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## Campbell v. Reisch: The Dangers of the Campaign Loophole in Social Media Blocking Litigation

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**CAMPBELL V. REISCH: THE DANGERS OF THE CAMPAIGN LOOPHOLE IN  
SOCIAL-MEDIA-BLOCKING LITIGATION**

*Clare R. Norins & Mark L. Bailey*

INTRODUCTION

In June of 2018, Missouri resident Mike Campbell criticized his state representative Cheri Reisch on Twitter. In response, Reisch permanently blocked Campbell from following or commenting on her Twitter account that she used to communicate with the public about her legislative duties and activities.<sup>1</sup> This is a scenario that plays out repeatedly where government officials react to private parties whose speech they dislike by blocking them on social media or deleting their comments. Campbell filed suit against Reisch, alleging violation of his free speech rights.<sup>2</sup> The district court agreed. Following a bench trial, the court found that Campbell was entitled to declaratory and injunctive relief.<sup>3</sup> But the Eighth Circuit reversed, holding that because Reisch's Twitter had started as a personal campaign account, and was still a vehicle for promoting her fitness for public office, she was free to block whomever she chose.<sup>4</sup>

Since 2016, social-media-blocking litigation against government officials has been a lively and growing battleground for the First Amendment rights of

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<sup>1</sup> Campbell v. Reisch, 986 F.3d 822, 824 (8th Cir. 2021); Campbell v. Reisch, 367 F. Supp. 3d 987, 989-90 (W.D. Mo. 2019).

<sup>2</sup> Campbell, 986 F.3d at 823.

<sup>3</sup> Campbell v. Reisch, No. 2:18-CV-4129-BCW, 2019 WL 3856591, at \*9 (W.D. Mo. Aug. 16, 2019), *rev'd and remanded*, 986 F.3d 822 (8th Cir. 2021).

<sup>4</sup> Campbell, 986 F.3d at 827-828.

free speech and petition.<sup>5</sup> In April 2023, the Supreme Court granted certiorari in two social-media-blocking cases involving the personal accounts of government officials and so can be expected to weigh in on this issue in the coming term.<sup>6</sup> Government officials increasingly rely on social media to communicate with the public because it provides a cost-effective method for quickly and timely relaying information while simultaneously engaging with large numbers of constituents.<sup>7</sup> Reciprocally, ever greater numbers of private individuals are using the interactive features of government officials' social media pages to voice their opinions and petition for change.<sup>8</sup> Notably, social media allows internet users to express themselves and dialogue in real time, with both the government official who operates the account, and other viewers and commenters engaging with it. Perhaps not surprisingly, this has prompted some government officials to block those users whose comments they deem to be critical or offensive. However, this kind of speech regulation by a government actor introduces viewpoint discrimination—a cardinal sin under the First Amendment.<sup>9</sup>

In 2019, three United States Circuit Courts of Appeal issued opinions concluding that social media blocking by government officials violates the First Amendment.<sup>10</sup> These courts held that: (1) public officials who operate interactive social media accounts in their official capacity have created government-controlled public forums for speech, and (2) the officials cannot then engage in viewpoint-based regulation of private speech in those forums

<sup>5</sup> *Davison v. Plowman*, 191 F. Supp. 3d 553, 555, 558 (E.D. Va. 2016) was the first reported case to recognize a First Amendment claim based on a plaintiff being blocked from a government official's social media account and his comments deleted.

<sup>6</sup> Amy Howe, *Justices Add Two Cases on Liability of Officials Who Block Critics on Social Media*, SCOTUSBLOG (Apr. 24, 2023), <https://www.scotusblog.com/2023/04/justices-add-two-cases-on-liability-of-officials-who-block-critics-on-social-media/> [https://perma.cc/R86Z-MFS9]. See also *U.S. Sup. Ct., Order List: 598 U.S.* (stating certiorari granted in *O'Connor-Ratcliff v. Garnier* and *Lindke v. Freed*), [https://www.supremecourt.gov/orders/courtorders/042423zor\\_1p24.pdf](https://www.supremecourt.gov/orders/courtorders/042423zor_1p24.pdf) [https://perma.cc/6PD3-24YB].

<sup>7</sup> See *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1163 (9th Cir. 2022) (“[E]lected officials across the country increasingly rely on social media . . . to communicate with constituents and seek their input in carrying out their duties as public officials.”).

<sup>8</sup> See *infra* Section II.

<sup>9</sup> See *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (“The government may not discriminate against speech based on the ideas or opinions it conveys.”); see also *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829, 830 (1995) (explaining that viewpoint discrimination is an “egregious form of content discrimination” and is “presumptively unconstitutional”).

<sup>10</sup> See *Knight First Amend. Inst. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019), *judgment vacated sub nom.* *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1220-21, 1227 (2021); see also *Davison v. Randall*, 912 F.3d 666, 691 (4th Cir. 2019); *Robinson v. Hunt Cnty.*, 921 F.3d 440, 449, 452 (5th Cir. 2019).

by blocking people or deleting their comments based on the perspective being expressed.<sup>11</sup> But if, instead, the official controls the account in her private capacity, then there is no state action, the First Amendment does not apply, and the official is free to censor or block people, at will.<sup>12</sup> Since 2019, many federal district courts and four additional Circuit Courts of Appeal have concurred with this basic framework.<sup>13</sup>

However, determining the threshold question of whether a public official operates the relevant social media account in her official capacity (i.e., “under color of state law”) for purposes of Section 1983 liability has resulted in less consensus.<sup>14</sup> Following the lead of the Fourth and Second Circuits, the majority of the circuit courts to have reached the question, and myriad lower courts, apply a totality-of-the-circumstances approach.<sup>15</sup> This approach takes into account the following non-exhaustive factors in determining whether a government official’s publicly accessible social media account is operated in an official, versus personal, capacity: (1) whether the official presents herself on the social media account as a government actor by using her government title and address, linking to her government website, or displaying photographs

<sup>11</sup> See *Davison*, 912 F.3d at 687; see also *Knight*, 928 F.3d at 236; accord *Garnier*, 41 F.4th at 1179, 1181; see *Robinson*, 921 F.3d at 449-50.

<sup>12</sup> See *Knight*, 928 F.3d at 236.

<sup>13</sup> See *Garnier*, 41 F.4th at 1163; see also *Lindke v. Freed*, 37 F.4th 1199, 1203, 1206 (6th Cir. 2022); *Campbell v. Reisch*, 986 F.3d 822, 825-27 (8th Cir. 2021); *Attwood v. Clemons*, 818 F. App’x 863, 867-68 (11th Cir. 2020); Patricia Beety & Joline Zepeceveski, *Technological Transformation of the Public Square: Government Officials Use of Social Media and the First Amendment*, 47 MITCHELL HAMLINE L. REV. 510, 511-12, 518-21 (2021) (detailing the application of the First Amendment public forum doctrine to social media and the history of social-media-blocking litigation); Joseph A. D’Antonio, Note, *Whose Forum Is It Anyway: Individual Government Officials and Their Authority to Create Public Forums on Social Media*, 69 DUKE L.J. 701, 712-22 (2019) (analyzing the history of the application of the First Amendment public forum doctrine to public officials’ social media pages).

<sup>14</sup> *West v. Atkins*, 487 U.S. 42, 48 (1988) (“To state a claim under [42 U.S.C.] § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.”).

<sup>15</sup> See *Davison*, 912 F.3d at 680 (considering “the totality of the circumstances surrounding [defendant]’s creation and administration of the [relevant] Facebook Page.”); see also *Knight*, 928 F.3d at 236 (endorsing a “fact-specific inquiry” which is “informed by how the official describes and uses the account; to whom features of the account are made available; and how others, including government officials and agencies, regard and treat the account.”); accord *Garnier*, 41 F.4th at 1173; cf. *Campbell*, 986 F.3d at 825 (purporting to apply analysis endorsed by *Davison* and *Knight* without deciding if this approach “is correct”). But see *Lindke*, 37 F.4th at 1206 (“[W]e part ways with other circuits’ approach to state action” by focusing on “the actor’s official duties and use of government resources or state employees” instead of on “a [social media] page’s appearance or purpose.”). The Fifth Circuit did not have to grapple with this official-capacity inquiry because the official Facebook page of the Hunt County Sheriff’s Office was undisputedly a government social media account for which the sheriff was the final policy maker. See *Robinson*, 921 F.3d at 448.

of herself engaged in government business; (2) whether the official uses the account to communicate with the public about her official duties and activities; and (3) whether third parties, such as other government actors and members of the public, interact with the account as though it belonged to a government official.<sup>16</sup> But in January 2021, the Eighth Circuit in *Campbell v. Reisch* prioritized a fourth consideration of whether the account was initially created as a campaign device, rather than as a tool of governance, and whether it continues to aid in any future re-election by creating a favorable impression of the official's job performance.<sup>17</sup> By assigning greatest weight to the account's purpose and function at the time of origin, and less weight to the purpose and function at the time of the alleged First Amendment violation, *Campbell* created an exploitable loophole: public officials who, post-election, continue using their campaign social media accounts to communicate with the public about their official duties and activities, thereby demonstrating their suitability (they hope) for continuing to hold office, may lawfully block users based on viewpoint.

*Campbell* concerned Missouri State Representative Cheri Reisch's interactive Twitter account, which had originated in 2015 as a campaign device when she was first running for office.<sup>18</sup> However, after winning election in 2016, she continued to use the account to communicate with constituents about her official duties and activities.<sup>19</sup> In 2018, after attending a Missouri Farm Bureau event, Reisch criticized her political adversary, Maren Jones, who had also been present at the event by tweeting, "Sad my opponent put her hands behind her back during the Pledge [of Allegiance]."<sup>20</sup> Another state representative, Kip Kendrick, tweeted that this comment was a low blow

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<sup>16</sup> *Davison*, 912 F.3d at 680-681; *Knight*, 928 F.3d at 236; accord *Garnier*, 41 F.4th at 1173. The Knight First Amendment Institute, which litigated the Twitter blocking case against Trump and served as appellate counsel in *Davison v. Randall*, has been a pioneer in successfully advocating that courts apply a fact-specific, totality-of-the-circumstances analysis to whether public officials operate social media accounts in their official capacity. See *Knight Institute to Represent Plaintiff in the First Social-Media-Blocking Lawsuit to Reach Appellate Court*, KNIGHT FIRST AMEND. INST. (May 2, 2018), <https://knightcolumbia.org/content/knight-institute-represent-plaintiff-first-social-media-blocking-lawsuit-reach-appellate-court> [<https://perma.cc/E3EZ-3V8U>]; see also *Critics Blocked from President's Twitter Account File Suit*, KNIGHT FIRST AMEND. INST. (July 11, 2017), <https://knightcolumbia.org/content/critics-blocked-presidents-twitter-account-file-suit> [<https://perma.cc/S85Z-DUA5>].

<sup>17</sup> See *Campbell*, 986 F.3d at 826, 827.

<sup>18</sup> *Campbell v. Reisch*, No. 2:18-CV-4129-BCW, 2019 WL 3856591, at \*2 (W.D. Mo. Aug. 16, 2019), *rev'd and remanded*, 986 F.3d 822 (8th Cir. 2021).

<sup>19</sup> *Id.* at \*2-3.

<sup>20</sup> *Id.* at \*3.

toward Jones whose father and brothers had served in the military.<sup>21</sup> Campbell then retweeted Kendrick's comment on his own Twitter.<sup>22</sup> Reisch reacted by blocking Campbell from her account.<sup>23</sup> Although the Eighth Circuit went through the motions of applying the totality-of-the-circumstances approach endorsed by its sister circuits,<sup>24</sup> it nevertheless held that Reisch had not created a public forum subject to the First Amendment because, in the court's view, she used the account more in the manner of a campaign newsletter "to promote herself and position herself for more electoral success down the road."<sup>25</sup> Accordingly, the court held it was Reisch's "prerogative to select her audience," including by blocking Campbell or anyone else from commenting on or even viewing her Twitter account.<sup>26</sup>

As this Article will explain, the Eighth Circuit's approach in *Campbell* sets a dangerous precedent for future social-media-blocking cases. First, on the merits, the Court limited its totality-of-the-circumstances analysis to a surface review of how Reisch used her Twitter account before she took office as compared to after, allowing the campaign origin of the account to overly influence the case's outcome.<sup>27</sup> A deeper dive into Reisch's post-election use of her Twitter account demonstrates that the nature of the account shifted, such that she was primarily operating it as a tool of governance and not for campaigning.

Second, and more fundamentally, the *Campbell* court flipped First Amendment doctrine on its head by resolving any perceived ambiguities about the nature and purpose of the Twitter account exclusively in Reisch's favor.<sup>28</sup> Thus, so long as her official-duty speech could also potentially function as self-

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Campbell v. Reisch*, 986 F.3d 822, 825 (8th Cir. 2021).

<sup>25</sup> *Id.* at 826, 827.

<sup>26</sup> *Id.* at 827, 827-28.

