No. 19-2994

IN THE

United States Court of Appeals for the Eighth Circuit

MIKE CAMPBELL,

Plaintiff-Appellee,

v.

CHERI TOALSON REISCH,

Defendant-Appellant.

On Appeal from the United States District Court for the Western District of Missouri

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BRIEF FOR DEFENDANT-APPELLANT

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SUMMARY OF THE CASE

When Appellant Cheri Toalson Reisch posted a Twitter message about her opponent in a re-election race for the Missouri House of Representatives, Appellee Mike Campbell saw the message, disagreed with it, and re-posted to his own Twitter account a message critical of Reisch. Reisch then "blocked" Campbell on Twitter, which prevented him from directly replying to Reisch's Twitter messages or from viewing them when logged into his account. Campbell sued, alleging a First Amendment violation.

Following a bench trial, the district court found in favor of Campbell under 42 U.S.C. § 1983, finding state action and a violation of Campbell's First Amendment rights. This was error. First, there was no state action because Reisch did not act with any authority vested unto her by virtue of her office. Moreover, she was an individual legislator engaged in campaign speech. Because there is no state action, this Court need not reach the constitutional question; but if it does, the district court erred because a "forum analysis" does not apply.

Due to the complexity of these emerging issues, Appellant respectfully requests oral argument of 15 minutes per side.

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JURISDICTIONAL STATEMENT

The district court had federal-question jurisdiction over this case pursuant to 28 U.S.C. § 1331. Following a bench trial, the district court entered its Findings of Fact and Conclusions of Law on August 16, 2019. *See* Add. 1-16. Appellant timely filed her Notice of Appeal on September 13, 2019. J.A. 293. Following the parties' joint motion for entry of judgment in a separate document (J.A. 294-95), the district court entered a Clerk's Judgment on December 18, 2019 (J.A. 296). In the event Appellant's notice of appeal was premature in advance of this Clerk's Judgment, the notice of appeal is deemed filed on the date of the entry of judgment. *See* Fed. R. App. P. 4(a)(2). Thus, the notice is timely in either event.

This Court has jurisdiction under 28 U.S.C. § 1291.

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STATEMENT OF ISSUES

1. Whether the district court erred in finding that Reisch—an individual state legislator engaged in campaign speech—acted under color of state law in "blocking" Campbell on Twitter even though she did not exercise power possessed by virtue of state law, nor was it made possible only because she is clothed with the authority of state law.

   Magee v. Trs. of Hamline Univ, Minn., 747 F.3d 532 (8th Cir. 2014).

   King v. Friends of Kelly Ayotte, 860 F. Supp. 2d 118 (D.N.H. 2012)

   Minnesota State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271 (1984)

2. Whether this Court should reach the constitutional question, and if it does, whether the district court erred in applying a "forum analysis" to this case, even though a private entity owns the "forum," the private entity has primary control over who can access the "forum," and the private entity controls what can be said in the "forum."

   Bailey v. Feltmann, 810 F.3d 589 (8th Cir. 2016)

   Morgan v. Bevin, 298 F. Supp. 3d 1003 (E.D. Ky. 2018)

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

   Minnesota State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271 (1984)

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STATEMENT OF THE CASE

In September 2015, Appellant Cheri Toalson Reisch announced her candidacy for the 44th District of the Missouri House of Representatives. Add. 3-4, ¶¶ 22-23. Contemporaneous with that announcement, Resich created a Twitter account. Add. 3, ¶ 22. She made her first post on Twitter on September 21, 2015, stating: "I am proud to announce my candidacy to represent Missouri's 44th District. Let's work together and create opportunities for jobs and education." Add. 3-4, ¶¶ 23.

With more than 300 million users worldwide and 70 million in the United States, Twitter is a social media platform where users can post short messages called "tweets" that are available to the general public. Add. 2, ¶¶ 2-3. Each Twitter user has a unique username (called a "handle"), which displays with an "@" symbol followed by the username. *Id.* ¶ 6. A user can "follow" other users by clicking a "follow" button on the other user's page, and the other user's tweets then automatically appear in the user's "feed," which is a continuously-updating scroll of tweets. *Id.* ¶¶ 7-8. A user may also republish ("retweet") another person's tweets to her own followers, and she can comment on the

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tweets of other users. *Id.* ¶ 9. At any time, users can see a log of their own past tweets, comments, and retweets, along with comments to, or retweets of, the content they published themselves. *Id.* ¶ 10.

Twitter also allows its users to "block" other users from "following" their tweets. Add. 3 ¶ 12. If the blocked user attempts to follow the blocking user (or if the blocked user is logged into her account and attempts to view the blocking user's page), the blocked user will see a message indicating they are blocked from following that account or viewing tweets associated with that account. *Id.* ¶ 13.

When Reisch launched her campaign and her Twitter account, she chose the Twitter handle "@CheriMO44," referring to the district for which she was campaigning. *Id.* ¶ 15-16. Resich's Twitter page identifies herself as "Christian, MO State Rep 44th District, Mother, Grandmother." *Id.* ¶ 17. The profile photos show Resich on the House floor. *Id.* ¶¶ 20-21. Reisch's Twitter page includes a link to cheri44.com, which is Reisch's campaign webpage. *Id.* ¶ 19. Resich testified that constituents can reach her in person, by phone, or by email. App. 6, ¶ 30. She further testified that she does not consider

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Twitter a way in which she communicates with her constituents, or a medium through which she invites communication. *Id.* ¶ 31.

After Reisch launched her campaign and her Twitter account, she used Twitter to seek campaign donations, and otherwise used it to message about her campaign. *See* Add. 4, ¶¶ 24, 26. In fact, throughout the first ten months of 2016, Reisch posted "dozens of tweets about her campaign for the Missouri House, frequently using the hashtags #MO44 and #TeamCheri." *Id.* ¶ 26. On November 8, 2016, Resich announced on Twitter her election to the Missouri House of Representatives.[1] *Id.* ¶ 27.

After her election, Reisch continued to Tweet, describing her legislative accomplishments and successes. Several examples of these tweets are chronicled in the district court's order (Add. 4-6, ¶¶ 28(a)-(n)), and here Reisch will include a few illustrative examples to provide context for the Court. In March 2017, Resich retweeted a post from @MOHouseGOP, stating: "We are proud to deliver results during the first half of the session that will bring job growth to MO. #moleg." Add.

[1] The district court's order contained a minor typographical error indicating that this occurred in 2018, but the correct date is November 8, 2016.

