Nos. 17-2002, 17-2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIAN DAVISON,

Plaintiff-Appellee and Cross-Appellant,

v.

PHYLLIS RANDALL,

Defendant-Appellant and Cross-Appellee.

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

BRIEF *AMICI CURIAE* OF FIRST AMENDMENT LEGAL SCHOLARS IN SUPPORT OF PLAINTIFF-APPELLEE AND CROSS-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 4th Cir. R. 26.1, *amici curiae* are natural persons and are therefore not subject to corporate disclosure statement requirements.

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Bill Sherman, *Your Mayor, Your "Friend": Public Officials, Social Networking, and the Unmapped New Public Square*, 31 Pace L. Rev. 95 (2011) 6

Other Authorities

Maeve Duggan & Aaron Smith, Pew Research Ctr., *The Political Environment on Social Media* (Oct. 25, 2016) http://assets.pewresearch.org/wp-content/uploads/sites/14/2016/10/24160747/PI_2016.10.25_Politics-and-Social-Media_FINAL.pdf 17

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INTERESTS OF *AMICI CURIAE*[1]

Amici legal scholars are experts in the First Amendment who have taught courses in constitutional law or the First Amendment, published articles and books on these topics, and dedicated significant attention to the study of First Amendment freedoms. Based on their experience, *amici* seek to draw attention to the critical First Amendment values at stake when public officials ban individuals from participating in public fora on social media. *Amici* are listed in the Appendix.

INTRODUCTION

The First Amendment principles that govern this case are well established. When a government official opens a space to the public and invites citizens to express their views to the official and other interested citizens, she creates a public forum for speech. The official may not then selectively restrict access to that forum by barring viewpoints she does not like because, for example, a speaker makes comments critical of the government or otherwise not aligned with the official's views. The government official fully retains, however, the ability to control her own speech, and established First Amendment principles also allow the official to structure discussions within the forum by imposing reasonable time, place, or manner restrictions, so long as those restrictions are not based on the viewpoints expressed.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

The fact that this case involves communications between a public official and her constituents on social media rather than at a town hall provides no valid reason for not applying these settled First Amendment principles. Indeed, it is difficult to imagine a more straightforward application of them. As the district court found, Loudoun County Board of Supervisors Chair Phyllis Randall created a public forum by establishing a Facebook page—entitled the "Chair Phyllis J. Randall" page—and using it as a "tool of governance," J.A. 477, which enabled her "to hear from ANY Loudoun citizen on ANY issues, request, criticism, compliment, or just your thoughts," J.A. 465 (quoting Randall). And as the district court also held, Randall engaged in viewpoint discrimination when she temporarily barred Brian Davison from participating in that forum because he raised an allegation—concerning corruption in the Loudoun County government—that she found offensive. J.A. 471-72.

Affirming the district court's conclusions on these issues will in no way undermine Randall's own rights as a public official to communicate with her constituents through social media or her ability to curate the content of her Facebook page in a manner consistent with the long history of government officials subjecting speech platforms to reasonable, viewpoint-neutral regulations in order to foster a healthy and robust exchange of ideas. *Amici* therefore urge this Court to affirm the district court's conclusions as to these core First Amendment issues.

ARGUMENT

I. By Intentionally Opening Her Facebook Page to Comments from Any of Her Constituents on Any Topic, Randall Created a Public Forum for Purposes of the First Amendment.

A. Government-Controlled Channels of Communication Designed for Expressive Use and Generally Open to the Public Are Public Fora.

The Supreme Court has long recognized limitations on the government's ability to restrict speech in certain spaces, or fora. The Court has referred generally to three such types of fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

"Traditional public fora are those places," like public streets and parks, "which 'by long tradition . . . have been devoted to assembly and debate.'" *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). "In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."[2] *Id.*

[2] In a nonpublic forum, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46. Randall does not rely on the nonpublic forum doctrine in her brief.

