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
No. 2:18-cv-4129-BCW

BRIEF OF PLAINTIFF/APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 6

ARGUMENT 7

I. Reisch acted under color of state law when she excluded Campbell and other critics of her fitness for public office from accessing and commenting on the Twitter account she uses to discuss her legislative agenda and accomplishments with the general public 7

A. Excluding a state official's critics from a public forum created by that official to discuss her conduct in office is state action 7

B. The same state action analysis applies to officials in the legislative branch as well as the executive branch 16

C. Reisch's own First Amendment rights do not excuse her suppression of dissenting voices in a public forum 19

II. Reisch deprived Campbell of his First Amendment right to free speech by excluding him from a designated public forum based on his viewpoint 25

A. Reisch's Twitter account is controlled by a state actor 27

B. Individual legislators are no less bound by the First Amendment than the President of the United States 33

CONCLUSION 34

CERTIFICATE OF COMPLIANCE 35

CERTIFICATE OF SERVICE 36

Appellate Case: 19-2994 Page: 2 Date Filed: 03/23/2020 Entry ID: 4894162

TABLE OF AUTHORITIES

Cases

Arkansas Educ. Television Comm'n v. Forbes,
523 U.S. 666 (1998).....22

Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n,
531 U.S. 288, 295 (2001). 10

Clark v. Kolkhorst, Case No. A-19-CV-0198-LY-SH,
2020 WL 572727, at *3 (W.D.Tex. Feb. 5. 2020) (slip opinion).....17

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,
473 U.S. 788, 806 (1985) 24, 27-28

Davison v. Randall,
912 F.3d 666, 680 (4th Cir. 2019) .....*passim*

Davis v. Passman,
442 U.S. 228, 244 (1979) 17

Eichenlaub v. Township of Indiana,
385 F.3d 274, 281 (3d Cir.2004).....23

Griffin v. State of Md.,
378 U.S. 130, 135 (1964). 12

Haberthur v. City of Raymore, Missouri,
119 F.3d 720, 724 (8th Cir. 1997). 11

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.,
515 U.S. 557, 581 (1995) 22, 28

King v. Friends of Kelly Ayotte,
860 F. Supp. 2d 118, 125 (D.N.H. 2012) 22

Knight First Amendment Inst. at Columbia Univ. v. Trump,
928 F.3d 226, 236 (2d Cir. 2019).....*passim*

Knight First Amendment Inst. at Columbia Univ. v. Trump,
302 F. Supp. 3d 541, 566 (S.D.N.Y. 2018) .....*passim*

Appellate Case: 19-2994 Page: 3 Date Filed: 03/23/2020 Entry ID: 4894162

Lebron v. Nat'l R.R. Passenger Corp.,
513 U.S. 374, 392 (1995) 12, 32

L.L. Nelson Enterprises, Inc. v. Cty. of St. Louis, Mo.,
673 F.3d 799, 805 (8th Cir. 2012). 7-9

Lugar v. Edmondson Oil Co.,
457 U.S. 922, 929 (1982) 9

Magee v. Trustees of Hamline Univ., Minn.,
747 F.3d 532, 535 (8th Cir. 2014) 7

Manhattan Cmty. Access Corp. v. Halleck,
139 S. Ct. 1921 (2019) 32

Minnesota Voters All. v. Mansky,
138 S. Ct. 1876, 1885, 201 L. Ed. 2d 201 (2018) 23, 27, 32

Morgan v. Bevin,
298 F. Supp. 3d 1003, 1011 (E.D. Ky. 2018). 28-30

Nat'l Endowment for the Arts v. Finley,
524 U.S. 569 (1998) 22

One Wisconsin Now v. Kremer,
354 F. Supp. 3d 940, 951–52 (W.D. Wis. 2019) 17

Orr v. Wal-Mart Stores, Inc.,
297 F.3d 720, 725 (8th Cir. 2002) 20

Packingham v. North Carolina,
137 S. Ct. 1730, 1737 (2017) 26-27

Perry Educ. Ass'n v. Perry Local Educators' Ass'n,
460 U.S. 37, 45 (1983). 25

Pleasant Grove City, Utah v. Summum,
555 U.S. 460 (2009) 22-23, 26

Police Dep't of City of Chicago v. Mosley,
408 U.S. 92, 96 (1972). 26

Appellate Case: 19-2994 Page: 4 Date Filed: 03/23/2020 Entry ID: 4894162

Ramirez-Peyro v. Holder,
574 F.3d 893, 900 (8th Cir. 2009). 10

Roe v. Humke,
128 F.3d 1213, 1216 (8th Cir. 1997). 10-11

Rosenberger v. Rector & Visitors of the Univ. of Va.,
515 U.S. 819, 830 (1995) 28

Rowe v. City of Cocoa, Fla.,
358 F.3d 800, 802 (11th Cir.2004) 23

Smoky Hills Wind Project II, LLC v. City of Indep., Missouri,
889 F.3d 461, 471 (8th Cir. 2018) 19

Southeastern Promotions, Ltd. v. Conrad,
420 U.S. 546, 555 (1975) 27, 32

United States Postal Service v. Council of Greenburgh Civic Ass'ns,
453 U.S. 114, 128-29 (1981) 28, 32

Walker v. Tex. Div., Sons of Confederate Veterans, Inc.,
135 S.Ct. 2239, 2250 (2015) 29

Wickersham v. City of Columbia,
481 F.3d 591, 597 (8th Cir. 2007) 9

Wood v. Milyard,
566 U.S. 463, 473 (2012) 19

Zanna v. Mohave Cty., No. CV-10-8149-PCT-GMS,
2012 WL 3871575, at *4 (D. Ariz. Sept. 6, 2012) 23, 33

Appellate Case: 19-2994 Page: 5 Date Filed: 03/23/2020 Entry ID: 4894162

STATEMENT OF THE CASE

Appellant Cheri Toalson Reisch ("Rep. Reisch") is a State Representative for the 44th District of the Missouri House of Representatives. Appellant's Addendum ("Add.") 2, ¶2. Like many members of the Missouri General Assembly, Rep. Reisch has a Twitter account. Add. 3, ¶14. Twitter is a social media platform with more than 300 million active users worldwide, including approximately 70 million users in the United States. Add. 2, ¶3. Twitter allows users to publish short messages to the general public called "tweets"; to republish or respond to others' tweets; and to interact with other Twitter users. Add. 2, ¶4. A tweet may include photographs, videos, and hyperlinks but cannot exceed 280 characters. Add. 2, ¶5.

