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

REPLY BRIEF FOR DEFENDANT-APPELLANT

LOWELL D. PEARSON
HUSCH BLACKWELL LLP
235 East High Street, Suite 200
Jefferson City, Missouri 65102
Telephone (573) 761-1115
Facsimile (573) 634-7854
lowell.pearson@
huschblackwell.com

MICHAEL T. RAUPP
HUSCH BLACKWELL LLP
4801 Main Street, Suite 1000
Kansas City, Missouri 64112
Telephone (816) 983-8000
Facsimile (816) 983-8080
michael.raupp@
huschblackwell.com

May 20, 2020

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... **ii**

INTRODUCTION **1**

ARGUMENT **3**

I. Reisch Did Not Act Under Color of State Law. 3

A. This Court's precedent—consistent with that of the Supreme Court—establishes the lack of state action in this case. 3

B. If this Court expands the analysis to include a broader evaluation of Reisch's conduct on Twitter, there is still no conduct under color of law. 11

II. Forum Analysis Does Not Apply 22

CONCLUSION **28**

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) **30**

CERTIFICATE OF SERVICE **31**

Appellate Case: 19-2994 Page: 2 Date Filed: 05/20/2020 Entry ID: 4915220

TABLE OF AUTHORITIES

Page(s)

Cases

Ark. Educ. Television Comm'n v. Forbes,
523 U.S. 666 (1998) 24

Brentwood Academy v. Tennessee Secondary School Athletic Association,
531 U.S. 288 (2001) 6

Clark v. Kolkhorst,
2020 WL 572727 (W.D. Tex. 2020) 15

Davis v. Passman,
442 U.S. 228 (1979) 15

Davison v. Randall,
912 F.3d 666 (4th Cir. 2019) 12, 14, 15, 27

Democratic Party of United States v. Wisconsin,
450 U.S. 107 (1981) 20

Eichenlaub v. Township of Indiana,
385 F.3d 274 (3d Cir.2004) 21

Haberthur v. City of Raymore, Missouri,
119 F.3d 720 (8th Cir. 1997) 9

Kay v. New Hampshire Democratic Party,
821 F.2d 31 (1st Cir. 1987) 20

King v. Friends of Kelly Ayotte,
860 F. Supp. 2d 118 (D.N.H. 2012) 20

Knight First Amendment Inst. at Columbia Univ. v. Trump,
928 F.3d 226 (2d Cir. 2019) 12, 15, 24

Lugar v. Edmondson Oil Co.,
457 U.S. 922 (1982) 5, 6, 7, 17

Appellate Case: 19-2994 Page: 3 Date Filed: 05/20/2020 Entry ID: 4915220

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

Manhattan Cmty. Access Corp. v. Halleck,
139 S. Ct. 1921 (2019) 13

Minnesota Voters All. v. Mansky,
138 S. Ct. 1876 (2018) 25

Morgan v. Bevin,
298 F. Supp. 3d 1003 (E.D. Ky. 2018) 23

One Wisconsin Now v. Kremer,
354 F. Supp. 3d 940 (W.D. Wis. 2019) 15, 16

Pleasant Grove City, Utah v. Summum,
555 U.S. 460 (2009) 24

Ramirez-Peyro v. Holder,
574 F. 3d 893 (8th Cir. 2009) 4, 7, 10

Roe v. Humke,
128 F.3d 1213 (8th Cir. 1997) 7, 8, 9

Rowe v. City of Cocoa, Fla.,
358 F.3d 800 (11th Cir.2004) 21

Southeastern Promotions, Ltd. v. Conrad,
420 U.S. 546 (1975) 25

U.S. Postal Serv. v. Council of Greenburgh Civic Associations,
453 U.S. 114 (1981) 26

United States v. Colbert,
172 F.3d 594 (8th Cir. 1999) 8

Walker v. Tex. Div., Sons of Confederate Veterans, Inc.,
135 S. Ct. 2239 (2015) 24

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

Zanna v. Mohave City,
2012 WL 3871575 (D. Ariz. 2012) 20, 27, 28

Statutory Authorities

42 U.S.C. § 1983..... 3, 8, 14

Rules and Regulations

8th Cir. R. 28A(h)(2) 30

Fed. R. App. P. 32(a)(5) 30

Fed. R. App. P. 32(a)(6) 30

Fed. R. App. P. 32(a)(7)(B) 30

INTRODUCTION

Appellee Mike Campbell continues to ignore the proper scope of the color-of-state-law inquiry, surveying the entirety of Appellant Cheri Toalson Reisch's actions on Twitter as opposed to focusing on the specific conduct alleged to be unconstitutional—Reisch's decision to "block" Campbell under the specific facts of this case. Binding authority establishes that state action occurs when a public employee exercises "power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Magee v. Trs. of Hamline Univ, Minn.*,747 F.3d 532, 535 (8th Cir. 2014). Campbell and the district court each fail to explain how Reisch did so, and that should be the end of this case.

