sufficient. This conclusion was justified. The account is fairly attributed to the government because of, among other things, the way it is presented to the public, the way it is used, the government resources used to operate and administer it, and the way the government itself has described the account.

Defendants also place heavy emphasis on the fact that then–Mr. Trump created the account before he became President and that he will retain the account after he leaves office. *See* Appellants' Br. at 19–20. That the First Amendment did not apply to the account three years ago, however, and that it may not apply to the

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begins the analysis with the state action doctrine or the public forum doctrine, the conclusion in this case is the same: The @realDonaldTrump account is subject to the First Amendment.

account three years from now, does not control the state action analysis today. Whether the First Amendment applied to the account in the past, and whether it will apply to it in the future, the First Amendment applies to it *now* because Mr. Trump is the President and he is using the account as an extension of his presidency. As the district court reasoned:

> Here, the President and Scavino's present use of the @realDonaldTrump account weighs far more heavily in the analysis than the origin of the account as the creation of private citizen Donald Trump. That latter fact cannot be given the dispositive weight that defendants would ascribe to it. Rather, because the President and Scavino use the @realDonaldTrump account for governmental functions, the control they exercise over it is accordingly governmental in nature.

SA49–SA50.

Equally unpersuasive is Defendants' argument that Defendants' blocking of the Individual Plaintiffs cannot qualify as state action because Twitter has made the blocking function available to all of its users, and that accordingly Defendants' use of the function cannot reflect the exercise of governmental authority. *See* Appellants' Br. at 20, 25 (contending that Defendants' blocking of the Individual Plaintiffs was not "'made possible only because [the official] is clothed by the authority of [federal] law.'" (quoting *West*, 487 U.S. at 48)). The problem with Defendants' argument is that it assumes that the question of whether *blocking* reflects state action can be answered without reference to whether the *account* reflects state action. But the two questions are inseparable. In other words, Defendants gloss over a crucial

distinction: While all Twitter users have the ability to block other users from their accounts, only Defendants have the ability to block other users from the @realDonaldTrump account, which is distinct from all other Twitter accounts for all of the reasons discussed above. As the district court wrote:

> The context of the property from which the government is excluding . . . must factor into the analysis. No one can seriously contend that a public official's blocking of a constituent from her purely personal Twitter account—one that she does not impress with the trappings of her office and does not use to exercise the authority of her position—would implicate forum analysis, but those are hardly the facts of this case.

SA48.

Defendants' argument that the @realDonaldTrump account cannot reflect state action because Twitter has ultimate control over its platform also fails. Appellants' Br. at 24–27. That Twitter could block the Individual Plaintiffs from the @realDonaldTrump account on viewpoint-related grounds does not mean that Defendants are free to do so. The First Amendment does not foreclose private theaters from closing their doors to those whose views they disfavor, but it does constrain governments that lease those theaters in doing so, even if the theaters themselves retain their exclusionary authority. *See Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (holding that a privately owned theater leased by a city was a public forum); *see also Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 150 (D.D.C. 2016) (holding that government officials cannot

avoid statutory transparency obligations by using private email servers rather than governmental ones). The same principles hold true here.[9]

II. Defendants violated the First Amendment by excluding the Individual Plaintiffs from a public forum based on viewpoint.

A. The comment threads associated with the @realDonaldTrump account are a designated public forum.

The comment threads associated with the @realDonaldTrump account are a designated public forum because Defendants have opened them to the public for expressive activity without restriction as to subject matter or speaker. Focusing on the comment threads is appropriate because the comment threads are the digital space to which the Individual Plaintiffs seek access. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) ("[I]n defining the forum we have

[9] Defendants' blocking of the Individual Plaintiffs from the @realDonaldTrump account is distinguishable from the conduct that was challenged in the cases the Defendants cite, *see* Appellants' Br. at 25–26, which concerned conduct taken by government officials while off-duty, for purposes unrelated to official matters, *see, e.g.*, *Zherka v. DiFiore*, 412 F. App'x 345, 347 (2d Cir. 2011) (district attorney not acting under color of law when calling from private cell phone to complain about article published in plaintiff's newspaper); *Federer v. Gephardt*, 363 F.3d 754, 759 (8th Cir. 2004) (incumbent representative not acting under color of law when he allegedly conspired against plaintiff's campaign because conspirators' acted on behalf of the representative "as a political candidate and private person"); *Colombo v. O'Connell*, 310 F.3d 115, 117–18 (2d Cir. 2002) (per curiam) (school superintendent not acting under color of law when he privately retained lawyer to write letter threatening to privately sue plaintiff); *Pitchell*, 13 F.3d at 548 (off-duty police officer not acting under color of law when, drunk in his own home, he used personal weapon to shoot guest).

