Case No. 18-10238

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DEANNA J. ROBINSON,

Plaintiff-Appellant,

v.

HUNT COUNTY, TEXAS, et al.

Defendant-Appellee.

BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION AND KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, IN SUPPORT OF PLAINTIFF-APPELLANT

On Appeal from the
U.S. District Court for the Northern District of Texas, Dallas
The Honorable James E. Kinkeade, U.S. District Court Judge
Case No. 3:17-cv-513

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to this Court's Rule 29.2, the undersigned counsel of record for *amici curiae* certifies that the following additional persons and entities have an interest in the outcome of this case.

1. Electronic Frontier Foundation, *amicus curiae*. Electronic Frontier Foundation is a nonprofit organization recognized as tax exempt under Internal Revenue Code § 501(c)(3). It has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.
2. David Greene, attorney for *amicus curiae* Electronic Frontier Foundation.
3. Camille Fischer, attorney for *amicus curiae* Electronic Frontier Foundation.
4. Knight First Amendment Institute at Columbia University, *amicus curiae*. The Knight Institute is a nonprofit organization recognized as tax exempt under Internal Revenue Code § 501(c)(3). It has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.
5. Katherine Fallow, attorney for *amicus curiae* Knight Institute.

Dated: May 29, 2018

/s/ David Greene
David Greene

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STATEMENT OF INTEREST[1]

Electronic Frontier Foundation (EFF) endeavors to ensure that the public has a right to communicate to the government and with each other in perhaps the most pervasive form of civil engagement in use today – the social media pages and feeds of governmental agencies and officials. Recognizing the Internet's power as a tool of democratization, EFF has, for over 25 years, worked to protect the rights of users to transmit and receive information online. EFF is a non-profit civil liberties organization with approximately 40,000 dues-paying members, bound together by mutual 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 files amicus briefs in courts across the country, including briefs that highlight the pervasive use of social media platforms as a means of delivering governmental services and communicating with constituents. Among many other landmark cases, EFF filed amicus briefs in *Packingham v. North Carolina*, 137 S. Ct. 1730 (U.S. 2017), cited numerous times in the Court's opinion, and *Knight First*

[1] No party's counsel authored this brief in whole or in part. Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *amici*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

Amendment Institute at Columbia University v. Trump, 1:17-cv-05205-NRB (S.D.N.Y.).

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

INTRODUCTION

The social media accounts, pages, and feeds of governmental agencies and officials allow members of the public to comment directly to an agency, respond immediately or at a later time to an agency's own posting, communicate news and ideas to other members of the public following the agency, and debate and discuss issues with other members of the public. They foster involvement in public affairs and generally bring democracy closer to the people.

Governmental efforts to close off or otherwise limit these platforms must thus be greeted with great skepticism by courts. *See Doe v. Santa Fe Independent School District*, 168 F.3d 806, 820 (5th Cir. 1999). Courts especially must not blindly defer to the labels the government, in the form of either an agency or an individual official, places on these platforms. Rather, courts have a duty to look beyond such labels and to the underlying use of the platform by both the government and the public. Courts must not honor statements of designation or non-designation made with "fingers crossed or tongue in cheek." *Id.* at 821.

Such an examination must not be taken lightly. The people's First Amendment rights are at stake.

ARGUMENT

I. This Court Must Look Beyond the Sheriff's Labeling of its Facebook Page as 'Nonpublic Forum' to Determine the True Nature of the Forum, and the Public's Rights Therein

For a nontraditional forum to be designated as a public forum, the designation must be purposeful. A government does not create a designated or limited public forum unintentionally.

Courts thus commonly attempt to divine the government's intent in determining whether government is operating a designated or limited public forum or a nonpublic forum. *See Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788, 802 (1985).[2]

But no court has ever required a public forum designation to be express: the government need not proclaim "we hereby designate this a public forum" or otherwise use the phrase "public forum" or any of its variants. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 267 & n.5 (1981) (finding

[2] In many cases, this determination is critical. In a designated public forum, both content and viewpoint discrimination are subjected to First Amendment strict scrutiny. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-47 (1983); *Chiu v. Plano Independent School Dist.*, 260 F.3d 330, 345-46 (5th Cir. 2001). A government may also create a "limited public forum" which is open for "public expression of particular kinds or by particular groups." *Fairchild v. Liberty Independent School Dist.*, 597 F.3d 747, 758 (5th Cir. 2010). The subject matter and speaker limitations placed on the forum must be viewpoint-neutral and "reasonable in light of the purpose served by the forum." *Id.* But one cannot be excluded from the forum if their speech is within the limitations so placed on the forum. In a nonpublic forum, reasonable content discrimination is permitted, but viewpoint discrimination remains subject to strict scrutiny. *Perry*, 460 U.S. at 45-47.

that university created a designated public forum in the absence of any express designation); *Concerned Women for America, Inc. v. Lafayette County*, 883 F.2d 32, 34 (5th Cir. 1989) (holding that a library designated a public forum by the practice of allowing access to diverse groups, in the absence of express designation).