Even if this Court expands its inquiry and considers additional activity on the Twitter account itself, that analysis must necessarily be limited the Twitter activity giving rise to this case. Campbell ignores that constraint as well; even though Reisch's tweet giving rise to this case was core political campaign speech, Campbell claims that *other* tweets by Reisch at *other* times were "official" in nature, which (according to Campbell) somehow transforms this incident into one

Appellate Case: 19-2994 Page: 6 Date Filed: 05/20/2020 Entry ID: 4915220

under the color of state law. Reisch is an individual state legislator who was engaged in campaign speech. Such circumstances do not warrant expanding the color-of-state-law inquiry to the degree Campbell seeks.

Finally, if this Court reaches the merits of the First Amendment issue, Campbell ignores Reisch's central argument as to why a forum analysis does not apply—a private entity, not the government, has control over who can speak in the "forum" and over what speech is allowed there. These realities are simply incongruent with the application of forum analysis, and the lack of government control means no forum exists for purposes of the First Amendment.

This Court should reject Campbell's attempt to meaningfully change the law in this Circuit on both state action and the First Amendment in a case where the facts and the relevant law do not warrant it. This Court should reverse the judgment of the district court.

Appellate Case: 19-2994 Page: 7 Date Filed: 05/20/2020 Entry ID: 4915220

ARGUMENT

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

A. This Court's precedent—consistent with that of the Supreme Court—establishes the lack of state action in this case.

Perhaps unsurprisingly, both parties begin their discussion of this element of § 1983 liability by discussing *Magee v. Trs. of Hamline Univ, Minn.*, 747 F.3d 532 (8th Cir. 2014). As the most recent comprehensive discussion from this Court on the issue, it should guide the Court's decision here as well.

After providing his own rendition of the relevant background in *Magee*, Campbell recites some of the facts that led the Court to hold the officer was not acting under color of state law. Campbell omits, however, this Court's discussion of its actual legal holding:

> Nothing in Magee's complaint indicates that Titus's actions were made possible by, or undertaken in, his position as a police officer. "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 wrongdoer is clothed with the authority of state law." *West*, 487 U.S. at 49 (internal quotations omitted). 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.

Appellate Case: 19-2994 Page: 8 Date Filed: 05/20/2020 Entry ID: 4915220

Magee, 747 F.3d at 536.

So too here. As Reisch explained in her opening brief, her role as a state legislator gave her no authority to take the specific action alleged to be unconstitutional—blocking Campbell on Twitter. Appellant Br. 16-18. Nor was she able to do this "only because" she was "clothed with the authority of state law." *Magee*, 747 F.3d at 536. Campbell avoids application of the facts here to the law in *Magee*, instead trying to distinguish *Magee* because the claim at issue was a First Amendment retaliation claim, not a First Amendment claim. Appellee Br. 9. This is a *non sequitur*; what claim was at issue makes no difference to the Court's description of what is required for an individual to be acting under color of state law. Relatedly, Campbell claims *Magee*'s analysis is "specific to the facts of that case"—of course it is. Even the district court's order—the one Campbell attempts to uphold—explained that the state action inquiry is "necessarily fact intensive." Add. 15 (citing *Ramirez-Peyro v. Holder*, 574 F. 3d 893, 900-01 (8th Cir. 2009)). *Magee* correctly articulated the legal paradigm of how to go about that inquiry, and Campbell's refusal to apply the facts in this case to the legal paradigm explained in *Magee* is telling.

