

No. 19-2994

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MIKE CAMPBELL,

PLAINTIFF-APPELLEE,

v.

CHERI TOALSON REISCH,

DEFENDANT-APPELLANT.

On Appeal from the United States District Court
For the Western District of Missouri
Case No. 2:18-cv-04129-BCW

The Honorable Brian C. Wimes, United States District Court Judge

**BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION
IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST¹

Recognizing the Internet's power as a tool of democratization, the Electronic Frontier Foundation (EFF) has, for nearly 30 years, worked to protect the rights of users to transmit and receive information online. EFF is a non-profit civil liberties organization with more than 30,000 dues-paying members, bound together by mutual and strong interest in helping the courts ensure that such rights remain protected as technologies change, new digital platforms for speech emerge and reach wide adoption, and the Internet continues to re-shape governments' interactions with their citizens. EFF has written extensively on the issues presented in this appeal² and has filed amicus briefs in cases highlighting the pervasive use of the Internet and social media platforms as a means for the government to deliver

¹ Pursuant to Federal Rule of Appellate Procedure Rule 29(c), amicus certifies that no person or entity, other than amicus, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(2), amicus represents that all parties have consented to the filing of this brief.

² See, e.g., Camille Fischer, *Can the Government Block Me on Twitter?: 2018 Year in Review*, Elec. Frontier Found. (Dec. 22, 2018), <https://www.eff.org/deeplinks/2018/12/can-government-block-me-twitter-2018-year-review>; David Greene and Karen Gullo, *When Tweets Are Governmental Business, Officials Don't Get to Pick and Choose Who Gets to Receive, Comment On, And Reply to Them. That Goes for the President, Too*, Elec. Frontier Found. (Nov. 30, 2017), <https://www.eff.org/deeplinks/2017/11/when-officials-tweet-about-government-business-they-dont-get-pick-and-choose-who>.

services and communicate, back and forth, with constituents, including in *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019), and *Robinson v. Hunt County*, 921 F.3d 440 (5th Cir. 2019).

INTRODUCTION

Representative Reisch's use of the Twitter account @CheriMO44 to communicate directly with the American people about her work as a state representative is just one example of how Twitter and other social media are widely used by officials and agencies at all levels of government across the country. Social media has proved to be an efficient way for government to communicate vital information to the public. It is not surprising that some private social media platforms are specifically designed for such purposes.³

Given the pervasive use of social media, individuals have First Amendment rights both to receive governmental messages transmitted through social media as well as to participate in the interactive communicative forums created by them. Representative Reisch's viewpoint-based blocking of the plaintiffs unconstitutionally burdens these First Amendment rights.

³ See, e.g., Nixle, *Public Safety Communications*, <http://www.nixle.com/public-safety-communications/>; Ron Eland, *City Adopts Emergency Alert System*, Sedona Red Rock News, Oct. 18, 2017, <http://www.redrocknews.com/new/s88888896-city-news/67159-city-adopts-emergency-alert-system>.

Representative Reisch's use of Twitter has familiar historical analogs. American political figures have long adopted new communication technologies to engage directly with the public. Franklin Delano Roosevelt's Fireside Chats were delivered directly into Americans' homes by radio.⁴ Eisenhower broadcasted presidential announcements on public access television.⁵ And presidential candidate debates have been televised since the 1960 election.⁶

It would have been plainly impermissible for any holder of elected office to punish certain individuals by making it more difficult for them to get these broadcasted messages than every other American. A court surely would have rejected an officeholder's attempt to get a court order barring all broadcasters from momentarily delivering their signal to certain viewers disfavored by that officeholder. The result should be no different merely because today's social media platforms make such blocking easy. What might have required a court order before is now easily accomplished, as a

⁴ Tamara Keith, *Commander-In-Tweet: Trump's Social Media Use and Presidential Media Avoidance*, NPR (Nov. 18, 2016), <http://www.npr.org/2016/11/18/502306687/commander-in-tweet-trump-social-media-use-and-presidential-media-avoidance>.

⁵ *Id.*

⁶ Jill Lepore, *The State of the Presidential Debate*, New Yorker (Sept. 12, 2016), <https://www.newyorker.com/magazine/2016/09/19/the-state-of-the-presidential-debate>.

feature of these platforms. But the effect remains the same: disfavored citizens are denied their First Amendment rights.

ARGUMENT

I. SOCIAL MEDIA HAS BEEN WIDELY ADOPTED BY GOVERNMENTAL AGENCIES AND OFFICIALS AT ALL LEVELS TO COMMUNICATE WITH THEIR CONSTITUENTS.

Governments all over the country—indeed, all over the world—use various social media platforms to disseminate important information to the public, and to debate the policies of the day with each other and with their constituents, all in a rapid and freely accessible manner.

In 2016, a United Nations study on the use of social media and other web-based tools for the delivery of government services online and for the participation of the public reported that 177 member states out of 193 (roughly 92%) include social media portals on their national websites.⁷

In the last decade, as the use of social media has grown generally, the political use of social media has increasingly factored in U.S. federal and state elections and legislative processes, as well as the ways that federal and state

⁷ Dep't of Econ and Soc. Affairs, United Nations, *United Nations E-Government Survey 2018: Gearing E- Government to Support Transformation Towards Sustainable and Resilient Societies* 119, Fig. 5.29 (2018), https://publicadministration.un.org/Portals/1/Images/E-Government%20Survey%202018_FINAL%20for%20web.pdf.

government agencies offer services to the public. Federal agencies and sub-agencies have registered thousands of social media profiles with the United States Digital Service.⁸ And federal agencies frequently use these social media profiles to promote U.S. policy interests and educate and inform the public. For example, the Department of Homeland Security, under both the Obama and Trump Administrations, has used its Twitter page, @DHSgov, to promote October as Cyber Security Awareness Month, providing tips to the public on simple steps individuals can take to secure their online information. The Administrative Office of the U.S. Courts uses its Twitter page, @uscourts, to provide news and information about U.S. courts to the public, including court closures and operating status. The State Department's Twitter page, @StateDept, routinely shares travel advisories, information about official visits with foreign dignitaries, and the U.S. position on world events.