focused on the access sought by the speaker."). The Individual Plaintiffs here do not seek the ability to tweet *from* the @realDonaldTrump account. (Those tweets are properly understood as government speech, as discussed further below.) Rather, the Individual Plaintiffs challenge Defendants' decision to block them from the account, which has the effect of preventing them from replying to the President's tweets, and from participating in "conversations" with other users. The Individual Plaintiffs are akin to individuals who seek to speak in otherwise-open town halls or city council meetings. Those individuals do not seek to speak from the dais, but they assert the right to respond to government speakers and interact with other citizens on the same terms as other citizens. The relevant question here, then, is whether the comment threads constitute a public forum.

They do. As the Supreme Court has said, "a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech." *Cornelius*, 473 U.S. at 802; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Make the Road by Walking, Inc. v. Turner*, 378 F.3d 133, 142–43 (2d Cir. 2004). A public forum does not need to be a physical space. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (holding that the "same principles" regarding public forums are "applicable" where the space at issue is "a forum more in a metaphysical than in a spatial or geographic sense"); *Cornelius*, 473 U.S. at 801 (finding that a

space that "lack[ed] a physical situs" was still a public forum); *see also Leuthy v. LePage*, No. 1:17-cv-00296 (JAW), 2018 WL 4134628, at *14 (D. Me. Aug. 29, 2018) (noting that public forums "may include intangible channels of communication"); *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 716 (E.D. Va. 2017) (holding that the comment thread on a Facebook page that was governmental in nature constituted a "forum for speech" under the First Amendment), *appeal docketed*, No. 17-2002 (4th Cir. Aug. 29, 2017).

In determining whether government officials have created a designated public forum, courts consider (1) the forum's compatibility with expressive activity; and (2) whether the government's overall "policy and past practice" shows that the forum is intended to be used for speech by the public. *See Paulsen v. Cty. of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991); *see also Cornelius*, 473 U.S. at 802. Both of these factors weigh in favor of finding that the comment threads associated with the @realDonaldTrump account are a public forum.

First, it is plain that the comment threads are "compatible" with expressive activity. Indeed, the entire purpose of the comment threads is to facilitate speech. The President's Twitter account is a "metaphysical space" in which the President speaks and members of the public respond to the President's statements and engage with one another about them. *See Rosenberger*, 515 U.S. at 830 (applying public

forum analysis to student newspaper funding); *Cornelius*, 473 U.S. at 801 (charitable contribution program); *Perry Educ. Ass'n*, 460 U.S. at 46–47 (school mail system).

Second, Defendants have opened this forum to speech by the general public. The comment threads are accessible to anyone with a Twitter account without regard to political affiliation or any other limiting criteria. Stip. ¶ 36 (A55). Defendants have not published any rule or policy purporting to restrict, by form or subject matter, the speech of those who participate in the forum. *Id*. Nor have they sought to limit the forum to specific classes of speakers based on their status—e.g., to the President's family, friends, or business colleagues. Defendants suggest that tweets from the @realDonaldTrump account are analogous to speeches given to small audiences on private property, Appellants' Br. at 2, 15–16, 28, but the analogy is inapt. The President has not opened up his private property to the public in the way that he has opened up the comment threads of the @realDonaldTrump account. To the contrary, he has permitted anyone who wants to follow the account to do so—which is why more than 55 million Twitter users now follow it. The only users who are prevented or impeded from participating in the comment threads are those whom the President and his aides have selectively blocked. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) ("A designated public forum is not

created when the government allows selective access for individual speakers rather than general access for a class of speakers.").[10]