Appellate Case: 19-2994 Page: 9 Date Filed: 05/20/2020 Entry ID: 4915220

Campbell then claims this Court's holding in *Magee* is "far narrower than either the Supreme Court or this Court has applied in other cases." Appellee Br. 9. But the cases Campbell cites do not bear this out. Indeed, he does not analyze these cases, instead pulling isolated sentences or fragments in an attempt to demonstrate a broader legal inquiry. For example, Campbell cites *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), but only for the proposition that conduct is state action if it is "fairly attributable to the State." Appellee Br. 9. Indeed, Campbell omits the Court's articulation of its "two-part approach to this question of 'fair attribution.'" *Lugar*, 457 U.S. at 937. "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Id.* "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* This is right in line with the legal framework this Court articulated in *Magee*, and Campbell is incorrect in trying to differentiate it. Indeed, his failure to prove that Reisch's act of blocking him on Twitter was an exercise of "power possessed by virtue of state law and made possible only because [Reisch] is clothed

Appellate Case: 19-2994 Page: 10 Date Filed: 05/20/2020 Entry ID: 4915220

with the authority of state law," (*Magee*, 747 F.3d at 536) is no different than Campbell's failure to prove that Reisch exercised "some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible" (*Lugar*, 457 U.S. at 937).

Campbell next cites *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), which evaluates the separate question of when a *private entity* can be engaged in state action, holding it can be "if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Id.* at 295. In any event, Campbell quotes the Court's discussion explaining that no one fact is determinative, so courts must evaluate this inquiry based on the facts of their case. Appellee Br. 10 (*quoting Brentwood*, 531 U.S. at 295-96). Once again, that is precisely what this Court did in *Magee* and precisely what this Court should do here.[1] That in no way disturbs the legal test that such an analysis must satisfy, which is set forth in the

[1] It is particularly ironic that Campbell lauds an inquiry taking into account all of the circumstances as discussed in *Brentwood*, but is dismissive of this Court's holding in *Magee* as "specific to the facts of that case." *See* Appellee Br. 9.

Appellate Case: 19-2994 Page: 11 Date Filed: 05/20/2020 Entry ID: 4915220

two elements from *Lugar*. As the Supreme Court explained, "[a]lthough related, these two principles are not the same." *Lugar*, 457 U.S. at 937. Thus, no matter the case or the factual circumstances, to be state action, a party must exercise "some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Id.* Blocking someone on Twitter is simply not such an exercise of State authority.

In Campbell's next attempt to show *Magee* is an overly narrow statement of the law, he turns to this Court's cases, citing two decisions this Court *quoted in Magee*. *Compare* Appellee Br. 10 (quoting *Ramirez-Peyro v. Holder*, 574 F.3d 893, 900 (8th Cir. 2009) *and Roe v. Humke*, 128 F.3d 1213, 1216 (8th Cir. 1997)), *with Magee*, 747 F.3d at 535 (quoting *Ramirez-Peyro*, 574 F.3d at 900 *and Humke*, 128 F.3d at 1216). Campbell does not discuss the facts of these cases nor their application of the relevant law.

Instead, Campbell picks a quote from *Ramirez-Peyro*, stating that the state action inquiry looks to see if there is a "sufficient nexus" between the official's public position and the alleged harmful conduct. But just prior to saying that, the *Ramirez-Peyro* Court stated—in a

quote not included in Campbell's brief—the legal standard necessary to make such a nexus sufficient: "A public official 'acts under color of law when he misuses power possessed by virtue of . . . law and made possible only because he was clothed with the authority of . . . law.'" 574 F.3d at 900 (quoting *United States v. Colbert*, 172 F.3d 594, 596 (8th Cir. 1999)). Once again, this is the same standard articulated in *Magee*.

Similarly, Campbell's discussion of *Humke* leaves out substantial parts of the legal test that must be met. *E.g.*, *Humke*, 128 F.3d at 1212 ("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 wrongdoer is clothed with the authority of state law." (internal quotation marks and citations omitted)); *id.* (noting that state action requires that the "injury complained of must have been caused by the exercise of some right or privilege created by the state, by a rule of conduct imposed by the state, or by a person for whom the state is responsible"). That the Court actually *applied* such a standard is also seen in the Court's analysis, where it found no state action because the defendant "was neither

Appellate Case: 19-2994 Page: 13 Date Filed: 05/20/2020 Entry ID: 4915220

actually acting in his official capacity or exercising his responsibilities pursuant to state law, nor purporting to so act." *Id.* at 1216.

Suffice it to say, this Court's authorities illustrate a consistent application of the same law, including in *Magee*. Campbell's attempt to characterize *Magee* as an outlier simply because he dislikes the outcome is undermined by each case he cites. Indeed, this Court's consistent application of the color-of-state-law inquiry is demonstrated in the "illustration" Campbell offers: a police officer who commits a sexual assault using his state authority to effectuate the assault is found to have acted under color of state law, whereas a police officer who committed the same act while not using the authority of his position is not acting under color of state law. *See* Appellee Br. 11 (comparing *Hunke*, 128 F.3d at 1218, with *Haberthur v. City of Raymore, Missouri*, 119 F.3d 720, 724 (8th Cir. 1997)). This result is not surprising, and it is entirely in line with *Magee* and this Court's consistent state-action jurisprudence.