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5, ¶ 28(c). In May 2017, Reisch tweeted a photograph of herself and the Speaker of the House with the caption, "I promised my neighbors in #MO44 that I'd work tirelessly to improve our #economy. I'm making good on that promise." *Id.* ¶ 28(d). In June 2017, Reisch tweeted about passage of the Real ID bill. *Id.* ¶ 28(e). In August 2017, Reisch tweeted: "I testified before the Senate today to repeal prevailing wage. Saves taxpayers $, helps schools, cities, etc." *Id.* ¶ 28(g). In December 2017, Reisch tweeted her legislative scorecard from United for Missouri, stating: "I scored an A. Not bad for a Freshman." Add. 6, ¶ 28(k). And in June 2018, Reisch tweeted: "Accomplished much in my 1st 2 years, ready for the next 2." *Id.* ¶ 28(n).

On June 22, 2018, Resich tweeted about her appearance at a Boone County, Missouri Farm Bureau event. *Id.* ¶ 33. Specifically, she tweeted: "Sad my opponent put her hands behind her back during the Pledge." *Id.* That tweet referenced Reisch's opponent in her upcoming re-election race, Maren Jones. *Id.* The next day, another state representative commented on Reisch's tweet, stating, "Maren's father was a Lieutenant in the Army. Two of her brothers served in the military. I don't question [Maren's] patriotism. That's a low blow and

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unacceptable from a member of the Boone County delegation." Add. 6-7, ¶ 34. Appellee Mike Campbell saw this representative's tweet, and he retweeted it on his own account. Add. 7, ¶ 35. Sometime after he did so, he received notice that he had been blocked from Reisch's Twitter account. *Id.* ¶ 38. Campbell was therefore unable to directly reply to Reisch's tweets and was also unable to join into a conversation with Reisch's other followers in the comment section below Reisch's original tweet about her opponent. *Id.* ¶ 41.

Campbell sued Reisch under 42 U.S.C. § 1983 alleging a violation of his First Amendment rights, seeking declaratory and injunctive relief. J.A. 083-101. He sought a declaration that Reisch's act blocking him on Twitter "is a viewpoint-based restriction of speech in a designated public forum in violation of the First and Fourteenth Amendments." J.A. 091. He also sought a permanent injunction preventing Reisch from blocking his Twitter account from her page based on the content or viewpoint of his speech, and also preventing Reisch from blocking any other user based on the content or viewpoint of their speech. J.A. 092.

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Following a bench trial, the district court found that Campbell proved an actionable claim under § 1983 and was entitled to declaratory and injunctive relief. Add. 1-16. Specifically, the district court found that the "interactive space" below Reisch's tweets is subject to First Amendment "forum analysis" (Add. 9-12); that this space is a "designated public forum" (Add. 12-14); and that Reisch's "blocking" of Campbell violated the First Amendment (Add. 14-15). Finally, the district court found that Reisch acted under color of state law in blocking Campbell. Add. 15-16.

This appeal follows.

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SUMMARY OF THE ARGUMENT

To establish liability under 42 U.S.C. § 1983, Campbell must establish that Reisch (1) acted under color of state law, (2) to deprive him of a constitutional right. The district court erred on both elements.

Although the district court spent only two paragraphs discussing the "state action" element, that is the primary basis upon which this case fails. Campbell alleges that Reisch violated his First Amendment rights when she blocked him on Twitter. Thus, Campbell must prove she did so by exercising power she possessed due to state law and made possible *only* because she was clothed with the authority of state law. Of course, that is not the case here, where neither state law nor Reisch's "authority" has any bearing whatsoever on her ability to block users on Twitter. That should be the end of the inquiry.

Even if this Court expands the state-action inquiry, however, to look at the nature of Reisch's Twitter account as a whole, Campbell still fails to prove state action. As contrasted with executive officials or government employees actually using Twitter to take official acts, Reisch is an individual state legislator. She has no ability to take official acts via Twitter, nor is there any evidence in the record she did

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so. Instead, Reisch was engaged in campaign speech, discussing her legislative accomplishments and other achievements. Such speech is plainly protected by Reisch's First Amendment rights, and she has the ability to curate that message and its recipients. Thus, even under this broader view of the state-action analysis (one much broader than this Circuit has ever endorsed) Reisch's blocking of Campbell on Twitter was not an act under color of state law. This Court should reverse the district court's judgment on this basis alone.

Because there is no state action, this Court should avoid the constitutional question of whether any space on Twitter is subject to a forum analysis, and if so, what type of forum analysis should apply. In the event the Court decides to address it, the district court erred in finding the "interactive space" below Reisch's tweets is a "designated public forum." Forum analysis—which almost always involves property owned by the government—is simply not applicable here. While it is possible for forum analysis to apply to property the government controls (but does not own), that is done only in circumstances where the government controls access to the forum as well as the speech that can occur there.

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Here, neither is true. Twitter controls everyone's access to the "forum" and maintains the unilateral ability to decide who can and who cannot participate on the platform in the first place, a privilege it can revoke for any reason or no reason at all. Further, Twitter even controls the *content of the speech* that can occur in this supposedly "public forum." Indeed, Twitter already enforces content regulations much more restrictive than what the First Amendment protects. A forum analysis simply cannot apply in this circumstance. Finally, an individual state legislator, such as Reisch, has never been found to have the authority to open up a government forum for speech on her own accord. For all these reasons, the district court's First Amendment analysis is flawed as well, and this Court should reverse its judgment accordingly.

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ARGUMENT

Campbell asserts his claim under 42 U.S.C. § 1983, "which imposes liability for certain actions" that are (1) "taken under color of law"; and (2) "deprive a person of a right secured by the Constitution and laws of the United States." *Magee v. Trs. of Hamline Univ, Minn.*, 747 F.3d 532, 535 (8th Cir. 2014). Most cases similar to this one center their analysis on the second element—i.e., whether Twitter is subject to a forum analysis; if so, what type of "forum" is at issue; and what actions within that forum, if it exists, are unconstitutional.

In this case, however, the proper focus is on the first element, because Reisch did not act under color of state law. She did not derive any authority from her official position that provided her the ability to block[2] Campbell on Twitter, nor is that an act within her official duties

[2] To be clear, Campbell is still free to post whatever he wants about Reisch on his own Twitter page, and he may still view all of Reisch's tweets when not logged into his account. He may also comment on Twitter messages that other users have posted in direct response to Reisch. He is prevented only from viewing Reisch's page while logged in to his account, as well as from directly replying immediately below Reisch's tweets on her page. While Reisch recognizes that this distinction is not dispositive of the case, the clarification is important for context because "the term 'block' conjures an image much harsher than reality. No one is being blocked from speaking on Twitter . . . ." *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1013 (E.D. Ky. 2018).