Although the government is neither "required to create" a designated public forum in the first place nor "required to indefinitely retain [its] open character . . . , as long as it does so it is bound by the same standards as apply in a traditional public forum." *Perry*, 460 U.S. at 45–46.[3] For both traditional and nontraditional public fora, "[r]easonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Id.* at 46. Significantly for this case, the government is forbidden "to exercise viewpoint discrimination, even when the . . . forum is one of its own creation." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

The government designates a forum "by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. The government's intent is established by the "policy and practice" it employs with respect to its use of the property, "the nature of the property," and the property's "compatibility with expressive activity." *Id.* A public space that is "designed for and dedicated to expressive activities," *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975), or that

[3] This Court has noted "some confusion" regarding the relationship between the "designated public forum" and "limited public forum" conceptions. *See Goulart v. Meadows*, 345 F.3d 239, 249 (4th Cir. 2003); *but see Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (subsequently providing clarification). The Court need not parse the distinctions between designated and limited public fora in this case, as Randall designated her page as open to all speakers on any topic.

"has as 'a principal purpose . . . the free exchange of ideas,'" *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992) (*ISKCON*) (quoting *Cornelius*, 473 U.S. at 800), presumptively constitutes a public forum. Spaces serving multiple functions may qualify as a public forum so long as "the open access and viewpoint neutrality commanded by the [forum] doctrine is 'compatible with the intended purpose of the property.'" *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673 (1998) (quoting *Perry*, 460 U.S. at 49).

Certain categories of government-owned and government-controlled property are not scrutinized under the forum doctrine. Of particular relevance here, when the government itself speaks, "the Free Speech Clause has no application," and distinctions based on viewpoint are permitted. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009). In determining whether the government, rather than private parties, is engaged in speech, the Supreme Court looks to whether the communication has historically conveyed a message from the government, whether the speech is "closely identified in the public mind" with the government, and whether the government maintains "control over the messages conveyed." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248–49 (2015).

B. Social Media Platforms Like Facebook Empower Officials to Engage Directly with Their Constituents in Unprecedented Ways.

As the Supreme Court has recognized, the Internet has wrought a transformative shift in American public life. Exchanges that once occurred in public

parks and on street corners are now channeled into social media and other virtual spaces. Public officials at all levels of government now use Facebook, Twitter, and other social media to engage directly with their constituents. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (noting that all governors and almost every member of Congress have social media accounts); *see also* Bill Sherman, *Your Mayor, Your "Friend": Public Officials, Social Networking, and the Unmapped New Public Square*, 31 Pace L. Rev. 95, 96 (2011) ("Local public officials are stampeding to use online social networks."). Having dramatically lowered the barriers to public participation, the Internet has helped elected officials reach and communicate with constituents in real time and has amplified citizens' voices.

Since their earliest encounters with the medium, courts have appreciated the democratizing potential of the Internet as "a vast platform from which to address and hear from a worldwide audience." *Reno v. ACLU*, 521 U.S. 844, 853 (1997). In providing "relatively unlimited, low-cost capacity for communication," the Internet enables virtually anyone to "become a town crier with a voice that resonates farther than it could from any soapbox." *Id.* at 870. The Supreme Court has identified "social media in particular" as "the most important place[] . . . for the exchange of views" in contemporary life, and has compared it to "the modern public square" where a "private citizen [may] make his or her voice heard." *Packingham*, 137 S. Ct. at 1735, 1737.

By allowing public figures to create and publish "pages," Facebook provides government officials with a dynamic means of interacting with the public. A government official may use her Facebook page to post information on policy issues, public services, and the like. Users can then comment on those posts or send a message to the official. The official, in turn, may respond to users' comments, and users may respond to each other's comments. Thousands of users—or more—may follow an official's page to view the conversations occurring there. In this way, public officials' Facebook pages encourage real-time dialogue on social and political issues, enabling Americans to "petition their elected representatives and otherwise engage with them in a direct manner." *Packingham*, 137 S. Ct. at 1735.