Each Twitter user has a unique account name or "handle," which comprises an @ symbol followed by a word or phrase. Add. 2, ¶6. Users may choose to "follow" other Twitter account holders by searching for their handles and clicking the "follow" button. Add. 2, ¶7. A "followed" user's tweets automatically appear in the "following" user's Twitter "feed," which is a continuously-updating scroll of new tweets from other users. Add. 2, ¶8. A user may comment on the tweets of other users, or she may "retweet" their tweets to her own followers. Add. 2, ¶9. Users may also see a log of their own past tweets, comments, and retweets, along with any comments or retweets they have received from their own followers. Add. 2, ¶10. Some Twitter users publish hundreds of tweets per day while others merely read the tweets that appear in their Twitter feed. Add. 2, ¶11. Twitter also allows its users to block certain other users

Appellate Case: 19-2994 Page: 6 Date Filed: 03/23/2020 Entry ID: 4894162

from following their tweets. Add. 3, ¶12. If the blocked user attempts to follow the blocking user, or attempts to access the Twitter account from which the user is blocked, the blocked user will see a message indicating that the other user has blocked her from following the account and viewing the tweets associated with the account. Add. 3, ¶13.

Representative Reisch uses the Twitter handle @CheriMO44. Add. 3, ¶15. The "MO44" in her Twitter handle "CheriMO44" refers to the elected office she holds in 44th District of the Missouri House of Representatives. Add. 3, ¶16. Representative Reisch's Twitter profile describes her as a "Christian, MO State Rep 44th District, Mother, Grandmother." Add. 3, ¶17. Below this description is a circle with a downward facing point and the words "District 44, Missouri, USA," as well as a link to her campaign website, cheri44.com. Add. 3, ¶¶18-19. The banner photo at the top of her Twitter page and the circular photo above her profile show Representative Reisch at her desk on the Missouri House floor. Add. 3, ¶¶20-21.

Since her election to the Missouri House of Representatives on November 8, 2016[1], Representative Reisch has used her Twitter page to engage in discourse about political topics and to indicate her position relative to other government officials, Add. 6, ¶32, routinely tweeting or retweeting about her work as a state representative and posting pictures of herself on the House floor, Add. 4, ¶28. For example, on

[1] As noted in Appellant's Brief, the District Court's Findings of Fact included a minor typographical error indicating that Representative Reisch was elected in 2018 instead of 2016.

Appellate Case: 19-2994 Page: 7 Date Filed: 03/23/2020 Entry ID: 4894162

January 4, 2017, Representative Reisch tweeted a photo of herself at her desk in the House floor with the caption, "Today I was humbled to commit myself to represent everyone in the 44th District & uphold the Constitution of Missouri. #MOLeg." Add. 4, ¶28(a). On January 29, 2017, she tweeted a picture of her office with the caption, "Thrilled to have so many of my neighbors from the 44th District come by the office at tonight's energetic Governor's Ball. #MOLeg #MO44." Add. 4, ¶28(b). On March 22, 2017, Representative Reisch retweeted a post by @MOHouse GOP declaring, "We are proud to deliver results during the first half of the session that will bring job growth to MO. #moleg." Add. 5, ¶28(c). On May 22, 2017, Representative Reisch tweeted a photograph of herself with House Speaker Todd Richardson 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." Add. 5, ¶28(d). On June 12, 2017, Representative Reisch tweeted about the passage of the Real ID bill. Add. 5, ¶28(e). On July 12, 2017, Representative Reisch tweeted about "Right to Work" and tort reform legislation. Add. 5, ¶28(f). On August 16, 2017, Representative Reisch tweeted, "I testified before the Senate today to repeal prevailing wage. Saves taxpayers $, helps schools, cites, etc." Add. 5, ¶28(g). On September 7, 2017, Representative Reisch tweeted a photo of herself with Governor Greitens and the caption, "Toured @3M facility in my district today w/Gov @EricGreitens. Glad to hear they are growing & bringing new jobs w/help of #MOLeg policies!" Add. 5, ¶28(h). On October 19, 2017, Representative Reisch tweeted a photo of herself with then-Lieutenant

Governor Parson with the caption, "Glad to have Lt. Gov @MikeParsonforMO in my District for Associated Industries of MO." Add. 5, ¶28(i). On November 13, 2017, Representative Reisch tweeted, "Congrats to @RobVescovo our new Floor Leader. We both at times, can be that bull in the china cabinet if we need to be." Add. 5, ¶28(j). On December 9, 2017, Representative Reisch tweeted her legislative scorecard from United for Missouri, adding: "I scored an A. Not bad for a Freshman." Add. 6, ¶28(k). On March 14, Representative Reisch tweeted about a picnic in her House office, writing, "My office is in the People's House. It's all of ours to share in its glory." Add. 6, ¶28(l). On May 18, 2018, she retweeted a message from House Speaker Todd Richardson with the comment, "Thank you Mr. Speaker, you are a true gentleman. We worked hard and got the job done." Add. 6, ¶28(m). On June 13, 2018 she tweeted, "Accomplished much in my 1st 2 years, ready for the next 2." Add. 6, ¶28(n).

On June 23, 2018, Representative Reisch blocked Respondent Mike Campbell—one of her constituents in the 44th House District—from her Twitter account. Add. 2, ¶1; Add. 7, ¶38. Both Reisch and Maren Jones, her opponent in the upcoming 2018 election, had attended a Farm Bureau event in Boone County on June 22, after which Reisch tweeted, "Sad my opponent put her hands behind her back during the Pledge." Add. 6, ¶33. Reisch's fellow state legislator Kip Kendrick replied to her tweet, "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

unacceptable from a member of the Boone County delegation." Add. 6-7, ¶34. Mike Campbell saw Kendrick's reply and retweeted it to his own Twitter followers to provide "context for what [Reisch] was tweeting out into the public sphere" about Maren Jones. Add. 6-7, ¶35, 37. A short time later, Reisch blocked Campbell from her Twitter account, rendering him unable to see or join in the ongoing debate among Reisch's followers about her jab at Maren Jones. Add. 7, ¶41. Reisch has also blocked at least 123 other Twitter users from her account. Add. 7, ¶43.

