

Nos. 17-2002, 17-2003

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIAN DAVISON,

Plaintiff-Appellee,

v.

PHYLLIS RANDALL,

Defendant-Appellant.

On appeal from the United States District Court
for the Eastern District of Virginia at Alexandria,
Case No. 1:16-cv-00932-JCC-IDD

**INFORMAL BRIEF OF *AMICUS CURIAE*
THE KNIGHT FIRST AMENDMENT INSTITUTE
IN SUPPORT OF PLAINTIFF-APPELLEE**

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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
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CERTIFICATE OF SERVICE

I certify that on November 13, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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TABLE OF CONTENTS

| | |
|---|----|
| INTEREST OF AMICUS CURIAE | 1 |
| INTRODUCTION | 1 |
| ARGUMENT | 4 |
| I. Social Media Platforms Have Become Important Venues for Political Speech, Including for Communications Between Citizens and Public Officials. | 4 |
| II. The Court Should Take a Functional Rather than Formalistic Approach to Assessing Whether a Public Official’s Social Media Account Reflects State Action. | 9 |
| III. A Public Official’s Social Media Account that Reflects State Action Is a Designated Public Forum if It Is Open to the Public for Expressive Activity. | 12 |
| IV. The First Amendment Prohibits Government Officials From Excluding Individuals from Public Forums on the Basis of Viewpoint. | 18 |
| CONCLUSION | 19 |

TABLE OF AUTHORITIES

| | Page(s) |
|---|----------------|
| CASES | |
| <i>Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n</i> , 531 U.S. 288 (2001)..... | 11 |
| <i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) (per curiam)..... | 19 |
| <i>Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five</i> , 470 F.3d 1062 (4th Cir. 2006) | 18 |
| <i>City of San Jose v. Superior Court</i> , 389 P.3d 848 (Cal. 2017)..... | 10 |
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| <i>Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.</i> , 473 U.S. 788 (1985)..... | 13, 16 |
| <i>Davison v. Loudoun Cnty. Bd. of Supervisors</i> , No. 1:16cv932, 2017 WL 3158389 (E.D. Va. July 25, 2017)..... | 3, 11, 12 |
| <i>Denver Area Educ. Telecomms. Consortium, Inc. v. FCC</i> , 518 U.S. 727 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) | 16 |
| <i>Goulart v. Meadows</i> , 345 F.3d 239 (4th Cir. 2003) | 13 |
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| | |
|--|---------|
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| <i>Matal v. Tam</i> , 137 S. Ct. 1744 (2017) (Kennedy, J., concurring in part and concurring in the judgment in part) | 18 |
| <i>Page v. Lexington County. Sch. Dist. One</i> , 531 F.3d 275 (4th Cir. 2008) | 15 |
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| <i>Perry Educ. Ass’n v. Perry Local Educators’ Ass’n</i> , 460 U.S. 37 (1983)..... | 13 |
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| | |
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The White House, Facebook, <https://www.facebook.com/WhiteHouse>6

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The White House, YouTube, <https://www.youtube.com/user/whitehouse>.....6

INTEREST OF AMICUS CURIAE¹

The Knight First Amendment Institute at Columbia University (“Knight Institute” or “Institute”) is a non-partisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. The Institute is particularly committed to protecting free speech against threats arising out of the use of new technologies. The Institute is currently litigating a First Amendment challenge on behalf of itself and seven Twitter users who were blocked from President Trump’s Twitter account, @realDonaldTrump, based on their viewpoints. *Knight First Amendment Institute at Columbia University v. Trump*, 1:17-cv-05205 (S.D.N.Y.).

INTRODUCTION

Among the “vast democratic forums of the Internet,” social media platforms are the “most important places . . . for the exchange of views” today. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (internal quotations and citation omitted). These platforms have become essential venues for the exchange of core political speech. *Id.* Of particular relevance to this case, social media platforms like Facebook and Twitter enable ordinary citizens to speak directly to public officials,

¹ Pursuant to Rule 29(a)(4)(E), counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to this filing.

and to interact with other citizens about matters relating to government, in much the same way they could if they were gathered on a sidewalk or in a public park, or at a city council meeting or town hall.