It bears emphasis that the comment threads are integral to the @realDonaldTrump account; they are not merely peripheral to it. The defining feature of Twitter is its facilitation of real-time interaction. *See* Twitter, "About," https://about.twitter.com. As the Supreme Court emphasized in *Packingham*, social media platforms like Twitter offer "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard," in part because these platforms permit citizens to "engage with [their elected representatives] in a direct manner." 137 S. Ct. at 1735, 1737. Further, Defendants make frequent use of Twitter's interactive features. The President and his aides regularly retweet the tweets of supporters who have replied to @realDonaldTrump, evidence that they are attentive to replies posted in the comment threads. *E.g.*, Stip. Ex. A. at 3–4, 9, 13, 20 (A74–A75, A80, A84, A91). That Defendants have blocked the Individual Plaintiffs based

[10] Because Defendants have opened the @realDonaldTrump account to the general public without any limiting criteria, the account is properly characterized as a designated public forum rather than as a limited public forum. *See R.O. ex rel. Ochshorn v. Ithaca City Sch. Dist.*, 645 F.3d 533, 539 (2d Cir. 2011). The type of forum is not dispositive in this case, however, because viewpoint discrimination is impermissible even in limited and nonpublic forums. *See Make the Road by Walking*, 378 F.3d at 143.

on the substance of their replies to the President's tweets is further evidence that Defendants are attentive to, and engage with, the comment threads.

The @realDonaldTrump account thus functions like a digital town hall meeting—one in which the President stands at the front of the room that he has opened to the general public, and in which assembled citizens respond to his statements and engage with each other about those statements. Courts have long recognized that these types of meetings constitute designated public forums. *See, e.g.*, *Surita v. Hyde*, 665 F.3d 860, 869 (7th Cir. 2011) (expressing "no doubt" that "audience time during . . . city council meetings constituted a designated public forum); *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990) ("City Council meetings . . . where the public is afforded the opportunity to address the Council[] are the focus of highly important individual and governmental interests . . . . [S]uch meetings, once opened, have been regarded as public forums, albeit limited ones."); *Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989) ("[T]he city commission designated their meeting a public forum when the commission intentionally opened it to the public and permitted public discourse on agenda items."); *see also Musso v. Hourigan*, 836 F.2d 736, 742 (2d Cir. 1988) (noting that public speech is usually allowed at an open school board meeting); *cf. City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S.

167, 175 (1976) (holding that government could not exclude people from open school board meetings based on viewpoint).

Defendants argue that the public forum doctrine is inapplicable here because Twitter is a privately owned company. Appellants' Br. at 20. The public forum doctrine is not made inapplicable, however, simply because the government uses private rather than public property to establish a space for expression. *See, e.g.*, *Se. Promotions*, 420 U.S. at 555 (holding that a privately owned theater, leased by a city, was subject to public forum analysis); *ABC v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) (applying public forum doctrine to a private campaign headquarters); *see also Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 792 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (public fora are not "limited to property owned by the government"); *Cornelius*, 473 U.S. at 801 (noting that public forum analysis applies to "public property or private property dedicated to public use"); *Halleck*, 882 F.3d at 306–07 (noting that when the "government contracts to use private property for public expressive activity, it creates a public forum." (quoting *Denver Area*, 518 U.S. at 794 (Kennedy, J.))).

Notably, to accept the Defendants' argument that public forums cannot be established on private property would be to hold that *no* government-run social-media site could *ever* be a public forum. On the government's theory, even the

@POTUS and @WhiteHouse Twitter accounts, along with countless other government-run social media accounts, would be beyond the reach of the public forum doctrine, with the result that government officials could freely bar individuals from any or all of them on the basis of viewpoint. This result would be anathema to the First Amendment and entirely at odds with the Supreme Court's statements in *Packingham* recognizing the role that social media platforms now play in facilitating public discourse. *See* 137 S. Ct. at 1735. Indeed, the government's argument would seem to mean that all government *websites* would be beyond the reach of the public forum doctrine, since those websites are usually hosted by private internet service providers and nearly always are transmitted across privately owned internet infrastructure. The First Amendment should not be understood to allow this result.