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as a state legislator. Further, *even if* the content of the speech at issue is considered when determining whether an official is acting under color of state law (it shouldn't be), Reisch still prevails. In contrast to other cases involving *executive branch* officials found to be performing official functions of their jobs through Twitter, Reisch is an individual *legislator* engaged in campaign activity. As discussed below, these are critical distinctions that have a meaningful impact on the color-of-state-law analysis.

Because Reisch was not acting under color of state law, this Court can, and should, avoid the more complicated constitutional question of what First Amendment protections apply to comment sections on Twitter pages. In the event the Court decides to reach this issue, the district court erred in finding that Reisch opened up a designated public forum that provided Campbell with First Amendment protections. As a legislator engaged in campaign activity on a private platform owned and controlled by a private corporation, Reisch did not create any sort of a public forum. This Court should reverse for this reason as well.

Because the decision below followed a bench trial, this Court reviews the district court's factual findings for clear error and reviews

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the conclusions of law de novo. *Meecorp Capital Markets, LLC v. PSC of Two Harbors, LLC*, 776 F.3d 557, 562 (8th Cir. 2015). "Mixed questions of law and fact that require the consideration of legal concepts are also reviewed de novo." *Id.* (internal quotation marks and citations omitted).

I. Reisch Did Not Act Under Color of State Law.

"A public employee acts under color of law when [s]he exercise[s] power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Magee*, 747 F.3d at 535 (internal quotation marks and citations omitted) (second alteration in original); *see also West v. Atkins*, 487 U.S. 42, 49 (1988); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). "The defendant must act or purport to act 'in the performance of official duties, even if [s]he oversteps [her] authority and misuses power.'" *Id.* (quoting *Johnson v. Phillips*, 664 F.3d 232, 239-40 (8th Cir. 2011)). "Acts of officials in the ambit of their personal pursuits are plainly excluded from Section 1983 liability." *Id.* (internal quotation marks and citations omitted). "By enforcing that constitutional boundary between the governmental and the private, the state-action doctrine protects a

robust sphere of individual liberty." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

The district court dedicated only two paragraphs to analyzing whether Reisch acted under color of state law. Add. 15-16. In that short analysis, the district court recounted facts regarding attributes of the Twitter account itself, the campaign functions of the Twitter account, and noted that Reisch used the account to "tweet *about* her work as a public official." *Id.* at 16 (emphasis added). This analysis misses the mark for several reasons.

A. Reisch did not exercise any power she possessed by virtue of state law or her authority as an individual state legislator.

To begin, the district court improperly focused on attributes of the Twitter account itself. The correct scope of analysis is whether the specific action alleged to be unconstitutional—Reisch's act of blocking Campbell—meets this Court's legal test for an action under color of state law. "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the

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wrongdoer is clothed with the authority of state law." *Magee*, 747 F.3d at 536.

Of course, nothing about Reisch's role as a state legislator gave her the authority or the ability to block Campbell; Twitter's terms of service did that. There is no state law that provides Reisch some unique ability to block Campbell; again, Twitter's terms of service did that. And it certainly cannot be said that Reisch's act of blocking Campbell was made possible "only because" she is "clothed with the authority of state law." Simply put, Campbell's claim must fail at this early juncture because there is no evidence in the record to establish that Reisch exercised power she possessed only via her role as a state legislator in order to block Campbell on Twitter. Because Campbell fails this Circuit's test to establish an action "under color of state law," the district court's decision should be reversed.

Magee provides a useful corollary. There, Magee, a university professor, filed a § 1983 action against the university, its dean, and a police officer, alleging a violation of her First Amendment right to free speech. *Magee*, 747 F.3d at 534. Magee authored a commentary in the local newspaper "criticizing a state judge's decision not to 'investigate'

allegations of racism in a trial for murder of a St. Paul police officer." *Id.* at 534. The defendant police officer, Officer Titus, was both an officer and the president of the St. Paul Police Federation. *Id.* at 534. Shortly after the plaintiff's article, Titus authored an editorial questioning the plaintiff's "fitness to teach" and stating "I hope Professor Magee confines her race baiting and cop-hating to her newspaper submissions and keeps it out of the classroom." *Id.* Further, the Police Federation, "under Titus's leadership, declared a boycott against the university, seeking punitive action against Magee," and "Titus and other officers contacted university officials, demanding they remove Magee." *Id.* Magee was called before the university president to explain her commentary, and the administrators "contemplated" adverse actions against her. *Id.*

Two years later, Magee was charged with state-law tax violations and was subsequently convicted of four gross misdemeanors. *Id.* Thereafter, the university initiated disciplinary actions against Magee and terminated her employment. *Id.* She sued, claiming her termination was a concerted effort "to please police and to prevent her

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from teaching about police misconduct, and otherwise to restrain her speech, and as retaliation for past speech." *Id.*

In analyzing Magee's § 1983 claim, this Court began—as it should here—by analyzing the color-of-state-law requirement. When it came to Officer Titus, this Court affirmed dismissal, concluding there were no allegations to suggest his actions "were made possible by, or undertaken in, his position as a police officer." *Id.* at 536. Specifically, "Magee does not assert that Titus, at any time, invoked or used his authority as a police officer." *Id.* "While his editorial noted he was an officer, this recites his occupation and does not necessarily indicate he was acting in his official capacity." *Id.*

The same is true here. Nothing in the record establishes that Reisch exercised any authority granted unto her by virtue of her role as a state legislator in blocking Campbell on Twitter. *See also Wilson v. Price*, 624 F.3d 389, 393 (7th Cir. 2010) ("Because [defendant, an Illinois alderman] had no enforcement authority, none of the actions taken to compel Wilson to move the illegally parked cars were effectuated under color of state law, as one cannot misuse power one does not possess.

When officials possess no authority to act, we have found that their conduct is outside the ambit of § 1983." (internal citation omitted)).

Under Eighth Circuit precedent, Campbell's claim must fail.

B. This Court should reject attempts to broaden the state-action inquiry, but even if the broader context of Resich's full Twitter account is considered, there is still no action under color of state law.

Instead of following the Eighth Circuit's precedent on evaluating the existence (or lack) of state action in First Amendment cases (*Magee*), the district court elected to follow the Fourth Circuit's much broader conception of state action. *See* Add. 15-16 (citing *Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019)). To be sure, the district court began by reciting general and relevant legal principles from the Eighth Circuit, noting that a public employee generally acts under color of state law "while acting in his official capacity or while exercising his responsibilities pursuant to state law," and also if the official "acts or purports to act in the performance of official duties, even if he oversteps his authority and misuses power." Add. 15 (citing *Roe v. Humke*, 128 F.3d 1213, 1215 (8th Cir. 1997); *Johnson v. Phillips*, 664 F.3d 232, 240 (8th Cir. 2011)). The district court also noted that this inquiry is

"necessarily fact intensive." *Id.* (citing *Ramirez-Peyro v. Holder*, 574 F.3d 893, 900-01 (8th Cir. 2009)).