⁸ DigitalGov, *U.S. Digital Registry*, <https://usdigitalregistry.digitalgov.gov> (providing searchable database of registered federal government profiles).



Homeland Security ✓
@DHSgov



October is National Cybersecurity Awareness Month.
Learn ways to [#BeCyberSmart](#) here:



Be Cyber Smart

The #BeCyberSmart Campaign is a national effort to raise public awareness of how to recognize cyber vulnerabilities ...

[dhs.gov](#)

9:53 AM · Oct 4, 2019 · [Twitter Web App](#)



United States Courts ✓
@uscourts



Feb. 19 is the last day to submit comments on proposed amendments to appellate, bankruptcy, and civil rules.



Proposed Amendments Published for Public Comment

[uscourts.gov](#)

7:00 AM · Feb 12, 2020 · [TweetDeck](#)



United States Courts ✓
@uscourts

⚠️ Beware of scammers targeting potential jurors and others interacting with the courts. Federal courts never ask for sensitive information or payment by phone. Contact your local federal court and law enforcement if you are threatened.



Federal Court Scams
uscourts.gov

9:46 AM · Feb 11, 2020 · [Twitter Web Client](#)

↻ Department of State Retweeted



Travel - State Dept ✓
@TravelGov

#SouthKorea: Travel Advisory Update: Level 2- Exercise Increased Caution due to an outbreak of COVID-19. On January 30 the WHO determined the rapidly spreading outbreak constitutes Public Health Emergency of International Concern. ow.ly/VEol50yufL9



6:23 AM · Feb 24, 2020 · [Hootsuite Inc.](#)

State governments, too, frequently use Twitter to communicate with their residents about matters of public concern. The State of Missouri's Twitter account, for example, shares state job postings,⁹ college scholarship opportunities,¹⁰ and fire hazard warnings.¹¹ It also solicits feedback and input from the public.



⁹ @MoGov, Twitter (Nov. 8, 2019, 12:57 PM), <https://twitter.com/MoGov/status/1192909143180316672>.

¹⁰ @MoGov, Twitter (Jan. 15, 2020, 1:47 PM), <https://twitter.com/MODHEWD/status/1217563966425030656>.

¹¹ @MoGov, Twitter (July 1, 2019, 10:07 AM), <https://twitter.com/MoGov/status/1145740599892566032>.

And, like federal agencies, state agencies operate their own, separate Twitter pages as well. The South Dakota government website, for instance, provides links to over 40 individual Twitter pages run by various state agencies, which in turn offer information on everything from snowmobile conditions and public safety to the state fair.¹²

Legislators at both the federal and state levels actively engage social media as a method of conversing with their constituents and connecting with their communities. Every U.S. Senator and Representative in the 115th Congress had a Twitter profile in 2018.¹³ In a 2015 survey of members of Congress and their staff, the Congressional Management Foundation found that 76% of respondents felt that social media enabled more meaningful interactions with constituents, 70% found that social media made them more accountable to their constituents, and 71% said that constituent comments directed to the representatives on social media would influence an undecided lawmaker.¹⁴

¹² *Twitter*, S.D. Gov., <https://sd.gov/twitter.aspx>.

¹³ Jacob R. Straus, Cong. Research Serv., R45337, *Social Media Adoption by Members of Congress: Trends and Congressional Considerations* 3 Fig. 1 (2018), <https://fas.org/sgp/crs/misc/R45337.pdf>.

¹⁴ Cong. Mgmt. Found., *#SocialCongress2015* (2015), <http://www.congressfoundation.org/projects/communicating-with-congress/social-congress-2015>.

After large policy announcements from the executive branch, members of Congress often disseminate their opinions via social media, even inviting the public to interact with their positions. When President Trump announced his decision to pull out of the Paris Climate Accord, for example, Senator Kamala Harris tweeted out a petition urging people to sign and encourage the President to rethink his decision.



State legislators also extend public debate in their chambers to social media forums. In New York, debates over funding and employee salaries between the legislature and the governor's office took place on Twitter.¹⁵ In Maryland, legislators debated the benefits of state legislation versus county regulations.¹⁶ And

¹⁵ Tom Precious, *Cuomo and Lawmakers Start New Year on Nasty Note, Via Twitter and Speeches*, Buffalo News (Jan. 4, 2017), <https://buffalonews.com/2017/01/04/cuomo-lawmakers-start-new-year-nasty-note-via-twitter-speeches/>.

¹⁶ Annie Linskey, *In Annapolis, a Second Debate in Cyberspace*, Baltimore Sun (Mar. 17, 2012), <http://www.baltimoresun.com/news/maryland/politics/bs-md-lawmaker-twitter-20120317-story.html>.

in Georgia, representatives engaged in heated debate over the removal of confederate monuments.¹⁷

The use of social media as an efficient method of communication from governmental offices to the public is perhaps best seen with state and local governments. State legislators, police departments, councilpersons, and mayors use their Twitter, Facebook, and other social media pages as real-time bulletin boards for important community information.