Where the analogy breaks down is when Campbell attempts to apply it to blocking on a social media account. Whereas the police officer acting under color of state law used the very authority vested

Appellate Case: 19-2994 Page: 14 Date Filed: 05/20/2020 Entry ID: 4915220

unto him through state law in order to commit the constitutional violation, Reisch did not exercise any sort of authority vested unto her as a state legislator in blocking someone on Twitter. Perhaps recognizing this flaw, Campbell instead tells the Court to focus on the entirety of Reisch's conduct on Twitter, and because Campbell believes some of her speech there relates to her role as a state legislator, any blocking is therefore state action. As Reisch described in her opening brief, this Court's jurisprudence does not call for the consideration of conduct outside the specific constitutional violation alleged to determine whether state action exists, and this Court should not do so here. Appellant Br. 19-21.

In any event, Campbell appears to believe that illustrating *any* nexus between "official" activity and the incident in question is sufficient, but not even his out-of-context case quotes go so far. Indeed, Campbell's selected quote from *Ramirez-Peyro* requires a "*sufficient* nexus" to show state action. 574 F.3d at 900 (emphasis added). As *Ramirez-Peyro*, *Magee*, and other binding precedent explains, to be sufficient, that nexus must demonstrate that Reisch exercised power

Appellate Case: 19-2994 Page: 15 Date Filed: 05/20/2020 Entry ID: 4915220

possessed by virtue of state law and made possible only because she is clothed with the authority of state law. That is not the case here.

Finally, Campbell claims that Reisch believes no state action could exist because any private citizen could block people on Twitter. Appellee Br. 12. Reisch never made this assertion in her opening brief (and Campbell does not include a citation as to where he believes she did so). Resich's argument has nothing to do with *who* has the ability to use the block function on Twitter; rather, it focuses on whether the ability to do so comes from Reisch's authority as a state legislator. *See* Appellant Br. 16. It plainly does not, and this Court should reverse the district court's judgment accordingly.

B. If this Court expands the analysis to include a broader evaluation of Reisch's conduct on Twitter, there is still no conduct under color of law.

Even if this Court decides to take a broader view of the state action inquiry than precedent dictates and looks to the nature of Reisch's Twitter activity, this Court should still determine that Reisch did not act under color of state law. To be sure, Campbell is quick to suggest that this Court should reflexively follow the decisions of the Second and Fourth Circuits to conclude state action exists. Appellee Br.

13-16 (discussing *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019); *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019), as amended (Jan. 9, 2019)). Reisch explained in her opening brief why these cases are inapplicable due primarily to her role as a state legislator and the record's demonstration that she was engaged in campaign speech. Appellant Br. 21-36. Those distinctions still hold and preclude a finding of state action. Several points warrant specific mention.

First, as the Fourth Circuit confirmed, even under this "expanded" state-action inquiry in which the contents of the social media account are evaluated, the "specific actions giving rise to [the plaintiff's] claim" illustrated state action. *Davison*, 912 F.3d at 681. Indeed, the Court evaluated the specific social media posts that led to the dispute, finding that those comments related to the defendant's official duties. *Id.* Because the Fourth Circuit believed the defendant's specific action of blocking the plaintiff arose out of the performance of the defendant's official communications on Facebook, state action was present. *Id.*

Here, Campbell *does not contest* that the post giving rise to him being blocked by Reisch was pure campaign messaging and political

Appellate Case: 19-2994 Page: 17 Date Filed: 05/20/2020 Entry ID: 4915220

speech—nothing whatsoever related to Reisch's official duties. Appellee Br. 25. No matter, argues Campbell, because Reisch's action blocked him from interacting with *future* tweets that may relate to her official duties, so the act of blocking him was therefore state action. *See id.* In other words, Campbell claims an action that, on its face, is unquestionably not taken under color of state law can nonetheless be transformed into state action if there is a chance the action will impact the ability of the plaintiff to *later* exercise constitutional rights.[2] The scope of such a theory is staggering and is not supported by the case law, confirmed by the lack of any citation to support it. Indeed, one can think of endless scenarios in which a public employee engages in purely private acts against someone that could impact that person's ability to engage in *future* constitutionally protected activity. Such conduct has never before been transformed into state action, and doing so would destroy "that constitutional boundary between the governmental and the private," which "protects a robust sphere of individual liberty." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1982 (2019).