Rather, the Supreme Court divines intent from both "the policy and practice of the government" with respect to allowing nongovernmental speech and by "examin[ing] the nature of the property and its compatibility with expressive activity to discern the government's intent." *Cornelius*, 473 U.S. at 802. The Fifth Circuit looks at the same two factors. *Chiu v. Plano Independent School District*, 260 F.3d 330, 346 (5th Cir. 2001).

Consistent with this holistic analysis, the fact that a government expressly states that a place, program, or platform is "a nonpublic forum," while perhaps evidence of intent, is not determinative. "[C]ourts must consider both explicit expressions about intent and" the government's policies and practices as well as "the nature of the property and its compatibility with expressive activity." *Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65, 76 (1st Cir. 2004) (emphasis added). "[A] statement of intent contradicted by consistent actual policy and practice would not be enough to support the" government's assertion that

no public forum exists. *Id.* at 77.[3] As the Ninth Circuit has explained, "an abstract policy statement purporting to restrict access to a forum is not enough. What matters is what the government actually does—specifically, whether it consistently enforces the restrictions on use of the forum that it adopted." *Hopper v. City of Pasco*, 241 F.3d 1067, 1075 (9th Cir. 2001). *See also Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. No. 5*, 941 F.2d 45, 47 (1st Cir. 1991) ("[A]ctual practice speaks louder than words.").

As the court recently ruled in a similar case, regarding the "interactive space" on President Trump's Twitter account, @realDonaldTrump, "'Intent is not merely a matter of stated purpose. Indeed, it must be inferred from a number of objective factors, including: [the government's] policy and past practice, as well as the nature of the property and its compatibility with expressive activity.'" *Knight First Amendment Institute, et. al. v. Donald J. Trump, et. al*, case 1:17-cv-05205-NRB, Memorandum and Order at 61 (S.D.N.Y. May 23, 2018) (quoting *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991)). Looking beyond the President's assertions to the contrary, the court found the "interactive

[3] In *Ridley*, the First Circuit ultimately found that the stated intent was consistent with the government's practice of sharply limiting the content of speech that could take place in the forum, and its practice of strictly enforcing that policy. *Id.* at 77. The First Circuit later affirmed that it does "not rely on [the agency's] expressed intention alone" in answering the public forum question. *American Freedom Defense Initiative v. Massachusetts Bay Transportation Authority*, 781 F.3d 571, 579 (1st Cir. 2015).

space" created by tweets from @realDonaldTrump to be a designated public forum. *Id.*

This Court, like others, rejects blind deference to express labels of "nonpublic forum" to guard against bad faith and the label being used as a pretext for discriminating against a particular would-be speaker. *See Ridley*, 390 F.3d at 77. As this Court has previously noted, "self-serving statements regarding the purpose of the meeting are not enough to prove 'intent.'" *Chiu*, 260 F.3d at 349 n.13. Rather, "we push aside 'self-serving statements regarding the purpose of the meeting' for objective evidence leavened by common sense." *Fairchild v. Liberty Independent School District*, 597 F.3d 747, 759 (5th Cir. 2010). "[I]t is clear that the government's proffered intent does not govern [the public forum] inquiry, else it would be a limited inquiry indeed. . . . We must, therefore, view skeptically [the agency's] own self-serving assertion of its intent and examine closely the relationship between the objective nature of the venue and its compatibility with expressive activity." *Doe*, 168 F.3d at 820.

Thus, in *Campbell v. St. Tammany Parish School Board*, 231 F.3d 937, 940-41 (5th Cir. 2000), this Court began, but did not end, its analysis by looking at the school board's statement in its Use of School Facilities Policy establishing "the use of some of the public school buildings as a limited public forum." Rather, this Court ensured that that statement of intent was

"reinforced" by the restrictions set forth in the policy and the evidence of even handed enforcement of them in the record, which rebut any inference of bad faith or pretext. *Id.* at 941. The record reflected that "the uses made of school facilities in no way frustrated the board's explicit purpose of creating a limited public forum." *Id.* at 941.

II. Despite its 'Nonpublic Forum' Label, the Sheriff's Facebook Page Bears the Hallmarks of a Limited Public Forum, Though One With Only A Very Few Nonapplicable Limitations.

Here, in contrast to *Campbell*, the Sheriff's statement that the Facebook page is a "nonpublic forum" must be rejected, without even considering the actual use, because the policy that is spelled out in the same statement actually describes a limited public forum, though one with only a few very narrow limits that do not apply to Ms. Robinson's speech. Certainly, the specific types of speech expressly excluded from the Sheriff's Facebook page are not the kind of exclusions that characterize a nonpublic forum. Contrary to *Campbell*, the statement of intent is not "reinforced" in any way; rather it is undermined by the very language that follows it.