State and local agencies also play a pivotal role in directing people to breaking information about disaster zones and the government's response, as well as publishing information that enables people to take care of themselves and their loved ones in the immediate aftermath of a natural disaster. Crucially, these feeds are viewed as authoritative and reliable in times of emergency and civic confusion.

The crucial public benefits of social media use by local governments was made starkly clear during recent natural disasters. Consider the severe flooding along the Missouri River that affected thousands of homes and caused billions of dollars of damage in 2019. The National Weather Service's outpost for Omaha,

¹⁷ Greg Bluestein, *Georgia Lawmaker: Talk of Ditching Confederate Statues Could Cause Democrat to 'Go Missing'*, Atlanta J. Const. (Aug. 30, 2017), <https://www.ajc.com/blog/politics/georgia-lawmaker-talk-ditching-confederate-statues-could-cause-democrat-missing/wI2hOiINAE2LLD59qEpNrJ/>.

Nebraska warned of flash flooding and urged residents in the area to evacuate. The Council Bluffs Police Department tweeted out requests for disaster relief donations. And the Kansas Division of Emergency Management shared housing resource information for evacuees, while the Kansas Department of Health and Environment warned residents reliant on well water that wells can be contaminated by flooding.





Council Bluffs PD
@councilbluffspd



FLOOD RELIEF DROP POINT

The Council Bluffs Police Department, 1 Ezra Jackson Way, is opening up a drop point for supplies to aid in flood relief. Just inside the front doors of the department's lobby will be a drop point to make donations. We would like to focus on water, diapers, baby formula, clothing, non-perishable food items, personal hygiene products, bathroom tissue and clean up kits (bleach, gloves, trash bags, shovels, and masks). If you wish to make a monetary donation please write checks to the Red Cross flood relief.

Council Bluffs is a great and generous city, please help us help our neighbors recover from this historic, and tragic flooding that has affected so many in our area.

Thank you,
Council Bluffs Police Department.

11:13 AM · Mar 20, 2019 · [Twitter Web Client](#)



KDEM @KansasEmergency · Jun 5, 2019



Free temporary housing for evacuees on Airbnb

OpenHomes
by Airbnb



Free temporary housing for evacuees on Airbnb

From May 30th to June 20th, 2019 select hosts on Airbnb are providing free accommodations through our Open Homes program to those impacted by the flooding in the Midwest.

Airbnb Open Homes hosts provide free, temporary housing to those displaced during or after a disaster. During and after a disaster, Airbnb activates its community of hosts to aid governmental and non-governmental efforts to find temporary accommodation for those in urgent need. Local community members in the impacted or surrounding area can offer their spare rooms or home to people in need.

Have you been evacuated from your home? Find temporary housing:

www.airbnb.com/midwestfloods

How it works

1. Visit the link above

Click "Find Housing" on the right side of the webpage.

2. Search available listings

You can view available housing by area, dates, type of space, number of beds/ rooms to meet your needs.

3. Click "Request to Book"

to message a potential host with a request for accommodations.

4 Sign In or sign up for an Airbnb account

If you do not have an account, you will go through a quick sign up process that includes taking a photo of a valid government issued ID and entering a credit card into our system. You will not be charged for an open homes stay- just be sure to select property listed as \$0.

5. Message with your potential host

Introduce yourself, who you are travelling with and what your housing

6. Confirm plans

Your potential host will respond by accepting your reservation request, asking follow up questions or letting you know their space is not the right fit. If they are unable to accommodate you, you can reach out to another host.

7. Check-in

Once you have a confirmed Open Homes reservation, you will check into the listing at the agreed upon

Our partners



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All Hands and Hearts



Mercy Corps

Guest Experiences

"This is a really good opportunity to make a difference for someone that might need a moment to think, or a space to rethink about what's next."

Laura, Open Homes Guest impacted by the Mexico City Earthquake

"[Host] Cinde and her smile just brightened up everything and made us feel comfortable."

Melissa, Open Homes Guest impacted by the Northern California wildfires

More Information

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You can email any questions to Airbnb's dedicated Open Homes customer support team at openhomesupport@airbnb.com

Learn more

Visit www.airbnb.com/openhomes/disaster-relief





Local officials continue to use social media as a tool for updating the public on disasters and updating affected communities on the status of federal aid and disaster relief. The Governor of Missouri used his Twitter feed, @GovParsonMO, to direct Missourians toward federal and state emergency resources in the wake of the floods and to update residents on the status of the ongoing recovery. The Missouri State Emergency Management Agency has tweeted out information on how to protect homes from this year's flood season after the destruction wreaked last year, sharing information about flood preparedness, insurance, and how to access local weather alerts.



Governor Mike Parson ✓
@GovParsonMO

Missouri has been battling floods & severe storms. As I travel the state, I am proud to see neighbors helping neighbors as we face this flood fight together.