C. Randall's Use of Facebook Establishes that She Created a Public Forum Rather Than Merely a Channel for Government Speech.

By expressly taking advantage of Facebook's unprecedented capacity for dynamic engagement with constituents, Randall made the "Chair Phyllis J. Randall" Facebook page into a designated public forum.

As the district court recognized, "[w]hen one creates a Facebook page, one generally opens a digital space for the exchange of ideas and information." J.A. 485. Here, Randall used her Facebook page as a "tool of governance," J.A. 477,[4] frequently addressing her posts to "Loudoun," *i.e.*, all of her constituents, in order to

[4] For this reason, and others, the district court correctly found that Randall's blocking of Davison occurred under color of state law and was therefore subject to the First Amendment. *See* J.A. 476–81.

seek their comments on official issues, J.A. 467. Randall also affirmatively encouraged comments on her Facebook page from "ANY Loudoun citizen on ANY issues, request, criticism, compliment, or just your thoughts," J.A. 465, and, consistent with this statement, repeatedly engaged in back-and-forth discussions with her constituents about matters of public concern. *See, e.g.*, J.A. 427 (flood-plain zones); J.A. 433 (funding for firefighters' equipment); J.A. 448 (questions for upcoming Board of Supervisors meeting). Moreover, Facebook's interactive functionality was particularly well-suited to this dynamic civic interaction; given the way Facebook operates, and choices Randall made about the page, Randall's postings could be viewed by the public and commented upon by other Facebook users. Significantly, Randall did not apply any viewpoint-neutral policies to bar or even limit anyone's participation on the page. J.A. 487.

Given these attributes, it is plain that Randall created a public forum. To be sure, Randall was not required to create the forum in the first place. But by her words and actions, she designated the "Chair Phyllis J. Randall" page as a channel of multi-dimensional communication for use by the public. *See Cornelius*, 473 U.S. at 802. Viewpoint-neutral access to the "Chair Phyllis J. Randall" Facebook page is also compatible with her forum's intended purpose, as Facebook users understand that one of the site's principal purposes is to promote the free exchange of ideas—a feature the Supreme Court has found important in identifying public fora. *See Forbes*, 523 U.S. at 673; *ISKCON*, 505 U.S. at 679. Put simply, when a government official

makes the decision to open up her Facebook page to all comers, as Randall did here, a public forum is created. *See Page v. Lexington Cty. Sch. Dist. One*, 531 F.3d 275, 284 (4th Cir. 2008) (suggesting that a government website that includes "a type of 'chat room' or 'bulletin board' in which private viewers could express opinions or post information" would qualify as a public forum).[5]

Randall argues in this Court that, because her "Facebook page is government speech," she can validly censor other users' comments on that page, simply because she does not like them. *See* Appellant's Br. 30. Yet the "government speech" label applies at most to Randall's own statements on Facebook, not to comments made by private persons interacting in the forum she created on the "Chair Phyllis J. Randall" page. *See, e.g.,* J.A. 427 (comment that "[p]utting recreation in a flood plain is not a good idea" and responsive comment from Randall stating, "Bob, thank you but to be clear the county is absolutely NOT on 'this path'"). In contrast to true government speech, no one could possibly confuse the private individuals' comments as conveying a message from the government, associate that commentary with the government, or assume the government maintains "control over the messages conveyed" by other users. *Walker*, 135 S. Ct. at 2248–49. Rather, as the Supreme Court has recognized, when "private parties, and not only the government, [use a] system to communicate,"

[5] As noted earlier, *see supra* note 2, Randall does not argue that her page is a nonpublic forum. Even if Randall's page *were* a nonpublic forum, the First Amendment would *still* prohibit discrimination on the basis of a speaker's viewpoint—which is precisely what Randall did in this case. *See Cornelius*, 473 U.S. at 806.

