18-1691

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, REBECCA BUCKWALTER, PHILIP COHEN, HOLLY FIGUEROA, EUGENE GU, BRANDON NEELY, JOSEPH PAPP, NICHOLAS PAPPAS

Plaintiffs–Appellees

v.

DONALD J. TRUMP, in his official capacity as President of the United States, DANIEL SCAVINO, in his official capacity as White House Director of Social Media and Assistant to the President

Defendants–Appellants

SARAH HUCKABEE SANDERS, in her official capacity as White House Press Secretary

Defendant

On appeal from the United States District Court for the Southern District of New York — No. 1:17-CV-5205 (Buchwald, J.)

PLAINTIFFS–APPELLEES' RESPONSE TO DEFENDANTS–APPELLANTS' PETITION FOR REHEARING EN BANC

Jessica Ring Amunson
Tassity Johnson
Tali R. Leinwand
Jenner & Block
1099 New York Avenue NW, Suite 900
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com

Jameel Jaffer
Katie Fallow
Carrie DeCell
Alex Abdo
Meenakshi Krishnan
Knight First Amendment Institute at Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
(646) 745-8500
jameel.jaffer@knightcolumbia.org

Attorneys for Plaintiffs–Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel certifies that Plaintiff–Appellee the Knight First Amendment Institute at Columbia University has no parent corporations and that no publicly held corporation owns 10 percent or more of its stock. The Knight Institute is a non-profit, non-partisan organization governed by a nine-member board of directors, five of whom are associated with Columbia University.

/s/ Jameel Jaffer
Jameel Jaffer

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The panel's decision is correct and consistent with this Court's and the Supreme Court's state action and public forum precedents. 3

A. The panel correctly held that the @realDonaldTrump account reflects state action. 3

B. The panel correctly held that Defendants violated the First Amendment by blocking the Individual Plaintiffs from the @realDonaldTrump account. 10

II. This case is not "exceptional" within the meaning of Rule 35. 12

CONCLUSION 14

CERTIFICATE OF COMPLIANCE 15

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

Cases

Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001) 4, 8

Campbell v. Reisch, No. 2:18-cv-4129, 2019 WL 3856591 (W.D. Mo. Aug. 16, 2019) 13

Colombo v. O'Connell, 310 F.3d 115 (2d Cir. 2002) 8, 9

Davison v. Randall, 912 F.3d 666 (4th Cir. 2019) 13

Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019) 9, 10

One Wis. Now. v. Kremer, 354 F. Supp. 3d 940 (W.D. Wis. 2019) 14

Pitchell v. Callan, 13 F.3d 545 (2d Cir. 1994) 3, 9

United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000) 11

West v. Atkins, 487 U.S. 42 (1988) 3

Windom v. Harshbarger, No. 1:19-cv-24, 2019 WL 2397809 (N.D. W. Va. June 6, 2019) 13

Zherka v. DiFiore, 412 F. App'x 345 (2d Cir. 2011) 9

SUMMARY OF ARGUMENT

The panel correctly held that President Trump and his White House staff operate the @realDonaldTrump Twitter account in an official capacity, that their official operation of the account has established a public forum for expression, and that their blocking of critics from that forum violates the First Amendment's prohibition on viewpoint discrimination. Defendants now challenge the panel's decision based on arguments recycled from their original briefing on appeal. But Defendants do not and cannot meet either of Rule 35's requirements for en banc review.

First, the panel decision is consistent with both this Court's and the Supreme Court's precedents. As required by these precedents, the panel first analyzed the threshold question of whether, in blocking the Individual Plaintiffs,[1] Defendants acted in a governmental capacity. Op. 15. To answer this question, the panel appropriately looked to the parties' joint stipulation of facts, which describes Defendants' operation and use of the account in significant detail. Based on the joint stipulation, the panel concluded that President Trump and his staff, including Defendant Daniel Scavino, the White House social media director, use the

[1] In this brief, "Individual Plaintiffs" refers to the seven people whose blocking from the @realDonaldTrump account led to this lawsuit. "Plaintiffs" refers to all eight appellees listed in the caption, including the Knight First Amendment Institute at Columbia University ("Knight Institute").