Need a neighbor? Check out these resources:
recovery.mo.gov #MOFlood #MORecovery



12:54 PM · Jun 6, 2019 · [Twitter Web App](#)



Governor Mike Parson ✓
@GovParsonMO

.@FEMA has approved 990+ households for Individual Assistance & provided more than \$4.5M directly to survivors to help with recovery. Five Disaster Recovery Centers are open in Missouri to answer any questions.

fema.gov/disaster-recov...

disasterassistance.gov

800-621-3362

Register for Disaster Assistance

www.DisasterAssistance.gov

800-621-FEMA (3362)
(711/Video Relay Service)
TTY: 800-462-7585

Have this information ready when you apply:

- Social Security number (one per household)
- Address of the damaged home or apartment
- Description of the damage
- Information about insurance coverage
- Telephone number
- Mailing address
- Bank account & routing numbers for direct deposit of funds

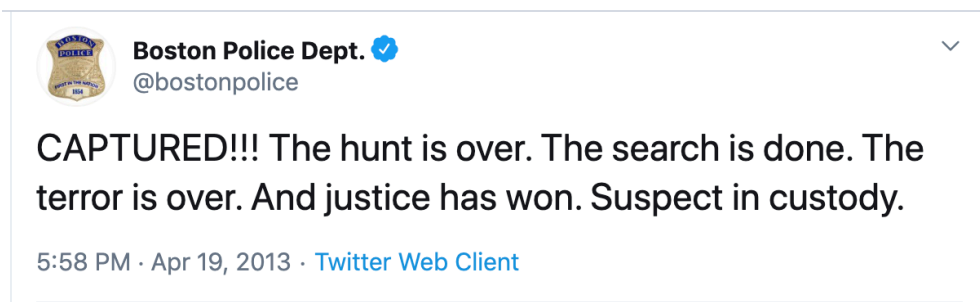
Disaster assistance is available without regard to race, color, religion, national origin, sex, age, disability, English proficiency or economic status. If you or someone you know has been discriminated against, call FEMA at 1-800-621-3362.

FEMA SEMA

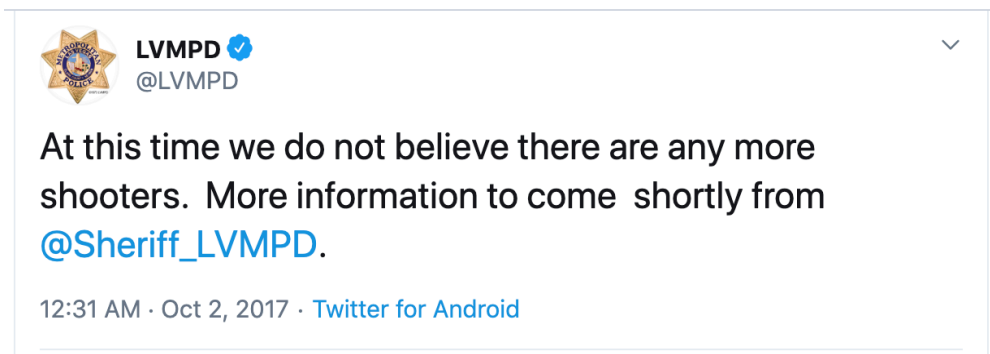
2:55 PM · Aug 2, 2019 · [Twitter Web App](#)



Local police departments also update the public through social media about ongoing investigations. In many cases, individual access to these feeds is necessary for residents and others in the area to timely assess public safety threats. The Boston Police Department updated the city in the aftermath of the 2013 Boston Marathon Bombing, including telling residents to shelter in place and then alerting when the bombing suspect was captured.



Similarly, the Las Vegas Police Department used Twitter to give the community real-time updates after the October 2017 mass shooting at a country music festival, including disclosing to the public that there was only one shooter.

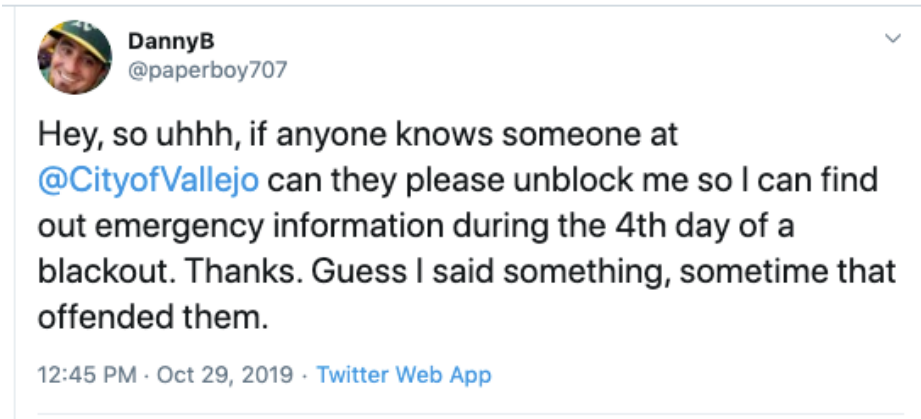


And in a mass shooting at a videogame tournament in 2018, the Jacksonville, Florida Sheriff's Office not only used Twitter to update the public on the status of the investigation, but also to communicate directly with victims at the tournament so that the police department could rescue them from their hiding spots.



These uses highlight the real dangers of denying individuals access to information disseminated by their government via social media. For example,

when the City of Vallejo blocked a resident from its official Twitter feed, he did not receive emergency information during a multi-day power shutdown.



Public officials commonly use nominally “personal” social media profiles for these official communications. Most famously, President Trump chose to continue using his named Twitter account, @realDonaldTrump, because it garnered more followers than the official @POTUS Twitter account.¹⁸ This is in no way outside the norm. When John Kerry became Secretary of State in 2013, he inherited and used the handle @StateDept.¹⁹ But soon after he began promoting

¹⁸ Michael Gove and Kai Diekmann, *Full Transcript of Interview with Donald Trump*, *The Times*, (Jan. 16, 2017) <https://www.thetimes.co.uk/article/e621220e-dbc2-11e6-a7b1-3a60b507a068>.