Fortunately, this Court has explained how to apply these general principles in the context of a First Amendment case; it did precisely that in *Magee*. And although it is certainly true that the inquiry is fact intensive, that "inquiry" must be targeted on the conduct *actually alleged to be unconstitutional*, here, the blocking of Campbell on Twitter. Thus, the court should be evaluating that specific act, and determining whether Reisch "exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Magee*, 747 F.3d at 536.

When the district court announced the standard it chose to apply, it began by stating, "With particular reference to issues arising under the First Amendment," but chose to then adopt the Fourth Circuit's more expansive approach in *Davison*. In *Davison*—a case involving the Chair of a county board of supervisors blocking a Facebook user from an official "Chair" Facebook page—the Fourth Circuit employed a much more sweeping analysis of the social-media page as a whole, the type of content it included, and the nature of the interactions on the Facebook

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page, as opposed to focusing the state-action inquiry on the allegedly unconstitutional activity itself. *See Davison*, 912 F.3d at 679-81.

This Court has simply not endorsed such a broad approach. The inquiry—while fact intensive—must focus on the allegedly unconstitutional act *itself* to determine whether Reisch acted under color of state law. The district court erred by not conducting the analysis required under this Court's precedent, and this Court should reverse accordingly.

In any event, even if this Court decides to expand the color-of-state-law inquiry to look not only at the allegedly unconstitutional act, but also to the overall nature of the Twitter account and the speech that occurred thereon, the district court's decision should still be reversed, based primarily on two critical distinguishing characteristics. First, Reisch is an individual state legislator, not an executive official or any government employee that could conceivably take official acts through a Twitter account. Second, Reisch was engaged in core campaign speech on her Twitter account (as the district court readily recognized). Reisch's own First Amendment speech and associational rights permit her to curate her audience for such speech.

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1. Reisch did not execute any official duties of her office through her Twitter account.

When courts, like the Fourth Circuit, expand the scope of the state-action inquiry in the manner described above, they typically look to the nature and content of the social media account to determine if the government employee is using the account to execute official duties of the office. When the office in question is an executive office, or an office with executive functions, such an inquiry is at least plausible.

For example, when evaluating President Trump's Twitter account, the Second Circuit described that the President uses official staff members to operate and maintain the account, uses the account to announce "high-level White House and cabinet-level staff changes as well as changes to major national policies," and uses the account as "an important tool of governance and executive outreach." *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 235-36 (2d Cir. 2019). The President used the account "as an official account for conducting official business." *Id.* at 236.

Such an analysis at least conceptually makes sense for the President, who, as an executive official (indeed, as the unitary executive in our federal system) has the ability to conduct official acts of the office

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through his Twitter account. Because the Second Circuit concluded he was doing so, it found the President to be a government actor for use of the account. *Id.* Importantly, however, the Second Circuit recognized that "not every social media account operated by a public official is a government account." *Id.* Indeed, the court recognized that future courts would need to look at specific facts regarding the features and uses of the account in question to determine if it is similarly used as an official means of conducting the functions of the office. *Id.*

Similarly, in *Davison*, the Fourth Circuit analyzed the use of a Facebook account. The government official had a separate "personal" Facebook account, a separate "campaign" account, and, two days prior to taking her seat as Chair of the board of county supervisors, she then created the "Chair's Facebook Page." *Davison*, 912 F.3d at 674. In evaluating whether the Chair acted under color of state law in blocking someone from the Chair's Facebook Page, the Fourth Circuit used its expanded inquiry to determine how the account was used, ultimately concluding that the Chair used the page "as a tool of governance." *Id.* Specifically, in addition to using the page to inform the public about the committee's work, she used the page to "solicit[] input from the public

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on policy issues she and the [board] confront." *Id.* at 680. She also used the page to "inform the public about serious public safety events and to keep her constituents abreast of the County's response to a snowstorm and to coordinate snow removal activities." *Id.* The Court therefore found that the Chair "created and administered the page to perform actual or apparent duties of her office." *Id.* at 681 (internal quotation marks and alterations omitted).

Once again, the court found that the purpose of this Facebook page was for the Chair to conduct official business of her office. Given the administrative roles delegated to the Chair, and her specific use of the Facebook page to solicit comments and also to coordinate official acts of the county, it is again at least conceivable that her actions could be seen as being taken under color of state law.

In this case, however, the Twitter account at issue is that of a single state legislator. Contrary to the accounts at issue in the Second and Fourth Circuit cases, Reisch did not use this account to conduct "official business" or to conduct the "duties of her office." Indeed, as a legislator, her scope of official acts is significantly narrower than those available to executive or administrative officials. While she takes

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official action when she votes on bills (which she cannot do, of course, via Twitter), even those votes may not ultimately result in any governmental action unless adopted by a majority of both houses and signed by the Governor. Further, Reisch may similarly execute official duties of her office when serving on committees (participating in oversight, hearings, etc.), but there is no evidence even remotely suggesting that any of this was done via her Twitter account (nor is it plausible to see how it could). And while the Chair in *Davison* specifically used the social media page to "solicit[] input from the public on policy issues she and the Loudoun Board confront" (*Davison*, 912 F.3d at 676) by "expressly inviting 'ANY Loudoun citizen' to visit the page and comment 'on ANY issues,'" (*id.* at 682), Reisch simply did not use her Twitter page in any similar manner. Indeed, Resich testified that she did not consider Twitter a way in which she communicates with constituents, nor a medium though which she invites communication. Add. 6, ¶ 31.

Put simply, Reisch's role as an individual state legislator makes a substantial difference in the outcome of this inquiry. This is a distinction that Judge Keenan aptly recognized in her *Davison*

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concurrence. *See Davison*, 912 F.3d at 692 (Keenan, J., concurring) ("[I]t appears to be an open question whether an individual public official serving in a legislative capacity qualifies as a unit of government or a government entity for purposes of her ability to open a public forum."). Judge Keenan correctly noted that elected executive officials can "conduct government business unilaterally, including through the use of social media." *Id.* Although the Chair in *Davison* was a legislative official, the record was "silent regarding the Chair's authority to take any official action on her own." *Id.* Nevertheless, Judge Keenan voted to join the majority analysis that the acts she was taking to "perform actual or apparent duties of her office" constituted state action, finding herself bound to follow relevant Fourth Circuit precedent. *Id.*

As discussed above, Reisch's Twitter activity is far different than the *Davison* Chair's use of the account to perform the duties of her office. But Judge Keenan is absolutely correct in her observation that "[t]he nature and extent of a public official's authority should have some bearing on the official's ability to open a public forum on social media," and that the distinctions between executive and legislative officials "is a

matter that should be addressed by the Supreme Court." *Id.* To be clear, while it was an open question in *Davison* whether the Chair had any actual authority individually, her actions on Facebook demonstrated she was performing official functions of the Chair role through that site. Here, there is no such close call. An individual state legislator simply does not have an even arguable means of conducting official actions through social media. And a review of Reisch's actual activity on Twitter confirms she is engaged in no such official action. *See generally* Add. 4-6. The tweets in the record establish that Reisch used the account to discuss legislative accomplishments along with (as discussed in detail below) core campaign speech.