B. Speech in the comment threads associated with the @realDonaldTrump account is not government speech.

Defendants also attempt to avoid application of the public forum doctrine, and the requirement of viewpoint neutrality, by arguing that the @realDonaldTrump account reflects only government speech. Appellants' Br. at 31. In particular, Defendants assert that even if state action is present in this case, the @realDonaldTrump account cannot be a public forum because it is "a tool [for President Trump] to express his own views and convey them to other Twitter users and the world at large." *Id.* at 30. That argument is untenable under the government

speech doctrine and conflates different components of the @realDonaldTrump account.

To qualify as government speech, (1) the speech at issue must "have long been used . . . to convey state messages"; (2) the speech must be "closely identified in the public mind" with the government; and (3) the state must "maintain[] direct control over the message[]." *Matal*, 137 S. Ct. at 1760 (quotation marks omitted); *see also* SA53–SA54. Indeed, this Court recently reaffirmed the well-settled precedent that "speech that is otherwise private does not become speech of the government merely because the government provides a forum for the speech or in some way allows or facilitates it." *Wandering Dago, Inc v. Destito*, 879 F.3d 20, 34 (2d Cir. 2018) (citing *Cornelius*, 473 U.S. at 811–13; *Latino Officers Ass'n, N.Y., Inc. v. City of N.Y.*, 196 F.3d 458, 468–69 (2d Cir. 1999) (holding that police department's refusal to permit police affinity group to march in parades was not a form of government speech)); *see also Leuthy*, 2018 WL 4134628, at *13 (rejecting governor's position that "all of what appears on his Facebook page constitutes his speech").

As the district court correctly concluded, the replies to and retweets of each tweet by @realDonaldTrump fail to satisfy all three criteria of the government speech test. Replies sent by private citizens, for example, "are most directly associated with the replying user rather than the sender of the tweet being replied to." SA55. They are controlled by the user who generates them, and no other Twitter

user can alter the content of any reply, either before or after it is posted." *See* Stip. ¶ 26 (A52). As such, and "[g]iven the prominence with which the account information of the replying user is displayed in the replying tweet, the reply is unlikely to be 'closely identified in the public mind' with the sender, even when the sender of the tweet being replied to is a governmental one." SA55–SA56 (quoting *Matal*, 137 S. Ct. at 1760). Finally, "the government maintains no control over the content of the reply." SA56. "[N]o selection is involved in determining who has the ability to interact directly with the President's tweets." SA56–SA57. Instead, Defendants have left this space open to commentary from essentially anyone with a Twitter account, and they have not imposed any limitations on what those people may say. The comment threads comprising these replies—and the replies to those replies—thus feature the speech of members of the public, not that of the President. Defendants do not even try to explain how these comment threads would satisfy the requirements of the government speech doctrine.

In a slightly different version of their government speech argument, Defendants propose that the @realDonaldTrump account cannot be a public forum because the President and his aides did not intend for it to be a public forum. Appellants' Br. at 32. But this Court has emphasized that a government defendant's "bare assertion" that it did not intend to designate a forum for speech is "not conclusive"; instead, intent must be inferred from a number of factors, including the

government's policies and past practices, and the compatibility of the space with expressive activities. *Paulsen*, 925 F.2d at 69. Here, Defendants' assertion that the account's "*raison d'etre*" is the President's speech, Appellants' Br. at 32, is belied by the fact that tens of thousands of reply tweets—speech from thousands of people from across the country and the world—are made in response to every single tweet from the President. The President could have chosen a static website to communicate his own speech (or a blog, or a radio station), but instead he and his aides opted to use Twitter, a platform defined by interactivity, and they have embraced the platform's interactive features, engaging with replies and sometimes retweeting them. And other than blocking individual users based on viewpoint, the President and Mr. Scavino have taken no steps to limit or exercise editorial control over the speech occurring on the comment threads. In these circumstances, the proper inference is that Defendants purposefully opened up the comment threads to speech by members of the public.

Finally, Defendants' argument that the act of blocking critics is itself government speech turns the First Amendment on its head. A government official may be expressing a viewpoint by barring a critic from a town hall or city council meeting, but the expression of this viewpoint is not something the First Amendment protects. If the space is a public forum, the First Amendment protects the right of the critic to criticize; it does not protect the "right" of the government official to squelch

dissent. Indeed, part of the point of the First Amendment is to ensure that public officials are exposed to criticism. *See, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (describing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) ("The right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets us apart from totalitarian regimes.").