¹⁹ @StateDept, Twitter (Feb. 4, 2013, 6:09 AM), <https://twitter.com/statedept/status/298433014776623104>.

U.S. diplomatic policy through the handle @JohnKerry instead.²⁰ Former Congressman Jason Chaffetz has used his @jasoninthehouse since December 2008, after his election but before his term began, and continues to use it now, even though he resigned his seat in 2017.²¹ Senator Cory Booker has used @CoryBooker since 2008 when he was Mayor of Newark, New Jersey, long before he ran for Senate in 2013.²²

Heads of government institutions and political leaders will on average have more followers on their individual accounts than on their official or institutional ones.²³ Additionally, researchers studying the psychology of online news have found that social media users and news readers do not typically distinguish between institutional and personal accounts when accessing news stories; therefore, it is unlikely that the average Twitter user in the United States distinguishes between President Donald Trump's use of @RealDonaldTrump, for

²⁰ Nahal Toosi, *Nikki Haley's Twitter Account Raises Protocol Concerns*, Politico (May 20, 2018), <https://www.politico.com/story/2018/05/20/nikki-haley-personal-twitter-account-597279>.

²¹ @jasoninthehouse, Twitter, <https://twitter.com/jasoninthehouse>.

²² @CoryBooker, Twitter, <https://twitter.com/CoryBooker>.

²³ Arthur Mickoleit, *Social Media Use by Governments: A Policy Primer to Discuss Trends, Identify Policy Opportunities and Guide Decision Makers*, OECD Working Papers on Public Governance, No. 26 (2014), <https://doi.org/10.1787/5jxrcmghmk0s-en>.

example, and his use of @POTUS when accessing the accounts or reading about U.S. government policy and actions.²⁴

Courts have found officials to be conducting government business despite their use of nominally personal accounts on private third-party communications services in a variety of contexts. The Second Circuit determined that President Trump uses his personal Twitter profile, @realDonaldTrump, in an official capacity because the account had “the trappings of an official state-run account,” including Trump’s official title and photos of Trump engaged in official duties, and because Trump has “consistently used [the account] as an important tool of governance and executive outreach” since taking office. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 231, 236 (2d Cir. 2019).

The Fourth Circuit similarly rejected the claim by a public official—Phyllis Randall, Chair of the Loudon County, Virginia Board of Supervisors—that she operated a Facebook page in a “purely personal” capacity. *Davison v. Randall*, 912 F.3d 666, 679 (4th Cir. 2019). The court concluded that Randall’s “purportedly private actions” in running the Facebook page constituted official action because Randall used the page to further her duties as a municipal officer, including by

²⁴ Hyunjin Kang, *et al.*, *Source Cues in Online News: Is Proximate Source More Powerful than Distal Sources*, *Journalism and Mass Commc’ns Quarterly*, Vol. 88, 719-736 (Mar. 2012), https://www.researchgate.net/publication/230608544_Source_Cues_in_Online_News_Is_Proximate_Source_more_Powerful_than_Distal_Sources.

providing information to the public about the Board’s official activities and soliciting input from the public on policy issues. *Id.* at 680.

Several federal district courts, confronting this issue, have similarly concluded that even purportedly “personal” or “campaign” pages on social media are cabined by the First Amendment when they bear the trappings of official accounts or promote the interests of account holder’s government office. *See Faison v. Jones*, No. 2:19-cv-00182-TLN-KJN, 2020 WL 869122, at *6 (E.D. Cal., Feb. 21, 2020); *Garnier v. Poway Unified Sch. Dist.*, No. 17-cv-2215-W (JLB), 2019 WL 4736208, at *7 (S.D. Cal., Sept. 26, 2019).

In an analogous context, the D.C. Circuit in 2016 ordered the disclosure of emails containing government business sent to and from the personal email account of John Holdren, the former head of the White House Office of Science and Technology Policy, finding that the use of a private domain does not subvert citizens’ right to know what the department is up to. *Competitive Enterprise Inst. v. Office of Science & Tech. Policy*, 827 F.3d 145, 150 (D.C. Cir. 2016). State courts interpreting state records laws have ruled similarly. *See, e.g., Toensing v. Att’y Gen. of Vt.*, 178 A.3d 1000, 1004 (Vt. 2017); *City of San Jose v. Sup. Ct. of Santa Clara*, 389 P.3d 848, 861 (Cal. 2017); *Griffis v. Pinal Cty.*, 156 P.3d 418, 421 (Ariz. 2007).

II. MEMBERS OF THE PUBLIC HAVE A FIRST AMENDMENT RIGHT TO ACCESS THE SOCIAL MEDIA FEEDS OF GOVERNMENTAL OFFICIALS AND AGENCIES.

Given that agencies and officials use social media to convey important public safety information, denying disfavored individuals access to those feeds endangers lives. And denying disfavored citizens access to policy announcements and debates among legislators hinders their ability to monitor the performance of their governmental officials and otherwise participate in their own governance.

Such discriminatory denial of access violates the First Amendment. When governmental events and communications are generally open to the public, viewpoint-based exclusion of some individuals is unconstitutional.

This requirement of equal access was the law before the advent of social media, when governmental officials and agencies communicated to the public through the press, which played a surrogate role in channeling information from the government to the public. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (explaining surrogate role that the press plays).

Discrimination against a newspaper was held to be, in effect, discrimination against that newspaper's readers.