Campbell sued Reisch under 42 U.S.C. § 1983 to vindicate his First Amendment right to participate in political discourse about his state representative in the same forum she had used to impugn the patriotism of her political rival. Following a bench trial, the district court issued a declaratory judgment concluding (a) that Campbell had engaged in political speech by retweeting Kendrick's reply to Reisch, (b) that the interactive space associated with Reisch's Twitter account is a designated public forum, (c) that Reisch blocked Campbell from accessing or speaking in that forum based on the viewpoint he had expressed, and (d) that she acted under color of state law to suppress speech critical of her performance as a public official. The district court also permanently enjoined Reisch from blocking Campbell or other Twitter users from her Twitter page based on the content or viewpoint of their speech. Reisch appeals.

Appellate Case: 19-2994 Page: 10 Date Filed: 03/23/2020 Entry ID: 4894162

SUMMARY OF THE ARGUMENT

The Second and Fourth Circuits have both held that the First Amendment prohibits a public official from blocking individual speakers from engaging in disfavored speech within the interactive space associated with a social media account used by that official to interact with the public on the performance of her official duties. Applying the public forum analysis adopted in those cases to the facts of this case, the district court correctly ruled that Representative Reisch violated the First Amendment when she blocked Campbell—and more than 100 other users—from her Twitter account because she did not like the viewpoint he expressed.

Rep. Reisch appeals from the district court's declaratory judgment and permanent injunction on two main grounds. First, she argues that the district court erred in finding she acted under color of state law because (A) she did not exercise any authority possessed by virtue of her public office to block Campbell, (B) individual state legislators cannot take any actions under color of state law, and (C) her Twitter account is campaign speech protected by Reisch's own First Amendment Rights. Second, Reisch argues (A) that Twitter is not susceptible to public forum analysis, and (B) that individual state legislators cannot create public forums.

There is no merit to any of Reisch's arguments. Regardless of the office held, a state official who initiates a *dialogue* with the general public on social media about the conduct of her office has created a designated public forum subject to the First

Appellate Case: 19-2994 Page: 11 Date Filed: 03/23/2020 Entry ID: 4894162

Amendment. If the same official excludes some speakers from that forum to silence criticism of her office, she does so under color of law.

ARGUMENT

I. Reisch acted under color of state law when she excluded Campbell and other critics of her fitness for public office from accessing and commenting on the Twitter account she uses to discuss her legislative agenda and accomplishments with the general public.

A. Excluding a state official's critics from a public forum created by that official to discuss her conduct in office is state action.

In her first point on appeal, Reisch argues that she did not block Campbell from her Twitter account "under color of state law."[2] Relying largely on *Magee v. Trustees of Hamline Univ., Minn.*, 747 F.3d 532, 535 (8th Cir. 2014), Reisch contends that a public employee acts under color of law *only* 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." App. Br. at 14. Asserting that her ability to block followers from her Twitter account is a feature common to all Twitter users rather than a unique "power possessed by virtue of state law" or "made possible only because [she] is clothed with the authority of state law," Reisch argues that she did not block Campbell "under color of state law." *Id.*

[2] "The essential elements of a constitutional claim under § 1983 are (1) that the defendant acted under color of state law, and (2) that the alleged wrongful conduct deprived the plaintiff of a constitutionally protected federal right." *L.L. Nelson Enterprises, Inc. v. Cty. of St. Louis, Mo.*, 673 F.3d 799, 805 (8th Cir. 2012).

Appellate Case: 19-2994 Page: 12 Date Filed: 03/23/2020 Entry ID: 4894162

Reisch's reliance on *Magee* is misplaced. In that case, a tenured professor and a private law school wrote a newspaper column accusing the St. Paul Police Department of racism. *Magee*, 747 F.3d at 534. Subsequently, the president of the St. Paul Police Officer's union wrote his own op-ed, questioning Magee's fitness to teach and urging the officer's union to boycott the University. *Id.* Two years later, after she was convicted of tax evasion, the university fired Magee. *Id.* She then sued the university and the president of the officer's union under 42 U.S.C. § 1983 for conspiring to violate her First Amendment rights. *Id.*

On appeal from the district court's dismissal for failure to state a claim, this Court held that Magee had not pleaded sufficient facts that the any of the defendants was acting under color of state law. *Id.* at 535. The Court explained that "whether a police officer is acting under color of state law turns on the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties." *Id.* "Absent any actual or purported relationship between the officer's conduct and his duties as a police officer, the officer cannot be acting under color of state law." *Id.* (internal citations omitted). "Factors include: whether the officer is on duty and in uniform, the motivation behind the officer's actions, whether the officer had access to the victim because of his position, and whether the officer threatened official conduct in the future." *Id.* Magee failed to state a claim, this Court reasoned, because she did not allege that the police defendant was "on duty or in uniform when he published his editorial"; that "he was motivated by anything other than his

personal concern and the [union's] position"; or that "he had access to her (or her editorial) because he was an officer." *Id.*

Magee is inapposite. First and foremost, that case involved a First Amendment *retaliation* claim, which has nothing to do with the *public forum analysis* at issue here. The newspaper in which both Magee and the officer published their op-eds was neither created, maintained, nor controlled by the police department (or any other government agency or official). Even if that newspaper could be considered a public forum—which neither Magee argued nor the Eighth Circuit found—there was no allegation that the police officer blocked Magee from reading the newspaper herself or prevented her from submitting her own writing for publication. The gravamen of Magee's claim was that the defendant police officer got her *fired*, not that he prevented her from speaking as is the case here.

Magee's analysis of conduct "under color of state law" is specific to the facts of that case and far narrower than either the Supreme Court or this Court has applied in other cases. "[T]he statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982); *see also Wickersham v. City of Columbia*, 481 F.3d 591, 597 (8th Cir. 2007) ("If a party's conduct meets the requirements for state action, the same acts also qualify as actions taken 'under color of state law' for purposes of § 1983."). To be considered "state action," a challenged act must be "fairly attributable to the State." *Lugar,* 457 U.S. at 929. "What is fairly attributable is a

matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). "From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." *Id.* at 295–96.

When state action is disputed, this Court "look[s] to see whether a sufficient nexus exists between the official's public position and the official's harmful conduct." *Ramirez-Peyro v. Holder*, 574 F.3d 893, 900 (8th Cir. 2009). "[A]cts of officers in the ambit of their personal pursuits are plainly excluded" while "[a]cts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." *Roe v. Humke*, 128 F.3d 1213, 1216 (8th Cir. 1997). "[W]hether a police officer is acting under color of state law turns on the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties." *Id.* at 1216.