forum analysis—and not the "government speech" doctrine—is the appropriate lens through which to analyze the case. *Id.* at 2252. That is precisely what occurred here. *See Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541, 577 (S.D.N.Y. 2018), *appeal docketed*, No. 18-1691 (2d Cir. June 5, 2018).[6]

Supreme Court precedent also makes clear that, contrary to Randall's position, her Facebook page does not fall outside the public forum doctrine simply because the government does not formally own the page and did not design the digital environment and tools that allow Facebook pages to function as a modern public square. *See Packingham*, 137 S. Ct. at 1737. Government officials cannot avoid the First Amendment's requirements by renting a suitable space to hold public meetings, rather than hosting meetings in government-owned property. *See Conrad*, 420 U.S. at 547, 555 (privately owned theater under long-term lease to a city was a "public forum[] designed for and dedicated to expressive activities"); *Cornelius*, 473 U.S. at 801

[6] In *Morgan v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018), the court concluded that Kentucky's governor did not violate the First Amendment when he banned critics from commenting on his official social media pages because the pages, in their entirety, qualified as Governor Bevin's own speech. In particular, the court based its decision on its view that users will assume messages "com[e] from" the Governor if they "appear on" or are "connected to" his pages, even when the messages are posted by people other than the Governor. *Id.* at 1012. This conclusion is simply mistaken—as laid out above, comments from other users, posted under their own names in these contexts, cannot reasonably be viewed as messages from the government or associated with the government, or as something over which the government maintains control. Moreover, even if *Morgan* were correctly decided, its reasoning would not apply here because Randall expressly designed her Facebook page as a forum in which her constituents could express their own views.

(forum analysis applies to "public property or to private property dedicated to public use"). Here, Randall affirmatively chose to utilize Facebook's speech-enhancing features to create a forum for interacting with her constituents. *See* J.A. 463. And, importantly, Randall and her chief of staff are the exclusive administrators of the "Chair Phyllis J. Randall" page. J.A. 478. They, not Facebook, banned Davison and thereby exercised effective control over the content on Randall's Facebook page.

Most fundamentally, motivating many of the Supreme Court's decisions in government speech cases is a concern that demanding open access by the public ultimately would be more speech-restrictive because it would lead the government to close the venue entirely. *See, e.g.*, *Summum*, 555 U.S. at 480 ("[W]here the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place."); *Forbes*, 523 U.S. at 680–81 (finding a nonpublic forum where wholly open access could "result in less speech, not more").

Here, by contrast, forbidding public officials from banning people from their official pages is the more speech-enhancing course. To an even greater extent than with a physical forum, an official's Facebook page is "capable of accommodating a large number of public speakers without defeating the essential function of . . . the program." *Summum*, 555 U.S. at 478. Moreover, as noted above, the broad access and public interactions Facebook enables are why Randall—and so many other public officials—choose to use it. Thus, as we explain further below, it is highly unlikely that these officials would shut down their pages entirely over the inability to bar those who

disagree with them. There is therefore no inherent incompatibility between the government activity at issue—maintaining a Facebook page open to public comment—and the provision of viewpoint-neutral access to anyone who wishes to participate in the conversation.

II. Randall Engaged in Unconstitutional Viewpoint Discrimination When She Blocked Davison's Political Speech Because His Criticism of Her Colleagues in Government Offended Her.

A. The First Amendment Prohibits Public Officials from Censoring Constituent Speech Because of Its Political Viewpoint.

No principle could be plainer or more fundamental than the fact that the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972). In this instance, Randall did precisely that by blocking Davison from her page. Regardless what kind of public forum Randall's Facebook page may be, her censorship of constituent speech because of the political viewpoint it expressed is prohibited. *See, e.g.*, *Rosenberger*, 515 U.S. at 829.

