KNIGHT
FIRST AMENDMENT
INSTITUTE
at Columbia University

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Jennifer Utrecht
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Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave NW Room 7710
Washington, DC 20530

Re: *Knight First Amendment Institute, et al. v. Trump, et al.*, Case No. 17-CV-5205 (NRB)

Dear Jennifer and Scott,

Thank you for letting us know that the four new individuals identified in our March 14 letter have been unblocked. However, we are concerned about the remaining blocked individuals listed in the attachment to our letter. These individuals continue to be blocked, and to date you have failed to respond to our arguments for why their continued blocking is unconstitutional.

We are writing to reiterate our request that defendants unblock the remaining individuals. If defendants do not intend to unblock these individuals, we ask that you confirm that fact so that we may consider their other options for obtaining relief, including through litigation. Because we believe that these individuals would almost certainly prevail in a legal challenge to the blocking, we urge defendants to unblock them voluntarily, in order to avoid time-consuming litigation and discovery.

In your email dated August 29, 2018, you stated that President Trump and Mr. Scavino had decided not to unblock (1) people whose accounts were blocked before President Trump was inaugurated, and (2) people who were not able to produce the tweet that prompted their blocking. As we explained in our previous letters, however, there is no justification for defendants' continuing to exclude these people from the public forum created by the @realDonaldTrump account. Defendants have never responded to the points we made in our previous letters, and under governing precedent, defendants are almost certain to lose if these two

categories of blocked individuals were forced to litigate their claims in order to get unblocked.

It is well established that once government officials establish a public forum open to speech by members of the general public, the government bears a heavy burden of justifying any decision to exclude certain individuals from that forum. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 267–68 (1981) (Having "created a forum generally open for use by student groups . . . the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms"); *City of Madison, Joint Sch. Dist. v. Wisc. Emp't Relations Comm'n*, 429 U.S. 167, 175 (1976) (although a State may conduct business in private session, "[w]here the State has opened a forum for direct citizen involvement," exclusions bear a heavy burden of justification); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 316–17 (1974) ("To insure that subject matter or content is not the sole basis for discrimination among forum users, all selective exclusions from a public forum must be closely scrutinized and countenanced only in cases where the government makes a clear showing that its action was taken pursuant to neutral 'time, place and manner' regulations, narrowly tailored to protect the government's substantial interest in preserving the viability and utility of the forum itself."). Here, defendants have offered *no* justification for blocking the remaining individuals on the spreadsheet, and defendants would almost certainly fail to meet the heavy burden of justifying the decision to continue to exclude these individuals from the @realDonaldTrump account in a future lawsuit.

As to the first category of blocked individuals, even if Donald Trump blocked them from what was then a private account, the continued blocking of these individuals by President Trump and Mr. Scavino constitutes state action. And regardless of the initial reason for the blocking, President Trump and Mr. Scavino would not be able to justify their decision to continue to block these individuals from participating in a public forum open generally to the public.

As to the second category, these individuals should not bear the burden of producing the tweet(s) that prompted their blocking before defendants will unblock them. To begin, you have never suggested in our correspondence that these individuals were blocked for any reason other than their viewpoint. Given the President's demonstrated practice of blocking individuals because of their viewpoint, it is fair to assume that these additional individuals were also blocked because the President did not like what they had to say, particularly in the absence of any evidence to the contrary. If these individuals were forced to litigate their claim that they should be unblocked, they would be able to make out a *prima facie* showing that excluding them from a public forum violates the First Amendment. For the reasons already discussed, defendants would need to

meet their heavy burden of providing clear evidence that the individuals were blocked for reasons unrelated to their viewpoints—a burden defendants almost certainly could not carry. And in order to try and meet that burden, President Trump and Mr. Scavino would be required to provide discovery as to the reason for why each individual was blocked.

For these reasons, we are making a final request that defendants unblock the remaining individuals listed on our spreadsheet. If it is defendants' position that they will not unblock these individuals short of litigation and civil discovery, please let us know and we will proceed to evaluate their options, including a new constitutional lawsuit.

Sincerely,



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