@realDonaldTrump account to conduct the business of the presidency. The panel properly rejected Defendants' argument, pressed again here, that Defendants' blocking of the Individual Plaintiffs can be disaggregated from Defendants' operation of the account in an official capacity. Defendants do not seriously contend that the panel applied the wrong legal standard; their complaint is that the panel got it wrong on the facts. But, as detailed below, the panel's conclusion that Defendants operate the @realDonaldTrump account as a tool of governance is more than justified by Defendants' own admissions.

Second, this case is not "exceptional" within the meaning of Rule 35. While the principles at stake here are certainly important, the panel's faithful application of long-established doctrine to a new factual context does not warrant the exceptional step of en banc review. As the panel emphasized, determining whether a public official's use of social media constitutes government action requires a "fact-specific inquiry." Op. 20. The panel set forth a non-exhaustive list of factors to guide this inquiry, affording district courts both guidance and flexibility to evaluate the facts before them. In several rulings issued before and since the panel's decision, other courts have identified similar factors in considering the applicability of the First Amendment to other public officials' social media accounts, demonstrating that courts are capable of managing the fact-specific inquiry that the panel described. Moreover, Defendants' suggestion that the mere involvement of the President of the

United States in this litigation warrants rehearing en banc lacks any precedential support.

In sum, Defendants fail to meet the standards for rehearing en banc, and, accordingly, this Court should deny Defendants' petition.

ARGUMENT

I. The panel's decision is correct and consistent with this Court's and the Supreme Court's state action and public forum precedents.

A. The panel correctly held that the @realDonaldTrump account reflects state action.

Defendants' primary argument for rehearing en banc is that the @realDonaldTrump account is a "personal social media account," and that accordingly the President's decision to block the Individual Plaintiffs from the account could not have involved state action. Petition at 1. The panel correctly rejected this argument.

In considering whether an official's act was a "personal pursuit" or instead reflected state action, "courts look to the nature of the officer's act, not simply his duty status." *Pitchell v. Callan*, 13 F.3d 545, 548 (2d Cir. 1994). Generally, a government employee who acts in her official capacity or in furtherance of her official responsibilities is a state actor for purposes of enforcing constitutional rights. *West v. Atkins*, 487 U.S. 42, 50 (1988). In determining whether a government employee acts in her official or private capacity, courts evaluate whether the conduct

is "fairly attributable" to the government. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). The fundamental question is whether there is a sufficiently "close nexus between the [government] and the challenged action." *Id.* (quoting *Jackson v. Metro Edison Co.*, 419 U.S. 345, 351 (1974)).

Applying this framework, the panel rightly concluded that "overwhelming" and undisputed factual evidence in the record shows that the @realDonaldTrump account is used as an "important tool of governance and executive outreach" and reflects state action. Op. 15, 19. As the panel observed, Defendants' position that the President's use of the @realDonaldTrump account during his presidency is private "founders in the face of the uncontested evidence in the record of substantial and pervasive government involvement with, and control over, the account." *Id.* at 17.

The panel observed that the webpage associated with the @realDonaldTrump account bears all the indicia of an official account. The panel noted that the account is "presented by the President and the White House staff as belonging to, and operated by, the President," and that the account is registered to "Donald J. Trump, '45th President of the United States of America, Washington, D.C.'" *Id*. It noted that the President describes his use of the account as "Modern Day Presidential," and that Daniel Scavino, the White House social media director, has described the account as a means for the President to communicate directly with "you, the American people." *Id.* at 17–18. It recognized that the @WhiteHouse account, "an

undoubtedly official Twitter account," informs Twitter users to "[f]ollow for the latest from @POTUS @realDonaldTrump and his Administration." *Id.* at 18. It also observed that the @POTUS account frequently retweets—or republishes—tweets from the @realDonaldTrump account, and that the National Archives and Records Administration considers the President's tweets from the @realDonaldTrump account to be "official records that must be preserved under the Presidential Records Act." *Id.*