As described by the district court, Davison posted on her page soon after participating in a town hall discussion held by the Loudoun County Board of Supervisors and Loudoun County School Board. The district court found that, according to Randall, Davison's post "included allegations of corruption on the part of Loudoun County's School Board involving conflicts of interests among the School

Board and their family members." J.A. 471. Randall deleted Davison's post and banned him from commenting further on her page "because"—as the district court found—"she was offended by his criticism of her colleagues in the County government." J.A. 472.

The district court therefore correctly concluded that Randall barred Davison "from a digital forum for criticizing her colleagues in the County government"—"the quintessential form of viewpoint discrimination against which the First Amendment guards." J.A. 491, 488. Although Randall now contends that her decision to censor Davison was based on the "subject" of "people's family members" and not on any particular view, Appellant's Br. 25 (emphasis omitted), she does not contend that the district court committed clear error in concluding, based on the full record, that Randall censored Davison because she disapproved of his purportedly "slanderous" comments that school board members "had acted unethically," J.A. 269, 488–89.[7] In doing so, Randall clearly engaged in viewpoint discrimination. She closed an otherwise open forum to a citizen because he expressed an unwanted, critical view.

Randall's action is particularly concerning because speech on matters of public governance lies "at the heart of the First Amendment's protection." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (plurality op.)

[7] The record does not suggest—and Randall does not contend—that Davison's comment was abusive or threatening. In an appropriate case, a court might consider whether an official social media policy could permissibly allow such comments to be deleted. *See infra* at 24 & n.10. This is not such a case.

Indeed, speech on the specific matter that Randall alleges Davison sought to address—"corruption in a public program"—"involves a matter of significant public concern." *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014). In such cases, the First Amendment's bar against censorship of critical views effectuates "our '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.'" *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). The First Amendment therefore bars Randall, as a government official, from excluding Davison from a public forum because she disliked his comments about alleged misconduct by county officials.

Moreover, prohibiting viewpoint discrimination of the kind Randall engaged in here recognizes that such behavior harms the banned individual in a number of ways. Most critically, a user banned from a Facebook page cannot interact with the page's posts through comments or "likes," or message the page.[8] Such a user is thereby excluded from participating in the public discourse occurring on the public official's page, which—as described below—may be the critical venue for such speech. Because social media acts as a modern-day loudspeaker, amplifying the speaker's

[8] Facebook, Help Center; *How do I ban or unban someone from my Page?*, https://www.facebook.com/help/185897171460026?helpref=faq_content (last visited July 13, 2018).

message in a way he or she is generally unable to accomplish otherwise, banned users are robbed of a valuable opportunity to make their speech heard. *See Knight Inst.*, 302 F. Supp. 3d at 577 ("While the right to speak and the right to be heard may be functionally identical if the speech is directed at only one listener, they are not when there is more than one."). What is more, knowing that officials may block users in response to their critical comments may well lead users to self-censor.

The fact that Davison may have been able to express his views elsewhere also does not alleviate the injury he suffered. "If restrictions on access to a . . . public forum are viewpoint discriminatory, the ability of a group to exist outside the forum would not cure the constitutional shortcoming." *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 690 (2010); *see also Reno*, 521 U.S. at 879–80 (rejecting the suggestion that a speaker's ability to post content elsewhere on the Internet would suffice to cure the constitutional harm). And, contrary to Randall's assertion, the fact that she barred "Virginia SGP" and not an account with Davison's name on it, does not change the analysis. *See* Appellant's Br. 27. Davison, not Randall, is entitled to choose which Facebook name he wishes to use. Among other things, Davison's "Virginia SGP" account has a unique group of followers.

Finally, defendant's viewpoint discrimination implicates not only the public forum doctrine but also the right of citizens to petition the government for redress of their grievances. The First Amendment's Petition Clause guarantees the right to speak to those empowered to take action in response, thereby promoting

governmental accountability to the electorate. *See* Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. Rev. 1975, 2009-10 (2011). Banning constituents from commenting on social media simply because they raise concerns about government malfeasance, on the other hand, closes off a channel of communication and thereby burdens these important rights.