By way of illustration, consider two situations in which a police officer commits a sexual assault. In the first situation, assume the officer is off-duty, driving his personal vehicle, and not wearing his uniform or carrying his badge or gun. He invites a young woman to his farm to ride all-terrain vehicles and subsequently gropes her while sitting behind her on a four-wheeler. In the second situation, assume an on-duty officer in uniform follows a young woman home in his patrol car and threatens to

give her a speeding ticket before driving away. A month later, the same officer is again on duty and wearing his uniform when enters the store where the woman works, forces his hand underneath the woman's sweatshirt, and gropes her. As this Court has concluded, the first officer "was not acting under color of law because there was no nexus between his position as a police officer and his abuse of [the woman] on the day in question." *Hunke*, 128 F.3d at 1218. By contrast, the second officer was acting under color of state law because his "actions were entwined with an abuse of his police authority." *Haberthur v. City of Raymore, Missouri*, 119 F.3d 720, 724 (8th Cir. 1997). While both situations involve a sexual assault by a police officer, only the later involves a nexus between the defendant's public office and his harmful conduct.

Now consider two situations in which a state legislator blocks a constituent from one of her social media accounts. In the first situation, assume the legislator uses her social media account to post pictures of her grandchildren and only permits members of her family to access the account. In the second situation, assume the legislator uses her social media account to engage in a dialogue with the general public about her legislative agenda and accomplishments but excludes constituents who disagree with her from seeing or commenting on posts. Both scenarios involve a public official restricting the speech of others on her social media accounts, but only the later involves a nexus between the restricted speech and the legislator's office. Only the latter restriction is fairly attributable to the state because its purpose is to silence criticism of a state official.

Reisch argues that blocking someone on Twitter cannot be state action because blocking is a function available private citizens as well and not a power possessed solely by virtue of her public office. She misses the point. That Reisch used software created by a private company to deprive Campbell of his First Amendment rights does not preclude a finding of state action any more than does an officer's use of a Smith & Wesson revolver to shoot a suspect without due process. "The Constitution constrains governmental action by whatever instruments or in whatever modes that action may be taken." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995); *see also Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019) ("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."). "If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law." *Griffin v. State of Md.*, 378 U.S. 130, 135 (1964).

It is similarly irrelevant that Reisch may also block Campbell from her strictly private Facebook page without violating the constitution. What makes her conduct *state action* here is that she blocked him from participating in her online dialogue with the general public in order to silence criticism of her fitness to hold public office. *See Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019), as amended (Jan. 9, 2019) ("a challenged action by a governmental official is fairly attributable to the state when 'the

sole intention' of the official in taking the action was 'to suppress speech critical of his conduct of official duties or fitness for public office.'").

The Fourth Circuit's opinion in *Davison* and the Second Circuit's opinion in *Knight* offer much closer analogs to the facts of the present case than *Magee*. In *Davison*, defendant Phyllis Randall, who served as the Chair of the Loudoun County, Virginia, Board of Supervisors, personally created and administered a Facebook page entitled "Chair Phyllis J. Randall." *Davison*, 912 F.3d at 673. One of her constituents, Brian Davison, brought a § 1983 claim against Randall after she banned him from her page. *Id.* The Fourth Circuit concluded that "Randall clothed [her Facebook page] in the power and prestige of her state office, and created and administered the page to perform actual or apparent duties of her office." *Id.* at 681. She also used the Facebook page "as a tool of governance" by "provid[ing] information to the public about her and the Loudoun Board's official activities and soliciting input from the public on policy issues she and the Loudoun Board confront." *Id.* at 680. Because Davison's critical comments "[we]re linked to events which arose out of [Randall's] official status … Randall acted under color of state law in banning Davison from the [Page]." *Id.* at 681 (internal citation omitted). Davison's comment "informed the public about what happened at the Loudoun Board and Loudoun County School Board's joint meeting," and "dealt with an issue related to that meeting and of significant public interest—School Board members' alleged conflicts of interest in approving financial transactions." *Id.* Consequently, the Fourth Circuit reasoned that

"Randall's ban of Davison amounted to an effort to suppress speech critical of such members' conduct of their official duties or fitness for public office, which further reinforces that the ban was taken under color of state law." *Id.* (citation, internal quotation marks and brackets omitted).

In *Knight*, several critics of President Trump brought a *Bivens* action against the president for blocking them from his @RealDonaldTrump account. As in *Davison*, the court in *Knight* concluded that the "interactive space" associated with each of the president's tweets constituted a public forum for First Amendment purposes and that blocking plaintiffs based on their criticism of the president was unconstitutional viewpoint discrimination. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 566 (S.D.N.Y. 2018). On appeal, the president argued that he is "not acting in his official capacity when he blocks users because that function is available to all users, not only to government officials." *Knight*, 928 F.3d at 236. The Second Circuit disagreed, observing that "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." *Id.* at 236. "Because the President … acts in an official capacity when he tweets, we conclude that he acts in the same capacity when he blocks those who disagree with him." *Id.*

Reisch's conduct in the present case is essentially the same as Randall's and Trump's conduct in *Davison* and *Knight*. Reisch clothed her Twitter account in the power and prestige of her state office. She used the Twitter handle "@CheriMO44,"

referring to the elected office she holds in 44th District of the Missouri House of Representatives. Add. 3, ¶16. Her profile describes her as "MO State Rep 44th District." Add. 3, ¶17. The banner photo at the top of her Twitter page and the circular photo above her profile show Reisch at her desk on the Missouri House floor. Add. 3, ¶¶20-21. Reisch also used her Twitter account "as a tool of governance" by providing information to the public about her official activities and soliciting input from the public on policy issues she and the Missouri General Assembly confront. For example, Reisch tweeted a photo of herself at her desk on the House floor on the day she took office with the caption, "Today I was humbled to commit myself to represent everyone in the 44th District & uphold the Constitution of Missouri. #MOLeg." Add. 4, ¶28(a). On March 22, 2017, she tweeted, "We are proud to deliver results during the first half of the session that will bring job growth to MO. #moleg." Add. 5, ¶28(c). On May 22, 2017, Reisch tweeted a photograph 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." Add. 5, ¶28(d). On June 12, 2017, she tweeted about the passage of the Real ID bill. Add. 5, ¶28(e). On July 12, 2017, she tweeted about "Right to Work" and "tort reform" legislation. Add. 5, ¶28(f). On August 16, 2017, Reisch tweeted, "I testified before the Senate today to repeal prevailing wage. Saves taxpayers $, helps schools, cites, etc." Add. 5, ¶28(g). On September 7, 2017, she Reisch tweeted a photo of herself standing next to then-Governor Greitens with the caption, "Toured @3M facility in my district

today w/Gov @EricGreitens. Glad to hear they are growing & bringing new jobs w/help of #MOLeg policies!" Add. 5, ¶28(h). On October 19, 2017, Representative Reisch tweeted a photo of herself standing next to then-Lieutenant Governor Parson with the caption, "Glad to have Lt. Gov @MikeParsonforMO in my District for Associated Industries of MO." Add. 5, ¶28(i). In short, Reisch used her Account as "an important tool of governance." *Knight*, 928 F.3d at 236.