<sup>27</sup> "We acknowledge that she occasionally used the account to provide updates on where certain bills were in the legislative process or the effect certain recently enacted laws had had on the state. But tweets like these are fully consistent with Reisch using the account to tout her record because they show voters that she was actively advancing her legislative agenda and fulfilling campaign promises. . . . The dissent points to a few tweets that Reisch posted after the election to support the view that she changed the way in which she was using her account. These messages are necessarily different from previous ones because they report on events that occurred in the state legislature. But it is not obvious that their purpose was different. They were consistent with a desire to create a favorable impression of Reisch in the minds of her constituents." *Campbell*, 986 F.3d at 826-27.

<sup>28</sup> *See id.* at 827 (ruling that any features that could show official-capacity use simultaneously reflected the account's campaign character).

promotion for future re-election, the court gave her the green light to block anyone from the account for any reason. This approach flies in the face of the principle of protecting more, not less, private speech from viewpoint-based government regulation, and risks suppressing large numbers of voices given that so much of today's communication between public officials and their constituents takes place on officials' social media accounts.<sup>29</sup> Yet, the *Campbell* decision invites elected officials to skirt the prohibition on viewpoint discrimination by continuing to use campaign-origin accounts to communicate with the public after they win office, under the guise that it ultimately serves the purpose of positioning them for re-election.<sup>30</sup> Even if many social media communications by public officials may fairly be characterized as both functions of governance and laying the groundwork for the next campaign, this duality should be resolved in favor of more, not less, First Amendment protection for members of the public who are trying to engage in the political process. In other words, the tie should go to safeguarding the speech rights of constituents, rather than prioritizing a public official's right to shut out the voices they dislike.

This Article unfolds as follows. Part I explains why freedom of speech and the right to petition require courts to protect private individuals' speech on government officials' social media accounts from viewpoint-based regulation. This part also considers narrow circumstances where social-media-blocking might be permitted without First Amendment offense. Part II explores the history of social-media-blocking litigation. It highlights the Second, Fourth, and Fifth Circuit Courts of Appeal's seminal decisions in 2019 which were echoed by the Ninth Circuit in 2022, explains why the majority of courts agree that the government-speech doctrine does not apply to social media blocking, and looks at how courts have treated social media accounts that are used purely for campaign or election purposes.<sup>31</sup> Part III

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<sup>29</sup> See *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1451 (2014) ("[T]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it.") (quoting *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 457 (2007)); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 361 (2010) (explaining how in the context of the First Amendment, "it is our law and our tradition that more speech, not less, is the governing rule.").

<sup>30</sup> See, e.g., *Felts v. Reed*, No. 4:20-CV-00821, 2022 WL 898768, at \*8-9, \*14 (E.D. Mo. Mar. 28, 2022) (considering *Campbell* when finding a question of fact existed as to whether the president of the St. Louis Board of Alderman operated his Twitter account for campaign purposes, even though the record was "bereft of examples" of campaign activities on the account and "communications about the official duties of his office . . . appears to be a focus of the [a]ccount."); *Buentello v. Boebert*, 545 F. Supp. 3d 912, 920 (D. Colo. 2021) (considering *Campbell* when adopting Colorado state representative's argument that her campaign Twitter account is not a public forum despite post-election use of the account to communicate about her official duties and activities).

<sup>31</sup> For full treatment of these issues, see Beety & Zepcevski, *supra* note 13, at 511-14, 517-21.

critiques the Eighth Circuit's social-media-blocking approach in *Campbell v. Reisch* as factually and analytically flawed, and, more fundamentally, out of step with the democracy-enhancing principles of the First Amendment. It explains how *Campbell* creates a First Amendment work-around whereby public officials can exclude their critics with impunity so long as their social media account originated as, or at any point functioned as, a campaign tool. It also explores how the Eighth Circuit's decision is already having consequences in social-media-blocking litigations in other federal courts. This article concludes by arguing that, in contrast with *Campbell*, courts should not allow the campaign origin of an elected official's social media account to hijack the totality-of-the-circumstances analysis and should instead resolve ambiguities about officials' post-election use of campaign-origin accounts in ways that protect private individuals' political speech and democratic engagement.

## I. WHY ACCESS TO PUBLIC OFFICIALS' INTERACTIVE SOCIAL MEDIA ACCOUNTS MATTERS

Whether and how the First Amendment applies to government officials' social media accounts has fundamental ramifications for our democracy. These accounts are the digital spaces where individuals and public officials meet to discuss the pressing political and social issues of our time. The ability to freely engage in this type of exchange has long been recognized as one of the core purposes of the First Amendment.<sup>32</sup> The marketplace of ideas as imagined by Justice Oliver Wendell Holmes, Jr. over a century ago<sup>33</sup> is today realized on social media platforms.<sup>34</sup> People naturally turn to the Facebook and Twitter accounts of their public officials to exercise both their freedom of speech and right to petition. Whether the First Amendment applies to these public officials' social media pages is of crucial importance because it

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<sup>32</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (noting that the First Amendment reflects "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"); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (arguing that the Founders intended the First Amendment to demonstrate "that public discussion is a political duty; and that this should be a fundamental principle of the American government").

<sup>33</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that one of the key purposes of the First Amendment is to allow ideas to enter into "competition of the market" and be found true or false by the public).

<sup>34</sup> See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (recognizing social media websites as "principal sources for . . . speaking and listening in the modern public square").



determines which members of the public get to exercise those rights and who forfeits them at the discretion of the public official.

*A. Interactive social media accounts operated by government officials function as today's "town squares"*

In 2017, the Supreme Court first recognized the First Amendment importance of digital forums. In *Packingham v. North Carolina*, the Court noted that “[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the vast democratic forums of the Internet in general . . . and social media in particular.”<sup>35</sup> Since *Packingham*, social media has become the dominant method by which officials interact with the public.<sup>36</sup> As of 2020, 99% of U.S. Senators and 100% of members of the U.S. House of Representatives operated an official social media account.<sup>37</sup> Likewise, 100% of state governors currently use one or more social media accounts for official purposes,<sup>38</sup> and at least ten states have adopted social media policies to guide legislators and officials in navigating these ever-more-frequently used methods of interacting with their constituents.<sup>39</sup> For instance, between 2016 and 2020, members of Congress increased their Twitter followers by 300% and tweeted 81% more often.<sup>40</sup> Members of Congress also increased their Facebook followers by 50% and posted 48% more often.<sup>41</sup>

Increased social media use by public officials has, in turn, generated increased levels of online public engagement. The average number of

<sup>35</sup> *Id.* at 1735 (internal quotations omitted).

<sup>36</sup> JACOB R. STRAUS, CONG. RSCH. SERV., R45337, SOCIAL MEDIA ADOPTION BY MEMBERS OF CONGRESS: TRENDS AND CONGRESSIONAL CONSIDERATIONS (2018).

<sup>37</sup> *Percentage of U.S. Congress Members Who Posted on Official Social Media Accounts in 2020*, STATISTA (last visited Dec. 18, 2022), <https://www.statista.com/statistics/958794/congress-members-posted-official-social-media-accounts-usa/> [https://perma.cc/8UPE-3SSQ]; STRAUS, *supra* note 36, at 3.

<sup>38</sup> See *Governors' Social Media Accounts*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/governors/social/> [https://perma.cc/EA2H-9EGW] (last visited Dec. 18, 2022) (listing the Twitter, Facebook, Instagram, and YouTube accounts for governors of all fifty states and all U.S. territories).

<sup>39</sup> *Legislative Social Media Policies and Resources*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/about-state-legislatures/policies-related-to-legislative-use-social-media.aspx> [https://perma.cc/83MV-6Q7M] (last visited Dec. 18, 2022).

<sup>40</sup> PATRICK VAN KESSEL, REGINA WIDJAYA, SONO SHAH, AARON SMITH, & ADAM HUGHES, CONGRESS SOARS TO NEW HEIGHTS ON SOCIAL MEDIA, PEW RSCH. CTR. 12 (July 16, 2020), <https://www.pewresearch.org/internet/2020/07/16/congress-soars-to-new-heights-on-social-media/> [https://perma.cc/5R33-43XM] (analyzing congressional use of social media from 2016 to 2020).

<sup>41</sup> *Id.* at 13.

followers for each congressional social media account has grown from roughly 15,000 followers per member of Congress in 2016, to an average of 36,878 followers on Twitter and 27,605 followers on Facebook in 2020.<sup>42</sup> On Congresspersons' Twitter accounts, the average number of user reactions per post has grown from only six per post in 2016 to seventy-five per post in 2020.<sup>43</sup> On Facebook, the average number of reactions per post has grown from sixty-six per post in 2016 to 111 per post in 2020.<sup>44</sup> This data highlights the prominent role of social media, both with respect to government officials communicating with the public and constituents accessing their representatives.

Regarding private speech on government officials' social media accounts, constituents and members of the public can express their opinions and reactions both in response to the official's posts as well as in response to other viewers' comments on the account. This includes not only posting substantive comments on the account, but endorsing content by "liking," "agreeing with," or "loving" it, as well as expressing disapproval by "hating" it or giving it a "thumbs down." Such immediate, multi-directional means of private expression to and about public officials on matters of public concern, at any time and from any location, was not possible prior to the rise of social media. Thus, as the Supreme Court has observed, these kinds of interactive social media pages "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard" and function as today's equivalent of yesteryear's town square.<sup>45</sup> Accordingly, there is a paramount First Amendment interest in preventing government officials from excluding private individuals from these designated online speech forums because of the individuals' points of view. A government official's shutting down private speech not only infringes the expressive freedom of the speaker, but also deprives the speaker and others engaging with the account of the reciprocal right to receive one another's knowledge and perspective.<sup>46</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 12.

<sup>44</sup> *Id.*

<sup>45</sup> *Packingham*, 137 S. Ct. at 1737.

<sup>46</sup> *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas.").

*B. Social media blocking interferes with the First Amendment right to petition*

Much emphasis has been placed on the violation of free-speech rights that occurs when public officials censor or ban private individuals from their interactive social media accounts.<sup>47</sup> Yet the right to petition is equally implicated. As recognized by the Supreme Court “the right to petition [is] one of the most precious of the liberties safeguarded by the Bill of Rights,”<sup>48</sup> and it resides at the very heart of our representative form of government.<sup>49</sup>

While the analysis of right-to-petition violations may be treated as co-extensive with deciding whether the right to free speech has been infringed,<sup>50</sup> it is worth noting the distinct interests served by the two separately enumerated rights. As Justice Anthony M. Kennedy explains:

The 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 . . . A petition conveys the special concerns of its author to the government and, in its usual form, re-requests action by the government to address those concerns.<sup>51</sup>

In the digital age, courts must protect the right to petition in the forums where individuals and public officials most often meet: interactive social media accounts.<sup>52</sup> Allowing public officials to unilaterally decide, based on viewpoint preference, who from the public can speak, and therefore petition, on their

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<sup>47</sup> See, e.g., *Davison*, 912 F.3d at 688 (“That [defendant]’s action targeted comments critical of the School Board members’ official actions and fitness for office renders the banning [of plaintiff] all the more problematic as such speech occupies the core of the protection afforded by the First Amendment.” (internal quotations omitted)); *Robinson*, 921 F.3d at 442 (noting in the social media blocking context that “[o]fficial censorship based on a state actor’s subjective judgment that the content of protected speech is offensive or inappropriate is viewpoint discrimination”).

<sup>48</sup> *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1948 (2018) (quoting *BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 524 (2002)).

<sup>49</sup> See *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) (“The very idea of a government, republican in form, implies a right on the part of its citizens . . . to petition for a redress of grievances.”).

<sup>50</sup> See, e.g., *Knight First Amend. Inst. v. Trump*, 302 F. Supp. 3d 541, 577 n.24 (S.D.N.Y. 2018), *aff’d*, 928 F.3d 226 (2d Cir. 2019), *judgment vacated sub nom. Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220 (2021) (finding plaintiff’s free speech rights were infringed and noting “[w]e do not analyze separately the argument that the blocking of the individual plaintiffs violates their right ‘to petition the Government for a redress of grievances’ under the First Amendment’s Petition Clause.”).

<sup>51</sup> *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388-89 (2011).

<sup>52</sup> *Packingham*, 137 S. Ct. at 1735 (“[O]n Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose.”); KESSEL, *supra* note 40, at 2.

social media accounts and who cannot, undermines both rights.<sup>53</sup> Understanding that petition rights are in play—i.e., the right to criticize and dissent from the governmental official’s views, positions, or actions and to call for change—is particularly urgent because officials are unlikely to block users who agree with them, praise their work, and request no corrective action.<sup>54</sup> Instead, social media exclusion usually involves officials censoring their detractors, who are often agitating for a different course of action and redress. This, however, is exactly backwards under the First Amendment. People’s right to speak ill of their government and demand reform is precisely the type of expression the Amendment most strenuously seeks to protect.<sup>55</sup> It is therefore incumbent upon the courts to call “foul” when public officials create interactive social media forums for speech but proceed to regulate them in a viewpoint discriminatory manner that punishes dissent and silences petitioners.