Even if the Court elects to expand its jurisprudence on what is appropriately considered when determining whether actions are taken under color of state law, the district court's opinion should still be reversed. Reisch's role as a state legislator makes clear she was not engaged in any activity on Twitter that could be considered performance of official duties as a state legislator.

2. Reisch was engaged in campaign speech through her Twitter account, and her actions, including blocking Campbell, are protected by the First Amendment.

In perhaps the district court's most significant error, the few sentences dedicated to analyzing "color of state law" improperly equate Reisch's *campaign* conduct with executing official duties of her office:

> As referenced above, Defendant launched her Twitter account alongside her ***political campaign***. Defendant's handle references her elected district, and her Twitter account links to her ***campaign webpage***. Further, the image associated with Defendant's Twitter account is a photo of her on the state house floor. Finally, Defendant used the Twitter account to tweet ***about her work*** as a public official.

Add. 16 (emphasis added). Indeed, each fact upon which the district court attempts to rely to show action under color of state law is nothing more than traditional campaign activity.

To be sure, campaign activity is substantially different and, as important here, legally distinct from execution of the official duties of a public office. Indeed, it is telling that even in the cases that reach results contrary to that Reisch seeks here (such as *Knight* and *Davison*), the courts are *not* relying on any campaign activity to establish state action. That is so for a couple reasons. First, and most simply,

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campaigning is not an official activity of a state legislative office. Therefore, any such activity would be entirely irrelevant to a state-action inquiry.

Second, and more significantly, speech in political campaigns—including who that speech is directed toward—has substantial First Amendment protection. *See, e.g. King v. Friends of Kelly Ayotte*, 860 F. Supp. 2d 118, 124-25 (D.N.H. 2012). Indeed, when a political official holds a campaign event, she can invite whomever she likes and exclude whomever she likes, all consistent with the First Amendment; in fact, such actions are protected by the candidate's, and the political party's, rights to free assembly and association. *See id.* (citing *Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 122 (1981); *Kay v. New Hampshire Democratic Party*, 821 F.2d 31, 33 (1st Cir. 1987)). Even if that event occurs in a *traditional public forum* (e.g., a public park where the official has obtained a permit for a campaign event), the official can include anyone she would like to hear the speech within that event and can prohibit protest activities within

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the event.[3] *See Sistrunk v. City of Strongsville*, 99 F.3d 194, 200 (6th Cir. 1996) (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995)).[4]

The point discussed in the previous paragraph is critical in this case given all of the evidence in the record—highlighted in the district court's excerpt quoted above—that Reisch's activity on Twitter was campaign activity. *See* Add. 16. And that is further reinforced by the content of the tweets themselves. Indeed, the tweets contained in the record are simply statements of Reisch's legislative accomplishments and bills that passed during her tenure, or other statements about her qualifications and achievements. For example:

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[3] Here, as discussed *infra* Section II, if this Court reaches the constitutional issue, Reisch does not believe that *any* type of a forum analysis applies in this case. This principle is included here only to demonstrate that, even in the most protected traditional public fora, political candidates may curate campaign speech and their audience as they see fit.

[4] Further, citizens, including Campbell, have "no constitutional right as members of the public to a government audience for their policy views." *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 286 (1984). "Nothing in the First Amendment or in [the Supreme Court's] case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Id.* at 285.

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- Tweeting a picture of herself with the Speaker of the House, stating: "I promised my neighbors in #MO44 that I'd work tirelessly to improve our #economy. I'm making good on that promise."

- Tweeting about the passage of the "Real ID" Bill.

- "I testified before the Senate today to repeal prevailing wage. Saves taxpayers $, helps schools, cities, etc."

- Tweeting her legislative scorecard from United for Missouri, and stating: "I scored an A. Not bad for a Freshman."

- "Accomplished much in my 1st 2 years, ready for the next 2."

Add. 4-6.[5] These are core campaign statements, and they illustrate that—far from executing any *official* duties through Twitter—Reisch was engaged in campaign speech. Said differently, there is no question that if Reisch held a campaign event (no matter the nature of the "forum" in which it was held) she could have verbally stated every single one of her tweets in the record, decided precisely who was

[5] These are selected examples of Reisch's tweets taken from the district court's Findings of Fact and Conclusions of Law and were apparently tweets the district court found relevant to the analysis. To the extent needed, Reisch's full Twitter page is included in the record. *See* T.E. 001-105. As the Court will find, there are also a substantial number of tweets that are entirely personal in nature as well, having nothing whatsoever to do with politics.

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allowed to attend the event and hear those statements, and also remove people from the event if they began expressing disagreement. The outcome is no different simply because the statements are made on Twitter.

Equally telling is the perverse dichotomy established under Campbell's view of the law. As the district court explained, the portion of Twitter at issue here is the "interactive space" below a tweet—that is, the area where individuals can directly reply to a tweet by Reisch. Add. 9-11. Under Campbell's view, an incumbent politician—including one engaged in the type of core campaign messaging Reisch posted—has no ability whatsoever to control who directly comments on any of her messages. A non-incumbent candidate, on the other hand, can block whomever she pleases, removing any negative comments from her messaging on Twitter. Thus, while the incumbent is forced to endure whatever commentary on her Twitter page—no matter how negative, distracting, or irrelevant—the non-incumbent candidate is able to customize and curate comments to create the appearance of a uniformly positive response to her messaging.

Such a disparate and unfitting outcome is plainly avoidable. When an individual state legislator is engaged in campaign messaging on Twitter, that simply cannot give rise to action deemed to be "under color of state law."