Of course, the most important parallel between Reisch, Randall, and Trump is that all three excluded their respective detractors from the social media accounts they use to interact with the public in response to criticism about their conduct in, and fitness for, public office. Just as "Randall's ban of Davison amounted to an effort to suppress speech critical of [her] … fitness for public office," Reisch's ban of Campbell amounted to a suppression of speech critical of her fitness for public office. And just as the President Trump "used the blocking function of [his Twitter] Account to exclude disfavored voices," *Knight*, 928 F.3d at 236 (2d Cir. 2019), Representative Reisch used that same function to silence those who disagreed with her. Considering the totality of these circumstances, the district court correctly held that Reisch acted under color of state law in banning Campbell from her Twitter account.

B. The same state action analysis applies to officials in the legislative branch as well as the executive branch.

Reisch argues that she cannot engage in state action via Twitter because she is in the legislative branch rather than the executive branch and cannot carry out any of

her official duties on Twitter. It's hard to test that claim without a comprehensive list of her official duties—she identifies only casting votes and participating in committee hearings in her brief. But whatever the official duties of a state representative may be, engaging in public discourse with her constituents must figure prominently among their number.

Reisch does not cite any case law for the proposition that a legislator cannot engage in state action except when voting or siting in committee hearings.[3] The only authority she mentions at all is dicta from a concurring opinion in *Davison*, in which Judge Keenan questions whether an individual legislator "qualifies as a unit of government or a government entity for purposes of her ability to open a public forum." 912 F.3d at 692 (Keenan, J., concurring). Nonetheless, Judge Keenan joined the majority in holding that the Chair of the Loudoun County Board of Supervisors—an ostensibly legislative office—engaged in state action when blocking Davison from

[3] Numerous federal courts have held that § 1983/*Bivens* claims may be brought against individual legislators for actions other than voting or sitting on committees. *See, e.g., Davis v. Passman*, 442 U.S. 228, 244 (1979) (former congressional staffer could bring *Bivens* action against congressman for violating staffer's due process rights); *Clark v. Kolkhorst*, Case No. A-19-CV-0198-LY-SH, 2020 WL 572727, at *3 (W.D.Tex. Feb. 5. 2020) (slip opinion) (denying motion to dismiss because plaintiff plausibly alleged that defendant state senator acted under color of state law in managing her Facebook page); *One Wisconsin Now v. Kremer*, 354 F. Supp. 3d 940, 951–52 (W.D. Wis. 2019) (granting summary judgment against members of the Wisconsin General Assembly for blocking constituents from their Facebook pages, finding "There is little question that Kremer and Nygren's accounts rely on the power and prestige of ... state office and were created and administered ... to perform actual or apparent duties of [Kremer and Nygren's] office[s]" as state legislators).

her Facebook page "to suppress speech critical of [her] conduct of official duties or fitness for public office." 912 F.3d at 680.

Reisch's attempt to distinguish her use of her Twitter account from President Trump's or from Randall's use of her Facebook page is likewise unavailing. Randall used her Facebook page to "provide information to the public about her and the Loudoun Board's official activities and [to] solicit input from the public on policy issues she and the Loudoun Board confront." *Davison*, 912 F.3d at 680. President Trump used his Twitter account "as a channel for communicating and interacting with the public about his administration." *Knight*, 928 F.3d at 235. Similarly, Reisch used her Twitter account to provide information to the public about her official activities—from passage of the Real ID bill, "tort reform," and "right-to-work" legislation; to her testimony before the Senate in support of repealing Missouri's prevailing wage law; to public appearances in her district with the governor and lieutenant governor. Add. 5, ¶¶28a-i. She also used her Twitter account to engage in dialogue with other legislators, constituents, and journalists about the conduct of her office and the legislation she voted on.[4] Indeed, the tweets giving rise to this suit were initially exchanged between Reisch and fellow state representative Kip Kendrick, an

[4] *See, e.g.*, Appendix of Trial Exhibits at 4 (replying to tweets by fellow state representatives Sara Walsh and Bruce Franks, Jr.); 10 (replying to tweets from constituent Robyn Schelp about picnicking in Rep. Reisch's office while at the capitol); 13 (replying to and disagreeing with tweet by St. Louis Post Dispatch editor Tony Messenger regarding legislative inaction); 24 (disagreeing with state auditor Nicole Gallaway about sharing voting records with federal government); 29 (tweeting about presenting Missouri House Proclamations to Hallsville students).

exchange that generated an ongoing dialogue between nearly 30 other Twitter users. *See* Appendix of Trial Exhibits at 106-133. Reisch's exclusion of dissenting opinions from the ongoing dialogue in the comment section of her Twitter account is no less state action than President Trump's exclusion of dissenters from the ongoing dialogue in the comment section of his Twitter account. In both cases, a government official is censoring public debate based on the viewpoint of the speaker—conduct that is fairly attributable to the state.

C. Reisch's own First Amendment rights do not excuse her suppression of dissenting voices in a public forum.

For the first time on appeal, Reisch argues that blocking Campbell cannot be considered state action because her Twitter account is purely campaign speech and therefore the First Amendment protects her right to exclude others. Reisch did not raise this argument in the district court. She did not even use the word "campaign," much less "campaign speech," in either her motion to dismiss briefing or her Answer to the First Amended Complaint. Other than testifying briefly that her nephew set up her Twitter account when she started her campaign for the House, Tr. at 42:25-43, Reisch did not argue at trial that her Twitter account was campaign speech. This Court should not entertain this argument for the first time on appeal. *See Wood v. Milyard*, 566 U.S. 463, 473 (2012) ("For good reason, appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved"); *Smoky Hills Wind Project II, LLC v. City of Indep., Missouri*, 889 F.3d 461, 471 (8th Cir. 2018) ("We

Appellate Case: 19-2994 Page: 24 Date Filed: 03/23/2020 Entry ID: 4894162

do not ordinarily consider arguments raised for the first time on appeal."); *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 725 (8th Cir. 2002) ("We consider a newly raised argument only if it is purely legal and requires no additional factual development, or if a manifest injustice would otherwise result.").