*C. Are There Not Sometimes Valid Reasons for Blocking Social Media Users?*

Public officials operating interactive social media accounts may wish to block users to maintain control over their accounts for a variety of reasons, but doing so involves potential First Amendment pitfalls. For instance, a public official may want to block certain users based on the content or viewpoint of

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<sup>53</sup> See *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763 (1988) (stating that the government’s “permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official”); *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1221 (11th Cir. 2017) (ruling that a government official’s unbridled discretion to determine who gets to speak violates the First Amendment in both limited and designated public forums).

<sup>54</sup> At least one scholar has argued that in the context of social media blocking, violation of the right to petition should be considered as a stand-alone claim. See JoAnne Sweeny, “*Lol No One Likes You*”: *Protecting Critical Comments on Government Officials’ Social Media Posts Under the Right to Petition*, 2018 WIS. L. REV. 73, 100 (2018) (advocating “stringent” review of right-to-petition claims in the social media context where the court determines whether the government official had a sufficient interest in blocking the user and whether blocking is the least restrictive means of serving that interest).

<sup>55</sup> See *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1955 (2018) (noting that speech critical of the government sits “high in the hierarchy of First Amendment values.”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 282-83 (1964) (“It is as much [a citizen’s] duty to criticize [the government] as it is the official’s duty to administer. . . . We conclude that such a privilege is required by the First and Fourteenth Amendments.”).

their posts in order to: put an end to “bullying” or “trolling” on the account,<sup>56</sup> prevent misinformation from appearing on the account, or avoid having their own speech on the account overwhelmed by that of one or a few disproportionately vocal users. These may seem, at first blush, like legitimate reasons for censoring private speech on a government official’s social media account. But the First Amendment requires a more nuanced analysis, particularly when the offensive speech in questions relates to matters of public concern.<sup>57</sup>

This is because our country has a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . [which] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>58</sup> Moreover, protection for speech critical of public officials has never turned upon “the truth, popularity, or social utility of the ideas and beliefs which are offered.”<sup>59</sup> Thus, once a public official has opened their social media account for public comment, they must accept that this will almost invariably include some amount of “trolling,” misinformation<sup>60</sup>, or expression of what is colloquially referred to as “hate speech” that will nonetheless be protected if it relates, even in only a broad sense, to matters of public concern.<sup>61</sup> Under such

<sup>56</sup> “Trolling” in this context refers to posting inflammatory or off-topic messages for the purpose of provoking emotional responses, disrupting others’ online activities, or manipulating a political process. See *Troll (slang)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Internet\\_troll](https://en.wikipedia.org/wiki/Internet_troll) [<https://perma.cc/74QH-J46D>] (last visited Jan. 8, 2022).

<sup>57</sup> See *Boos v. Barry*, 485 U.S. 312, 322 (1988) (“[I]n public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment” (internal quotations omitted)).

<sup>58</sup> *New York Times*, 376 U.S. at 270; see also *id.* at 282 (“It is as much [the citizen’s] duty to criticize as it is the official’s duty to administer.”).

<sup>59</sup> *Id.* at 271 (quoting *NACCP v. Button*, 371 U.S. 415, 445 (1963)); see also *Bridges v. California*, 314 U.S. 252, 270 (1941) (“[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions.”).

<sup>60</sup> Misinformation or “fake news” encompasses not only inaccurate assertions of fact, but also interpretations or opinions that may be more difficult to establish as empirically false. See John R. Vile, *False Speech*, FIRST AMEND. ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1506/false-speech> [<https://perma.cc/3G5J-D7HX>] (last visited Sept. 10, 2022). However, even demonstrably false speech retains First Amendment protection, unless it can be shown to fit within another unprotected category, such as defamation. See *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (stating that the Supreme Court “rejects the notion that false speech should be in a general category that is presumptively unprotected”).

<sup>61</sup> See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 454 (2011) (holding that placards held by religious protestors outside an Iraq War veteran’s funeral stating, “God Hates Fags,” “Thank God for Dead Soldiers,” and “God Hates You” warranted First Amendment protection as commentary on big-picture social issues such as “the political and moral conduct of the United States and its citizens, the

circumstances, public officials may want to insulate themselves by disabling the interactive features of their official social media account so that they alone control its content—i.e., essentially eliminating the public-forum aspect of the account. However, this solution only passes constitutional muster if it equally prohibits all viewers from expressing themselves on the account and is not done for the purpose of silencing particular viewpoints.<sup>62</sup> Moreover, eliminating the public forum feature of the account may not be a preferred solution since part of what draws people to a public official's social media account is the ability to interact and engage there with both the official and other users.

Rather than shutting down their social media accounts' interactive features, public officials also have the option of engaging in counter-speech by posting responses that correct misinformation or disavow "hate speech" that users have posted.<sup>63</sup> However, on a government official's social media account, counter-speech may not always have a salutary effect since it can serve to amplify the unwanted speech on the account by drawing more attention to it, and may encourage that same author or similar ones to try to bait the public official into further exchanges.

This leads to the matter of a public official deleting posts or blocking users because the official does not want their own speech to be drowned out by their critics, or by espousers of misleading or false information. In theory, it is constitutionally permissible for a public official to fashion content and viewpoint-neutral rules aimed at eliminating repetitive or high-volume

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fate of our Nation, [and] homosexuality in the military"); *see also* *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

<sup>62</sup> *See, e.g.,* *Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass.*, 868 F.2d 473, 480 (1st Cir. 1989) ("Once the state has created a forum, it may not . . . close the forum solely because it disagrees with the messages being communicated in it."); *Rhames v. City of Biddeford*, 204 F. Supp. 2d 45, 51 (D. Me. 2002) ("[I]f [the City] were to shut down the public access channel temporarily so as to stifle discussion of a particular current controversy, with plans to reopen the channel later after the controversy had subsided, or so as to stifle the particular speech of this plaintiff, that shutdown would be speaker and viewpoint censorship and would violate the First Amendment under any analysis."); *Mo. Knights of the Ku Klux Klan v. Kansas City*, 723 F. Supp. 1347, 1352-53 (W.D. Mo. 1989) (finding a difference between censorship that does not favor either side of controversy and censorship that excludes certain viewpoints).

<sup>63</sup> *See* Nadine Strossen, *Counterspeech in Response to Changing Notions of Free Speech*, AM. BAR ASS'N, (Oct. 20, 2018), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-ongoing-challenge-to-define-free-speech/counterspeech-in-response-to-free-speech/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/counterspeech-in-response-to-free-speech/) [<https://perma.cc/2ZRN-BAF8>] ("[T]he constitutionally permissible response to speech conveying controversial, disfavored views is 'counterspeech,' not censorship—more speech, not silence.").

commentators.<sup>64</sup> For instance, the terms-of-use for an official's social media account could declare that no one other than the account holder may post more than 3 times in a 24-hour period. Courts have also recognized that public officials can limit discussion or comments on their social media accounts to certain topics, so long as the limitation is viewpoint-neutral and reasonable in light of the purpose of the account.<sup>65</sup> Giving clear notice to users that discussion on the account is limited to only certain subject matter may allow officials to constitutionally remove off-topic posts.<sup>66</sup> However, these legitimate content moderation policies, such as limiting the number of posts from the same user over a given time period or limiting the topics that can be discussed on the account, only survive First Amendment scrutiny if officials vigilantly monitor the account and consistently enforce the content moderation rules equally against everyone—not just against users whose speech the account holder dislikes.<sup>67</sup> Such consistent content moderation can entail difficult line drawing and be time-consuming, and potentially expensive to undertake.

Finally, blocking users may be permissible in narrow circumstances when users' speech and conduct crosses the line from offensive or false, but still protected, speech to unprotected harassment, true threats, or incitement. Public officials have the right to delete comments or block users that are obscene, make direct threats of physical harm to others, or incite imminent unlawful action.<sup>68</sup> However, bright line situations are more often the exception

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<sup>64</sup> See *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1180 (9th Cir. 2022) (recognizing that public officials may impose reasonable restrictions on the time, place, or manner of protected speech, including on their public-forum social media accounts); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (stating that time, place, or manner restrictions in a government forum for speech must (1) be content-neutral, (2) be narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels for communication of the information).

<sup>65</sup> See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Once it has opened a limited forum . . . [t]he State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint."); see, e.g., *Davison v. Plowman*, 247 F. Supp. 3d 767, 776-77 (E.D. Va. 2017), *aff'd*, 715 F. App'x 298 (4th Cir. 2018) (ruling that restricting off-topic comments on the defendant official's Facebook page must be "viewpoint neutral and reasonable in light of the objective purpose of the forum" (quotations omitted)).

<sup>66</sup> See, e.g., *Charudattan v. Darnell*, 834 F. App'x 477, 480-81 (11th Cir. 2020) (ruling that a sheriff's office lawfully removed off-topic comments from its account pursuant to its social media policy).

<sup>67</sup> See, e.g., *Garnier*, 41 F.4th at 1179-80 (outlining the "reasons to doubt" defendants' contention that they only blocked the plaintiffs from their social media accounts because plaintiffs were "spamming them repetitively" and "fill[ing] up the page," rather than because defendants disliked plaintiffs' viewpoint).

<sup>68</sup> See *United States v. Alvarez*, 567 U.S. 709, 717-18 (2012) (identifying true threats, incitement, and obscenity as among the categories of speech historically recognized as permissibly subject to content-based restriction).

than the rule. It can be difficult to distinguish offensive and hurtful, yet still-protected speech, from speech that officials can lawfully block or remove from their accounts.<sup>69</sup>

Recognizing the complexities of determining when it might be permissible for public officials to block users or delete their comments, the vast majority of social-media-blocking cases that reach the courts involve users being blocked for engaging in political speech. This article therefore focuses on how best to adjudicate those cases where the social media account originated as a campaign tool.

## II. HISTORY OF SOCIAL-MEDIA-BLOCKING LITIGATION

Social media blocking by government officials is a relatively new area of First Amendment jurisprudence and has been the topic of legal debate in recent years.<sup>70</sup> The first reported case to substantively address social media blocking was *Davison v. Plowman* (2016) in the Eastern District of Virginia.<sup>71</sup> The district court denied the defendant official's motion to dismiss, holding that the official's voluntarily unblocking the plaintiff from the disputed Facebook page did not moot the plaintiff's First Amendment claim.<sup>72</sup> This was the first time a court recognized that a government official's blocking someone from their social media account can create a free-speech violation.<sup>73</sup>

Since 2016, social-media-blocking litigation has proliferated.<sup>74</sup> The doctrine began to solidify in 2019 through a series of three circuit courts of

<sup>69</sup> Compare Alexandria Ocasio-Cortez (@AOC), Twitter (Aug. 29, 2019, 6:43 AM), <https://twitter.com/AOC/status/1167206144793817088> [<https://perma.cc/3EZN-2LEA>] (detailing that Congresswoman Ocasio-Cortez had been subjected to harassment on her Twitter account, including fake nude photos of her posted by a user monikered "the Daily Caller"), with *id.* (showing a tweet from Columbia University explaining that the Knight Institute urged Ocasio-Cortez to restore access to Twitter users blocked from her account on the basis of viewpoint).

<sup>70</sup> Compare Dawn Carla Nunziato, *From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital*, 25 B.U. J. SCI. & TECH. L. 1, 55 (2019) (arguing that when government officials open up their pages to the public to discuss topics related to governance, social media blocking should almost never pass constitutional muster) with *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J. concurring) (arguing that government officials do not have enough control of their social media accounts for these pages to constitute government forums). See also Kathleen McGarvey Hidy, *Social Media Use and Viewpoint Discrimination: A First Amendment Judicial Tightrope Walk with Rights and Risks Hanging in the Balance*, 102 MARQ. L. REV. 1045, 1082-85 (2019) (arguing that proliferation of social-media-blocking litigation poses risks to the free speech and debate at the core of these disputes).

<sup>71</sup> *Davison v. Plowman*, 191 F. Supp. 3d 553 (E.D. Va. 2016).

<sup>72</sup> *Id.* at 557-58.