First, the policy excludes several categories of unprotected speech that could be excluded even from a traditional public forum: obscenity, defamation, threats, commercial speech that promotes illegal goods or services, and speech that infringes copyright or trademark. *See Hall v. Board of School Commissioners of Mobile County*, 681 F.2d 965, 971 (5th Cir. 1982)

("In a public forum, the state may restrict expression which is obscene, consists of fighting words, or which poses an imminent danger of grave evil."); *White Buffalo Ventures, LLC v. University of Texas at Austin*, 420 F.3d 366, 378 (5th Cir. 2005) (finding it unnecessary to decide public forum status because it found the commercial speech at issue to be constitutionally proscribable); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004) (explaining that constitutionally unprotected speech may be restricted even in a public forum). *See generally Brown v. Entertainment Merchants Ass'n,* 564 U.S. 786, 791 (2011) (explaining that the prevention of unprotected speech presents no constitutional problem).

Second, a forum cannot be defined by exclusions that are based on subjective or overly general criteria. "'[S]tandards for inclusion and exclusion' in a limited public forum 'must be unambiguous and definite' if the 'concept of a designated open forum is to retain any vitality whatever.'" *Christ's Bride Ministries, Inc. v. SEPTA,* 148 F.3d 242, 251 (3d. Cir. 1998), *cert. denied,* 525 U.S. 1068, 119 S.Ct. 797, 142 L.Ed.2d 659 (1999) (quoting *Gregoire v. Centennial Sch. Distr.*, 907 F.2d 1366, 1375 (3d Cir.1990)). *See Hopper*, 241 F.3d at 1077-78 (collecting concurring authority from other courts). In *Hopper*, the Ninth Circuit accordingly rejected a ban on "controversial" art as a proper limitation on an otherwise public forum. *Id.* at 1079-80.

Thus, to the extent the Sheriff's January 18th post is considered an

amendment to or an elucidation of the Sheriff's policy, the added forbidden categories of "foul language, hate speech of all types and comments that are considered inappropriate" are too subjective to help define the forum, and cannot transform an otherwise open forum to a limited or nonpublic one.

After these purportedly definitional "limits" on the forum are excluded, it is clear that the forum is far more inclusive than exclusive: the only content excluded is false information and some specific forms of political advocacy. These kinds of minimal restrictions are consistent with the Sheriff's Department Facebook page's status as a minimally limited public forum, and there is no contention that Ms. Robinson's statement was excluded on the basis of these valid limitations.

This Court has found that even broader limits than those at issue here did not nullify all public forum rights. In *Campbell*, the school board made its buildings available for "civic and recreational meetings and entertainment and other uses pertaining to the welfare of the community," but excluded "partisan political activity, for-profit fund-raising, and 'religious services or religious instruction.'" 231 F.3d at 940. This Court held that the school board thus created a limited public forum, from which Campbell was excluded because she sought to hold religious services, thus speaking outside of the forum's specifically defined limits. *Id.* at 942. And

that exclusion was thus permissible as long as it was done so without reference to any specific religious viewpoint. *Id.* at 943.

Here, in contrast, Ms. Robinson's speech, because it is not false or not the excluded political advocacy, is not outside the forum's permissibly defined limits. The forum is otherwise open for her private speech, and strict scrutiny must apply to all content-based restrictions placed on her speech.

III. Government Use of Social Media Platforms to Communicate With Their Constituents, and Allow Them to Communicate With Each Other, Is Pervasive at All Levels of Government.

Though the case before this court deals only with a single blocked post on the Hunt County Sheriff's Department's Facebook page, the precedent this Court establishes will have wide-ranging ramifications because of the pervasive use of similar social media platforms by governments at all levels all over the country.

Billions of people use social media platforms to communicate with each other, engage with news content, and share information. The Pew Research Center found that seven in ten Americans use social media in this way.[4] Facebook is by far the most popular platform, with 68% of U.S. adults using it.[5]

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[4] *Social Media Fact Sheet* (survey conducted Jan. 3-10, 2018), http://www.pewinternet.org/fact-sheet/social-media/.
[5] *Id.*

Governments all over the country – indeed, all over the word – use various social media platforms to disseminate important information to the public, to foster public discussion, and to allow debate related to 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 for the delivery of government services and for public participation reported that 152 member states out of 193 (roughly 80%) include links to social media and other networking features on their national websites.[6] Also, 20% of the member states reported that engagement through social media led to new policy decisions and services.[7] Member countries viewed social media as a low-cost, ready-made solution for posting basic public-sector information and for citizen collaboration.[8]

In the last decade, the political and public use of social media in the United States has increasingly factored into elections, the legislative process, and government services. Federal agencies and sub-agencies have registered more than 10,000 social media profiles with the United States

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[6] U.N. Dep't of *Econ.* And Soc. Affairs, *United Nations E-Government Survey 2016: E-Government in Support of Sustainable Development*, at 65, U.N. Sales No. E.16.II.H.2 (2016), http://workspace.upan.org/sites/Internet/Documents/UNPAN97453.pdf .