B. Permitting a Public Official to Selectively Bar Speakers from Her Social Media Pages Can Mislead the Public, Distort Public Dialogue, and Undermine Government Accountability.

Suppression of political speech is particularly concerning in the social media context because of its potential to mislead the public, distort public dialogue, and undermine officials' accountability.

A Facebook page like Randall's is open to the public and available for public comment. Anyone with a Facebook account can view the page and comment on posts (unless banned), and Randall invited her constituents to do exactly that. *See* J.A. 465. Particularly given the manner in which Randall set up and utilized her page, members of the public naturally would conclude that the exchanges they observe there represent uncensored conversations reflecting the range of opinions among those who engage on the page. That quite reasonable conclusion would be deeply mistaken, however, if a public official could skew the balance of the commentary by excluding or hindering critics from speaking in a forum that the official holds out as being open to all.

Ad hoc and selective banning of users based on viewpoint is particularly problematic, moreover, given the increasingly important role of social media to public debate and dialogue on issues of public governance. Social media users expect to follow and possibly participate in political discussions online,[9] and public officials at all levels of government use social media sites as critical tools of communication and response. The decline of traditional local news reporting has likely made social media outlets all the more important for local news consumption and civic engagement. Given these developments, it is crucial that courts do not allow politicians to censor comments they do not like and thereby skew their constituents' perceptions of the debates unfolding in the public eye and ear. *Cf. Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017) (rejecting the application of the government speech doctrine to trademark registration because, "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints").

Indeed, allowing Randall to censor critics in the name of "government speech" would also turn a core presumption of the government speech doctrine—that the government can be held accountable for its own speech—on its head. *See, e.g.*, *Bd. of*

[9] According to a 2016 poll, approximately one third of social media users often or sometimes discuss government and politics on social media. Maeve Duggan & Aaron Smith, Pew Research Ctr., *The Political Environment on Social Media* 7 (Oct. 25, 2016) http://assets.pewresearch.org/wp-content/uploads/sites/14/2016/10/24160747/PI_2016.10.25_Politics-and-Social-Media_FINAL.pdf.

Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy."). Randall argues that she should be able to claim as her own the speech of those private citizens who agree with her, while silencing those whose views she finds inconvenient. Yet those private citizens' speech would not, without more, be attributed to Randall. Randall's page gives no indication that she is curating, editing, or even approving commenters' messages. The government should not be able to avoid political accountability for its views by having speech attributed to private speakers while also controlling the views expressed by those speakers under the rubric of "government speech."

C. There is No *De Minimis* Exception to the First Amendment's Prohibition on Viewpoint Discrimination—And, Even if There Were, Randall's Actions Were Not *De Minimis*.

Randall also contends that, because she banned Davison from her Facebook page for "only a single night," any First Amendment harm fell below a "*de minimis*" threshold with which the First Amendment supposedly "is not concerned." Appellant's Br. 28. This argument is contradicted by controlling Supreme Court precedent.

As the Supreme Court has emphasized, it is "vital to the operation of democratic government that the citizens have facts and ideas on important issues before them," and "delay of even a day or two may be of crucial importance in some

instances." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968) (quoting *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting)); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Moreover, the Supreme Court has squarely held that "[t]here is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001). Randall "did not ban Plaintiff pursuant to any neutral policy or practice that she has applied in an evenhanded manner." J.A. 487. Rather, Randall suppressed speech that she found "offen[sive]," even though, as she now confesses, she had no idea whether Davison's allegations were true. *Id.* *Reilly* makes clear that there is no "*de minimis* exception" for a First Amendment violation of this kind.