<sup>73</sup> See *id.*

<sup>74</sup> See Beety & Zepcevski, *supra* note 13, at 519-21 (detailing the rise of social-media-blocking litigation).



appeals decisions, each of which held that social media blocking by a public official had either violated, or been sufficiently pled to violate, the First Amendment. First, the Fourth Circuit in *Davison v. Randall* affirmed judgment for the plaintiff Brian Davison<sup>75</sup> in ruling that the chairperson of a county board of supervisors engaged in prohibited viewpoint-based discrimination when she blocked constituent Davison from her “Chair Phyllis J. Randall” Facebook page after he posted comments critical of Randall.<sup>76</sup> The Fourth Circuit first determined that Randall operated the interactive Chair Facebook page in her role as a government official, rather than her personal capacity, for purposes of § 1983 liability. It then applied public forum doctrine, which prohibits viewpoint discrimination by the government when regulating private speech.<sup>77</sup>

Chairperson Randall had created the relevant Chair Facebook page the day before she was sworn in as chair, separate from her personal Facebook profile and separate from her campaign Facebook page.<sup>78</sup> In determining that Randall operated her Chair Facebook page in her official capacity, the Fourth Circuit considered “the totality of the circumstances surrounding Randall’s creation and administration” of the page and her “banning of Davison from that page.”<sup>79</sup> Those circumstances included, without limitation: that the title of the Facebook page included Randall’s government title; Randall designated the page as belonging to a government official; the page listed as Randall’s contact information her official county email and website addresses, and her county office telephone number; many of Randall’s posts were addressed to her constituents; she published posts on the page on behalf of the board of supervisors; she encouraged her constituents to use the page as a channel for “back and forth constituent conversations” with her; her posts frequently concerned matters related to her public office; and she banned Davison for posts related to her official status.<sup>80</sup>

The same year that the Fourth Circuit decided *Davison*, the Second Circuit in *Knight First Amendment Institute v. Trump* affirmed summary judgment for the plaintiffs, holding that former President Donald J. Trump had likewise engaged in prohibited viewpoint-based regulation of private speech when he blocked seven users from his personal Twitter account after

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<sup>75</sup> Brian Davison was also the plaintiff in *Davison v. Plowman* 191 F. Supp. 3d 553 (E.D. Va. 2016).

<sup>76</sup> *Davison v. Randall*, 912 F.3d 666, 672-73, 675, 687-88 (4th Cir. 2019).

<sup>77</sup> *Id.* at 680-88. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009) (noting that restrictions on private speech in government-controlled forums must be viewpoint neutral).

<sup>78</sup> *Davison*, 912 F.3d at 673.

<sup>79</sup> *Id.* at 680.

<sup>80</sup> *Id.* at 680-81, 683.

they posted critical comments.<sup>81</sup> This landmark decision applied the public forum doctrine to a government official's undisputedly *personal* social media account, finding that President Trump had nonetheless been using the account in his official capacity since taking office.<sup>82</sup> This conclusion was based, without limitation, on the fact that: the account was registered to "Donald J. Trump, 45<sup>th</sup> President of the United States of America, Washington, D.C."; the account featured photographs of Trump engaged in the performance of his official duties; Trump used the account to communicate with the public about matters related to official business such as high-level staffing changes and national policy; he used the account to engage with foreign leaders; official White House social media accounts directed users to Trump's personal Twitter account and also re-tweeted some of Trump's tweets from this account; and Trump's tweets were preserved by the National Archives and Records Administration under the Presidential Records Act.<sup>83</sup>

The Second Circuit's holding in *Knight* crucially established that the public forum doctrine could apply to a personal social media account that predated the government official's time in office. The circuit did so based on a fact-specific analysis of how the personal account was currently being used by the official at the time users were blocked.<sup>84</sup> In April 2021, the Supreme Court vacated the Second Circuit's decision as moot after Trump was no longer president and Twitter had suspended his account in the wake of the January 6, 2021 attack on the U.S. Capitol Building.<sup>85</sup> Despite this, the Second Circuit's analysis remains an important guide for other courts in applying the public forum doctrine to public official's personal social media accounts.<sup>86</sup>

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<sup>81</sup> *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 232, 239-40 (2d Cir. 2019), *vacated sub nom. Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021).

<sup>82</sup> *Id.* at 231.

<sup>83</sup> *Id.* at 231-32; 235-36.

<sup>84</sup> *Id.* at 231.

<sup>85</sup> *Knight*, 141 S. Ct. at 1220; see Kate Conger and Mike Isaac, *Twitter Permanently Bans Trump, Capping Online Revolt*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/08/technology/twitter-trump-suspended.html> [<https://perma.cc/U52U-2753>].

<sup>86</sup> See, e.g., *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1174 n.10 (9th Cir. 2022) (noting that, although vacated as moot, "the [*Knight*] opinion nonetheless has persuasive value"); *Czosnyka v. Gardiner*, No. 21-CV-3240, 2022 WL 407651, at \*2-3 (N.D. Ill. Feb. 10, 2022) (relying on *Knight* to argue that a government official had sufficient control over his social media accounts to create public forums); *Clark v. Kolkhorst*, No. 1:19-CV-198-LY, 2021 WL 5783210, at \*4 (W.D. Tex. Dec. 7, 2021) (applying *Knight* to distinguish the public official's social media page at issue); *Tanner v. Ziegenhorn*, No. 4:17-CV-780-DPM, 2021 WL 4502080, at \*2 (E.D. Ark. Sept. 30, 2021) ("The [public forum] reasoning in *Knight* . . . remains sound and instructive on this point, even though the

The Fifth Circuit was the final court of appeals to decide a social media blocking case in 2019. In *Robinson v. Hunt County*, the circuit reversed dismissal of plaintiff Deanna J. Robinson's claims at the pleading stage. The circuit allowed her First Amendment lawsuit to go forward against Hunt County, whose sheriff's office had deleted her critical comments from its Facebook page and blocked her from accessing the account.<sup>87</sup> Distinct from *Davison* and *Knight*, the Fifth Circuit applied the public forum doctrine to the social media account of a government office rather than of a single government official.<sup>88</sup> The county did not dispute, and the district court below had not addressed, Robinson's assertion that the sheriff office's Facebook page was a public forum subject to the First Amendment. The Fifth Circuit therefore assumed this premise to be true.<sup>89</sup> It then readily found that the sheriff was the final policy maker for purposes of regulating his office's Facebook page and that he acted in his official capacity in authorizing his employees to delete comments they deemed "inappropriate" and ban the user who had posted them.<sup>90</sup> Hence, unlike in *Davison* and *Knight*, there was no need for a totality-of-the-circumstances analysis of whether the sheriff's office's Facebook page was administered in an official versus a personal capacity for purposes of satisfying § 1983's government-action requirement, since it was undisputedly a government-run page.

Together, *Davison*, *Knight*, and *Robinson* establish that the following types of interactive social media accounts can function as public forums for private speech wherein the First Amendment applies: an individual official's designated "government official" account (*Davison*),<sup>91</sup> an individual official's personal account used to conduct official government business (*Knight*),<sup>92</sup> and a government office's account (*Robinson*).<sup>93</sup> In the first two scenarios, *Davison* and *Knight* further established a totality-of-the-circumstances approach for the threshold inquiry of whether the public official in question operates the social media account in her official capacity (i.e., under color of state law) subject to

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Supreme Court later ordered the case dismissed as moot."); *Russell v. Brown*, No. 3:20-CV-811-CHB, 2021 WL 4492857, at \*9 (W.D. Ky. Sept. 30, 2021) (relying on *Knight* to analyze whether a public official's private social media account was "fairly attributable to the State").

<sup>87</sup> *Robinson*, 921 F.3d at 445, 447–49.

<sup>88</sup> *Id.* at 445.

<sup>89</sup> *Id.* at 447–48.

<sup>90</sup> *Id.* at 448–49.

<sup>91</sup> *Davison*, 912 F.3d at 681–87.

<sup>92</sup> *Knight*, 928 F.3d at 234.

<sup>93</sup> *Robinson*, 921 F.3d at 447–48.

First Amendment scrutiny, or in her personal capacity where the First Amendment does not apply.<sup>94</sup>

#### A. *National Consensus Emerging Around Social Media Blocking*

By 2020, a national consensus was emerging that a private citizen has a First Amendment right to be free from viewpoint-based discrimination when using the interactive features of a government official's social media page if, based on the totality of the circumstances, the owner of the account is operating the account in her "official capacity."<sup>95</sup> This right was not clearly established in all circuits by 2020, nor is it so today.<sup>96</sup> But a critical mass of courts have adopted this analytic approach, including now the Eleventh Circuit,<sup>97</sup> the Ninth Circuit,<sup>98</sup> and, at least superficially, the Eighth Circuit.<sup>99</sup>

However, the distinction between an "official capacity" social media account and a "personal capacity" account is often the sticking point that will occupy most of a court's analysis in a social-media-blocking case. "Official capacity" is clear when the social media in question is an official's designated government account or the account of a government office, agency, or

<sup>94</sup> *Davison*, 912 F.3d at 680; *Knight*, 928 F.3d at 236.

<sup>95</sup> See Beety & Zepcevski, *supra* note 13, at 527 (observing "how quickly the position that social media is subject to a public forum analysis has become cemented").

<sup>96</sup> See *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1183 (9th Cir. 2022) (acknowledging that the law was not clearly established at the time the defendants blocked the plaintiffs from their social media accounts because "[u]ntil now, no Ninth Circuit or Supreme Court authority definitively answered the state action and First Amendment questions at issue in this case"); *Swanson v. Griffin*, No. 21-2034, 2022 WL 570079, \*3-4 (10th Cir. Feb. 25, 2022) (granting qualified immunity to social-media-blocking defendant because law not clearly established).

<sup>97</sup> See *Attwood v. Clemons*, 818 Fed. App'x 863, 867-68 (11th Cir. 2020) (announcing "this Court looks at the totality of the circumstances to determine whether the private [social media] account has transformed into an organ of official business" and holding that the blocked plaintiff stated a colorable First Amendment claim).

<sup>98</sup> See *Garnier*, 41 F.4th at 1177 ("[W]e follow the mode of analysis of the Second, Fourth, and Eighth Circuits to hold that the [defendants] used their social media accounts as an 'organ of official business.' . . . As state actors, the [defendants] violated the First Amendment when they blocked the Garniers from their social media pages."). The Ninth Circuit ultimately applied a time, place, and manner analysis, finding that the decision to block the plaintiffs was not sufficiently tailored to a significant governmental interest to pass First Amendment scrutiny. See *id.* at 1177.

<sup>99</sup> See *Campbell v. Reisch*, 986 F.3d 822, 824, 826 (8th Cir. 2021) ("[T]he question this case presents is whether Reisch acted under color of state law when she blocked Campbell on Twitter . . . A private account can turn into a governmental one if it becomes an organ of official business . . ."). The Eighth Circuit navigated the tension between defendant Reisch's narrow concept of "under color of state law" and Campbell's "more holistic view" of the issue under *Davison* and *Knight* by declaring, "[w]e do not decide which approach is correct because we think that, even applying the one Campbell advances, the record will not support a conclusion that Reisch acted under color of law." *Id.* at 825.

division.<sup>100</sup> Less cut and dry is when a court must decide whether a single government official's "unofficial" or "personal" social media account is nonetheless being used as an "organ of official business," thereby satisfying the state action requirement for § 1983 liability.<sup>101</sup> In such situations, courts apply a fact-intensive inquiry rather than a bright line rule to determine if the account is being used for official purposes.<sup>102</sup> For instance, courts look to whether the account is accessible to the general viewing public and has the trappings of the official's public office, such as display of their government title and government contact information, or pictures of them engaging in official conduct.<sup>103</sup> Courts further examine whether the official uses the account to share and discuss activities related to her public office,<sup>104</sup> and how other government officials and members of the public regard and use the account.<sup>105</sup> Courts also inquire whether an official invites constituents to engage about

<sup>100</sup> See *Robinson v. Hunt County*, 921 F.3d 440, 449 (5th Cir. 2019) (identifying as government action the Hunt County Sheriff Office's statements on its agency Facebook page explaining how comments on the page would be regulated).

<sup>101</sup> *West v. Atkins*, 487 U.S. 42, 48 (1988).

<sup>102</sup> See *Garnier*, 41 F.4th at 1173 ("finding state action is a process of sifting facts and weighing circumstances"); *Davison*, 912 F.3d at 680 (analyzing "the totality of the circumstances surrounding [defendant]'s creation and administration of the [relevant] Facebook Page" for purposes of determining state action); *Knight*, 928 F.3d at 236 ("Whether First Amendment concerns are triggered when a public official uses his [social media] account . . . will in most instances be a fact-specific inquiry"); *Clark v. Kolkhorst*, No. A-19-CV-00198-LY-SH, 2020 WL 6151570, at \*6 (W.D. Tex. Oct. 20, 2020) (noting that courts "share a fact-intensive analysis of the challenged social media site"); *Windom v. Harshbarger*, 396 F. Supp. 3d 675, 681 (N.D.W. Va. 2019) (noting in social-media-blocking case, "[t]here is no specific formula to apply when determining whether an official acted under color of state law; courts look to the totality of the circumstances").

<sup>103</sup> See *Faison v. Jones*, 440 F. Supp. 3d 1123, 1134 (E.D. Cal. 2020) ("Like President Trump in *Knight*, Defendant's Facebook page bore 'all the trappings' of his state office.") (quoting *Knight*, 928 F.3d at 231); *One Wisconsin Now v. Kremer*, 354 F. Supp. 3d 940, 952 (W.D. Wis. 2019) ("Also weighing in favor of finding state action is the fact that [defendants'] accounts are 'swathed in the trappings of their office.'") (quoting *Davison v. Loudon Cnty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 714 (E.D. Va. 2017)).