Even if Reisch had preserved this argument on appeal, it has no merit. She claims that "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." Appellant's Br. at 28. That argument is both factually and legally wrong. It is factually wrong because the portion of the district court's order she quotes from in her brief found only that Reisch "launched her Twitter account alongside her campaign," and that the account "links to her campaign webpage." *Id.* In that same paragraph, the district could also found that Reisch's Twitter "handle references her elected district," that "the image associated with Defendant's Twitter account is a photo of her on the state house floor," and that "Defendant used her Twitter account to tweet about her work as a public official." *Id.* Elsewhere in its Findings of Fact and Conclusions of law, the district court noted that "[d]uring her first 18 months in office, [Reisch] routinely tweeted or retweeted about her work as a state representative and posted pictures of herself on the House floor or standing with other elected officials." FOF ¶28, Add. at 4. The Court provided 15 lettered paragraphs describing many of those posts. It also found that Reisch "used her Twitter page to engage in discourse about political topics and/or to indicate her position relative to other government officials."

Appellate Case: 19-2994 Page: 25 Date Filed: 03/23/2020 Entry ID: 4894162

FOF ¶32, Add. at 6. On a purely factual level, the district court found more on Reisch's Twitter account than just "traditional campaign activity."

Reisch's argument is also legally flawed. She advances a false dichotomy that "campaign activity is substantially different and … legally distinct from the execution of her the official duties of a public office." Appellant's Br. at 28. But that's only partially true. To be sure, there are some purely campaign-related activities that do not involve the exercise of official duties, e.g., campaign rallies, door-to-door canvasing, mailing campaign literature. But there are few if any purely official acts that are not also part of an elected official's campaign to stay in office. Indeed, any politician who says or does something in her official capacity that is *not* also part of her reelection campaign isn't doing it right. Reisch paints with too broad a brush in suggesting that every statement she makes other than "yea" or "nay" on a particular bill on the House floor is "traditional campaign activity."

More importantly, even assuming that every tweet Reisch posted on Twitter were "traditional campaign activity," this case is not about her posts. It's about the interactive space created by each of her posts. In *Knight,* the district court "reject[ed] out of hand any contention that the content of the President's tweets are susceptible to forum analysis" because "the content of the tweets sent by @realDonaldTrump are solely the speech of the President or of other government officials." 302 F. Supp. 3d at 571. "The same cannot be said, however, of the interactive space for replies and retweets created by each tweet sent by the @realDonaldTrump account." *Id.* at 572.

"[R]eplies to the President's tweets remain the private speech of the replying user." *Id.* As will be discussed further below, it is "the interactive space associated with each of" Reisch's tweets that "is properly analyzed under the Supreme Court's forum precedents." *Id.* at 573.

Reisch is correct that a public official's own speech and assembly rights permit her to exclude whomever she wants from a campaign rally. *See, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.,* 515 U.S. 557, 581 (1995)(holding private parade organizers could exclude voices with which they did not agree even though parade occurs on a public street); *King v. Friends of Kelly Ayotte*, 860 F. Supp. 2d 118, 125 (D.N.H. 2012), aff'd (Apr. 5, 2013) ("when private actors rent private facilities, even for public political purposes, neither the venues nor the functions are converted into public forums for purposes of the First Amendment"). But the analogy between a campaign rally and an elected official's Twitter account breaks in the comment section. Unlike a campaign rally, which is limited in time and scope, "the interactive space of each tweet, as distinguished from the content of the tweet, [is not] constrained by the notions of inherent selectivity and scarcity that the Supreme Court held to counsel against the application of forum doctrine" in cased involving the denial of government grants, the exclusion of candidates from televised debates, or the refusal to place a donated statute in a municipal park. *Knight*, 302 F. Supp. 3d at 572 (citing *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998); and *Pleasant Grove City, Utah v.*

Summum, 555 U.S. 460 (2009); respectively). On the contrary, the interactive space below every tweet can hold a nearly infinite number of users and their comments.

A better analogy for a tweet's comment space is a town hall meeting, in which a legislator may not discriminate on the basis of viewpoint.[5] *See Zanna v. Mohave Cty.*, No. CV-10-8149-PCT-GMS, 2012 WL 3871575, at *4 (D. Ariz. Sept. 6, 2012) (town hall meeting held by Senator McCain was a limited public forum in which restraints on speech must be (1) "viewpoint neutral" and (2) "reasonable in light of the purpose served by the forum"); *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 281 (3d Cir.2004) (holding that a "citizen's forum" at a public meeting is a limited public forum because "public bodies may confine their meetings to specified subject matter"); *Rowe v. City of Cocoa, Fla.*, 358 F.3d 800, 802 (11th Cir.2004) ("city commission meetings are limited public fora—i.e., a forum for certain groups of speakers or for the discussion of certain subjects") (internal quotations and citations omitted). Such events may be highly structured and limited in subject matter, but they cannot discriminate between speakers on the basis of viewpoint:

[5] This analogy is not perfect. Town hall meetings are generally viewed as "limited public forums" or "nonpublic forums" rather than "designated public forums," as the Second and Fourth Circuits have held Twitter's comment space to be. That distinction is without a difference in this context, however, because even nonpublic forums may not discriminate on the basis of viewpoint. *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885, 201 L. Ed. 2d 201 (2018) ("The government may reserve such a forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and *not an effort to suppress expression merely because public officials oppose the speaker's view*.") (Emphasis added).

> Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, *the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.*

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (emphasis added). Elected officials do not lose their First Amendment rights when they take office, but they "cannot exercise those rights in a way that infringes the corresponding First Amendment rights of those who have criticized [them]. *Knight*, 302 F. Supp. 3d at 577.