When a public official uses her social media account as an extension of her office, her account reflects “state action” and is consequently subject to the First Amendment. And when the official opens the account for expression by the public at large—for example by inviting the public to post replies and comments—the account is a designated public forum. *E.g., Steinburg v. Chesterfield County Planning Comm’n*, 527 F.3d 377, 385 (4th Cir. 2008). The promise of social media as a “revolution[ary]” space for civic discourse, *Packingham*, 137 S. Ct. at 1736, is threatened when public officials block individuals from these kinds of expressive spaces on the basis of viewpoint. Viewpoint-based exclusion in this context infringes the First Amendment rights not only of those who are excluded but also of those who are left behind in a forum that has been sanitized of dissent.

This case presents an opportunity for the Court to make clear that well-established First Amendment protections, including the public forum doctrine and its central requirement of viewpoint neutrality, apply when public officials operate their social media accounts under color of law and open them to speech by the public. Defendant and her *amici* urge this Court to hold that the public forum doctrine does not apply to social media accounts operated by individual public officials. The

Knight Institute respectfully submits that this proposed rule would be inconsistent with Supreme Court and Fourth Circuit precedent and would inappropriately allow public officials to distort expressive forums that play an increasingly important role in our democracy. The appropriate approach in this context is a functional rather than formalistic one: The Court should look, as the district court did, to the way in which the account in question is used. If a public official uses a social media account as an extension of her office—*i.e.*, as a “tool of governance,” *Davison v. Loudoun Cnty. Bd. of Supervisors*, No. 1:16cv932, 2017 WL 3158389, at *7 (E.D. Va. July 25, 2017)—and if the official opens the account to speech by the public at large, as Defendant did here, then well-established First Amendment principles require that the account be treated as a public forum in which viewpoint-based exclusions are unconstitutional.

This functional approach appropriately balances the First Amendment rights of citizens with the First Amendment rights of public officials. Citizens do not surrender their First Amendment rights when they become public officials, and not every public official’s social media account can fairly be characterized as a public forum. Some public officials use their social media accounts not as extensions of their offices but as tools of personal expression, for communications having nothing to do with their official responsibilities. Such accounts do not reflect state action, and they should not be treated as public forums under the First Amendment. When

an official uses her account as an instrument of governance or an extension of her office, however, and allows the public to reply to and comment on her posts, she should not be permitted to avoid the constraints of the First Amendment, including its prohibition against viewpoint discrimination.

ARGUMENT

I. Social Media Platforms Have Become Important Venues for Political Speech, Including for Communications Between Citizens and Public Officials.

The Supreme Court recognized twenty years ago that the Internet had become an essential communications medium because it supplied “relatively unlimited, low-cost capacity for communication of all kinds.” *Reno v. ACLU*, 521 U.S. 844, 870 (1997); *see also Packingham*, 137 S. Ct. at 1735. Today, a fast-increasing volume of Internet-based communication occurs on social media platforms like Facebook and Twitter. These platforms allow users to comment about matters of personal or public concern and to engage in multiple conversations, among and across groups of users. Seven in ten American adults regularly use at least one Internet social media platform.² Billions of users engage with one another via social media platforms every day.³

² Shannon Greenwood et al., *Social Media Update 2016*, Pew Res. Ctr. (Nov. 11, 2016), <http://www.pewinternet.org/2016/11/11/social-media-update-2016>.

³ Facebook has, on average, 1.37 billion daily active users. Facebook, *Company Info*, <https://newsroom.fb.com/company-info>. Twitter has about 330 million monthly active users, who

In the realm of political participation, social media platforms have taken on special importance. As the Supreme Court recently observed, social media platforms like Facebook and Twitter provide “perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.” *Packingham*, 137 S. Ct. at 1737. Through social media, citizens “can petition their elected representatives and otherwise engage them in a direct manner”—that is, they can interact with public officials in much the same way as they could at a town hall. *Id.* at 1735; *see also Reno*, 521 U.S. at 870 (“Through the use of chat rooms, any person with a phone line can become a town crier Through the use of Web pages . . . the same individual can become a pamphleteer.”); *Liverman v. City of Petersburg*, 844 F.3d 400, 407–08 (4th Cir. 2016) (recognizing that “a social media platform amplifies the distribution of the speaker’s message . . . on matters of public import”).

