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

APPELLEE'S COMBINED PETITION FOR PANEL REHEARING OR REHEARING EN BANC

J. Andrew Hirth
MO Bar No. 57807
TGH LITIGATION LLC
28 N 8th St, Suite 317
Columbia, MO 65201
(573) 256 – 2850
andy@TGHLitigation.com
Attorneys for Appellee
Mike Campbell

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REASONS FOR GRANTING PANEL REHEARING
OR REHEARING ON BANC 1

BACKGROUND 2

ARGUMENT 6

I. The panel reversed the district court based on an argument neither raised nor litigated below. 6

II. The panel reversed the district court's finding of fact without any showing of clear error. 10

III. The majority opinion shields savvy public officials' social media accounts from public forum analysis. 12

CONCLUSION 14

CERTIFICATE OF COMPLIANCE 17

CERTIFICATE OF SERVICE 18

TABLE OF AUTHORITIES

Cases

Anderson v. City of Bessemer City,
470 U.S. 564 (1985) 1, 13

Davison v. Randall,
912 F.3d 666 (4th Cir. 2019) 1, 14-15

Fleck v. Wetch,
937 F.3d 1112 (8th Cir. 2019) 1, 7

Knight First Amendment Inst. at Columbia Univ. v. Trump,
928 F.3d 226 (2d Cir. 2019) 1, 14-15

Orr v. Wal-Mart Stores, Inc.,
297 F.3d 720 (8th Cir. 2002) 11

Schaub v. VonWald,
638 F.3d 905 (8th Cir. 2011) 1, 13

Smoky Hills Wind Project II, LLC v. City of Indep., Missouri,
889 F.3d 461 (8th Cir. 2018) 7

Stafford v. Ford Motor Co.,
790 F.2d 702 (8th Cir. 1986) 1, 8, 11

von Kerssenbrock-Praschma v. Saunders,
121 F.3d 373 (8th Cir. 1997) 7

Weitz Co., LLC v. Lloyd's of London,
574 F.3d 885 (8th Cir. 2009) 11

Wood v. Milyard,
566 U.S. 463 (2012) 7

REASONS FOR GRANTING REHEARING

The panel's decision conflicts with this Court's decisions in *Fleck v. Wetch*, 937 F.3d 1112, 1116 (8th Cir. 2019), and *Stafford v. Ford Motor Co.*, 790 F.2d 702, 706 (8th Cir. 1986), because the panel considered arguments raised for the first time on appeal as the basis for reversal. The panel's decision also conflicts with *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, (1985) and this Court's decision in *Schaub v. VonWald*, 638 F.3d 905, 915 (8th Cir. 2011), because the panel reversed the district court's factual findings without finding clear error.

En banc rehearing is also proper because this case raises questions of exceptional importance involving speech critical of the government. Contrary to the opinions of the Second Circuit in *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019), and the Fourth Circuit in *Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019), the panel concluded that a public official who blocks constituents based on their viewpoint from accessing or commenting on the social media account she uses to interact with the public does not act under color of state law as long as the account is used at least in part for campaign speech. The panel's decision creates an exception to the public forum doctrine large enough to swallow the rule adopted by the Second and Fourth Circuits.

BACKGROUND

Appellant Cheri Toalson Reisch ("Rep. Reisch") is a State Representative for the 44th District of the Missouri House. Appellant's Addendum ("Add.") 2, ¶2. 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.

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. Twitter also allows its users to block other users from following or commenting on their tweets. Add. 3, ¶12.

Representative Reisch uses the Twitter handle @CheriMO44. Add. 3, ¶15. The "MO44" refers to the elected office she holds in the House of Representatives. Add. 3, ¶16. 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

Appellate Case: 19-2994 Page: 5 Date Filed: 02/10/2021 Entry ID: 5003331

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 Reisch at her desk on the Missouri House floor. Add. 3, ¶¶20-21.

After her election on November 8, 2016[1], Reisch used her Twitter page to discuss 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 January 4, 2017, 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 June 12, 2017, Reisch tweeted about the passage of the Real ID bill. Add. 5, ¶28(e). On July 12, 2017, Reisch 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, cities, etc." Add. 5, ¶28(g). On September 7, 2017, Reisch tweeted a photo of herself with Governor Greitens and the caption, "Toured @3M facility in my district today w/Gov @EricGreitens.