The panel further observed that the President uses the account almost daily "as a channel for communicating and interacting with the public about his administration." *Id.* On the @realDonaldTrump account, the panel observed, the President "announce[s] 'matters related to official government business, including high-level White House and cabinet-level staff changes as well as changes to major national policies," "engage[s] with foreign leaders and [] announce[s] foreign policy decisions and initiatives," and "uses the 'like,' 'retweet,' 'reply,' and other functions of the [a]ccount to understand and to evaluate the public's reaction to what he says and does." *Id.* at 18–19. The panel also emphasized a fact that Defendants gloss over in their petition: the President "utilizes White House staff to post tweets and to maintain" the @realDonaldTrump account. *Id.* at 18. In highlighting this fact, the panel recognized that the President relies on White House staff and resources to maintain his near-daily channel of communication with the public. *Id.* Finally, the

panel rejected Defendants' argument—pressed again in their petition—that the @realDonaldTrump account is a private account merely because it was opened in 2009 as a personal account and will presumably revert to a personal account after the President leaves office. As the panel underscored, this case "concerns what the [a]ccount is now," and "temporary control by the government can still be control for First Amendment purposes." *Id.* at 6, 17.

As the panel rightly concluded, this mountain of evidence "overwhelming[ly]" establishes that the @realDonaldTrump account reflects state action. *Id.* at 15. In their petition, Defendants do not contest any of this overwhelming evidence—and they could not, given that they stipulated to all of the relevant facts below. Instead, Defendants reiterate their claim that the specific act of blocking is not state action even if the account itself reflects state action. The panel rejected this argument for good reason.

Defendants argue that their blocking of the Individual Plaintiffs cannot have been state action because *all* Twitter users have the ability to block other users from their accounts. Petition at 9–10. But the crucial point, as the panel observed, is that the question of whether the blocking reflected state action cannot be answered in a vacuum; it matters that the Individual Plaintiffs were blocked from an account that reflects state action. As the panel explained, "the fact that any Twitter user can block another account does not mean that the President somehow becomes a private person

when he does so." Op. 19. Indeed, Defendants' contrary theory would permit public officials to block users on the basis of viewpoint even from accounts that are indisputably official—like the @POTUS account—and even to block critics on the basis of viewpoint from offline public forums. But the courts have never suggested that a city councilor (for example) may eject her critics from a public meeting because a private citizen has the right to eject her critics from a backyard barbecue. Or to address Defendants' analogy, if President Bush or President Roosevelt had opened their private property to the general public for the purpose of hosting an open public meeting about matters relating to government, it would have violated the First Amendment for them to have excluded individuals from the meeting based on viewpoint. Petition at 10. Neither a private individual's ability to block users nor the private nature of the property is dispositive, and accepting the government's argument here would make nonsense of public forum doctrine.

In any event, the government's argument that the President blocked the Individual Plaintiffs in his personal capacity fails even if one focuses myopically, as Defendants propose the panel should have done, on the blocking itself. As the joint stipulation makes clear, the President blocked the Individual Plaintiffs immediately after they responded critically to tweets about the President's official actions or policies. *See, e.g.*, Stip. ¶¶ 5, 49 (A44, A61) (Plaintiff Dr. Gu was blocked after responding to a tweet by President Trump discussing his approval rating by tweeting,

"Covfefe: The same guy who doesn't proofread his Twitter handles the nuclear button."); *id.* ¶¶ 6, 50 (A44, A61–A62) (Plaintiff Neely was blocked after Neely responded to a tweet by President Trump relating to the opening of a new coal mine by tweeting, "Congrats and now black lung won't be covered under #TrumpCare.").

In other words, the Individual Plaintiffs were blocked while responding to tweets that themselves reflected state action, and accordingly there is a "close nexus" between Defendants' official status and the blockings being challenged. *Brentwood Acad.*, 531 U.S. at 295 (stating that state action exists where "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself'" (quoting *Jackson*, 419 U.S. at 351)).