The law should be no different now that officials and agencies can communicate directly with the public rather than through news media intermediaries. "The First Amendment guarantees a limited right of access to news

regarding activities and operations of government. This right includes, at a minimum, a right of access to information made available to the public or made available generally to the press.” *Times-Picayune Pub. Corp. v. Lee*, Civ. A. No. 88–1325, 1988 WL 36491, at *9 (E.D. La. Apr. 15, 1988) (nullifying a sheriff’s direction that his officers not process a newspaper’s public records requests, nor notify it of or allow its reporters to attend press conferences, nor notify it of significant events, such as shootings and traffic fatalities).

The Second Circuit thus held that the First Amendment rights of ABC News “and its viewing public” would “be impaired by their exclusion” from election night campaign rallies that were otherwise open to the news media. *Am. Broadcasting Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977). “[O]nce there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable.” *Id.* The Second Circuit specifically rejected the argument that the right of access involved was “necessarily the outer limit of the constitutional protection of the First Amendment.” *Id.*

Likewise, the First Circuit has also made clear that no branch of government may “selectively exclude news media from access to information otherwise made available for public dissemination,” because “granting favorable treatment to certain members of the media . . . allows the government to influence the type of

substantive media coverage that public events will receive,” a practice that “is unquestionably at odds” with the First Amendment. *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986).

Courts around the country have applied the equal access rule in a wide variety of contexts. The rule was applied, for example, to enjoin the exclusion of a teachers’ union newspaper from the School Board press room in Florida, *United Teachers of Dade v. Stierheim*, 213 F. Supp. 2d 1368, 1372-73 (S.D. Fla. 2002), and the exclusion of television stations being operated by management during a labor strike from city council meetings in Boston, *Westinghouse Broad. Co. v. Dukakis*, 409 F. Supp. 895 (D. Mass. 1976). It was applied to ensure that an underground newspaper in Iowa had access to police records, *Quad-City Cmty. News Serv., Inc. v. Jebens*, 334 F. Supp. 8, 13 (S.D. Iowa 1971) (explaining that the information “has already been made available to the public insofar as other media’s reporters are the public’s representatives”), and to provide a reporter access to a press conference when the mayor of Honolulu sought to exclude the reporter for being “irresponsible, inaccurate, biased, and malicious” in his reporting, *Borreca v. Fasi*, 369 F. Supp. 906, 907 (D. Haw. 1974).

The exclusion of individuals because of government disapproval of their viewpoints raises special concerns that officials could manipulate the public’s perception of them by disseminating their messages only through favorable filters.

“Hand-picking those in attendance,” the *Borreca* court observed, “intensifies the manipulation.” *Id.* at 910.

That the public, in these cases through the press, could ultimately get the information from other, less direct channels does not cure the constitutional defect. In *Southwestern Newspapers v. Curtis*, 584 S.W.2d 362, 363, 369 (Tex. Civ. App. 1979), the court enjoined a district attorney from requiring that reporters from a certain newspaper make appointments to gain access to official news sources, while he made those news sources available without appointments to all other media. As the court in *Westinghouse*, 409 F. Supp. at 896, found, access must be provided with “equal convenience.” *See also Stierheim*, 213 F. Supp. 2d at 1374 (finding First Amendment violation where reporters were “nevertheless deprived of the newsgathering environment and opportunities” afforded to the other news media).

Nor does it matter that the government shares the access decisions with a private actor. In *Telemundo of Los Angeles v. City of Los Angeles*, 283 F. Supp. 2d 1095, 1103 (C.D. Cal. 2003), the court found that a television station had a First Amendment right to cover the city’s official El Grito ceremony because the city and its nongovernmental co-presenters permitted another broadcaster to do so. That the city shared, and in some situations yielded, decision-making authority with a private civic

organization and another broadcaster, did not diminish the city's obligation to provide equal access. *See also Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975) (applying public forum doctrine to privately owned theater leased to the city).

The First Amendment thus protects access to governmental communications, ensuring that individuals are not denied speech alerting them in times of crisis, distributing necessary information about government services, and providing transparency about elected and appointed officials' actions and statements.

III. MEMBERS OF THE PUBLIC HAVE A FIRST AMENDMENT RIGHT TO COMMUNICATE WITH GOVERNMENTAL OFFICIALS THROUGH SOCIAL MEDIA WHEN SUCH CHANNELS ARE GENERALLY OPEN TO THE PUBLIC.

Certain social media platforms not only allow government agencies and officials to communicate to the public, but can also be configured to allow the public to communicate back to the agency and with each other, thus creating governmentally controlled forums for private speech. In so doing, the government endows the public with some degree of First Amendment rights to speak in these forums. Just what kind of forum is

created will depend on how the official specifically operates it.²⁵ But viewpoint discrimination resulting in the targeted expulsion of individual citizens and residents from these forums is barred regardless of whether the official maintains a public, limited or designated, or non-public forum.

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1982) (holding that even in a non-public forum, a speaker may not be excluded as “an effort to suppress expression merely because public officials oppose the speaker’s views”).

The social media platforms that federal, state, and local governments most commonly use—such as Twitter, Facebook, and Instagram—can all be configured in a manner that creates such forums. And government officials and agencies commonly use them for these democratizing purposes. As the Supreme Court has recognized, “on 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.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Thus, in *Davison v. Plowman*, No. 1:16cv180 (JCC/IDD), 2017

²⁵ See LyriSSa B. Lidsky, *Government Sponsored Social Media and Public Forum Doctrine under the First Amendment: Perils and Pitfalls*, 19 Pub. Law. 2 (2011), <http://scholarship.law.ufl.edu/facultypub/626>.