Public officials across the country have harnessed the power of social media platforms to speak directly to their constituents and to enable their constituents to respond to them and interact with one another. Many public officials have created Facebook “pages” for these purposes. (The “Chair Phyllis J. Randall” Facebook page at issue in this case is an example.) Other public officials have established

tweet an average of 500 million “tweets”—or short messages posted to and shared on the platform by users—a day. Statista, *Twitter: number of monthly active users 2010-2017*, <https://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users>; Internet Live Stats, *Twitter Usage Statistics*, <http://www.internetlivestats.com/twitter-statistics>.

Twitter accounts to “tweet” messages to the public and to allow those who “follow” their accounts to reply to their tweets and reply to others’ replies.⁴ President Trump communicates with the American people through numerous social media platforms, including Facebook, Instagram, YouTube—and most famously, Twitter.⁵ Every governor in the country, as well as every U.S. senator and the vast majority of U.S. Representatives from the 115th Congress, has a Twitter account.⁶ In a recent survey, the vast majority of congressional staffers agreed that social media had enabled congresspersons to have more meaningful interactions with their constituents and had made congresspersons more accountable to them.⁷

⁴ Twitter, *About conversations on Twitter*, <https://support.twitter.com/articles/20174577>; *see also* Twitter, *Types of Tweets and where they appear*, <https://support.twitter.com/articles/119138>.

⁵ *See* The White House, Facebook, <https://www.facebook.com/WhiteHouse>; @realDonaldTrump, Twitter, Donald J. Trump, <https://twitter.com/donaldtrump>; @POTUS, Twitter, President Trump, <https://twitter.com/potus>; @WhiteHouse, Twitter, The White House, <https://twitter.com/WhiteHouse>; The White House, YouTube, <https://www.youtube.com/user/whitehouse>; The White House, Instagram.com, <https://www.instagram.com/whitehouse>.

⁶ *US Governors*, Twitter, <https://twitter.com/TwitterGov/lists/us-governors> (public list produced by Twitter Government); *Members of Congress*, Twitter, <https://twitter.com/cspan/lists/members-of-congress/members?lang=en> (public list produced by CSPAN); *see also* Congressional Research Service, *Social Media in Congress: The Impact of Electronic Media on Member Communications*, R44509 (May 26, 2016), <https://fas.org/sgp/crs/misc/R44509.pdf>.

⁷ Bradford Fitch & Kathy Goldschmidt, Congressional Management Foundation, *#SocialCongress 2015 10-11* (2015), http://www.congressfoundation.org/storage/documents/CMF_Pubs/cmf-social-congress-2015.pdf.

Unfortunately, some public officials have adopted the practice of blocking from their social media accounts individuals who disagree with them or criticize their official decisions.⁸ President Donald Trump has blocked his critics from communicating with him on his Twitter account, @realDonaldTrump.⁹ The Governors of Kentucky and Maryland have also reportedly blocked hundreds of users from their official Twitter and Facebook accounts.¹⁰ Records released by the State indicate that the Governor of California has blocked “more than 1,500 individual accounts” from his official Twitter and Facebook accounts.¹¹ And a

⁸ “Government Block Lists Revealed” is a blog that documents the results of public records requests submitted to various public officials to obtain a list of users blocked from the public officials’ social media accounts. Government Block Lists Revealed, <http://govblock.blogspot.com/?view=flipcard>; see also Marissa Lang, *Politicians use Twitter’s block button, and citizens feel censored*, S.F. Chron. (June 21, 2017), <http://www.sfchronicle.com/business/article/Politicians-use-Twitter-s-block-button-and-11234602.php>.

⁹ Julia Mead, *26 People Who’ve Been Blocked by Trump on Twitter*, N.Y. Mag. (Sept. 17, 2017), <http://nymag.com/daily/intelligencer/2017/09/who-donald-trump-has-blocked-on-twitter.html>; Ashley Feinberg, *A Running List of People Donald Trump Has Blocked on Twitter*, Wired (June 14, 2017), <https://www.wired.com/story/donald-trump-twitter-blocked>; see also Jeff John Roberts, *White House Admits Trump Blocks Twitter Critics in Free Speech Lawsuit*, Fortune (Sept. 27, 2017), <http://fortune.com/2017/09/27/trump-twitter-lawsuit>.