Indeed, this case demonstrates why Randall is wrong to suggest that short-lived barriers to speech are harmless. Davison's Facebook comment was directly addressed to a core matter of public concern—public corruption—and was posted just hours after he challenged Randall about the same topic at an in-person town hall meeting. J.A. 469–70. Given the real-time nature of social media, the night of the meeting likely would be the precise time that interested Loudoun County residents might visit Randall's page to catch any follow-up conversation and engage with Randall and with one another.

Randall's act was thus in no way trivial. To the contrary, as the district court here concluded, "[b]y prohibiting [Davison] from participating in her online forum because she took offense at his claim that her colleagues in the County government had acted unethically, [Randall] committed a cardinal sin under the First Amendment." J.A. 488–89.

Randall certainly did the right thing by unblocking Davison the following morning. But Davison, and the First Amendment, were still harmed. To hold otherwise would suggest that officials may silence unwanted voices at just the moment when their voices are most likely to matter. Imagine an official engaging in selective blocking on a public forum the night before an election or a crucial public hearing. No one would believe that such action was rendered harmless by the official's unblocking of her opposition a half day later. Or consider the effect if officials could use temporary speech-blocking tactics as a "shot across the bow" or retribution. The First Amendment is particularly concerned with such government efforts to intimidate or impede disfavored speakers.

Randall's contrary argument rests on a conceptual error. The cases she cites stand only for the proposition that some government acts do not violate the Constitution at all because of their *de minimis* character. That is what the Court in *Ingraham v. Wright* meant when it said, in the course of a procedural due process analysis, that there are some impositions upon "liberty" that are "*de minimis*." 430 U.S. 651, 674 (1977). In context, the Supreme Court was simply reiterating that not all

"asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty or property.'" *Id.* at 672; *see also Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 415–16 (4th Cir. 2006) (rejecting the notion that allegedly retaliatory government conduct would actually chill protected activity).

In other words, the "*de minimis*" exception separates permissible governmental actions from unconstitutional ones; it does not place actual First Amendment injuries beyond the power of the courts to redress. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36–37, (2004) (O'Connor, J., concurring) ("There are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them."). And it is well established that courts may award nominal damages for First Amendment violations where the plaintiff's injuries were too slight or inchoate to warrant compensatory damages. *See, e.g.*, *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 428 (4th Cir. 2007). Randall's *de minimis* harm argument is inconsistent with these precedents and should be rejected.

III. There Is No Social Media Exemption from Established First Amendment Doctrines.

In this and other similar litigation, it has been asserted that applying established First Amendment principles to social media would be too unwieldy or inconsistent with the expressive or associative activities of public officials. In the case at bar, Randall implies that requiring her to leave her page open to all users (rather than being

able to allow some and silence others) would be "a form of compelled speech." Appellant's Br. 30.

These positions misunderstand the stakes and the reality of how these tools operate. Applying established First Amendment principles to social media fully preserves the ability of public officials to control their own speech and deter legitimate abuses of their social media pages. Consistent with the First Amendment, public officials may subject speech platforms to reasonable, viewpoint-neutral regulations in order to foster a healthy and robust exchange of ideas. *See Perry*, 460 U.S. at 46. State and local governments are fully capable of applying the principles underlying such regulations to social media, just as they have long applied those principles to physical spaces. There is thus no need whatsoever to exempt social media communication methods from the First Amendment.

With respect to their own speech interests, public officials can act in many ways on social media that are not subject to public forum analysis, just as they can in the physical world. They can chat with family, staff, and colleagues. They can hold closed sessions with select groups of individuals (subject to any applicable statutory sunshine law requirements). Public officials can also use some social media sites as a one-way megaphone, reserving this powerful new avenue of communication for their own messages.

Randall's social media practices are a case in point. As the district court described, Randall maintains a personal Facebook profile that she uses "to discuss

family matters." J.A. 469. The First Amendment does not apply to her activities on that page. Likewise, Randall has a "Friends of Phyllis Randall" Facebook page that she used during her campaign and "to discuss politics." J.A. 463, 469. To the extent that such a page is a closed platform for discussion with and among a limited group of people selected by Randall, the First Amendment imposes no restriction on her ability to admit speakers to the discussion based on their viewpoints.