[2] To be clear, as discussed in Section II, Reisch does not believe any of Campbell's constitutional rights are impacted, but, even assuming they were, this theory of state action is unfounded.

Appellate Case: 19-2994 Page: 18 Date Filed: 05/20/2020 Entry ID: 4915220

Even if this Court follows the Fourth Circuit's state-action analysis—the framework Campbell wants this Court to use—Reisch did not act under color of state law.

Second, despite Campbell's arguments to the contrary, Reisch's status as an individual legislator does make a difference to the state-action inquiry. Campbell incorrectly claims that Reisch's only support for this argument is Judge Keenan's concurrence in *Davison*. Appellee Br. 17. While Judge Kennan certainly did recognize a critical distinction between the authority of executive officials and those executing administrative functions on the one hand, and legislative officials on the other, the reason that distinction matters is grounded in the same Eighth Circuit precedent discussed above. For Campbell to succeed on a § 1983 claim, it is his burden to prove that Reisch exercised "power possessed by virtue of state law and made possible only because [she] is clothed with the authority of state law." *Magee*, 747 F.3d at 536. That inquiry is necessarily different depending on the role of the state official in question.

Reisch identified the duties of voting and participating in committee hearings as examples of legislators exercising that power

Appellate Case: 19-2994 Page: 19 Date Filed: 05/20/2020 Entry ID: 4915220

and engaging in acts possible only because they are state legislators. Properly added to that, as Campbell points out (Appellee Br. 17 n.3) is the act of employing official staffers—in that a legislator could be held liable for unconstitutionally terminating a staff-member's employment. *Davis v. Passman*, 442 U.S. 228, 244 (1979). In that circumstance, to be sure, a legislator would be exercising his power in that role made possible only because of her authority as a legislator.

But the only other cases Campbell cites about state action of individual legislators are social-media blocking cases where the district courts did not address this distinction between legislators and executive officials. In *Clark v. Kolkhorst*, 2020 WL 572727, at *3 (W.D. Tex. 2020), the court was evaluating a complaint only at the pleading stage and—in a very short discussion of state action—concluded that the complaint could survive a motion to dismiss because the plaintiff "pleaded facts and attached exhibits support her contention that Kolkhorst acted in her official capacity while operating" the Facebook page. Similarly, in *One Wisconsin Now v. Kremer*, 354 F. Supp. 3d 940, 951 (W.D. Wis. 2019), the court followed the decisions in *Knight* and *Davison* without any discussion of the distinction between executive

Appellate Case: 19-2994 Page: 20 Date Filed: 05/20/2020 Entry ID: 4915220

officials and legislators; indeed, it appears that such an argument was not raised.[3] In neither decision do the courts evaluate, much less reject, a distinction between executive and legislative officials.

The "official duty" that Campbell believes satisfies the state-action inquiry is communicating with constituents. Appellee Br. 17. Preliminarily, the focus of this argument is improperly placed upon Reisch's content on Twitter as opposed to the actual act alleged to be unconstitutional—the blocking. In any event, Campbell does not explain how speaking to these individuals 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. She has the ability to speak with these individuals at any time. And her mere title as state legislator alone is insufficient to transform it into state action; while that is *one* aspect of the state-action inquiry, the Supreme Court explained the *separate* requirement to show the defendant is exercising "some right or privilege created by the State or

[3] Further, as Reisch discussed in her opening brief (at 34 n.6), *One Wisconsin* is especially distinguishable because the state officials there actually used state resources to maintain the social media accounts. 354 F. Supp. 3d at 951-53. No such evidence exists here.

Appellate Case: 19-2994 Page: 21 Date Filed: 05/20/2020 Entry ID: 4915220

by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. That is not present here.

Third, Campbell incorrectly argues that Reisch waived the ability to contest the district court's ruling that her campaign activity contributed to the finding of state action. Appellee Br. 19-20. Not so. As has been discussed extensively throughout this briefing, Resich has constantly asserted throughout this case that her conduct did not constitute state action. At the bench trial, she then presented evidence—both testimony and exhibits—showing that she set the Twitter account up for campaign purposes and used it for campaign messaging, including the tweet giving rise to this case. Tr. 42:6–43:8, 44:3-12, 44:22–45:6, 65:1-10; T.E. 001-105. That the district court would misapply this evidence to the law and find that campaigning activity *helps* illustrate state action is an error Reisch could not possibly have foreseen until the district court entered its order following the bench trial. Indeed, Campbell does not state when this supposed waiver occurred, or what Reisch should have done to preserve an error that did not exist until the district court's ruling.

