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March 7, 2019

VIA CM/ECF

Catherine O'Hagan Wolfe, Clerk of Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

RE: Response to Plaintiffs' Rule 28(j) Letter
in *Knight First Amendment Institute at Columbia University, et al. v. Trump, et al.*, No. 18-1691

Dear Ms. Wolfe:

Defendants submit this letter under Rule 28(j) in response to plaintiff's letter calling the Court's attention to the Fourth Circuit's recent decision in *Davison v. Randall*, Nos. 17-2002 & 17-3004, 2019 WL 114012 (4th Cir. 2019), *as amended* (Jan. 9, 2019). In *Davison*, the Fourth Circuit held that the Chair of the Loudon County Board of Supervisors violated the First Amendment when she blocked a critic from commenting on her official Facebook page. That decision rests on two critical factors that are not present in this case.

First, the Fourth Circuit's finding of state action was premised significantly on the fact that the Facebook Page at issue was a "governmental official"—not a personal—account. *Id.* at *2, *8-*9. The Chair created the Facebook Page the day before she was sworn in, and designated it as a "governmental official" one, in contrast to the personal profile she also maintained. *Id.* at *2. Thus, unlike the longstanding @realDonaldTrump account at issue in this case, the Chair "created and administered" the Page "to further her duties as a municipal official," and her

control over that account was therefore "taken under color of state law." *Id.* at *8-*9.

Second, in holding that the Facebook Page constituted a public forum, the Fourth Circuit placed great emphasis on the fact that the Chair created the official Facebook Page specifically for the purpose of interacting with and receiving criticism from her constituents. *Id.* at *9-*13. Throughout the opinion, the court emphasized that the Chair had invited "ANY Loudon citizen" to make posts to the comments section of the Chair's page "on ANY issues, request, criticism, complement [sic] or just your thoughts." *Id.* at *2, *9, *11, *12, *13. The court found that, in doing so, the Chair "intentionally open[ed]" the page as a public forum. *Id.* at *9. By contrast, as explained in defendants' brief, @realDonaldTrump has not been intentionally opened as a forum for public expressive conduct. On the contrary, since its inception, Donald Trump has used the account to express his *own* views, not as a platform for others' speech.

Sincerely,

s/ Jennifer Utrecht
JENNIFER UTRECHT
U.S. Department of Justice
Appellate Staff, Civil Division

cc (via CM/ECF): Counsel of Record