Reisch argues that prohibiting the exclusion of Campbell from her Twitter account would create a "perverse dichotomy" in which non-incumbent candidates for public office may discriminate between viewpoints in the comment section of their campaigns' Twitter accounts but incumbent officials may not. She may be right to the extent that the public official uses the same Twitter account *both* to interact with the general public about the functions of her office *and* to campaign for reelection. However, public officials are not limited to a single social media account—indeed, Reisch maintains both a private and a public Facebook account. So long as an official maintains separate accounts for her political campaign and her official interactions with the general public, only the latter must be viewpoint neutral; she can exclude anyone she wants from her campaign account. Moreover, the incumbent in any political race has substantial advantages over a non-incumbent challenger. Having to

Appellate Case: 19-2994 Page: 29 Date Filed: 03/23/2020 Entry ID: 4894162

"endure" critical comments from her constituents on the Twitter account she uses for official business is a small price to pay for access to the bully pulpit.

Finally, Reisch argues that "it is unquestionable that the speech giving rise to the controversy was purely campaign messaging." Appellant's Br. at 33. But even assuming her post questioning her political opponent's patriotism was nothing more than campaign speech, Reisch blocked Campbell from more than just that one post. She blocked him from seeing or commenting on *every* tweet she posted thereafter. She also prevented him from participating in any public discourse arising out her tweets. Excluding a particular constituent from a government official's ongoing conversation with the general public based on that constituent's criticism of the official's conduct in office is precisely the kind of state action the public forum doctrine prohibits. The district court's conclusion that Reisch blocked Campbell under color of state law should be affirmed.

II. Reisch deprived Campbell of his First Amendment right to free speech by excluding him from a designated public forum based on his viewpoint.

The First Amendment "sharply circumscribes" the government's authority to regulate speech in "places which by long tradition or by government fiat have been devoted to assembly and debate." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Such places include streets and parks, which "have immemorially been held in trust for the use of the public … for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* In

addition to these "traditional public forums," the government may open additional public spaces for expressive activity. *Id.* While the government is not required to keep such "designated public forums" open indefinitely, "as long as it does so it is bound by the same standards as apply in a traditional public forum." *Id.* at 46. Thus, "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say." *Id.*

The Second and Fourth Circuits have applied public forum analysis to the interactive space associated with the social media accounts of public officials. *See, Knight*, 928 F.3d at 239 (holding the President violated the First Amendment by blocking individuals from his Twitter account based on their disfavored speech); *Davison*, 912 F.3d at 688 (holding county official engaged in unconstitutional viewpoint discrimination by banning a critic from her Facebook account). That both U.S. Circuit Courts to confront this issue thus far have applied public forum analysis to social media is hardly surprising. For many Americans, social media "are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham v. North Carolina,* 137 S. Ct. 1730, 1737

(2017). "These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Id.* "They allow a person with an Internet connection to become a town crier with a voice that resonates farther than it could from any soapbox." *Id.* In short, social media have become the forum of choice for most Americans to share their political views, interact with elected officials, and—perhaps most obviously—engage in dissent.

Reisch advances two arguments for not applying public forum analysis to any part of her Twitter account. First, she argues that her Twitter account is not property "owned or controlled by the government." Second, she argues that even if the president and other executive officials have the inherent authority to open public forums, individual legislators such as she cannot. Both arguments fail.

A. Reisch's Twitter account is controlled by a state actor.

While most public forum cases involve land to which the government holds actual title (e.g., parks, streets, sidewalks, public universities), government *ownership* is not strictly required. "For a communication space to be susceptible to forum analysis, it must be owned *or controlled* by the government." *Cornelius*, 473 U.S. at 801 (emphasis added). In *Southeastern Promotions, Ltd. v. Conrad*, for example, the Supreme Court held that a privately owned theater was a "public forum[] designed for and dedicated to expressive activities" because it was leased to the city and a municipal board exercised control over is programming. 420 U.S. 546, 555 (1975). More recently in *Mansky*, 138 S. Ct. at 1886, the Supreme Court held that all polling places—which are often at

churches, Elk Lodges, or on other private property—are nonpublic forums, at least on Election Day, because they are under government control. *Id.*; *see also United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 128-29 (1981) (applying public forum analysis to privately-owned letterboxes used by the U.S. Postal Service). Conversely, when government-owned property is temporarily placed under private control, public forum analysis is not appropriate. S*ee, e.g., Hurley*, 515 U.S. at 557 (holding organizers of St. Patrick's Day Parade could discriminate based on viewpoint even though parade occurred on public streets). These cases reveal that the dispositive factor in the applicability of public forum analysis is not whether the putative forum is actually owned by the government but whether it is under government control. This is especially true where the communication space is "a forum more in a metaphysical than in a spatial or geographic sense," *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995), and may "lack[ ] a physical situs," *Cornelius*, 473 U.S. at 801, in which case traditional conceptions of "ownership" may fit less well. *Knight*, 302 F. Supp. 3d at 566.

Reisch argues that she does not own or control her Twitter account because Twitter is a private corporation with the power to exclude anyone it wants from its platform. She relies principally on *Morgan v. Bevin*, a district court opinion holding that a governor'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." 298 F. Supp. 3d 1003, 1011 (E.D. Ky. 2018). That court reasoned that

"Governor Bevin's use of privately owned Facebook Page and Twitter pages is personal speech, and, because he is speaking on his own behalf, even on his own behalf as a public official, the First Amendment strictures that attend the various types of government-established forums do not apply." *Id.* (quoting *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2250 (2015) (holding state issued license places are government speech rather that public forum).

Morgan confuses the public forum and government speech doctrines, relying primarily on *Pleasant Grove City, Utah v. Summum*, in which the Supreme Court held that a city's decision to accept certain privately donated monuments while rejecting others "is best viewed as a form of government speech." 555 U.S. 460, 481 (2009). That Court reasoned that "If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either brace themselves for an influx of clutter or face the pressure to remove longstanding and cherished monuments.") *Id.* at 479 (internal quotation marks omitted). Appling the same reasoning to a public official's social media accounts, the *Morgan* court concluded that

> requiring Governor Bevin to allow anyone to access and post on his Facebook and Twitter accounts could shut down the pages altogether. Hypothetically, if this Court ruled Governor Bevin could not block anyone from his Twitter or Facebook accounts, his accounts could be flooded with internet spam such that the purpose of conveying his message to his constituents would be impossible and the accounts would effectively, or actually, be closed.