[7] *Id.* at 68.

[8] *Id.* at 3.

Digital Service,[9] and many more active government profiles remain unregistered. Federal agencies frequently use social media to promote U.S. policy interests.[10] Members of Congress actively use social media to connect with their constituents. All 100 Senators and the overwhelming majority of Representatives use social media.[11] In a 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 representative on social media would influence an undecided lawmaker.[12]

State legislators also use social media to communicate with their constituents and debate controversial issues. For example, New York

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[9] For a searchable database of registered federal government profiles, see https://usdigitalregistry.digitalgov.gov/.

[10] For example, the Obama Administration's Department of Health and Human Services used its social media feeds to advocate for passage of the Affordable Care Act, and then to help persuade at least 4 million people to sign up with HealthCare.gov in the first year. Joanne Kenen, *The selling of Obamacare 2.0*, Politico (Nov. 13, 2014, 5:10 AM), http://www.politico.com/story/2014/11/obamacare-enrollment-2015-112846.

[11] Congressional Research Service, *Social Media in Congress: The Impact of Electronic Media on Member Communications*, R44509, (May 26, 2016), https://fas.org/sgp/crs/misc/R44509.pdf.

[12] Congressional Management Foundation, *# SocialCongress2015*, (2015), http://www.congressfoundation.org/storage/documents/CMF_Pubs/cmf-social-congress-2015.pdf.

legislators and the Governor's office debated funding and employee salaries on Twitter.[13] In Maryland, legislators used social media to debate the benefits of state legislation versus county regulations.[14] And in Georgia, Representatives engaged in heated debate via social media over the removal of confederate monuments.[15] Further, local police departments, councilpersons, and mayors use their Facebook, Twitter, and other social media feeds as real-time channels for important community information. Cleveland Mayor Frank Jackson conducts "Twitter town halls," where residents tweet questions and the mayor responds through a live video.[16]

Social media platforms used by governmental agencies and officials allow the public to communicate back to the agency and with each other.

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[13] Tom Precious, *Cuomo and lawmakers start new year on nasty note, via Twitter and speeches,* The Buffalo News, (Jan. 4, 2017), http://buffalonews.com/2017/01/04/cuomo-lawmakers-start-new-year-nasty-note-via-twitter-speeches/.

[14] Annie Linskey, *In Annapolis, a second debate in cyberspace*, The Baltimore Sun, (Mar. 17, 2012, 5:36 PM), http://www.baltimoresun.com/news/maryland/politics/bs-md-lawmaker-twitter-20120316-story.html.

[15] Greg Bluestein, Georgia lawmaker: Talk of ditching Confederate statutes could cause Democrat to 'go missing', The Atlanta Journal Constitution, (Aug. 30, 2017) http://politics.blog.ajc.com/2017/08/29/georgia-republican-warns-democrat-she-could-go-missing-over-criticism-of-civill-war-monuments/.

[16] Andrew J. Tobias, "Cleveland Mayor Frank Jackson fields questions – some of them not so tough – in his first Twitter town hall," Cleveland.com, (Aug. 30, 2017), http://www.cleveland.com/cityhall/index.ssf/2017/08/cleveland_mayor_frank_jackson_60.html.

This allows individuals to directly respond to policies proposed by their elected representatives, including suggestions and criticisms, which enables greater citizen input in our representative democracy.

As the Supreme Court recognized just last term, "[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, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1977), and social media in particular." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

CONCLUSION

The Sheriff's self-serving declaration that the comments section on its Facebook page is a nonpublic forum is only the start of this Court's analysis, not the end. When the actual limits of the forum and the forum's actual use is examined, it is clear that the page is operated as a limited public forum from which Ms. Robinson speech should not be excluded.

Dated: May 29, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

I hereby certify as follows:

1. The foregoing Brief of *Amici Curiae* complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief is printed in proportionally spaced 14-point type, and there are 3,280 words in the brief according to the word count of the word-processing system used to prepare the brief (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)).

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and with the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft® Word for Mac 2011 in 14-point Palatino font.

Dated: May 29, 2018 /s/ David Greene

David Greene

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeal for the Fifth Circuit by using the appellate CM/ECF System on May 29, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 29, 2018 /s/ David Greene

David Greene