<sup>104</sup> See *Garnier v. Poway Unified Sch. Dist.*, No. 17-CV-2215-W, at \*17 (S.D. Cal. Sept. 26, 2019) ("Because [Defendants] were posting content related to their positions as public officials and had opened their pages to the public without limitation when they blocked the Garniers, the Court finds the interactive portion of their social media pages are public forums."); *One Wisconsin Now*, 354 F. Supp. at 954 ("Here, there can be no reasonable dispute that defendants intentionally created the interactive social media accounts at issue in order to communicate with members of the public about news and information related to their roles as public officials, and are continuing to operate them as such.").

<sup>105</sup> See *Garnier*, 41 F.4th at 1173 (ruling that courts should consider "how members of the public and government officials regard and treat the account" (citations omitted)); see also *Knight*, 928 F.3d at 271 ("The President and multiple members of his administration have described his use of the Account as official.").

matters of governance on the social media account.<sup>106</sup> Based on a totality of these factual circumstances, courts will then decide whether the account is operated in the owner's official capacity (i.e., under color of state law) or in their personal capacity where the First Amendment has no application.<sup>107</sup>

If the court finds that a government official operates the account in their official capacity, courts then look to whether publicly accessible interactive features are enabled on the account, such that viewers may post comments and non-verbal reactions without content restrictions.<sup>108</sup> If so, courts typically find the account to be a public forum.<sup>109</sup> The government official is then prohibited from regulating users' speech in that forum based on the speaker's viewpoint, including when the speech criticizes the official or their actions.<sup>110</sup>

<sup>106</sup> See *Davison*, 912 F.3d at 673 (telling constituents, "I really want to hear from ANY Loudoun citizen on ANY issues, request, criticism, complement or just your thoughts," and encouraging them to use her Facebook page for "back and forth conversations"); *Lindke v. Freed*, 563 F. Supp. 3d 704, 710 (E.D. Mich. 2021) ("A non-exhaustive list of factors that courts have considered in making this determination include . . . whether the public official solicits comments or invites constituents to have discussions on the page[.]" ), *aff'd*, 37 F.4th 1199 (6th Cir. 2022).

<sup>107</sup> See *Attwood v. Clemons*, 526 F. Supp. 3d 1152, 1167 (N.D. Fla. 2021) ("[T]his Court looks at the totality of the circumstances to determine whether the private account has transformed into an organ of official business."); *Swanson v. Griffin*, 526 F. Supp. 3d 1005, 1012 (D.N.M.) ("[I]t is undisputed that Defendant Griffin's 'Facebook page is an individual profile,' not a government page . . . [but] Defendant Griffin, in fact, repeatedly used his Facebook page 'as an official vehicle for governance.'").

<sup>108</sup> See *Knight*, 928 F.3d at 237 (stating Trump's Twitter account "was intentionally opened for public discussion when the President . . . made its interactive features accessible to the public without limitation"); *Davison*, 912 F.3d at 682 ("[Defendant] intentionally open[ed] the public comment section of the Chair's Facebook Page] for public discourse inviting ANY Loudoun citizen to make posts to the comments section of the Chair's Facebook Page—the interactive component of the page—on ANY issues, request, criticism, complement or just your thoughts[.]" (internal quotations omitted)). See also *Garnier*, 41 F.4th at 1178 ("Before the [defendant] Trustees began using word filters, their social media pages were open and available to the public without restriction on the form or content of comments. And far from forbidding comments, the Trustees occasionally solicited feedback from constituents through their posts and responded to individuals who left comments.").

<sup>109</sup> See *Knight*, 928 F.3d at 237 ("The Account was intentionally opened for public discussion when the President, upon assuming office, repeatedly used the Account as an official vehicle for governance and made its interactive features accessible to the public without limitation. We hold that this conduct created a public forum."); *Davison*, 912 F.3d at 687 (finding the defendant's Facebook page was a public forum because she invited constituents to comment and provide feedback); *Garnier*, 41 F.4th at 1179 ("We conclude that . . . the interactive portions of the [defendants'] Facebook pages were designated public fora.").

<sup>110</sup> See *Pleasant Grove City v. Summum*, 555 U.S. 460, 469–70 (2009) (viewpoint discrimination prohibited in public forums); *Windom v. Harshbarger*, 396 F. Supp. 3d 675, 684 (N.D.W. Va. 2019) ("Viewpoint discrimination is prohibited in all forums."). See, e.g., *Robinson*, 921 F.3d at 445 (finding plaintiff stated a viable First Amendment claim where she was blocked and her comment deleted after she allegedly "criticized [the sheriff's office's post] 'for expressing a policy of deleting and censoring protected speech.'"); *Knight*, 928 F.3d at 232 (finding a First Amendment violation

While the majority of lower courts have relied on this fact-intensive analysis, its application is not universal. The Sixth Circuit has taken a different tact on the question of “official capacity” versus “personal capacity,” noting:

[W]e part ways with other circuits’ approach to state action in this novel circumstance [of social media blocking]. Instead of examining a page’s appearance or purpose, we focus on the actor’s official duties and use of government resources or state employees.<sup>111</sup>

In deciding whether a city manager operated his Facebook account “under color of state law,” the *Lindke* court examined whether “the text of state law” required him “to maintain a social-media account,” and whether the account belonged to a government office, was paid for by government funds, or was maintained by government employees other than the account owner.<sup>112</sup> Answering all of these questions in the negative, the Sixth Circuit affirmed the district court’s grant of summary judgment to the city manager, holding that his Facebook page was “personal,” notwithstanding that it was publicly accessible, had the “trappings” of a government official’s page, and was used to communicate with constituents about city policies and directives.<sup>113</sup>

Another outlier to the totality-of-the-circumstances approach is *Morgan v. Bevin*, an early social-media-blocking case from the Eastern District of Kentucky, also located in the Sixth Circuit. There, the court denied the plaintiff’s motion for a preliminary injunction, holding that Kentucky Governor Matthew Bevin’s Twitter and Facebook accounts were not public forums.<sup>114</sup> While these accounts allowed viewers to publish comments in reaction to Governor Bevin’s posts, the court ruled that the governor did not intend to designate these accounts as open for all comers to speak. The court instead found that the governor established the accounts for the purpose of conveying his own message, that the entirety of his social media accounts—

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where “[t]he government concedes that each of [the plaintiffs] was blocked after posting replies in which they criticized the President or his policies and that they were blocked as a result of their criticism”); *Davison*, 912 F.3d at 688 (“That [defendant] Randall’s action targeted comments critical of the School Board members’ official actions and fitness for office renders the banning all the more problematic as such speech occupies the core of the protection afforded by the First Amendment.” (internal quotations omitted)).

<sup>111</sup> *Lindke v. Freed*, 37 F.4th 1199, 1206 (6th Cir. 2022). See also *Garnier*, 41 F.4th at 1176 (observing that the Sixth Circuit in *Lindke* “adopt[ed] a somewhat different analysis from ours and that of the Second, Fourth, and Eight Circuits”). The Supreme Court, having granted certiorari in both *Lindke* and *Garnier*, is poised to weigh in during the 2023-2024 term on this circuit split over the appropriate test for assessing “official capacity” versus “personal capacity” use of social media accounts by government officials. See *supra* note 6.

<sup>112</sup> *Id.* at 1203-05.

<sup>113</sup> *Id.* at 1201, 1205-07.

<sup>114</sup> *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1005 (E.D. Ky. 2018).

even the viewers' comments—constituted government speech, and that therefore the governor was free to cull users' comments in order to present his desired public image.<sup>115</sup> The court did not address whether the governor's decision to make his accounts interactive by allowing users to comment had created a public forum.

*Morgan* was decided in 2018 and predates the circuit courts' decisions in *Davison*, *Knight*, and *Robinson*. Its government-speech analysis has subsequently been criticized and rejected by courts across multiple jurisdictions. This is not least because *Morgan* ignored the clear delineation on Governor Bevin's interactive social media accounts between the his own posts, which are undisputedly government speech, and private users' speech in the form of comments and reactions.<sup>116</sup> Significantly, the Sixth Circuit's 2022 *Lindke* decision did not mention or acknowledge *Morgan*, further cementing that it is out-of-step with how courts currently analyze social-media-blocking claims.

### B. Campaign Origin Social Media Accounts

In the world of social-media-blocking litigation, three circuit courts of appeals to date have deemed government officials' re-election campaign accounts to be privately owned and operated and therefore beyond the reach of the First Amendment.<sup>117</sup> None of these circuits cite precedential support for the notion that campaign speech by a government official, including on a

<sup>115</sup> *Id.* at 1011-12. Accord Rodney A. Smolla, *The First Amendment and Public Officials' Social-Media Accounts*, DEL. LAW., Spring 2018, at 24 (arguing for a bright-line rule that only government social media accounts may be public forums and not the personal social media accounts of officeholders because requiring viewpoint-neutral regulation of speech on a personal account will diminish its "character as the officerholder's own unique, individual, candid and authentic expression").

<sup>116</sup> Compare with *Knight*, 928 F.3d at 239 ("while the President's tweets can accurately be described as government speech, the retweets, replies, and likes of other users in response to his tweets are not government speech under any formulation"); *Davison*, 912 F.3d at 686 ("comments and posts by users cannot be mistaken for [defendant] Randall's own speech because they identify the posting or replying personal profile or Page, and thereby distinguish that user from Randall"); *Blackwell v. City of Inkster*, 596 F. Supp. 3d 906, 919 (E.D. Mich. 2022) (declining to follow *Morgan*); *Attwood v. Clemons*, 526 F. Supp. 3d 1152, 1165 (N.D. Fla. 2021) (same); *Felts v. Reed*, 504 F. Supp. 3d 978, 985-86 (E.D. Mo. 2020) (same); *Faison v. Jones*, 440 F. Supp. 3d 1123, 1137 (E.D. Cal. 2020) (finding *Morgan* "unpersuasive"); *Leuthy v. LePage*, No. 1:17-CV-00296-JAW, 2018 WL 4134628, at \*16 (D. Me. Aug. 29, 2018) (declining "to follow key pillars of the *Morgan* Court's reasoning").

<sup>117</sup> *Campbell v. Reisch*, 986 F.3d 822, 827-29 (8th Cir. 2021); *Charudattan v. Damell*, 834 F. App'x 477, 479, 482-83 (11th Cir. 2020); *Kallinen v. Newman*, No. 22-20383, 2023 WL 2645555, at \*3 (5th Cir. Mar. 27, 2023).



publicly accessible social media account, is presumptively private. Doctrinal support for this position is thin, at best.<sup>118</sup>

In the most recent of these decisions, the Fifth Circuit in *Kallinen v. Newman* affirmed dismissal of a complaint filed by an attorney blocked from a state probate judge's re-election Facebook page after the attorney posted comments that accused the judge of showing preferential treatment to certain litigants who the attorney dubbed "court cronies."<sup>119</sup> The plaintiff attorney argued that the judge used the Facebook page both as "an organ of [the judge's] official position and as a means to advance his candidacy."<sup>120</sup> However, the circuit affirmed the district court's finding that the judge was not using the page "to perform his duties as a judge, such as conferring with parties or counsel or to issue orders or rulings."<sup>121</sup> Instead, the posts cited by the plaintiff consisted of "tips about the rules of evidence, communications about new technology in the courthouse, the probate court's docket load, and a celebration of Judge Newman's 110th career trial."<sup>122</sup> The circuit therefore agreed that the judge was not operating the Facebook page pursuant to his official judicial duties and thus his regulation of comments on the page did not constitute state action for purposes of a § 1983 First Amendment claim.<sup>123</sup> This was a reasonable conclusion given that the judge's posts on the page were not related to adjudicating matters before him and because, unlike executive and legislative officials, judges have no job duty to communicate or engage with the public outside of issuing judicial orders and conducting court conferences and proceedings.

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<sup>118</sup> Certainly, candidates for public office enjoy First Amendment protection for their speech. *See* *Brown v. Hartlage*, 456 U.S. 45, 53 (1982) ("The political candidate does not lose the protection of the First Amendment when he declares himself for public office."); *Buckley v. Valeo*, 424 U.S. 1, 52 (1976) ("The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates."). But the speech of government actors, including those running for re-election, is similarly protected by the government speech doctrine. *See* *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). Thus, the fact that an incumbent candidate for office enjoys speech protection does not answer whether the candidate is speaking as a private individual or in her official capacity as a current government official when campaigning for re-election to public office. Further scholarship is needed on whether social-media campaign speech, and particularly that of an incumbent, should ever be viewed as private given that the subject matter will inevitably relate to the candidate's current or prospective official duties and activities.

<sup>119</sup> *Kallinen*, 2023 WL 2645555, at \*4; *Kallinen v. Newman*, 616 F. Supp. 3d 645, 649 (S.D. Tex. 2022).