298 F. Supp. 3d at 1012.

Morgan fails to distinguish between a public official's own tweets and the comments of other users. While the district court in *Knight* "reject[ed], at the outset, any contention that the @realDonaldTrump account *as a whole* is the would-be forum to be analyzed," it distinguished between "the content of the tweets sent [by the president]" and "the 'interactive space' associated with each tweet in which other users may directly interact with the content of the tweets by, for example, replying to, retweeting, or liking the tweet." *Id.* Applying the government speech doctrine, the *Knight* court concluded that the president's own tweets and the timeline aggregating his tweets were government speech and therefore "not susceptible to forum analysis." *Id.* at 572. By contrast, "[r]eplying tweets are controlled by the user who generates them, and no other Twitter user can alter the content of any ... reply, either before or after it is posted." *Id.* Moreover, this "interactive space" created by each of the president's tweets is not "constrained by the notions of inherent selectivity and scarcity that the Supreme Court held to counsel against the application of forum doctrine in … [*Summum*]." *Id.* Rather, the interactive space is "generally accessible to the public at large without regard to political affiliation or any other limiting criteria" and "capable of accommodating a large number of public speakers without defeating [its] essential function" *Id.* at 573. Indeed, "the essential function of a given tweet's interactive space is to allow private speakers to engage with the content of the tweet, which supports the application of forum analysis." *Id.*

Like President Trump's, Reisch's tweets are either personal or government speech, which she is free to limit to whatever topics and viewpoints she wants. In that sense, her tweets are no different from either her official House website or her campaign website—no one but she may determine what to say in that space. But Twitter (and other social media) is fundamentally different because it is *an interactive platform by design* and open to the general public at large. Reisch was not obligated to communicate on Twitter as opposed to a non-interactive medium. But so long as she chooses to use such an interactive medium, she cannot exclude other voices from participating in the discourse because she doesn't like what they have to say.

The very conduct giving rise to this law suit belies Reisch's argument that she doesn't control her Twitter account. She alone chose what to post on her account, and she alone chose whom to exclude from that account. As the court in *Knight* explained,

> Though Twitter also maintains control over the @realDonaldTrump account (and all other Twitter accounts), we nonetheless conclude that the extent to which the President and Scavino can, and do, exercise control over aspects of the @realDonaldTrump account are sufficient to establish the government-control element as to … the interactive space associated with each of those tweets. While their control does not extend to the content of a retweet or reply when made, … it nonetheless extends to controlling who has the power to retweet or reply in the first instance.

302 F. Supp. 3d at 566–67; *see also Davison*, 912 F.3d at 684 ("Randall had complete control over the aspect of the Chair's Facebook Page giving rise to Davison's

Appellate Case: 19-2994 Page: 36 Date Filed: 03/23/2020 Entry ID: 4894162

challenge because, as administrator of the page, Randall had authority to ban Facebook profiles or Pages from using the Chair's Facebook Page—and, therefore, the interactive component of the page—authority she exercised in banning Davison's Virginia SGP Page.").

That Reisch's Twitter account is technically "owned" by Twitter, Inc. is no different from the privately-owned church used as a polling place in *Mansky*, 138 S. Ct. 1876 (2018) or the privately owned theater leased to the city in *Conrad*, 420 U.S. 546, (1975), or the privately-owned letterboxes use by the postal service in *Greenburgh*, 453 U.S. 114 (1981). In each case, *control* of the space by a state actor transformed otherwise private property into a public forum for purposes of the First Amendment.[6] "The Constitution constrains governmental action by whatever instruments or in whatever modes that action may be taken." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995).

[6] Reisch's reliance on *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019), is similarly misplaced. In that case, the Supreme Court held that that the *private owner* of a public access cable station in New York was not a state actor because "[t]he City does not own or lease the public access channels, and the City does not possess a formal easement or other property interest in those channels." *Id* at 1933. At the same time, the Court warned, "our point here should not be read too broadly. … [A] local government may decide to itself operate the public access channels on a local cable system .... Depending on the circumstances, the First Amendment might then constrain the local government's operation of the public access channels." *Id.* at 1934. Thus, under *Halleck*, Campbell cannot sue *Twitter* simply because it makes its platform available to the general public. But *Halleck* does not preclude Campbell from suing *a public official* who uses Twitter in violation of the First Amendment.

B. Individual legislators are no less bound by the First Amendment than the President of the United States.

Finally, Reisch suggests that individual legislators lack the power to open public forums in the first place. Her sole authority for this argument is Judge Keenan's concurrence in *Davison*, which questioned whether an individual legislator "qualifies as a unit of government or a government entity for purposes of her ability to open a public forum." 912 F.3d at 692 (Keenan, J., concurring). Whatever her doubts may have been, Judge Keenan joined the majority in holding that the Chair of the Loudoun County Board of Supervisors—an ostensibly legislative office—engaged in state action when blocking Davison from her Facebook page "to suppress speech critical of [her] conduct of official duties or fitness for public office." 912 F.3d at 680. In any event, courts have held that individual legislators create nonpublic forums when they hold town hall meetings. *See, e.g., Zanna*, WL 3871575, at *4 (town hall meeting held by Senator McCain was a limited public forum in which restraints on speech must be (1) "viewpoint neutral" and (2) "reasonable in light of the purpose served by the forum"). There is no principled reason for letting legislators stifle dissent when the president and other executive officers may not. Arguably, communication between constituents and the legislators they elect to represent them is the *most* essential form of communication to a functioning republic. Reisch literally *represents* Campbell in the 44th district of the Missouri House of Representatives. The

Appellate Case: 19-2994 Page: 38 Date Filed: 03/23/2020 Entry ID: 4894162

First Amendment does not obligate her to listen to Campbell, but she cannot prohibit him from speaking.

CONCLUSION

For the reasons stated above, this Court should affirm the district court's declaratory judgment and permanent injunction against Appellant Cheri Toalson Reisch.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record certifies, pursuant to Fed. R. App. P. 32(g), that:

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 9,866 words as determined by the word counting feature of Microsoft Word 365.

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3. Pursuant to Local Rule 28A(h), this Brief has been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free

/s/ J. Andrew Hirth
Counsel for Plaintiff-Appellee

Appellate Case: 19-2994 Page: 40 Date Filed: 03/23/2020 Entry ID: 4894162

CERTIFICATE OF SERVICE

I certify that on March 20, 2020, 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.

/s/ J. Andrew Hirth
Counsel for Plaintiff-Appellee

Appellate Case: 19-2994 Page: 41 Date Filed: 03/23/2020 Entry ID: 4894162