Moreover, the Defendants are wrong to suggest that, by blocking the Individual Plaintiffs, they are simply exercising the President's right "merely [to] declin[e] to listen to responses that he does not wish to hear." Appellants' Br. at 18–19. As explained in more detail below, blocking is not like selectively choosing not to listen; by blocking the Individual Plaintiffs, the President prevents them from participating at all in the forum.[11] Defendants' argument, if accepted, would lead to

[11] Defendants try to frame Plaintiffs' claim as asserting a right to have the President "listen" to their specific tweets, and in support of that argument, Defendants cite *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 288 (1984). Appellants' Br. at 35. But Plaintiffs are asserting no such right; instead, Plaintiffs seek only the right to speak within the public forum, free from viewpoint discrimination. Regardless, *Knight* is inapplicable, as the Supreme Court made clear in that case that the petitioners did "not and could not claim that they have been unconstitutionally denied access to a public forum. A 'meet and confer' session is obviously not a public forum." 465 U.S. at 280.

the absurd result that public officials could exclude critics from any public forum, in the name of the officials' own "right not to listen." But it is hard to conceive that government officials—particularly ones as prominent as the President—should claim a legitimate interest in avoiding criticism. Even assuming there were such a legitimate interest, the President can opt instead to use Twitter's "muting" function, which allows the blocking user not to view the offending tweet, but does not prevent the speaker of that tweet from participating in the comment threads. Appellants' Br. at 35.

C. The viewpoint-based blocking of the Individual Plaintiffs from the @realDonaldTrump account violated the First Amendment.

Defendants do not deny that President Trump blocked the Individual Plaintiffs from the @realDonaldTrump account based on their viewpoints. Such viewpoint-based exclusion is the most egregious violation of the freedom of speech guaranteed by the First Amendment—one impermissible in any type of forum. *See, e.g.*, *Matal*, 137 S. Ct. at 1765 (Kennedy, J.); *Rosenberger*, 515 U.S. at 829; *Make the Road by Walking*, 378 F.3d at 143. Further, it is axiomatic that political speech—the very sort in which the Individual Plaintiffs have sought to engage—"fall[s] within the core of First Amendment protection." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 600 (2008).

Defendants attempt to diminish the seriousness of this violation by claiming that the "only material impact" of President Trump's blocking on the Individual

Plaintiffs is that they are "prevent[ed] . . . from speaking directly to" President Trump. Appellants' Br. at 35. But this is not so. Blocking, Defendants have conceded, impedes the Individual Plaintiffs from accessing and responding to tweets from @realDonaldTrump, and from participating fully in the associated comment threads without the use of burdensome and time-consuming workarounds. Stip. ¶¶ 54–60 (A62–A66). The harm of such burdens on the Individual Plaintiffs' ability to access and engage with government statements is not, as Defendants contend, simply that President Trump has "ignore[d]" the Plaintiffs "while listening to others," or that blocked users have lost the ability to "amplify" their speech by "piggybacking on the government's speech." Appellants' Br. at 35–36 (quotation marks omitted). The harm is that President Trump has burdened the Individual Plaintiffs' ability to access and engage with official governmental statements and the responses of other members of the public within a public forum, simply because the Individual Plaintiffs criticized the President, his policies, or his views. Unlike the speaker choosing to call on only select audience members to maintain decorum in a forum, *see* Appellants' Br. at 36–37, President Trump has effectively ejected the Individual Plaintiffs from a forum otherwise open to all, based solely on their viewpoints.

The harm of such blatant viewpoint-based burdens on the Individual Plaintiffs is neither minimal nor tolerable under the First Amendment. The Supreme Court has

deemed laws burdening speech based on content or viewpoint to be just as suspect as laws banning speech outright on these grounds, because both types of government action create the danger that the government is impermissibly disfavoring certain ideas in the realm of public discourse. *See, e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *Leathers v. Medlock*, 499 U.S. 439, 448 (1991). Defendants have done just that, by denying the Individual Plaintiffs unburdened access to the designated public forum created through the @realDonaldTrump account merely because President Trump disfavors the views they expressed there.