¹⁰ See Morgan Watkins & Phillip M. Bailey, *Kentuckians Sue Gov. Matt Bevin for Blocking Them on Twitter and Facebook*, Courier Journal (July 31, 2017), <http://www.courier-journal.com/story/news/2017/07/31/kentuckians-sue-gov-matt-bevin-blocking-them-twitter-and-facebook/519427001>; Ovetta Wiggins, *Gov. Larry Hogan Sued by ACLU for Deleting Comments, Blocking Facebook Users*, Wash. Post (Aug. 1, 2017), https://www.washingtonpost.com/local/md-politics/md-aclu-sues-governor-for-deleting-comments-and-blocking-facebook-users/2017/08/01/9723d4a6-76d8-11e7-9eac-d56bd5568db8_story.html.

¹¹ See *FAC Prompts Disclosure of California Governor Jerry Brown’s Social Media “Block Lists,”* First Amendment Coalition (Sept. 26, 2017), <https://firstamendmentcoalition>.

number of local governments have settled First Amendment suits challenging their adoption of policies authorizing the deletion of comments and blocking of users from local agency social media accounts.¹²

Public officials' practice of blocking critics from their social media accounts threatens to impoverish and distort expressive forums that play an increasingly central role in our democracy. The practice also gives rise to the question presented by this case: whether, and in what circumstances, does a public official's social media account constitute a public forum under the First Amendment? *Amicus* respectfully submits that the same principles that the federal courts have applied to more conventional public forums should apply with full force in this new context. *Packingham*, 137 S. Ct. at 1736 (“[T]he Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast

org/2017/09/fac-prompts-disclosure-california-governor-jerry-browns-social-media-block-lists (releasing the Governor of California's “block lists”).

¹² See Cara Anthony, *Beech Grove, ACLU reach settlement in Facebook case*, Indianapolis Star (Aug. 4, 2016), <https://www.indystar.com/story/news/2016/08/04/beeceh-grove-aclu-reach-settlement-facebook-case/88075666> (reporting that the city of Beech Grove settled First Amendment suit for deleting critical comments from the municipal police department's Facebook page); Kristina Davis, *Sheriff's Facebook suit settles for \$20*, San Diego Union Trib. (Feb. 20, 2015), <http://www.sandiegouniontribune.com/sdut-sheriff-facebook-lawsuit-settle-karras-2015-feb20-story.html> (reporting that the San Diego County Sheriff's Department settled First Amendment suit for deleting plaintiff's comments and banning him from the Department's Facebook page); Andrew Walden, *HPD Ordered to Pay \$31K over Censored Facebook Comments*, Hawai'i Free Press (June 27, 2014), <http://www.hawaiifreepress.com/Articles/Main/tabid/56/ID/12959/HPD-Ordered-to-Pay-31K-over-Censored-Facebook-Comments.aspx> (reporting that Honolulu Police Department settled First Amendment suit for deleting unfavorable comments and banning users from the Department's Facebook page).

networks [in the Internet].”); *see also Reno*, 521 U.S. at 870 (finding “no basis for qualifying the level of First Amendment scrutiny” applied to the Internet); *cf. Liverman v. City of Petersburg*, 844 F.3d 400, 407–11 (4th Cir. 2016) (applying the First Amendment public employee speech doctrine to police department employees’ challenge to department’s social networking policy). For reasons discussed more fully below, the Knight Institute respectfully submits that the district court was correct to conclude that a public official’s social media account should be understood to reflect state action when it is used as an instrument of governance, and that an account that reflects state action should be treated as a public forum for First Amendment purposes if it has been opened to the public at large for expressive activity.

II. The Court Should Take a Functional Rather than Formalistic Approach to Assessing Whether a Public Official’s Social Media Account Reflects State Action.