WL 105984 (E.D. Va., Jan. 10, 2017), the court found that the comment section on the Commonwealth Attorney’s Facebook page was a limited public forum because the County “‘encourage[s]’ commenters ‘to engage [their] local government through social media by submitting . . . comments and questions regarding the posted topics.’” *Id.* at *2 (second alteration and omission in original).

These forums are by their nature, and often by default, open to large segments of the population—potentially every person with access to the Internet around the world—and, unlike physical spaces, are not constrained by size, capacity, or time.

Whether an official’s specific use of a social media account creates a public forum subject to constitutional restrictions will depend on the nature of that specific use. Courts looking at various officials’ specific uses have found that some create public forums and some do not. *Compare Robinson v. Hunt County*, 921 F.3d 440, 448 (5th Cir. 2019) (finding official’s Facebook page to be a public forum); *Knight First Amendment Inst.*, 928 F.3d at 237 (same); *Davison*, 912 F.3d at 687 (same) *with Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1010-11 (E.D. Ky. 2018) (denying a preliminary injunction on the finding that the governor operated his account solely as his private speech).

Thus, a ruling upholding the district court and finding that Representative Reisch's specific use of the Twitter account @CheriMO44 and the interactive spaces associated with it to conduct the business of her office created a public forum would not automatically transform the Twitter or Facebook account of every government worker into a public forum. Government officials remain free to use their private accounts for private matters, and to control the interactive components of their pages and feeds in a way that excludes public participation. But any social media feed used to conduct governmental business should be treated as a governmental process, just as platforms for the conduct of governmental business were in the analog age.

Federal, state, and local governments operate social media profiles to deliberately invite interaction from the public. The Transportation and Security Administration, for example, maintains a Twitter feed where individuals, regardless of their nationality, can submit questions about safety regulations for flying to, from, and within the United States by tweeting to the handle @AskTSA.



Elected officials can and do open their social media profiles to their constituents by holding online versions of town halls, even promoting hashtags (searchable links) where constituents can submit their opinions and advocate for changes to improve their communities. Recognizing how common and productive the practice of online town halls is, Facebook added a “Town Hall” feature, which users and elected officials can sign up for, that lets people find and call or email

their representatives through the platform.²⁶ Social scientists who have been studying constituent engagement over the last decade have found that online versions of town halls are more representative of the voting populace than their physical peers.²⁷

Examples of such “virtual town halls” abound. In 2011, President Barack Obama hosted a Twitter town hall where he answered questions tweeted to him with the hashtag #AskObama about jobs, the economy, education, and more.²⁸ In December 2019, the Florida Democratic Party held a town hall on Twitter, where then-presidential candidates Joe Biden, Elizabeth Warren, and Pete Buttigieg responded to tweets about voter registration in Florida using the hashtag #LETUSVOTEFL.²⁹

²⁶ Sarah Perez, *Facebook Officially Launches Town Hall for Contacting Government Reps, Adds Local Election Reminders*, TechCrunch (Mar. 27, 2016), <https://techcrunch.com/2017/03/27/facebook-officially-launches-town-hall-for-contacting-government-reps-adds-local-election-reminders/>.

²⁷ Tess Eyirch, *The Future of the Town Hall is Online*, Univ. of Cal., Riverside News (Oct. 1, 2018), <https://news.ucr.edu/articles/2018/10/01/future-town-hall-online>.

²⁸ Chris Cillizza, *Live-Blogging the President’s Twitter Town Hall (#askobama)*, Wash. Post (July 6, 2011), <http://wapo.st/mSZyvG>.

²⁹ John Kennedy, *Florida Democrats’ Twitter Town Hall Draws in Presidential Contenders*, Jacksonville.com (Dec. 13, 2019), <https://www.jacksonville.com/news/20191213/florida-democratsrsquo-twitter-town-hall-draws-in-presidential-contenders>.



State and local politicians similarly use online town halls to interface with constituents over social media. Alaska Governor Mike Dunleavy held a Facebook town hall in 2019, answering questions from constituents over live video.³⁰ Nebraska City hosted a Twitter town hall in 2018, responding to questions submitted with the hashtag #NECityListens.³¹ And Cleveland Mayor Frank G. Jackson holds Twitter town halls where residents can tweet questions to him and he responds from his office in the Cleveland City Hall.³²

³⁰ Gov. Mike Dunleavy, Facebook (May 21, 2019), <https://www.facebook.com/GovDunleavy/videos/live-town-hall-meeting-i-hope-you-can-join-me-today-friday-may-31st-at-noon-for-/614354619039103/>.

³¹ Mike Peterson, *Nebraska City Plans Twitter Town Hall*, KMA Land (Sept. 12, 2018), http://www.kmaland.com/news/nebraska-city-plans-twitter-town-hall/article_c41f1c9a-b6c9-11e8-af27-b784b1a3676e.html.

³² Nancy Kelsey, *VIDEO: Mayor Frank G. Jackson Holds First Ever Twitter Town*



The benefits of a direct engagement forum to both government and the public are readily apparent in the emergency services context. During Hurricane Harvey in 2017, Houston Mayor Sylvester Turner conversed interactively with his constituents on Facebook to not only deliver but also receive important information from constituents, in one case ensuring that emergency medical services could attend to a baby whose breathing machine would soon lose power.

Hall, City of Cleveland (Aug. 30, 2017), <https://clecityhall.com/2017/08/30/video-mayor-frank-g-jackson-holds-first-ever-twitter-town-hall/>.



Mayor Sylvester Turner ✓

August 27, 2017 · 🌐

911 services are at capacity. If you can shelter in place do so, a few inches in your home is not imminent danger. Only call if in you're in imminent danger.