III. Defendants violated the First Amendment by restricting the Individual Plaintiffs' access to generally available government information based on viewpoint.

Defendants' blocking of the Individual Plaintiffs from the @realDonaldTrump account violated the First Amendment for the independent reason that it burdened their access to the President's statements—which Defendants have chosen to make generally available to the public—simply because the President disagreed with their views. While the district court did not squarely address this claim, it affords an independent basis for affirming the judgment below. "The Government 'may not deny a benefit to a person on a basis that infringes [the First Amendment] even if he has no entitlement to that benefit.'" *Matal*, 137 S. Ct. at

1760–61 (quoting *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013)). In particular, once the government decides to make information available to the public, it may not exclude potential recipients of that information on the basis of "an illegitimate criterion such as viewpoint." *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 43 (1999) (Ginsburg, J., concurring); *see id.* at 42 (Scalia, J., concurring); *id.* at 45–46 (Stevens, J., dissenting); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 569 (2011) (observing that "restrictions on the disclosure of government-held information can facilitate or burden the expression of potential recipients and so transgress the First Amendment"); *ABC*, 570 F.2d at 1083 ("[O]nce there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable.").

This principle applies here. Defendants acknowledge that the @realDonaldTrump account includes government information, Stip. ¶¶ 32, 38 (A54, A56); *see id.* Ex. A (A72–A138), which they have made available, without restriction, to the general public. *Id.* ¶ 36 (A55). And they acknowledge that they burdened the Individual Plaintiffs' access to that information in response to criticism of the President or his policies. *Id.* at 1 (A43). In other words, Defendants selectively denied the Individual Plaintiffs the benefit of generally available government

information based on the Individual Plaintiffs' viewpoints. The First Amendment clearly prohibits this kind of discrimination.

IV. Defendants violated the First Amendment by restricting the Individual Plaintiffs' right to petition the government for redress of grievances based on viewpoint.

Defendants' viewpoint-based blocking of the Individual Plaintiffs also violated the First Amendment because it burdened their right "to petition the Government for a redress of grievances." U.S. Const. amend. I. Though the district court declined to analyze Plaintiffs' petition claim independently of their free speech claim, SA69 n.24, that claim provides an additional, independent basis for affirming the judgment below. The right to speak and the right to petition are related but not duplicative, and the Supreme Court has counseled courts not to "presume . . . that Speech Clause precedents necessarily and in every case resolve Petition Clause claims." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011). As the Court further explained, "[t]he right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs." *Id.*

Regardless of whether the @realDonaldTrump account qualifies as a public forum—though it does, *see supra* Section II.A—it serves as a communication channel through which ordinary citizens can and do "express their ideas, hopes, and

concerns" about the administration's policies and practices directly to the President. SA9–SA12, SA56–SA62; Stip. ¶¶ 13, 36, 41–44 (A45, A55, A57–A60). Twitter is a particularly effective channel for this kind of petition activity, as the Supreme Court itself has noted. *See Packingham*, 137 S. Ct. at 1735 ("[O]n Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner."); *cf. Mirabella v. Villard*, 853 F.3d 641, 647 (3d Cir. 2017) (addressing petition via email). Having opened that communication channel with the public, Defendants cannot constitutionally close it solely to those who express disagreement with the President or his policies. *See Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 680 (1996) (noting that "the government has no legitimate interest in repressing" "ordinary citizens[']. . . viewpoints on matters of public concern"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); *Mirabella*, 853 F.3d at 649–50 (holding retaliation for petition activity unconstitutional).

CONCLUSION

For the reasons set forth above, the judgment of the district court should be affirmed.

Dated: October 12, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the word limit of Federal Rule of Civil Procedure 32(a)(7)(B) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 10,591 words, and that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6).

Dated: October 12, 2018

/s/ Jameel Jaffer
Jameel Jaffer

CERTIFICATE OF SERVICE

I, Jameel Jaffer, an attorney, hereby certify that on October 12, 2018, I caused the foregoing Response Brief to be filed with the Court and to be served upon counsel of record via the Court's ECF email system.

Dated: October 12, 2018

/s/ Jameel Jaffer
Jameel Jaffer