Whether a public official’s social media account reflects state action—and engages the First Amendment—turns on how that account is used, including how the official describes and presents the account to the public. In other contexts, the state-action analysis is functional rather than formalistic. The analysis should be a functional one here, too.¹³

¹³ Public officials frequently use social media accounts registered to their own names to communicate with their constituents, in lieu of or as a complement to social media accounts named for the institutions they represent. For example, before the creation of the @POTUS Twitter

To assess whether a particular public official's social media account constitutes state action, the courts should look principally to how the account is used. Relevant factors will include those that were identified by the district court in this case: whether the official uses the account to converse with constituents, promote official events, and inform constituents of activities related to the office; whether government resources and staff are involved in operating the account; and whether the account includes markers of official status—for example, references to the official's government title, or photographs of the official engaged in official conduct (e.g., delivering official addresses, meeting with other officials, or attending official events).

That a public official established her account before assuming office should not, on its own, foreclose a finding that the account constitutes state action.¹⁴ The

account in 2015, former President Barack Obama used both the @BarackObama and the @WhiteHouse Twitter accounts. President Donald Trump has continued this practice by routinely tweeting from @realDonaldTrump, the Twitter account he used prior to his election. On average, social media accounts named for the individual public official attract considerably more social media users than the accounts named for the institutions they represent. Arthur Mickoleit, "Social Media Use by Governments: A Policy Primer to Discuss Trends, Identify Policy Opportunities and Guide Decision Makers" at 20, OECD Working Papers on Public Governance, No. 26, OECD Publishing, Paris (2014), <http://www.oecd-ilibrary.org/docserver/download/5jxrcmghmk0s-en.pdf?expires=1510117078&id=id&accname=guest&checksum=42CA5C88882D10CBD6D099874FD37916>.

¹⁴ In analogous circumstances, courts have held that emails sent from and received by the personal email accounts of public officials are public records subject to disclosure when the email accounts are used for conducting public business. *See, e.g., Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149-50 (D.C. Cir. 2016) (finding that use of private email domain did not relieve government agency of obligation to disclose those emails containing government business); *City of San Jose v. Superior Court*, 389 P.3d 848, 861 (Cal. 2017) (holding

Supreme Court has held that seemingly private action is subject to constitutional scrutiny if “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.” *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (internal quotation marks omitted). It has also observed that a “challenged activity may be state action when it is entwined with government policies, or when government is entwined in its management or control.” *Id.* at 295–96 (internal quotation marks, citations, and alterations omitted). This Court has similarly reasoned that suppression of speech by nominally private actors constitutes state action when “purportedly private actions are linked to events” arising out of the actors’ official status, and the actions arise “out of public, not personal, circumstances,” or where “the sole intention of a public official is to suppress speech critical of [her] conduct of official duties or fitness for public office.” *Rossignol v. Voorhaar*, 316 F.3d 516, 524 (4th Cir. 2003).

Accordingly, as the district court here properly held, a public official’s social media account should be understood to reflect state action if it is used as a “tool of governance.” *Davison v. Loudoun Cnty. Bd. of Supervisors*, No. 1:16cv932, 2017 WL 3158389, at *7 (E.D. Va. July 25, 2017). After a bench trial, the district court

that “a city employee’s writings about public business” are not excluded from the state public records act “simply because they have been sent, received, or stored in a personal account.”).

properly analyzed the function of the “Chair Phyllis J. Randall” account by considering, among other things, that Ms. Randall had used government resources (including her staff) to administer the Facebook page; that she had used the page “to keep her constituents abreast of her activities as Chair and of important events in local government”; that county newsletters directed constituents to the page; and that the official had made efforts to “swathe the . . . page in the trappings of her office.” *Id.* at *7–8. The court appropriately concluded that, “in the totality of circumstances,” the page was operated under color of law. *Id.* at *8 (internal quotation marks and citation omitted).¹⁵ *Amicus* respectfully submits that the district court’s reasoning was correct and that its functional analysis was consistent with the relevant precedents of the Supreme Court and this Court.

III. A Public Official’s Social Media Account that Reflects State Action Is a Designated Public Forum if It Is Open to the Public for Expressive Activity.

“[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.”

¹⁵ This district court’s fact-intensive analysis belies the concern expressed by Defendant’s *amici* that an official’s operation of a social media account will always be seen to involve state action because “there is virtually always a ‘nexus,’ perhaps even a ‘close nexus,’ between the private expressive activity of the politician and the official activity of government.” Brief of Amici Curiae Local Government Attorneys of Virginia, Inc., et al., at 6–7 (“LGAV Br.”). The district court did not base its holding merely upon Ms. Randall’s status as a public official. To the contrary, the court considered the factors listed above to determine that, under the totality of circumstances, the “Chair Phyllis J. Randall” page was used by her in furtherance of her governing duties as Chair of the Loudoun Board of Supervisors.

Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 802 (1985); see also *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); *Sons of Confederate Veterans, Virginia Div. v. City of Lexington*, 722 F.3d 224, 230 (4th Cir. 2013); *Warren v. Fairfax County*, 196 F.3d 186, 193 (4th Cir. 1999) (en banc). The public forum doctrine applies to physical spaces and to “metaphysical” spaces, *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 830 (1995), that “lack[] a physical situs,” *Cornelius*, 473 U.S. at 801, as well as to private property used by government for expressive purposes, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975). In determining whether the government has created a designated or limited public forum,¹⁶ courts consider the forum’s compatibility with expressive activity, as well as whether the government’s overall “policy and practice” supports the conclusion that the forum is intended to be used for speech by the public. *Cornelius*, 473 U.S. at 802.

¹⁶ This Court has used “designated public forum” and “limited public forum” interchangeably to refer to government-controlled spaces that have been opened to expressive activities by the public or by a segment of the public. *Goulart v. Meadows*, 345 F.3d 239, 250 (4th Cir. 2003). The Court recognizes two other categories of public forums. A “traditional” public forum is a place that “by long tradition or by government fiat ha[s] been devoted to assembly and debate,” such as public parks and sidewalks. *Perry*, 460 U.S. at 45. Content-based restrictions on speech in a traditional public forum are subject to strict scrutiny, and viewpoint-based restrictions are forbidden. *Goulart*, 345 F.3d at 248. A “nonpublic forum” is a government-controlled space that “is not open by tradition or designation to the public for expressive activity.” *Id.* The government can restrict access to a nonpublic forum “as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker’s view.” *Id.* (quoting *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677–78 (1998)).

Although the question of whether a particular social media account constitutes a public forum will depend on the facts of each case, the inherently open and interactive nature of social media platforms should be a key consideration. There is no question that social media platforms are compatible with expressive activity—indeed, their entire purpose is to facilitate speech. As the Supreme Court emphasized in *Packingham*, social media platforms are “essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.” 137 S. Ct. at 1735. The decision of a public official to use an interactive social media platform to communicate with the public is powerful evidence of an intent to create a forum open to speech by the public at large. Notably, by default a Facebook page may be viewed by any member of the public, and anyone with a Facebook account may “like” a public official’s page and post comments to it.¹⁷

Public officials’ social media accounts that are open to comment by the public are public forums under the First Amendment. Like school board meetings and town halls, they are venues in which public officials speak to their constituents and in which those constituents can respond as well as interact with one another. This Court has repeatedly held that city council and other local government public meetings are designated or limited public forums subject to the First Amendment. *See Steinburg*

¹⁷ See Facebook, *How do I control what visitors can post on my Page?*, <https://www.facebook.com/help/356113237741414>.

v. Chesterfield Cty. Planning Comm'n, 527 F.3d 377, 385 (4th Cir. 2008) (recognizing that local planning commission's public meetings were limited public forums); *Local 2106, Int'l Ass'n of Firefighters, AFL-CIO v. City of Rock Hill*, 660 F.2d 97, 99–100 (4th Cir. 1981) (holding that city violated First Amendment where “council meetings were open to any citizen . . . to comment on any subject relating to city government” but city employees were barred from speaking); *see also Collinson v. Gott*, 895 F.2d 994, 1000 (4th Cir. 1990) (Phillips, J., concurring) (“Speech at public meetings called by government officials for discussion of matters of public concern is entitled to normal [F]irst [A]mendment protections against general restrictions or *ad hoc* parliamentary rulings by presiding officials.”). The principles that applied to physical forums should apply with equal force to virtual ones, as this Court has recognized. *Page v. Lexington County Sch. Dist. One*, 531 F.3d 275, 280, 283 (4th Cir. 2008) (stating that “information distribution system” that “invite[s] private speakers” to express their views and opinions, or to post information using that system, constitutes a designated public forum for private speech).¹⁸