<sup>120</sup> *Kallinen*, 2023 WL 2645555, at \*2.

<sup>121</sup> *Id.*, at \*3; *Kallinen*, 616 F. Supp. 3d at 654.

<sup>122</sup> *Kallinen*, 616 F. Supp. 3d at 654.

<sup>123</sup> *Kallinen*, 2023 WL 2645555, at \*3-4.

The Eleventh Circuit reached a similarly reasonable conclusion when it held in *Charudattan v. Darnell* that an incumbent sheriff's re-election Facebook page did not constitute state action.<sup>124</sup> Considering the history of the page, the circuit noted that the sheriff originally titled the account "Relect Sadie Darnell" and only later changed it to "Sheriff Sadie Darnell" after winning re-election.<sup>125</sup> Thus, the page name did not include Darnell's official title at the time the plaintiffs were blocked.<sup>126</sup> The page contained "material about the campaign, the sheriff's race, endorsements, and Sheriff Darnell's philosophy and accomplishments."<sup>127</sup> The page included a disclaimer indicating it was a political advertisement paid for and approved by Sadie Darnell, Democrat, for Alachua County Sheriff; the page did not contain posts on behalf of the Sheriff's Office; and the page was not categorized as belonging to a "government official."<sup>128</sup> Most importantly, after the election, Sadie Darnell never used the Facebook page to communicate with the public about her duties and activities as sheriff.<sup>129</sup> Considering all of these circumstances, the court defensibly concluded that the account never diverged from being a private campaign page that was exempt from the First Amendment.<sup>130</sup> The same cannot be said for the Eighth Circuit's decision in *Campbell v. Reisch* (2021).

### III. *CAMPBELL V. REISCH*: A SHALLOW ANALYSIS OF "OFFICIAL VS. PERSONAL CAPACITY"

In September 2015, Cheri Reisch created her Twitter account @CheriMO44, named after the Missouri district seat for which she was campaigning.<sup>131</sup> Her first post announced her candidacy, and for the next many months she used the account to campaign and solicit donations.<sup>132</sup> When Reisch was sworn into office on January 6, 2017, she tweeted, "Let's get to work for Missouri & the 44th District," with a photo of herself on the state

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<sup>124</sup> *Charudattan v. Darnell*, 834 F. App'x 477, 479-79 (11th Cir. 2020).

<sup>125</sup> *Id.* at 479.

<sup>126</sup> *Id.* at 482.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 479.

<sup>130</sup> *Id.*

<sup>131</sup> *See Campbell v. Reisch*, 986 F.3d 822, 823 (8th Cir. 2021).

<sup>132</sup> *Id.* at 823-24.

house floor.<sup>133</sup> Thereafter, she continued to use the account to post about her work as a state representative until she stopped using the account in 2019.<sup>134</sup>

In 2018, Reisch permanently blocked plaintiff Mike Campbell from following or commenting on the account after he retweeted another state representative's comment that was critical of Reisch.<sup>135</sup> Specifically, Reisch had attended a community event where her political adversary in the upcoming election, Maren Jones, was also present. Afterwards, Reisch tweeted, "Sad my opponent put her hands behind her back during the Pledge."<sup>136</sup> Another state representative, Kip Kendrick, posted a comment critiquing Reisch's dig towards Jones, whose father and brothers had served in the military.<sup>137</sup> Campbell retweeted Kendrick's comment on his own Twitter.<sup>138</sup> He later received notice that Reisch had blocked him.<sup>139</sup>

Campbell sued, asserting that Reisch operated her Twitter account in her official capacity as a state representative and had unconstitutionally blocked him from that public forum based on his viewpoint.<sup>140</sup> Evidence showed that Reisch had also blocked at least 123 other Twitter users.<sup>141</sup> After a bench trial, the district court entered judgment for Campbell, finding that Reisch violated his First Amendment rights by acting under the color of state law and blocking Campbell after he shared Kendrick's critique of Reisch on his Twitter.<sup>142</sup> Reisch argued that she was acting in her personal capacity when she blocked Campbell. At the district court level, she did not claim to still be using her Twitter account for campaign purposes—she first made this argument only on appeal, after losing at trial.<sup>143</sup> Latching onto this new argument, the Eighth Circuit held that "the mere fact of Reisch's election did not magically alter the [campaign] account's character, nor did it evolve into something different. A private account can turn into a governmental one if it becomes an organ of official business, but that is not what happened here."<sup>144</sup>

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<sup>133</sup> See *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021) (No. 19-2994), Trial Ex. 1 (Reisch Twitter Feed from Sept. 21, 2015 to Feb. 13, 2019) (hereafter "Trial Exhibit 1") at 40.

<sup>134</sup> *Campbell*, 986 F.3d at 823–24, 29; *Campbell v. Reisch*, 367 F. Supp. 3d 987, 989–90 (W.D. Mo. 2019).

<sup>135</sup> *Campbell*, 986 F.3d at 824.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 824–25.

<sup>141</sup> *Id.*

<sup>142</sup> *Campbell v. Reisch*, No. 2:18-CV-4129-BCW, 2019 WL 3856591, at \*8 (W.D. Mo. Aug. 16, 2019), *rev'd and remanded*, 986 F.3d 822 (8th Cir. 2021).

<sup>143</sup> *Id.* at 825.

<sup>144</sup> *Id.* at 826.

The Eighth Circuit's decision was flawed for several reasons. First, the court was overly influenced by the campaign origin of Reisch's Twitter account, glossing over and minimizing evidence of Reisch's official-capacity use of the account once she took office. More fundamentally, the court chose to resolve all ambiguities about the nature of Reische's post-election use of the account in favor of Reisch—i.e., any tweets susceptible of dual interpretation as both communication about her official duties and self-promotion for possible future re-election, the court chose to see only as private election speech. Yet the court cites no precedent for its assumption that campaign speech by an incumbent official is inherently or presumptively private.<sup>145</sup> As a result, the court found Reisch had the right to block Campbell and others from her Twitter account because “[i]t’s her page to manage as she likes.”<sup>146</sup>

The Eighth Circuit's approach strains against First Amendment law and tradition that require courts to err on the side of protecting more political speech, not less.<sup>147</sup> Indeed, time and again, First Amendment doctrine goes out of its way to protect against burdening more speech than is absolutely necessary.<sup>148</sup> Yet the Eighth Circuit's treatment of Reich's account runs directly counter to these principles.

#### A. *Reisch's Post-Election Use of Her Twitter Account*

A tour through Reisch's Twitter reveals the following about her use of the account after she took office:

The public presentation of the account was essentially a wash. The account had some official-purpose “trappings” such as references to Reisch's

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<sup>145</sup> See *supra* note 118 (calling for future scholarship on the doctrinal basis for such an assumption).

<sup>146</sup> *Id.* at 828.

<sup>147</sup> See *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 209 (2014) (“[T]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it.”) (quoting *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 457 (2007)); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 361 (2010) (stating, in the context of the First Amendment, “it is our law and our tradition that more speech, not less, is the governing rule”).

<sup>148</sup> See, e.g., *United States v. Alvarez*, 567 U.S. 709, 729 (2012) (a content-based regulation “must be the ‘least restrictive means among available, effective alternatives.’”) (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)); *id.* at 720 (noting that “condition[s] for recovery in certain defamation cases exist[] to allow more speech, not less.”); *Hill v. Colorado*, 530 U.S. 703, 728 (2000) (ruling that a content-neutral regulation of speech must not “burden more speech than necessary” (internal citations omitted)); *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989) (ruling that time, place, manner restrictions on speech in public forums must not be “substantially broader than necessary”).

state representative title and photos of her in the legislature.<sup>149</sup> But these window dressings could also readily be associated with an incumbent's re-election page. Hence, the Eighth Circuit held they were "just too equivocal to be helpful here."<sup>150</sup>

More significantly, however, both the district court and the Eighth Circuit acknowledged that, post-election, Reisch "used her Twitter page to engage in discourse about political topics and/or to indicate her position relative to other government officials."<sup>151</sup> This is core official-capacity communication.<sup>152</sup> For example, Reisch's sixth tweet after taking office announced legislation introduced in the Missouri house concerning the rideshare companies Uber and Lyft.<sup>153</sup> The next day, she tweeted about pending legislation concerning both a "right to work" bill and the same rideshare companies.<sup>154</sup> Over the next two years, Reisch announced information relating to twelve different legislative initiatives on her Twitter account,<sup>155</sup> as well as making general statements about the legislation process.<sup>156</sup> This included communications to the public about bills on prevailing wage,<sup>157</sup> education funding,<sup>158</sup> REAL ID for state identification,<sup>159</sup> firearm regulations,<sup>160</sup> tort reform,<sup>161</sup> raising the age of criminal liability,<sup>162</sup> medical marijuana,<sup>163</sup> and regulations on owning certain dog breeds.<sup>164</sup>

Reisch also used the account to update her constituents on issues of public concern, another category of core official-capacity communication.<sup>165</sup> She

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<sup>149</sup> The account, as originally created, was titled "Cheri Toalson Reisch" with the handle @CheriMO44, referring to Reisch's district, and linked to her campaign website (cheri44.com). Trial Exhibit 1, *supra* note 133, at 2. After being elected, Reisch set her location on the account to "District 44, Missouri, USA." *Campbell*, 986 F.3d at 829. Her biography listed a combination of her personal and official roles: "Christian, MO state Rep 44th District, Mother, Grandmother, Phil 4:13[.]" Trial Exhibit 1, *supra* note 133, at 2. Both the profile and banner photographs on the account showed Reisch on the Missouri state house floor.

<sup>150</sup> *Campbell*, 986 F.3d at 827.

<sup>151</sup> *Id.* at 824.

<sup>152</sup> *Davison*, 912 F.3d at 680-81; *Knight*, 928 F.3d at 235-36.

<sup>153</sup> Trial Exhibit 1, *supra* note 133, at 39.

<sup>154</sup> *Id.* at 39.

<sup>155</sup> *Id.* at 2-39.

<sup>156</sup> *Id.* at 8, 9.

<sup>157</sup> *Id.* at 23, 35.

<sup>158</sup> *Id.* at 23, 35.

<sup>159</sup> *Id.* at 27, 31.

<sup>160</sup> *Id.* at 26.

<sup>161</sup> *Id.* at 24.

<sup>162</sup> *Id.* at 14, 20.

<sup>163</sup> *Id.* at 8.

<sup>164</sup> *Id.* at 12.

<sup>165</sup> *Davison*, 912 F.3d at 673-74; *Knight*, 928 F.3d at 231-32.

tweeted about efforts to change the policies of a local library to allow concealed firearms.<sup>166</sup> She used the account to update her constituents about major events within the community, including a fire at an agriculture company within her district.<sup>167</sup> She posted on the account when she was interacting with federal officials in the state.<sup>168</sup> These legislative and informational announcements support that Reisch had shifted from using her Twitter account to speak about her candidacy for office to using it to speak in her capacity as a working state legislator.

To be sure, Reisch engaged in some post-election tweets that can be viewed as communication both about her official duties and as laying the groundwork for her eventual run for re-election. For instance, she forwarded a message from the House members of her political party saying they were “proud to deliver results during the first half of session that will bring job growth to MO.” And on another occasion, she posted, “I promised my neighbors in #MO44 that I’d work tirelessly to improve our #economy. I’m making good on that promise.”<sup>169</sup> The Eighth Circuit ruled that these statements, “harkened back to promises [Reisch] made on the campaign trail,” thereby justifying the conclusion that her Twitter account was still, in its entirety, a private election page.<sup>170</sup> But, as noted by the dissent, “the statements of lawmakers carrying out their official duty to communicate information to constituents will very often harken back to some campaign promise or another, so this factor does not merit the outsized importance the [majority opinion] places on it today.”<sup>171</sup> Indeed, as noted above, at the trial level, Reisch did not even assert that she was still using her Twitter account for election purposes.<sup>172</sup> This highlights the shaky foundation for the Eight’s Circuit’s proclamation that election speech remained the primary purpose of Reisch’s account.

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<sup>166</sup> Trial Exhibit 1, *supra* note 133, at 24, 36; *see also* Brad Bergner & Carter Stoddard, *Update: Columbia Library Changes Gun Signage After Threat of Lawsuit*, COLUM. MISSOURIAN (Feb. 16, 2017), [https://www.columbiamissourian.com/news/local/update-columbia-library-changes-gun-signage-after-threat-of-lawsuit/article\\_a1c16096-f47d-11e6-abf4-7b54441f4824.html](https://www.columbiamissourian.com/news/local/update-columbia-library-changes-gun-signage-after-threat-of-lawsuit/article_a1c16096-f47d-11e6-abf4-7b54441f4824.html) [<https://perma.cc/L39H-LUKA>] (detailing Reisch’s efforts to change this policy).

<sup>167</sup> Trial Exhibit 1, *supra* note 133, at 30.

<sup>168</sup> *Id.* at 33 (depicting EPA administrator Scott Pruitt); *id.* at 15 (announcing President Trump’s visit to Missouri, including a picture of Reisch at the event).