👍🙄😬 608

133 Comments 607 Shares

↪ Share



Sandra Nunez Lechuga There is a baby on a ventilator on the last battery they've been waiting to be rescued. Address 10529 Aves st Houston 77034 please help them before they lose their baby!

2y

👍🙄😬 8

^ Hide 13 Replies

Most Relevant is selected, so some replies may have been filtered out.



Sandra Nunez Lechuga Christina Linza Itkonen no one is getting to them.. I'm simply trying to help. I would post the picture the family posted but unable to post

2y

👍 1



Mayor Sylvester Turner ✓ Christina Linza Itkonen this is a false rumor

2y · Edited

👍🙄 16



Mayor Sylvester Turner ✓ Sandra Nunez Lechuga, we've submitted to dispatch - ^M.R.D.\

2y

👍 5

As this interaction demonstrates, even though government social media serves a widespread audience, the capabilities for tailored and direct responses are remarkable. On a single Tweet from an elected official, citizens can respond directly and comment on policy announcements, other lawmakers can respond and

comment on the policy, and citizens can then respond to those lawmakers' comments. Thus, when President Trump suggested that New York Senator Chuck Schumer bore some responsibility for the October 31, 2017 terrorist attack in New York City, he started a multi-level, interactive debate on immigration policy that included other U.S. Senators as well as citizens from across the political spectrum.



The image is a screenshot of a tweet from Jeff Flake (@JeffFlake). The tweet text reads: "Actually, the Gang of 8, including @SenSchumer, did away with the Diversity Visa Program as part of broader reforms. I know, I was there". Below the main text is a quote from Donald J. Trump (@realDonaldTrump) dated Nov 1, 2017: "The terrorist came into our country through what is called the 'Diversity Visa Lottery Program,' a Chuck Schumer beauty. I want merit based." The tweet is timestamped "5:36 AM · Nov 1, 2017" and was posted via "Twitter Web Client".

Jeff Flake ✓
@JeffFlake

Actually, the Gang of 8, including [@SenSchumer](#), did away with the Diversity Visa Program as part of broader reforms. I know, I was there

Donald J. Trump ✓ @realDonaldTrump · Nov 1, 2017
The terrorist came into our country through what is called the "Diversity Visa Lottery Program," a Chuck Schumer beauty. I want merit based.

5:36 AM · Nov 1, 2017 · [Twitter Web Client](#)

-  **AZ SnakePit** @AZSnakepit · Nov 1, 2017
 Replying to @JeffFlake and @shoewizard59
 Probably wise you're standing down. The program is still active:
travel.state.gov/content/visas/...
 1 comment 4 retweets 5 likes
-  **Jack Sommers** @shoewizard59 · Nov 1, 2017
 He meant they tried. Boehner wouldnt bring it to vote in House
 2 comments 5 retweets 19 likes
-  **AZ SnakePit** @AZSnakepit · Nov 1, 2017
 Just a *little* different...
 2 comments 1 retweet 1 like
-  **Jack Sommers** @shoewizard59 · Nov 1, 2017
 Main point: Trump blamed Schumer for a program signed into Law in 1991 that Schumer tried and voted to kill in 2013, but R-Speaker killed
 2 comments 10 retweets 40 likes
-  **AZ SnakePit** @AZSnakepit · Nov 1, 2017
 Main point: Flake claimed to have "done away" with a program, which remains entirely active.
- 

Do away with definition and meaning | Collins Engl...
 Do away with definition: To do away with something means to remove it completely or put an end to it. ...
collinsdictionary.com
- 1 comment 3 retweets 6 likes
-  **Jack Sommers** @shoewizard59 · Nov 1, 2017
 semantically true but short on Context to argue this way If Flake wrote Schumer VOTED to do away with wud have been more accurate, I agree
 1 comment 2 retweets 6 likes
-  **Jack Sommers** @shoewizard59 · Nov 1, 2017
 Back to the Central Issue: Twitler popped off and blamed Schumer & his blame was completely misplaced. Flake corrected him. Rest pedantic
 4 comments 3 retweets 25 likes

It is clear that, in practice, social media platforms like Twitter that allow for the general public to comment upon governmental posts, communicate with officials, or otherwise participate in a public debate function like the paradigmatic speakers' corner in a public park. *See Perry*, 460 U.S. at 45 (identifying streets and parks as “quintessential public forums” for “assembly, communicating thoughts between citizens, and discussing public questions” (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939))).

Indeed, the interactive components of governmental social media accounts may well host these functions more than parks and streets currently do. As the Supreme Court recently recognized, “While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular.” *Packingham*, 137 S. Ct. at 1735 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1977)) (explaining that a denial of access to social media was a significant abridgment of First Amendment rights given modern civic and social communication).

Viewpoint discrimination in such forums plainly violates the First Amendment.

CONCLUSION

Representative Reisch's blocking of private Twitter users based on their critical view of her is unconstitutional.

Social media use by governments around the world, at every level, is the rule now, not the exception. Social media is a predominant form of communication to and with the public. As a result, members of the public must have a cognizable First Amendment right to receive communications from the government that are generally available to the public, and to participate in the forums that the government creates.

The First Amendment prohibits viewpoint discrimination in all analogous, pre-digital situations. It must do so here as well.

Dated: March 27, 2020

By: /s/ David Greene

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By: /s/ David Greene
David Greene

*Counsel for Amicus Curiae
Electronic Frontier Foundation*

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I hereby certify that on March 27, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system, pursuant to Eighth Circuit Rule 25A.

Dated: March 27, 2020

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