Finally, even the Fourth Circuit realized it is critical to analyze the question of "state action" in the context of "the specific actions giving rise to [Campbell's] claim"; that is, the specific speech on Twitter that gave rise to the blocking incident. *Davison*, 912 F.3d at 681. Here, contrary to *Davison*, it is unquestionable that the speech giving rise to the controversy was purely campaign messaging. Indeed, Reisch sent a tweet *specifically about her campaign opponent*, criticizing her for failing to place her hand over her heart during the pledge of allegiance at an event. Add. 6-7. Campbell re-tweeted a message criticizing Reisch's tweet, and Reisch then blocked Campbell. *Id.* Nothing about

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this exchange had anything to do with any official actions; it was purely campaign messaging.[6]

* * *

Both of the above characteristics—that Reisch is (1) an individual state legislator, and (2) engaged in campaign speech—are independently sufficient to establish she did not act under color of state law. But *especially* when considered together, that conclusion is inescapable. An individual state legislator simply cannot engage in state action or an official government act through Twitter. (And even if she theoretically could, there is certainly no evidence in the record that

[6] Further, to the extent it matters, attributes of the accounts reinforce this conclusion. While the Chair's account in *Davison* provided a link to her official webpage along with her official e-mail address and official telephone number, Reisch's Twitter page lists only her campaign webpage. *Compare Davison*, 912 F.3d at 680-81, *with* Add. 3. While the Chair submitted posts to the page on behalf of the Board as a whole and actively sought feedback and interaction, Reisch engaged in only her own messaging and campaign speech and did not seek feedback or interaction. *Compare Davison*, 912 F.3d at 681, *with* Add. 4-6. While the Chair established the page on the day before she took her official role as Chair, Reisch established her account contemporaneous with the launch of her campaign. *Compare Davison*, 912 F.3d at 673, *with* Add. 3-4. These facts also distinguish Reisch's account from the accounts at issue in *One Wisconsin Now v. Kremer*, 354 F. Supp. 3d 940, 951-53 (W.D. Wisc. 2019), as does the fact that Reisch does not use any State resources to operate her Twitter account. *See* Tr. 66:23–67:25.

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Reisch did so here.) Thus, because that speech on Twitter is not any official act of the state representative, it becomes clear that the type of speech identified in the record—discussing legislative accomplishments and other achievements—is campaign messaging. Said plainly, it is not state action.

In conclusion, this Court's inquiry—while fact-intensive—should be targeted at the conduct actually alleged to be unconstitutional, i.e., whether Reisch's blocking of Campbell on Twitter is an exercise of "power possessed by virtue of state law and made possible only because [Reisch] is clothed with the authority of state law." *Magee*, 747 F.3d at 536. The answer to that question is a resounding "no," and that should end the inquiry. But even under a broader framework, Reisch still prevails because she is both an individual state legislator, and she was engaged in campaign speech. While the Supreme Court has indicated there is a First Amendment right to speak on social media platforms in general without prohibition by the government, *see Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-36 (2017), there is simply no state action here, nor is Campbell prevented—in any way—from saying whatever he wants, about whoever he wants, on Twitter.

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Reisch did not act under color of state law when blocking Campbell on Twitter, and this Court should reverse the district court's cursory analysis of this element.

II. This Court Should Not Reach The Constitutional Question, But If It Does, There Is No Constitutional Violation Because Reisch's Twitter Page Is Not A Forum Subject To First Amendment Protection.

Because the record establishes Reisch did not act under color of state law, Campbell's claim fails as a matter of law, and this Court does not need to reach the constitutional inquiry. In fact, it would be "prudent to avoid addressing the proper constitutional standard unnecessarily." *Bailey v. Feltmann*, 810 F.3d 589, 593 (8th Cir. 2016) (citing *Camreta v. Greene*, 563 U.S. 692 (2011)). As discussed below, this is a complex constitutional question, one that Judge Keenan rightly recognized is rife with difficult questions for the Supreme Court to ultimately address. *Davison*, 912 F.3d at 692-93 (Keenan, J., concurring). That is all the more reason for the Court to avoid the question here, especially in the absence of any state action.

In the event this Court decides to wade into the constitutional issue, this record does not establish a constitutional violation. The courts that have found constitutional violations thus far have done so

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by finding interactive spaces on Twitter (or other social media platforms) to be "designated public fora" subject to constitutional protection. *See Knight*, 928 F.3d at 237-38; *Davison*, 912 F.3d at 681-88. As explained below, such an analysis does not hold here for two primary reasons. First, the public-forum analysis is simply incongruent with Twitter (and social media in general), such that the Court should not apply it. *See Morgan*, 298 F. Supp. 3d at 1010-13. Second, such an analysis is especially inappropriate when the account at issue is that of an individual state legislator involved in campaign speech. Accordingly, in the event this Court reaches the constitutional question, it should reverse the judgment of the district court.

A. This Court should not apply a forum analysis.

"[T]he Supreme Court uses a forum analysis for evaluating restrictions of speech on government property," and requires the court to determine "whether a property is a traditional public forum, a designated public forum, or a nonpublic forum." *Bowman v. White*, 444 F.3d 967, 974 (8th Cir. 2006) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983); *Families Achieving*

Independence & Respect v. Neb. Dep't of Soc. Servs., 111 F.3d 1408, 1418 (8th Cir. 1997)).

"A traditional public forum is public property that has 'traditionally been available for public expression,' *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992), and 'the free exchange of ideas,' *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 800 (1985)." *Ball v. City of Lincoln, Nebraska*, 870 F.3d 722, 730 (8th Cir. 2017). "The 'quintessential' examples of such traditional public forums are streets, sidewalks, and public parks, because these venues 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

"A 'designated' public forum, as the name implies, is created when the government 'intentionally open[s] a nontraditional forum for public discourse.'" *Id.* (alteration in original) (quoting *Cornelius*, 473 U.S. at 802). "'Although [the government] is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the

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same standards as apply in a traditional public forum.'" *Id.* (alteration in original) (quoting *Perry Educ. Ass'n*, 460 U.S. at 46). "A nonpublic forum is government property that 'is not by tradition or designation a forum for' expressive activities by the public." *Id.* (quoting *Perry Educ. Ass'n*, 460 U.S. at 46).

While this overall framework of the forum analysis is a helpful foundation to understand the import of the district court's ruling that the "interactive space" in Reisch's Twitter feed is a designated public forum (Add. 12-14), it is ultimately irrelevant, because a forum analysis is not appropriate here. Said differently, the Court should not reach the question of what type of forum is involved, because the forum analysis is simply inapplicable.