¹⁸ In *Page*, the Court ultimately held that the defendant school district's “information distribution system,” comprising a static website, the district's email, and hyperlinks to third-party websites posted to the district website, was not a designated public forum because it was not open to speech by the public, 531 F.3d at 283, but the Court made clear that “if the School District invited private speakers to use the platform of its channels of communication to speak in opposition, it could not then exclude private speakers who would speak in favor of the bill,” *id.* *Page* also makes clear that the presence of government speech within a public forum does not mean it is something other than a public forum. Whether a forum is a public forum under the First

Defendant and her *amici* err in contending that the public forum doctrine is inapplicable where the government uses private rather than public property to establish a space for expression. The Supreme Court has repeatedly rejected this proposition. *See, e.g., Se. Promotions Ltd.*, 420 U.S. at 555 (holding that a privately owned theater leased by a city was a public forum); *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”). Moreover, to accept Defendant’s theory would place *every* social media account—even those that are indisputably official—beyond the reach of the public forum doctrine. It would have correspondingly far-reaching implications for the right of individuals to engage in core political speech.

Equally meritless is the argument of Defendant’s *amici* that “[o]nly a governmental unit may create a public forum.” LGAV Br. at 4. It is true that past public forum cases often involved forums established by government entities rather than individual government officials, but this reflects historical practice rather than First Amendment principle. The relevant question is not who established the account

Amendment turns *not* on whether the forum includes government speech but on whether the forum has been opened for expression by the public at large. *Id.* at 283–84.

but how the account is being used. If a town's mayor began holding "town hall" meetings during which she routinely announced official actions and invited comment and responded to questions about government policy, there is no doubt that the forum would be considered a public forum under the First Amendment— notwithstanding the fact that the forum was established by a single official. The same logic should apply on social media.

Nor, finally, is there merit to the suggestion by Defendant's *amici* that applying the public forum doctrine in this context will inappropriately curtail the First Amendment rights of government officials. *See* LGAV Br. at 19–20. The public forum doctrine applies only to accounts that reflect state action and that have been opened up for expression by the public at large. Public officials themselves control whether these requirements are met. A public official who does not want her account to trigger First Amendment scrutiny is free to use her account for personal purposes—or, indeed, for any purpose except to facilitate governance. (Notably, Defendant established multiple Facebook pages for multiple purposes.) And even a public official who uses her account as an instrument of governance can avoid the public forum doctrine by using her account as a one-way-broadcast mechanism rather than a venue for public comment about government policy. Applying the public forum doctrine in this context, as the court below applied it, will protect

citizens' free-speech rights in forums that are increasingly vital to our democracy—and it will do so without curtailing the free-speech rights of public officials.

IV. The First Amendment Prohibits Government Officials From Excluding Individuals from Public Forums on the Basis of Viewpoint.

The First Amendment prohibits government officials from excluding individuals from public forums on the basis of viewpoint. Indeed, viewpoint-discrimination is forbidden in *every* type of public forum—whether traditional, designated or limited, or nonpublic. *Rosenberger*, 515 U.S. at 829 (“The government must abstain from regulation speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. . . . [T]he State [is forbidden from] exercis[ing] viewpoint discrimination, even when the . . . public forum is one of its own creation.”); *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 & n.2 (4th Cir. 2006) (“[W]hen the government opens its property to private speech, it may not discriminate based upon the viewpoint of the speaker.”). Excluding people based on viewpoint from social media accounts that operate as public forums violates 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 in part).

Here, the harm caused by viewpoint discrimination is especially profound because the speech curtailed by the discrimination is core political speech. *Rossignol*, 316 F.3d at 521–22 (“Discussion of public issues’ and ‘debate on the qualifications of candidates’ for public office have always been ‘integral to the operation of the system of government established by our Constitution.’” (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam))); *see also Buckley*, 424 U.S. at 14–15. Public officials’ practice of excluding individuals from official social media accounts on the basis of viewpoint has the effect of suppressing speech entitled to the highest constitutional protection.

CONCLUSION

For the reasons stated herein, *amicus* respectfully submits that the district court properly analyzed the First Amendment status of the “Chair Phyllis J. Randall” Facebook page.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because it contains 4,903 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).
2. This brief 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) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

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November 13, 2017

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2017, the foregoing *Amicus Curiae* Brief was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

/s/ Katherine Fallow

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