<sup>169</sup> *Campbell*, 986 F.3d at 824. Further examples of such duality include posts like: “[a]ccomplished much in my 1st 2 years, ready for the next 2,” and, in relation to a legislative scorecard from a group called “United for Missouri,” “I scored an A. Not bad for a Freshman.” *Id.*

<sup>170</sup> *Id.* at 827.

<sup>171</sup> *Id.* at 829 (Kelly, J., dissenting).

<sup>172</sup> *Id.* at 825.

The Eighth Circuit further observed that Reisch’s “post-election use of the account [was] too similar to her pre-election use to suggest that it had morphed into something altogether different.”<sup>173</sup> Again, the court’s view was unduly influenced by the campaign origin of the account because review of the post-election content of Reisch’s account does not support this finding. As again noted by the dissent:

Before Reisch was sworn in, her tweets used her campaign hashtag (“#TeamCheri”), invited people to join her campaign team, solicited campaign donations, and publicized endorsements from various groups and individuals. By contrast, between January 2017 and February 2019 . . . Reisch did not tweet a single request for campaign donations, or make any reference to “#TeamCheri.”<sup>174</sup>

In further contrast, during her initial campaign Reisch tweeted multiple times per week, and often multiple times per day in September and October 2016, leading up to the November 2016 election.<sup>175</sup> She then tweeted thirty times from November 1 to election day on November 8.<sup>176</sup> However, during her second run in 2018, she only tweeted twice during the month of September, zero times in October, and three times in November.<sup>177</sup> In other words, in the months immediately preceding her re-election she barely used the account at all. This further demonstrates that after her first successful bid for office, her primary purpose in using her Twitter account was no longer to promote her political candidacy but to communicate with the public about her official duties and activities as a legislator.

Interestingly, the political speech that resulted in Reisch blocking Campbell *did* arise in connection with Reisch’s 2018 re-election campaign – i.e., – she blocked Campbell after he retweeted a post that critiqued Reisch for her criticism of her political opponent in the upcoming election.<sup>178</sup> However, these campaign-related comments must be considered among the totality of the circumstances of how and why Reisch was using her Twitter account in 2018 when she blocked Campbell. Viewed over time, her speech on the account shifted away from electioneering in 2015 and 2016 and increasingly toward communicating in 2017 and 2018 about her official duties as an elected representative – one who had a job-specific responsibility to share information and engage with her constituents. To the extent any ambiguity

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<sup>173</sup> *Id.* at 826.

<sup>174</sup> *Id.* at 828 (Kelly, J., dissenting).

<sup>175</sup> Trial Exhibit 1, *supra* note 133, at 53–67.

<sup>176</sup> *Id.* at 44–53.

<sup>177</sup> *Id.* at 2–3.

<sup>178</sup> *Campbell*, 986 F.3d at 824–25.

about the nature and purpose of Reisch's Twitter account existed at the time she blocked Campbell, it should have been resolved in favor of finding that Reisch was using the account to carry out her job duties, consistent with an "official capacity" purpose. This would accord with the First Amendment's speech-protective orientation, while aligning with the Eighth Circuit's own mode of analysis, albeit the Circuit tilted in the opposite direction by finding that Reisch's post-election use was "consistent with" a campaign purpose.<sup>179</sup>

Continuing with a totality-of-the-circumstances analysis, the Eighth Circuit crucially failed to consider how third parties regarded and interacted with Reisch's Twitter account.<sup>180</sup> This factor weighs heavily toward finding the account was operated in Reisch's official capacity. Because she apparently maintained only the one Twitter account "@CheriMO44," all Twitter communications were addressed to her there.<sup>181</sup> She interacted on the account with other members of the Missouri legislature about governmental matters.<sup>182</sup> Members of the public and news media tagged Reisch's account, referring to

<sup>179</sup> See, e.g., *id.* at 826 (finding that Reisch's "us[ing] the account to provide updates on where certain bills were in the legislative process or the effect certain recently enacted laws had had on the state" was "consistent" with "show[ing] voters that she was . . . fulfilling campaign promises") (emphasis added); *id.* at 827 (finding that Reisch's messages updating constituents on her legislative activities "were consistent with a desire to create a favorable impression of [her] in the minds of her constituents") (emphasis added). These communications by Reisch were equally, if not more, "consistent" with carrying out her official job duty to keep her constituents informed about her activities as their legislative representative.

<sup>180</sup> See *Garnier*, 41 F.4th at 1173 (identifying as a "pertinent" factor in the state-action analysis "how members of the public and government officials regard and treat the account" (internal quotations omitted)); *Knight*, 928 F.3d at 231 (analyzing how other officials viewed and treated Trump's Twitter account as one used by a public official).

<sup>181</sup> See *Campbell*, 986 F.3d at 823–24, 827 (detailing the creation of Reisch's account but listing no other accounts associated with her); see also Sara Rachel Walsh (@SaraForMissouri), TWITTER (Nov. 7, 2021, 9:49 PM), <https://twitter.com/SaraForMissouri/status/1457540832697913347> [<https://perma.cc/F9UN-Q2SY>] (thanking Reisch for her endorsement but tagging no other account affiliated with Reisch, despite being described as Reisch's "BFF" in other tweets).

<sup>182</sup> See e.g., Trial Exhibit 1, *supra* note 133, at 8 (Reisch tagging current speaker of the state house @Rep\_TRichardson); *id.* (Reisch retweeting state representative @SaraforMissouri); *id.* at 14 (Reisch tagging state representative @NickBSchroer); Sara Rachel Walsh (@SaraforMissouri), TWITTER (Sept. 7, 2018, 2:42 PM), <https://twitter.com/SaraForMissouri/status/1038135548790104065> [<https://perma.cc/ZQ2X-38NC>] (tagging Reisch in a tweet about legislation to name a highway); Elijah Haahr (@elijahhaahr), TWITTER (Aug. 5, 2017, 7:42 PM), <https://twitter.com/elijahhaahr/status/893980471394263041> [<https://perma.cc/7JR3-GBFD>] (tweet from former speaker of the Missouri House, stating that "The Harrisburg Lions Club is packed for the @ChuckBasye47 dinner hosted by @MoCattle. CC @CheriMO44 @KirkMathews110 @ComejoForMO @hrehder").



her as a public official.<sup>183</sup> And even though Reisch deactivated her account in 2019, it continues to be tagged by other government officials, news outlets, and the public as belonging to a state legislator.<sup>184</sup> This all supports that Reisch's Twitter functioned as a tool for governance and therefore as an official-capacity account.

Finally, if Reisch had wanted to "select her audience" as the Eighth Circuit stated,<sup>185</sup> she could have achieved this through Twitter settings that allow an account owner to control who can access their account, tag their account, and reply to their tweets.<sup>186</sup> Instead, however, Reisch opened her account for the general public to be able to comment on it without subject matter restriction, allowing the account to be tagged by those in favor of her positions as well as those opposed.<sup>187</sup> This parallels the interactive, public-facing, and non-content-restricted social media accounts that the Fourth Circuit in *Davison* and the Second Circuit in *Knight* both held to be government-operated public forums. That Reisch's Twitter account originated for a campaign purpose does not

<sup>183</sup> See e.g., Gracie Wiberg (@Miss\_Wiberg), TWITTER (Mar. 20, 2018, 12:44 PM), [https://twitter.com/Miss\\_Wiberg/status/976137374588719109](https://twitter.com/Miss_Wiberg/status/976137374588719109) [<https://perma.cc/J48M-SV4Y>] (thanking Reisch for speaking to a fourth grade class about her work as a representative and including a picture of Reisch speaking to children); Eric Bohl (@EricMOFB), TWITTER (Jan. 19, 2018, 9:32 AM), <https://twitter.com/EricMOFB/status/954360922772049921> [<https://perma.cc/82BW-2ZWN>] (tweeting a picture of Reisch and other legislators at the Missouri legislative outlook breakfast and tagging her account from the account of the Director of Public Affairs & Advocacy for the Missouri Farm Bureau); Peter Stiepleman (@PStieple), TWITTER (Mar. 15, 2017, 2:05 PM), <https://twitter.com/PStieple/status/842074192078114818> [<https://perma.cc/MG9C-T5VX>] ("@CheriMO44 - @SuptCR6 @HR4Supt and #cpsbest thank you for opposing charter school legislation. You are a person of your word. @MissouriSBA"); Emily van Schenkhoef (@EmilyvanSchenk), TWITTER (June 3, 2017, 11:33 AM), <https://twitter.com/EmilyvanSchenk/status/871027066870915073> [<https://perma.cc/RFH7-WETU>] (tweeting a new article about legislation and thanking Reisch by tagging her account).

<sup>184</sup> See e.g., House Communications (@MOHOUSECOMM), TWITTER (Mar. 6, 2020, 2:38 PM), <https://twitter.com/MOHOUSECOMM/status/1236013177063772160> [<https://perma.cc/7GF5-VZE2>] (tagging Reisch's deactivated account alongside other state legislators to announce "Missouri House votes to lift ban on felons working in places that sell lottery tickets and alcohol").

<sup>185</sup> *Campbell*, 986 F.3d at 827.

<sup>186</sup> *About Conversations on Twitter*, TWITTER, <https://help.twitter.com/en/using-twitter/twitter-conversations> [<https://perma.cc/UN4C-T3L4>] (explaining that account holders can turn off comments on a given tweet by limiting replies to "only people you mention" and then not tagging anyone in the given tweet).

<sup>187</sup> Compare Peter Stiepleman (@PStieple), TWITTER (Mar. 15, 2017, 2:05 PM), <https://twitter.com/PStieple/status/842074192078114818> [<https://perma.cc/8RWP-Q3SU>] ("@CheriMO44 - @SuptCR6 @HR4Supt and #cpsbest thank you for opposing charter school legislation. You are a person of your word. @MissouriSBA"), with Bah! Timbug! (@Beertheist), TWITTER (Mar. 11, 2017, 10:05 PM), <https://twitter.com/Beertheist/status/840760631108210688> [<https://perma.cc/P35U-8BA2>] (retweeting a quote from Reisch about the problems in urban areas and saying "Here's @CheriMO44 giving a perfect example of why rural-dominated State houses screw over the economic engines of states. Moral superiority").

eclipse the fact that, post-election, she operated it in a functionally equivalent manner to the accounts in *Davis*, *Knight*, and other social-media-blocking cases where courts found “official capacity” use.<sup>188</sup>

The Eighth Circuit’s over-emphasis on the campaign origin of Reisch’s account in conducting its totality-of-the-circumstances analysis, and its resolution of all possible ambiguities in favor of finding a continued campaign purpose, deprived Campbell of both his ability to speak and petition in that forum, as well as his ability to receive the speech of others. When blocked, he could not see Reisch’s posts when he logged into Twitter, nor could he view the comments and reactions of other users interacting with Reisch and one another on her account. And of course, he could not post any comment on her account.

Reisch’s decision to exclude Campbell, along with up to as many as 123 other blocked users, violated the First Amendment. Moreover, the Eighth Circuit’s approach undermines expressive freedoms on a far larger scale because it provides a work-around for elected government officials to avail themselves of the ease, speed, affordability, and reach of public social media communication with their constituents without being constrained by the First Amendment from censoring speech they dislike.

*B. The Campaign-Origin Loophole: Why Ambiguities and Dual Meanings Should be Resolved in Favor of Protecting More Speech, Not Less*

*Campbell v. Reisch*’s analysis writ large will allow elected public officials to side-step First Amendment scrutiny of social media accounts that they operate in their official capacity. Under *Campbell*’s approach, a public official who opens an account for campaign purposes, wins the election, and then continues to use the account to communicate about their official duties will reap the benefits of engaging with the public via social media while being shed of the free-speech and right-to-petition safeguards she would otherwise have to navigate.

This loophole is not theoretical. Lower courts have already begun considering social-media-blocking cases through the *Campbell* lens, allowing the campaign origin of an account to overly influence the court’s view of the

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<sup>188</sup> See, e.g., *Garnier*, 41 F.4th at 1163, 1172, 1176 (rejecting campaign-origin defense where social-media-blocking defendants had initially created their Facebook pages to promote their campaigns for the school board, but after gaining office used the pages to communicate about “official District business or promote[] the District generally”).

account as a whole. *Buentello v. Boebert* (2021)<sup>189</sup> and *Felts v. Reed* (2022)<sup>190</sup> are two such examples.