The panel decision is consistent with this Court's state action precedents. The cases the government cites are inapposite because in those cases the Court found state action to be absent where the government official had engaged in off-duty conduct unrelated to official matters. For example, in *Colombo v. O'Connell*, 310 F.3d 115, 117–18 (2d Cir. 2002) (per curiam), the Court concluded that the school superintendent did not act under color of law when he privately retained a lawyer to write a letter threatening to privately sue the plaintiff. Importantly, the plaintiff in *Colombo* did not claim that the school superintendent "acted in an official capacity" or that he "employed or abused any power of his office." *Id.* at 118. In fact, as the Court noted, plaintiff's counsel "fail[ed] entirely even to claim on appeal that [the

school superintendent] acted under color of state law in his capacity as an officer of the state." *Id.*

Similarly, in *Pitchell*, the Court concluded that an off-duty police officer did not act under color of law when, drunk in his own home, he used his personal weapon to shoot a guest. 13 F.3d at 548. Likewise, in *Zherka v. DiFiore*, 412 F. App'x 345, 347 (2d Cir. 2011), the Court held that a district attorney did not act under color of law when calling from a private cell phone to complain about an article published in the plaintiff's newspaper. Unlike this case, *Pitchell* and *Zherka* involved off-duty government agents acting in a wholly personal capacity, and not under the color of law. Those cases expressly reaffirmed the principle that government agents act in an official capacity when they "invoke[] the real or apparent power" of their offices. *Pitchell*, 13 F.3d at 48. This case falls into that category. Defendants blocked the Individual Plaintiffs from an account that is used as an extension of the President's office, and on the basis of speech that was about the President's official acts. The panel correctly concluded that "the nature of the [President's] act" established state action. *Id.*

The panel decision is also fully consistent with the Supreme Court's recent ruling in *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019). In that case, the Supreme Court ruled that a private entity's provision of a forum for speech does not, on its own, transform the entity into a state actor subject to the First

Amendment. *Id.* at 1926. However, the Court noted that if a governmental actor "itself operate[d] the public access channels . . . the First Amendment might then constrain the local government's operation of the public access channels." *Id.* at 1934. This is exactly the scenario posited by *Halleck*. As the panel correctly concluded, the President of the United States, a quintessential state actor, acts in his official capacity when he and his staff operate the @realDonaldTrump account for official purposes and using government resources.

B. The panel correctly held that Defendants violated the First Amendment by blocking the Individual Plaintiffs from the @realDonaldTrump account.

After concluding that Defendants' blocking of the Individual Plaintiffs constituted state action, the panel correctly held that (1) Defendants' use of the @realDonaldTrump account created a public forum, and (2) by blocking the Individual Plaintiffs from that forum, Defendants violated the First Amendment. Defendants' attempt to attack these conclusions also fails.

First, Defendants claim that the panel erred in concluding that the @realDonaldTrump account was a public forum because the account was merely a means of conveying the President's own views. Petition at 13. As the panel observed, however, Defendants "intentionally opened [the @realDonaldTrump account] for public discussion when the President, upon assuming office, repeatedly used the [a]ccount as an official vehicle for governance and made its interactive features

accessible to the public without limitation." Op. 23. The panel properly concluded that these actions created a public forum. *Id.*

Second, Defendants are also incorrect to argue that the blocking of the Individual Plaintiffs cannot constitute a First Amendment violation because blocking has only an "incidental effect" on the blocked user's ability to be heard. Petition at 14. As the panel rightly concluded, blocking "burden[s] the Individual Plaintiffs' ability to converse on Twitter with others who may be speaking to or about the President." Op. 25. Once the President elects to make the interactive features of the @realDonaldTrump account open to the public, he "is not entitled to censor selected users because they express views with which he disagrees." *Id.* It is axiomatic, of course, that burdens on speech may violate the First Amendment even if they do not have the effect of squelching speech altogether. *Id.* at 26 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (stating that government "may no more silence unwanted speech by burdening its utterance than by censoring its content"); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000) ("The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.").