The reason forum analysis does not apply is grounded in the most fundamental principle of this doctrine: "the Supreme Court uses a forum analysis for evaluating restrictions of speech on ***government property***." *Bowman*, 444 F.3d at 974 (emphasis added). Indeed, the vast majority of "designated public forum" cases adjudicated are ones in which the government *owns the property* and the question is whether the government has sufficiently "opened up" that property, such that

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First Amendment protections apply. Of course, that is not the case here. The government does not own Twitter, nor does it own Reisch's Twitter account; neither party contends otherwise. As the district court stated: "There is no dispute that Twitter, Inc. owns Defendant's Twitter account, such that the account is not owned by the government." Add. 11. The district court nevertheless found that Reisch had sufficient "control" over the Twitter page, such that the forum analysis could apply. *Id.* That conclusion is in error. *See Morgan*, 298 F. Supp. 3d at 1010-13 ("Governor Bevin's Twitter and Facebook accounts are privately owned channels of communication and are not converted to public property by the use of a public official. Simply put, this is unlike any type of property typically protected by First Amendment forum analysis law.").

The district court grounded this flawed conclusion in the district court's decision in the *Knight* case regarding the President's Twitter account. *See Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 566 (S.D.N.Y. 2018), *aff'd*, 928 F.3d 226 (2d Cir. 2019). There, the court noted several occasions on which the Supreme Court has *referred* to a forum analysis potentially applying to

property the government somehow controlled (but did not own), even though the cited Supreme Court cases did not involve such property. *See id.* (collecting cases). Indeed, the *only case* the *Knight* court cited (one the district court here cites as well) finding a non-owned property to be a designated public forum is *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975). In *Conrad*, the Court found a designated public forum present in a theater that a city was operating under a long-term lease from the owner. *Id.* at 547, 555. There was little analysis of the "control" issue in the opinion, and it did not seem to even be contested that the government had unilateral control over access to the theater. Further—and perhaps most importantly as it drove the outcome of the case—the government had sole discretion over the content of the speech in the forum. *Id.* at 548-50. Indeed, the Court found an improper prior restraint when the board of directors of the theatre voted to reject a production of a controversial musical. *Id.* at 554-58. Those two aspects of "control"—control over access, and control over content—are dramatically different here and establish that the forum analysis does not apply.

First, with respect to controlling access, the district court admits that Twitter, not Reisch, controls the functions available on Twitter. Add. 11. Nevertheless, the district court concludes that because one of the available functions allows users to block one another, the potential to use such a function illustrates sufficient "control" to warrant a designated public forum. *Id.* That conclusion ignores several critical facts, beginning with control over who can access *any* content on Twitter in the first place. Of course, that power rests with Twitter, Inc., which maintains full discretion whether, and who, to allow onto its platform. It also maintains the ability to suspend or close accounts at its discretion. As Twitter's Terms of Service make clear:

> We may suspend or terminate your account or cease providing you with all or part of the Services at any time ***for any or no reason***, including, but not limited to, if we reasonably believe: (i) you have violated these Terms or the Twitter Rules and Policies or Periscope Community Guidelines, (ii) you create risk or possible legal exposure for us; (iii) your account should be removed due to unlawful conduct, (iv) your account should be removed due to prolonged inactivity; or (v) our provision of the Services to you is no longer commercially viable.

Twitter User Agreement, at 6-7 Twitter, https://cdn.cms-twdigitalassets.com/content/dam/legal-twitter/site-assets/privacy-policy-new/Privacy-Policy-Terms-of-Service_EN.pdf (hereinafter "*Twitter User*

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Agreement") (emphasis added); *see Halleck*, 139 S. Ct. at 1930 ("[W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion *over the speech and the speakers in the forum*." (emphasis added)).

Unlike situations such as *Conrad*, where the government maintains full control over access to the forum, here, the private entity that owns the forum maintains full control over who can access it in the first place. The type of secondary or subsidiary "control" of the ability to block a user (made possible only by the discretion of Twitter) is insufficient to warrant a designated public forum, especially when the private entity continues to maintain full operational control of access to the forum.

Second, and most importantly, Twitter—*not the government*—controls the nature and content of the speech that can occur in the forum. *See Halleck*, 139 S. Ct. at 1930. Once again, this is entirely inconsistent with the finding of a government forum. As discussed, the district court found the presence of a "designated public forum," (Add.

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11), which the case law establishes is *supposed* to operate just like a traditional public forum in terms of the expression allowed and the government's ability to restrict it. *See Ball*, 870 F.3d 730.

But here, that is impossible, because the government *does not control the speech*. Indeed, all speech on Twitter is governed by Twitter, Inc.'s policies, including, for example, its "Hateful Conduct Policy." *See Hateful conduct policy*, Twitter, https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy; *see also Twitter User Agreement* at 32 (incorporating Hateful Conduct Policy). That policy prohibits, *inter alia*, "[r]epeated and/or non-consensual slurs, epithets, racist and sexist tropes, or other content that degrades someone," as well as "[h]ateful imagery." *Id.* While such speech may be offensive and disgraceful, it is plainly within the scope of First Amendment protected speech. *See, e.g.*, *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) ("Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting))). Nevertheless, the government is said

to be opening up a public forum to speech protected by the First Amendment, even though speech protected by the First Amendment is already prohibited in that forum by the private owner of the forum. Said differently, the government is supposedly opening a forum with restrictions on speech that the government could not enact on its own. A forum analysis simply is not appropriate in this circumstance.

To be clear, this case is not about whether it is "good" or "bad" for an individual legislator to be able to block people on Twitter. Nor is it about the wisdom of Twitter's policies. Indeed, Twitter could decide at any moment to eliminate the blocking feature for anyone, or for only elected officials. At some point, the market may dictate that Twitter needs to revisit those policies, and as a private entity, it is certainly free to do so. Indeed, Twitter has already made the conscious decision to treat the speech of public officials different from the speech of other users no matter the "forum." If a government official posts a tweet that otherwise violates Twitter's content policies and should be removed, Twitter will sometimes decide—in its own independent judgment—to leave the tweet up because it is in the "public interest." *See About public-interest exceptions on Twitter*, Twitter, https://

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help.twitter.com/en/rules-and-policies/public-interest. This public-interest exception reiterates two critical points: (1) it is Twitter that is in complete control of the type of speech that can occur on this platform, irrespective of "forum," and it will unilaterally act to sensor (or not sensor) that speech as it sees fit; and (2) Twitter has the absolute right to change its policies at its discretion (*see Halleck*, 139 S. Ct. at 1930), and it knows how to do so.