In June 2021, the federal district court for the District of Colorado relied on *Campbell* to deny the plaintiff's motion for a preliminary injunction and find that U.S. Congresswoman Lauren Boebert's campaign-origin Twitter account remained a private account even though she continued to use it after she was elected.<sup>191</sup> The case arose when plaintiff Brianna Buentello criticized Boebert's comments about the January 6, 2021 attack on the United States Capitol building and tagged Boebert's Twitter account "@laurenboebert."<sup>192</sup> In response, Boebert blocked Buentello from the account.<sup>193</sup>

Boebert had created "@laurenboebert" on the day she announced her candidacy for Congress.<sup>194</sup> After she won the election, "many of Representative Boebert's tweets [on the account] . . . discuss[ed] political issues such as legislation, the federal budget, her legislative agenda," as well as her political opponents.<sup>195</sup> Yet relying on *Campbell v. Reisch*, the court summarily ruled that "these are the same kinds of issues Ms. Boebert raised on the campaign trail—the same sorts of tweets found insufficient to transform a private account into a state account in *Reisch*."<sup>196</sup>

In reaching this conclusion, the *Boebert* court did not meaningfully compare how Boebert used her account before she was in office to how she used it after she took office. The court did not analyze whether Boebert used "@laurenboebert," rather than her official congressional Twitter account "@RepBoebert," as her primary method of communicating with the public about her official duties and activities. The court also did not consider whether other public officials treated "@laurenboebert" as the account of a public official, interacting with and tagging this account in posts about government business. And the court further did not examine whether Boebert had invited members of the public and her constituents to engage with her about government affairs through "@laurenboebert." In other words, the court did not bother to conduct a meaningful totality-of-the circumstances analysis because it weighed the campaign-origin of the account so heavily as to

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<sup>189</sup> 545 F. Supp. 3d 912, 920 (D. Colo. 2021).

<sup>190</sup> No. 4:20-cv-00821, 2022 WL 898768, at \*6–7 (E.D. Mo. Mar. 28, 2022).

<sup>191</sup> See *Buentello*, 545 F. Supp. 3d at 921.

<sup>192</sup> *Id.* at 915.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 914.

<sup>195</sup> *Id.* at 920.

<sup>196</sup> *Id.*

be outcome determinative.<sup>197</sup> This is not to say that a less-conclusory analysis of Boebert's post-election use of the account would have ultimately found that she operated it in an official-capacity. It might not have.<sup>198</sup> But the point is that the campaign-origin of the account should not be used as a proxy for conducting a robust totality-of-the-circumstances analysis. Nor should the campaign-origin of the account require resolving in the elected official's favor all ambiguities or dual meanings in her post-election use of the account.

In *Felts v. Reed* (2022), the federal district court for the Eastern District of Missouri—being bound by Eighth Circuit precedent—leaned heavily on *Campbell* in denying summary judgment to plaintiff Sarah Felts who had been blocked by defendant Lewis Reed from his Twitter account “@PresReed” that he contended was a personal campaign account.<sup>199</sup> Reed held the position of President of the Board of Aldermen for the City of St. Louis.<sup>200</sup> He blocked Felts after she tagged “@PresReed” in her own tweet where she asked him a question related to the debate over closing one of the City's jails known as the “workhouse.”<sup>201</sup>

Reed had created “@PresReed” two years after he was first elected President of the Board. He had twice changed the account handle to “@Reed4Mayor,” although at the time Felts was blocked, and at the time her lawsuit was filed, the handle was “@PresReed.”<sup>202</sup> The account identified Reed as President of the Board, and the City's webpage for the Office of the President had, for a period of time, included a live feed to “@PresReed.”<sup>203</sup> Some resources from both the City of St. Louis and the President's Office had apparently been used to support operation of the account.<sup>204</sup> Most importantly, however, the court found that Reed's use of “@PresReed” to communicate

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<sup>197</sup> The court also distinguished Boebert as a legislative official, unlike the executive-official defendants in *Knight* and *Randall*. *Id.* at 918. The court reasoned that because a legislator lacks the authority to make unilateral government decisions like an executive official, this cuts against finding that Boebert acted under color of state law in making the unilateral decision to block someone on Twitter. *Id.* at 920. The court acknowledged that the social media accounts of state and city level legislators had been recognized as official accounts in cases decided in other districts, but dismissed them as “unpersuasive.” *Id.* at 919.

<sup>198</sup> *Cf. Clark v. Kolkhorst*, 2021 WL 5783210, at \*3-5 (W.D. Tex. Dec. 7, 2021) (applying a more rigorous totality-of-the circumstances analysis to the campaign-origin account of a Texas state senator and concluding that the page did not bear the trappings of an official government account or function as a tool of governance).

<sup>199</sup> *Felts*, 2022 WL 898768, at \*1, \*2, \*8.

<sup>200</sup> *Id.* at \*1.

<sup>201</sup> *Id.* at \*1.

<sup>202</sup> *Id.* at \*12.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at \*7 (alteration in the original).

about his official duties “was far from a ‘sporadic’ or secondary purpose—instead it appears to be a focus of the Account.”<sup>205</sup> Moreover, the court found the record of activity on “@PresReed” to be “bereft of examples of the type of campaign activities described in *Campbell*.”<sup>206</sup> Yet confoundingly, without pointing to any evidence of electioneering on “@PresReed,” the court declared there to be “a genuine dispute of material fact as to whether the content of the Account is more indicative of a campaign account or an official account.”<sup>207</sup> On this basis, the court therefore denied summary judgment for the plaintiff.<sup>208</sup>

The *Felts* decision, which relied on *Campbell* for the notion that Reed might be using “@PresReed” to “emphasize [his] suitability for public office,”<sup>209</sup> reflects the disproportionate weight that *Campbell* authorizes courts to give to even the slightest ambiguities regarding whether an account is used as a campaign device or a tool of governance. *Felts* was not a factually close case. As recounted by the court when it denied summary judgment for the plaintiff, the evidence strongly, if not overwhelmingly, supported that Reed used the account in his official capacity, even if the account could theoretically also promote Reed’s future candidacy for office. Yet, under *Campbell*, the case still proceeded to trial on the campaign-account defense theory, where judgment was, not surprisingly, ultimately entered for the plaintiff.<sup>210</sup>

In contrast, *Attwood v. Clemons* (2021) exemplifies a more speech-protective and therefore more constitutionally sound approach. In March 2021, the federal district court for the Northern District of Florida reviewed cross-motions for summary judgment that required the court to consider whether state legislator Charles Clemons operated his Twitter and Facebook accounts in his official capacity or in his personal capacity.<sup>211</sup> The case arose from plaintiff Peter Attwood tagging Clemons’ Twitter account in his tweet that demanded an explanation of Clemons’ vote against an assault weapons ban.<sup>212</sup> Clemons blocked Attwood from his Twitter account and later from his Facebook account after Clemons turned to Facebook to criticize Attwood for

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<sup>205</sup> *Id.* at \*14.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at \*15.

<sup>208</sup> *Id.* at \*16.

<sup>209</sup> *Id.* at \*13 (quoting *Campbell v. Reisch*, 986 F.3d 822,827 (8th Cir. 2021)).

<sup>210</sup> Following a bench trial, the district court found that “[n]othing in the record indicates [defendant] Reed used the Account to announce his candidacy for any office, solicit campaign donations, post about his campaigns, or discuss events for his political party. Rather, Reed used the Account to discuss official government business and interact with other Twitter users about that government business.” *Felts v. Vollmer*, No. 4:20-CV-00821, 2022 WL 17546996, at \*4 (E.D. Mo. Dec. 9, 2022).

<sup>211</sup> *Attwood v. Clemons*, 526 F. Supp. 3d 1152, 1161–62 (N.D. Fla. 2021).

<sup>212</sup> *Id.*

blocking him on Twitter.<sup>213</sup> Clemons had created both accounts as part of his initial run for office.<sup>214</sup> But after he was elected, he continued to use the accounts to: communicate with constituents about their needs during the COVID-19 pandemic; update the public on upcoming initiatives and public benefits coming from his office; and host a tele-town hall meeting with the public.<sup>215</sup>

Clemons urged the court to adopt the Eighth Circuit's approach in *Campbell* and find that all of these uses "reasonably trace back to a campaign purpose," meaning the accounts were private and Clemons could block whomever he wished.<sup>216</sup> The court noted that a reasonable fact-finder could agree with Clemons.<sup>217</sup> But recognizing the dual nature of Clemons' post-election use of the accounts, the court found it would also be "reasonable to find that [Clemon]'s social media accounts transitioned from campaign accounts to organs of his official business as a state legislator."<sup>218</sup> The court therefore denied summary judgment to Clemons on the issue of official capacity, and set the matter for trial.<sup>219</sup>

*Attwood* is crucially distinct from the analysis used in *Campbell* and *Buentello*. Rather than default to viewing Clemon's accounts as exclusively campaign-oriented, *Attwood* allowed for the possibility that Clemons' might also be using his accounts in his official-capacity, in which case viewpoint-based blocking would violate the First Amendment.<sup>220</sup> By identifying this as a question of fact to be decided at trial, the *Attwood* court rejected *Campbell*'s precedent of automatically resolving ambiguities or dual meanings in the use of a campaign-origin account in favor of the elected official.

*Attwood* takes an important step in the right direction toward restoring the First Amendment balance in social media blocking litigation involving campaign-origin accounts. But it does not go far enough. In a close case, where an elected official's use of social media could reasonably be interpreted as both election-related speech and also communication in their official capacity, principles of free speech and petition counsel that the tie should go

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 1161.

<sup>215</sup> *Id.* at 1167-68.

<sup>216</sup> *Id.* at 1166-67.

<sup>217</sup> *Id.* at 1168.

<sup>218</sup> *Id.* at 1167.

<sup>219</sup> *Id.* at 1176. Prior to trial, the plaintiff in *Attwood* dismissed his case with prejudice stating his belief "that the potential benefits of continuing this litigation [were] outweighed by the costs, including to the taxpayers funding Mr. Clemons'[s] defense." *Attwood v. Clemons*, No. 1:18CV38-MW, 2021 WL 7707720, at \*1 (N.D. Fla. June 7, 2021)(quoting ECF No. 87 at 1).

<sup>220</sup> 526 F. Supp. 3d at 1168-72.

to official-capacity use. And certainly in a not-close case like *Felts*, where the substantial weight of the evidence supports a finding of official-capacity use, the official should be held accountable for viewpoint-based censorship of private speech, even if the social media page may also have some degree of campaign value. This balancing of interests preserves the public's right to speak, petition, and listen in the forum(s) most directly connected to the elected official by ensuring that the official cannot then block their critics with impunity. Meanwhile, the elected official maintains the ability to promote themselves for purposes of re-election, while also carrying out their official duties on the account. In other words, defaulting to an official-capacity finding in a close case has the sanguine effect of preserving the maximum amount of speech for the greatest number of people and facilitating the type of robust political discourse the First Amendment exists to protect.<sup>221</sup> This outcome is far preferable to the alternative tie-break, exemplified in *Campbell*, where dualities of meaning on a campaign-origin account result in the narrow protection of only one person's expressive preferences – that of the elected official – while other speakers may be excluded or silenced without recourse. Such a result conflicts with the First Amendment's long history of rejecting government attempts to burden or restrict more speech than is necessary.<sup>222</sup>

## CONCLUSION

Elected officials' interactive social media accounts function as today's "town squares," providing lively digital spaces for both political speech and petition activity. Because the First Amendment exists to promote the free exchange of ideas and rigorous critique of public officials, it is important that these online forums remain accessible to speakers who the owner of the account would rather not abide (i.e., the detractors, the challengers, the nay-sayers). The bulk of social-media-blocking decisions aim to do precisely that: prevent viewpoint-based government regulation in government-created forums. But the campaign loophole created by the Eighth Circuit's *Campbell v. Reich* decision puts that speech-protective doctrine in jeopardy. It is simply too easy for any political hopeful running for election to establish a private,

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<sup>221</sup> *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 192 (1999) ("[T]he First Amendment requires us . . . to guard against undue hindrances to political conversations and the exchange of ideas"); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (noting speech "concerning public affairs is more than self-expression; it is the essence of self-government"); *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964) (emphasizing the First Amendment protects "criticism of government and public officials").

<sup>222</sup> *See, e.g., supra* note 148 (discussing *Alvarez*, *Hill*, and *Rock Against Racism*).

interactive social media campaign account on Twitter or Facebook and then, upon winning office, continue using that “campaign account” for official-capacity communications, excluding people for any reason – such as viewpoint – or no reason at all from being able to contribute to or access the political conversation occurring on the account.

When reasonable arguments can be made on both sides regarding the nature of a campaign-origin account—i.e., arguments that the account continues to be used for private election speech and arguments that the account now functions as a tool of governance—courts should err on the side of finding the latter. This in no way reduces the official’s own political speech; she remains free to express herself to the fullest on the account, and even, if she wishes, to deactivate its interactive features. She also remains free to operate separate accounts, one purely for campaigning and the other for official-duty communications.<sup>223</sup> But resolving ambiguities or dual meanings in favor of protecting more speech, not less, furthers the First Amendment’s interest in open critique of government and helps ensure continued public access to some of the most relevant contemporary forums for political speech today.

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Operating separate accounts cures any concern that incumbents running for re-election will be disadvantaged by the First Amendment in their ability to curate their campaign page as compared to their challengers who are not yet in office and therefore not subject to the First Amendment.