Likewise, if Randall wants to create a website on which she addresses matters of public concern in her official capacity without allowing comments, there would be no First Amendment problem with her doing so. And, consistent with the First Amendment, Randall can post her own views on her "Chair Phyllis J. Randall" page. But public officials cannot—as Randall did—create a public forum and then block participation because they do not like the user's speech.

In short, applying traditional First Amendment principles to social media is fully consistent with preserving the expressive and associational rights of public officials. Those principles hold that Davison must be free to speak in the public forum that Randall created without experiencing viewpoint discrimination, and that Randall is free to respond to Davison or ignore him, as she sees fit. *See Knight Inst.*, 302 F. Supp. 3d at 575–77 (rejecting the argument that President Trump's personal First Amendment rights to choose with whom he associates and to whom he listens excuse his decision to block his critics on Twitter).

Application of First Amendment principles, moreover, does not leave public officials without appropriate means to regulate the social media accounts they use for public business. Public officials have long been permitted to subject speech platforms to reasonable, viewpoint-neutral regulations in order to foster a healthy and robust exchange of ideas. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information."). Indeed, many governmental bodies already have implemented policies to regulate their use of social media accounts.[10] Those policies forbid, for example, the posting of spam, content that violates copyright laws, and obscene, threatening, abusive, or harassing language.[11]

Application of such policies may present difficult First Amendment questions in certain circumstances. But this is nothing new: government officials have long applied viewpoint-neutral regulations to *physical* public fora. *See, e.g.*, *Hague v. Comm. for*

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[10] *See, e.g.*, Nat'l League of Cities, *Building Local Government Social Media Policies*, http://www.nlc.org/sites/default/files/RISC-2011-Social-Media-Policies.pdf (last visited July 9, 2018) (noting that "[m]any local government social media policies are posted online" and providing "building blocks" for such policies).

[11] It is for this reason that the *Morgan* court was incorrect in assuming that Kentucky's governor would be unable to limit Internet spam if his social media pages were deemed public fora. *See Morgan*, 298 F. Supp. 3d at 1012.

Indus. Org., 307 U.S. 496, 515–16 (1939) (plurality op.) ("The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all . . . ."). There is no reason to believe public officials are anything less than fully capable of devising reasonable time, place, and manner regulations for social media and certainly nothing that would warrant taking the dramatic step of authorizing public officials to engage in viewpoint discrimination where new social media communication methods are concerned.

The facts of this case underscore the point. Loudoun County, where Randall serves, is one of the many jurisdictions with an established social media policy. Randall, however, sought to "creat[e] her Facebook page outside of the County's official channels so as not to be constrained by" that policy, J.A. 463, even while using that same page "as a tool of governance," and engaging in substantial "efforts to swathe the 'Chair Phyllis J. Randall' Facebook page in the trappings of her office." J.A. 477–80. That Randall intentionally chose to circumvent county guidelines does not remotely suggest that local officials have difficulty forming or implementing viewpoint-neutral policies consistent with traditional First Amendment principles. This Court should thus reject the invitation to exempt an important new communicative channel from the First Amendment's protections.

CONCLUSION

For these reasons, the district court correctly concluded that Randall's Facebook page was a public forum, and that Randall violated Davison's First Amendment rights by excluding him from that forum on the basis of the viewpoint he expressed.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Rule 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,475 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in Microsoft Word 2007, using Garamond, a proportionately spaced typeface, in 14-point font.

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CERTIFICATE OF SERVICE

I certify that on this 18th day of July, the foregoing brief was served on all parties or their counsel of record through the CM/ECF system. All parties are appellate ECF filing users and will receive service via the appellate CM/ECF system.

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