Accordingly, the question here is a narrow one: whether an individual state legislator violates the First Amendment when she utilizes a blocking feature made available by the private owner of a social media platform when that private owner controls access to the platform as a whole, as well as the speech that can occur on the platform. Finding liability, or even any type of forum, in these circumstances is simply inconsistent with how the First Amendment operates. Ultimately, [d]isagreement with public policy and disapproval of officials' responsiveness . . . is to be registered principally at the polls." *Minnesota State Bd.*, 465 U.S. at 285. Reisch is accountable to the voters, who "may choose to re-elect [her] or choose to elect someone else if they are unhappy with how [she] administers her social media

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accounts." *Morgan*, 298 F. Supp. 3d at 1013. "Though [Campbell] might disagree with [her] social media practices, the place to register that disagreement is at the polls." *Id.*

At the risk of overemphasizing the proverbial "slippery slope," there are several significant concerns with opening up a public-forum analysis to a single government official's use of private space. The first is simply the vast expanse of such an extension. If the "interactive space" below a public official's Twitter messages is a public forum, one must wonder what other private spaces or property (interactive or tangible) public officials (executive officials, legislative officials, judges, government employees, police officers, etc.) use from time to time that would now be subject to the same inquiry (even though the private owner has primary control of access to the venue as well as control over what is said there). Further, as specific to social media platforms, if an individual engages in speech in the "designated public forum" that violates the platform's policies (which are narrower than the First Amendment), can the private entity enforce those policies against the users? And what if the public official is a victim of the "hate speech"? Could the public official report to Twitter the "misconduct" under their

policy, even though the speech would otherwise be protected by the First Amendment? The forum analysis is ill-suited to address these circumstances; it is narrowly focused on government-owned property or property on which the government controls access and speech, which is plainly not the case here.[7]

As discussed, the district court rested its analysis primarily on the Southern District of New York's *Knight* decision, but other courts to have analyzed this issue suffer from the same deficiencies. The Second Circuit in *Knight*, for example, spends very little time on this question, concluding that a public forum was designated because the President "repeatedly used the Account as an official vehicle for governance and made its interactive features available to the public without limitation."

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[7] The Supreme Court has also stated that "where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 480 (2009). Finding the interactive space below a tweet to be a public forum would mean that Reisch has no ability whatsoever to remove any content, no matter how reprehensible (or irrelevant). Such a paradigm could easily lead to the closure of that forum—the interactive space below a tweet—altogether. *See Bevin*, 298 F. Supp. 3d at 1012. As discussed *supra* Section I.B.2., that is especially troubling when a non-incumbent candidate would have no such obstacle in curating her campaign messaging.

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928 F.3d at 237. As discussed (*supra* Section I.B.1-2), however, Reisch simply could not (and did not) use her account in this manner.[8]

The Fourth Circuit's decision in *Davison* falters for the same reasons as the *Knight* district court opinion. In fact, the Fourth Circuit rested much of its decision on a case recently reversed by the Supreme Court. *See Davison*, 912 F.3d at 683-85 (discussing *Halleck v. Manhattan Cmty. Access Corp.*, 882 F.3d 300 (2d Cir.), *rev'd in part*, 139 S. Ct. 1921 (2019)). In *Halleck*, the Supreme Court held that a private operator of public-access channels on a cable system was "not a state actor subject to the First Amendment" and reversed the Second Circuit's holding on the First Amendment claim accordingly. *Halleck*, 139 S. Ct. at 1928-34. And, in any event, the Fourth Circuit's discussion simply fails to address the issue discussed above—that a

[8] It is also a notable distinction that the individual Plaintiffs in *Knight* actually spoke in the supposed "forum" and were then blocked. *Knight*, 928 F.3d at 232. Here, Campbell never spoke—at any time on any subject—in the interactive space on any of Reisch's tweets. Rather, Reisch blocked him after he retweeted a message on *his own page*, conduct which he is indisputably able to continue to engage in today, and has been able to at all times. In fact, curiously, the district court concluded that "Campbell's retweet is protected speech" (Add. 8), but Campbell was never prevented (by Reisch or anyone else) from retweeting any content whatsoever, no matter how critical it was of Reisch.

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forum analysis could be appropriate on private property only when the government controls access to the forum as well as the speech occurring there.

Resich recognizes that a forum analysis can apply to fora "more in a metaphysical than in a spatial or geographic sense," *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995), and also to "private property dedicated to public use," *Cornelius*, 473 U.S. at 801. But the Supreme Court has never held, or even intimated, that such an analysis could apply to private property where the private owner controls who can visit the forum and, most significantly, the content of what speakers are allowed to say there. Forum analysis does not apply to Reisch's Twitter account, and this Court should reverse the judgment of the district court accordingly.

B. Reisch, as an individual state legislator, cannot open up a designated public forum.

As discussed extensively, Resich did not take any official action on Twitter, and it would be difficult to envision how she could do so, as contrasted with officials employing executive authority or some other type of administrative authority. Resich's scope of authority comes into play again with respect to the forum issue due to the district court's

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holding that Resich opened up a designated public forum to First Amendment protection. *See* Add. 12-14. It is not established, however, that an individual legislator even has the ability to do that.

What is common across designated-public-forum cases is that the government takes some sort of intentional action to open a forum up to public discourse. *See, e.g.*, *Cornelius*, 473 U.S. at 802 ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."). Once again, the vast majority these cases are ones in which the government owns the property, and courts are determining whether the government opened the property up to public discourse. Thus, those cases will feature some type of official act on behalf of the government entity opening those spaces up. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (finding a state university's adoption of policy making meeting facilities open to registered student groups created a public forum). Similarly, even when private property is at issue, there is an official act of the government entity to create the forum, such as the signing of a lease agreement to obtain control of the space. *Conrad*, 420 U.S. at 555.

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Here, however, Resich is an individual legislator who has no ability or authority to take official action on behalf of the government. Unlike the President, who (as discussed above) has innate executive authority, Resich does not possess the ability to take official action unilaterally. *See Knight*, 928 F.3d at 237 (noting that the President "repeatedly used the Account as an official vehicle for governance"). Although the Chair of the county board in *Davison* is a closer call, the Chair was exercising her authority in that role to conduct business of the body. 912 F.3d at 682. Recognizing the distinct role of a legislator, however, Judge Keenan remarked that "it appears to be an open question whether an individual public official serving in a legislative capacity qualifies as a unit of government or a government entity for purposes of her ability to open a public forum." *Davison*, 912 F.3d at 692 (Keenan, J., concurring).

In Judge Keenan's view, [t]he nature and extent of a public official's authority should have some bearing on the official's ability to open a public forum on social media." She is absolutely correct in that assessment. *Id.* While executive officials "can conduct government business and set official policy unilaterally," legislative officials do not

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have the same authority. *Id.* Absent Supreme Court authority expanding the forum doctrine to permit individual legislators to unilaterally open up designated public fora (despite their lack of authority take official action on behalf of the government), this Court should not permit such a theory.

For this additional reason, forum analysis does not apply here.

CONCLUSION

The judgment of the district court should be reversed.

December 20, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,788 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook.

3. This brief complies with the requirement of 8th Cir. R. 28A(h)(2) because it has been scanned for viruses and is virus-free.

December 20, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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