Appellate Case: 19-2994 Page: 22 Date Filed: 05/20/2020 Entry ID: 4915220

To be clear, there was no summary judgment briefing; although there was motion-to-dismiss briefing, that, of course, did not include evidence. Reisch has always asserted there was no state action, thus preserving for appellate review the specifics of how the district court decided to rule on that issue.

Fourth, because Reisch's tweets were campaign speech, she was not acting under color of state law. Campbell is dismissive of this notion, claiming there are blurred lines between campaign-related activity and talking about one's legislative accomplishments (the latter of which he claims to be "official"). Appellee Br. 21. Indeed, Campbell claims that if these lines are *not* blurred, an elected official "isn't doing it right." *Id.* Precisely. This further proves Reisch's point that talking about one's legislative accomplishments is not state action. If communicating with one's constituents is state action (as Campbell contends)—even when that communication occurs in a location that is privately owned and controlled—the scope of what courts have

Appellate Case: 19-2994 Page: 23 Date Filed: 05/20/2020 Entry ID: 4915220

traditionally considered state action is stretched well beyond what courts (and this Court in particular) have ever endorsed.[4]

Campbell then tries to set aside Reisch's political campaign speech by claiming "this case is not about her posts." Appellee Br. 21. He cannot have it both ways. Campbell spent the entirety of his brief up to that point telling this Court that it *must* consider the content of Reisch's tweets and cannot focus solely on whether the act of blocking is derived from any state authority. Now, when the legal ramifications are adverse, he tells the Court to ignore the substance of Reisch's tweets and focus on the effect of the blocking. No matter which one of Campbell's positions carries the day, there is no state action. Either Reisch's tweets are not considered and there is no state action because she was not using any authority of her office in blocking Campbell; or Reisch's tweets are considered, and there is no state action because she was engaged in political campaign speech.

---

[4] Similarly, Campbell's suggestion (at 24) that this problem could simply be solved by having one "official" account and one "campaign" account is fanciful. All that would do is *multiply* the issues for litigation, as parties would then dispute what content can properly be placed on each account before it crosses the line.

Appellate Case: 19-2994 Page: 24 Date Filed: 05/20/2020 Entry ID: 4915220

Fortunately, Campbell at least recognizes the robust protections Reisch described for campaign speech, including the ability to select who gets to hear and participate in campaign messaging. *See* Appellee Br. 22. He claims, however, that this analogy breaks down because blocking someone prevents them from speaking there forever. *See id.* Not so. Just like the protestors wanting to speak at campaign functions, Campbell wants to speak directly in the campaign messaging itself. Reisch is allowed to exclude him from doing so. *See, e.g.*, *King v. Friends of Kelly Ayotte*, 860 F. Supp. 2d 118, 124-25 (D.N.H. 2012) (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)). What Reisch cannot prevent—and what she doesn't prevent here—is Campbell's ability to engage in his own speech on his own platform about whatever he wants, including speech about Reisch. As Reisch described and is uncontested, Campbell had the full ability to use his own Twitter messaging to say whatever he wanted. *See* Appellant Br. 12 n.2.[5]

[5] For the same reason, Campbell's attempted analogy to a "town hall" is inapt. Further, the cases he cites are irrelevant. In *Zanna v. Mohave Cty.*, 2012 WL 3871575 (D. Ariz. 2012), the case was not even against a

Appellate Case: 19-2994 Page: 25 Date Filed: 05/20/2020 Entry ID: 4915220

Finally, Campbell brushes aside any concern about inequitable application of the First Amendment to incumbent candidates versus non-incumbents, claiming that because an incumbent has "substantial advantages" in a race, this is just something she should have to endure and is a "small price to pay for access to the bully pulpit." Appellee Br. 24-25. Casting aside fundamental First Amendment rights is no light request, and it is even more troubling that Campbell wishes to do so in order to expand the scope of state action far beyond its current bounds.