For all of these reasons, the panel correctly concluded that the @realDonaldTrump account represents state action, that the account is subject to the

First Amendment, that the account constitutes a public forum, and that the blocking of the Individual Plaintiffs violates the First Amendment.

II. This case is not "exceptional" within the meaning of Rule 35.

While the First Amendment principles at issue in this case are important, the case is not "exceptional" within the meaning of Rule 35. Contrary to the government's contention, the case does not warrant rehearing en banc simply because the President is a party, or because the panel's opinion will guide other courts. As an initial matter, the government cites no authority at all for the proposition that the Court should grant en banc review whenever the President is a party, and Plaintiffs are not aware of any such authority. Neither Rule 35 nor the Second Circuit provides for rehearing en banc based solely on the identity of the litigant who lost before the panel.

Nor is en banc review warranted simply because the panel's opinion will guide other courts considering public officials' use of social media. As the panel noted, "in most instances" the question of whether a public official's use of a social media account triggers the First Amendment will require a "fact-specific inquiry." Op. 20. The panel set forth a non-exhaustive list of factors to guide this inquiry, affording district courts both guidance and flexibility to evaluate the facts before them. In several rulings issued before and since the panel's decision, other courts have identified similar factors in considering the applicability of the First Amendment to

other public officials' social media accounts, demonstrating that courts are capable of managing the "fact-specific" state action inquiry that the panel described.

For example, in *Davison v. Randall*, 912 F.3d 666, 673 (4th Cir. 2019), the Fourth Circuit held that the chair of a local board of supervisors, Phyllis Randall, violated the First Amendment rights of a constituent when she temporarily blocked the constituent from posting comments to her "Chair Phyllis J. Randall" Facebook page. The Fourth Circuit relied on criteria similar to the ones the panel relied on here in determining that Chair Randall's use of her Facebook page reflected state action. Thus, the court looked to Chair Randall's use of the Facebook page "as a tool of governance" by "provid[ing] information to the public about her and the [local] Board's official activities" and "solicit[ing] input from the public on policy issues she and the [local] Board confront." *Id.* at 680. Chair Randall, like the President in this case, "clothed" the relevant social media account in the "power and prestige" of her office. *Id.* at 681. The Fourth Circuit concluded that Chair Randall's blocking of the constituent, based on his criticism of her policies, also stemmed from Chair Randall's "official status." *Id.* (quoting *Rossignol v. Voorhaar*, 316 F.3d 516, 524 (4th Cir. 2003)). Other cases have used essentially the same analytical framework. *See Campbell v. Reisch*, No. 2:18-cv-4129, 2019 WL 3856591, at *8 (W.D. Mo. Aug. 16, 2019); *Windom v. Harshbarger*, No. 1:19-cv-24, 2019 WL 2397809, at *6–7 (N.D. W. Va. June 6, 2019); *One Wis. Now. v. Kremer*, 354 F. Supp. 3d 940, 953

(W.D. Wis. 2019). These cases undermine Defendants' claim that courts are ill-equipped to determine whether public officials' use of social media reflects state action.

CONCLUSION

For the reasons set forth above, this Court should deny Defendants' petition for rehearing en banc.

Dated: September 27, 2019

Respectfully submitted,

/s/ Jameel Jaffer

Jameel Jaffer
Katie Fallow
Carrie DeCell
Alex Abdo
Meenakshi Krishnan
Knight First Amendment Institute at
Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
(646) 745-8500
jameel.jaffer@knightcolumbia.org

Jessica Ring Amunson
Tassity Johnson
Tali R. Leinwand
Jenner & Block
1099 New York Avenue NW, Suite 900
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the word limit of Federal Rule of Civil Procedure 32(a)(7)(B) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 3,203 words, and that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6).

Dated: September 27, 2019

/s/ Jameel Jaffer
Jameel Jaffer

CERTIFICATE OF SERVICE

I, Jameel Jaffer, an attorney, hereby certify that on September 27, 2019, I caused the foregoing brief to be filed with the Court and to be served upon counsel of record via the Court's ECF email system.

Dated: September 27, 2019

/s/ Jameel Jaffer
Jameel Jaffer