* * *

Reisch did not act under color of state law, because she never exercised "power possessed by virtue of state law and made possible only because [she] is clothed with the authority of state law." *Magee*, 747 F.3d at 536. Even under an inquiry (like that undertaken by the Second and Fourth Circuits) that is broader than this Court's precedent

---

legislator holding a town hall meeting, it was against a *government entity* who hosted it, so the question of whether the individual legislator engaged in state action was not even present. And the other two cases are similarly not about individual legislators, they are about public events held by governmental entities. *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 281 (3d Cir. 2004) ("citizens forum" at an already public meeting); *Rowe v. City of Cocoa, Fla.*, 358 F.3d 800, 802 (11th Cir. 2004) (city commission meeting).

Appellate Case: 19-2994 Page: 26 Date Filed: 05/20/2020 Entry ID: 4915220

calls for, the facts here do not demonstrate state action. This Court should reverse the judgment of the district court.

II. Forum Analysis Does Not Apply

This Court need not reach the First Amendment question posed by this case, because there was no state action to begin with. But if the Court does reach the constitutional question, forum analysis simply does not apply.

The parties begin from the same premise: the government does not own the property in question here. Thus, the only way the forum analysis can apply is if the government "controls" the property. *See* Appellant Br. 37-40; Appellee Br. 27-28. As Reisch explained, the *vast* majority of public-forum cases involve government-owned property. Here, since that is not at issue, the focus should be on what is necessary to show sufficient "control" under relevant case law. Reisch engaged in a detailed analysis of this question, explaining there is not sufficient control here, because a private entity—not the government—controls *both* who is permitted to speak *and* the content of the speech permitted. Appellant Br. 39-50.

Appellate Case: 19-2994 Page: 27 Date Filed: 05/20/2020 Entry ID: 4915220

Unfortunately, Campbell chooses to not directly address this argument. Instead, he wrongly claims that Reisch "relies principally on *Morgan v. Bevin*," and then initiates a five-page discussion of why he believes *Morgan* is wrongly decided, focusing primarily on the asserted distinction between the actual Twitter posts as "government speech" and the "interactive space" below tweets as a public forum. Appellee Br. 28-32. This analysis is misplaced for several reasons.

First, it is simply wrong to suggest that Reisch based her argument "principally" on *Morgan v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018). To the contrary, Reisch cited and substantively discussed a variety of authorities, all of which were focused at the key question here—whether the government controlled the space alleged to be a public forum. Campbell's use of *Morgan* as a strawman to avoid discussing the control issue simply illustrates the issue's dispositive force.

Second, Campbell's analysis operates at a level far too granular in trying to parse up an individual Twitter page into the posts themselves and the "interactive space" below the tweet, and then trying to assign

different First Amendment protections to them.[6] The entire point of Reisch's argument is that *all* of this is not just owned—but also controlled—by Twitter. Reisch understands that Campbell wants to focus the First Amendment analysis on *just* the interactive space below tweets. So be it. That space too—just like everything else on Twitter—is subject to Twitter's Terms of Service that give Twitter full discretion as to who can participate and what can be said. *See* Appellant Br. 42-

[6] It is understandable that Campbell tries to parse the Twitter page in this way, because it is the only way he can possibly prevail. If Campbell were correct (he is not) that the speech here is not campaign speech and is instead official in nature, then it is "government speech." Where government speech is at issue, forum analysis does not apply. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467-68 (2009). Campbell admits as much. Appellee Br. 28-30. So, he follows the lead of the *Knight* district court and the Second Circuit, carving out an artificial section of the Twitter page, designating it to be an "interactive space," and claiming First Amendment protection. *See id.* at 30. To the extent this Court decides to reach this level of granularity, this conclusion is wrong. "Having first arisen in the context of streets and parks, the public forum doctrine should not be extended in a mechanical way" to new areas if it is not "compatible with [their] intended purpose." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672-73 (1998) (internal citations omitted). Campbell suggests precisely that approach by encouraging the Court to parse up Reisch's Twitter page and mechanically apply forum doctrine to it, when doing so is incongruent with any forum analysis whatsoever. This Court should not reach this issue because forum analysis does not apply at all, but if the Court does reach it, Reisch is entitled to block certain users from her own page as an exercise of government speech. *See, e.g.*, *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2251 (2015).

Appellate Case: 19-2994 Page: 29 Date Filed: 05/20/2020 Entry ID: 4915220

45. Indeed, Twitter's policies constrain speech in a way the First Amendment would never allow, yet the government is said to be opening up a public forum there with full First Amendment protections. *Id.* at 44-45. These concerns are not addressed in Campbell's brief, and this incongruence plainly demonstrates that a forum analysis does not apply.

Tellingly, Campbell is unable to cite a case finding a public forum where the private owner still retained control over who could enter the forum and what they could say. Indeed, one of the cases Campbell cites—*Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975)—was discussed extensively in Reisch's opening brief. *See* Appellant Br. 41. Reisch explained that sufficient "control" was found in that case only because the government had control over both access to the leased theatre *as well as* the content permitted therein. *See id.* Campbell does not directly address this argument at all, continuing to cite *Conrad* as if it supports his position. The same is true with respect to *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018), where the Court found polling places on election day to be nonpublic fora because the *government* maintains rules that "strictly govern who may be present,

for what purpose, and for how long." Campbell's citation of *U.S. Postal Serv. v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981) is most perplexing, because the Court held there that letterboxes were not entitled to *any* First Amendment protection under a "forum" theory, noting that in locations such as military bases, prisons, and now letterboxes, "this Court recognized that the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *Id.* at 129. In any event, the Court further notes that when a private customer installs a letterbox, he "agrees to abide by the Postal Service's regulations in exchange for the Postal Service agreeing to deliver and pick up his mail." *Id.* at 128. None of Campbell's cited cases further his argument with regard to "control."

Third, because Campbell failed to address the dispositive "control" issue, he also neglected to address all of the unintended consequences of grafting the public-forum doctrine onto a place where it does not belong. *See* Appellant Br. 47-48. Indeed, Campbell advocates applying the public-forum doctrine to a forum owned by a private entity, where that entity controls who can speak in the forum, as well as what speech can occur there. That dramatic expansion of the doctrine will undoubtedly

call into question a multitude of other fora—both digital and non-digital—that have similar features and, before now, would never have been considered public. Campbell has no answer to these issues.

Finally, as Resich described in her opening brief, she—as an individual legislator—has no authority to open up a public forum on behalf of the government. Appellant Br. 50-53. Reisch explained that existing case law describes the opening of limited public fora only upon action by a governmental entity or an official with the authority to act on the government's behalf. *Id.* Campbell criticizes this argument for being grounded in Judge Keenan's concurrence in *Davison*. The issue Judge Keenan tees up, however, is borne out by the case law—Campbell cites no examples of individual state legislators unilaterally opening up limited public fora. Campbell attempts to cite *Zanna v. Mohave City* for that proposition (which involved a town hall forum with Senator John McCain), but—as discussed *supra*—the defendant there was *not* Senator McCain, and the question was *not* whether Senator McCain had opened a limited public forum. 2012 WL 3871575 (D. Ariz. 2012). Rather, the plaintiff filed suit against the *county that owned the venue*, and the question was what type of forum the county created by *hosting*

the McCain event. *Id.* at *1-4. Campbell does not cite any case law indicating an individual legislator possesses the authority necessary to open a limited public forum on behalf of the government.

* * *

Put simply, however Campbell wishes to define the "forum" here, the government did not own it, did not control who could access it, and did not control what people could say there. Forum analysis does not apply.

CONCLUSION

This Court should reverse the judgment of the district court.

Appellate Case: 19-2994 Page: 33 Date Filed: 05/20/2020 Entry ID: 4915220

May 20, 2020

Respectfully submitted,

/s/ MICHAEL T. RAUPP

MICHAEL T. RAUPP
HUSCH BLACKWELL LLP
4801 Main Street, Suite 1000
Kansas City, MO 64112
Telephone (816) 983-8000
Facsimile (816) 983-8080
michael.raupp@huschblackwell.com

LOWELL D. PEARSON
HUSCH BLACKWELL LLP
235 East High Street, Suite 200
Jefferson City, Missouri 65102
Telephone (573) 761-1115
Facsimile (573) 634-7854
lowell.pearson@huschblackwell.com

Attorneys for Defendant-Appellant

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 5,822 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.

May 20, 2020

/s/ MICHAEL T. RAUPP
MICHAEL T. RAUPP
Attorney for Defendant-Appellant

Appellate Case: 19-2994 Page: 35 Date Filed: 05/20/2020 Entry ID: 4915220

CERTIFICATE OF SERVICE

I hereby certify that on May 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/ MICHAEL T. RAUPP
MICHAEL T. RAUPP
Attorney for Defendant-Appellant

Appellate Case: 19-2994 Page: 36 Date Filed: 05/20/2020 Entry ID: 4915220