[1] The District Court's Findings of Fact included a minor typographical error indicating that Reisch was elected in 2018 instead of 2016.

Glad to hear they are growing & bringing new jobs w/help of #MOLeg policies!" Add. 5, ¶28(h). On October 19, 2017, 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 March 14, 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 June 23, 2018, Representative Reisch blocked her constituent, Appellee Mike Campbell, from her Twitter account after he retweeted a post critical of Reisch. Add. 2, ¶1; Add. 7, ¶38. Reisch had attended a Farm Bureau on June 22, after which she tweeted, "Sad my opponent [Maren Jones] 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 (emphasis added). Mike Campbell retweeted Kendrick's reply. Add. 6-7, ¶35, 37. Reisch then blocked Campbell (and 123 other users) from her Twitter account, rendering him unable to see or join in the ongoing debate among Reisch's followers. Add. 7, ¶¶41, 43.

Campbell sued Reisch under 42 U.S.C. § 1983. Following a bench trial, the district court found that, "[t]hroughout the first ten months of 2016, [Reisch] posted dozens of tweets about her campaign for the Missouri House, frequently using the hashtags #MO44 and #TeamCheri." Add. 4, ¶26. Once she was elected, however,

Reisch "used her Twitter page to engage in discourse about political topics and/or to indicate her position relative to other government officials." Add. 6, ¶32. "During her first 18 months in office, Defendant 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." Add. 4, ¶26. Based on its factual findings, the district court concluded (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.

On appeal, Reisch argued *for the first time* that her Twitter account was just part of her political campaign, and therefore she did not act under color of state law when blocking constituents. Notwithstanding the district court's factual finding that Reisch "used her Twitter page to engage in discourse about political topics and/or to indicate her position relative to other government officials," Add. 6, ¶32, a majority of the appeals panel found that

> Reisch's Twitter account is more akin to a campaign newsletter than to anything else, and so it's Reisch's prerogative to select her audience and present her page as she sees fit. She did not intend her Twitter page to be like a public park, where anyone is welcome to enter and say whatever they want. Reisch's own First Amendment right to craft her campaign materials necessarily trumps

> Campbell's desire to convey a message on her Twitter page that she does not wish to convey, even if that message does not compete for room as it would, say, in a campaign newsletter. While Reisch's posts open up an interactive space where Twitter users may speak, that doesn't mean that Reisch cannot control who gets to speak or what gets posted. It's her page to manage as she likes.

Slip Opinion at 9 (internal citations omitted). Judge Kelly dissented, concluding that the majority's "finding that Reisch used her Twitter account mainly to position herself for more electoral success down the road" was "neither supported by the record nor dispositive of the state-action inquiry." *Id.* at 10 (Kelly, J., dissenting).

ARGUMENT

I. The majority reversed the district court based on an argument neither raised nor litigated below.

"For good reason, appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance." *Wood v. Milyard*, 566 U.S. 463, 473 (2012). The Eighth Circuit routinely refuses to "consider arguments raised for the first time on appeal 'as a basis for reversal.' " *Fleck*, 937 F.3d at 1116 (quoting *von Kerssenbrock-Praschma v. Saunders*, 121 F.3d 373, 375 (8th Cir. 1997)); *Smoky Hills Wind Project II, LLC v. City of Indep., Missouri*, 889 F.3d 461, 471 (8th Cir. 2018). The rationale for this rule is twofold:

> First, the record on appeal generally would not contain the findings necessary to an evaluation of the validity of an appellant's arguments. Second, there is an inherent injustice in allowing an appellant to raise an issue for the first time on appeal. A litigant should not be surprised on appeal by a final decision there of issues upon which they had no

> opportunity to introduce evidence. A contrary rule could encourage a party to "sandbag" at the district court level, only then to play his "ace in the hole" before the appellate court.

Stafford, 790 F.2d at 706 (citations omitted).

As the panel majority noted in its opinion, "Reisch did not rely on the campaign nature of her account in her argument before the district court." Slip Opinion at 4. She did not even use the word "campaign," much less the phrase "campaign speech," in either her motion to dismiss briefing or her Answer to the First Amended Complaint. 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 she ever used her Twitter account for campaign purposes *after she was elected*. As Judge Kelly noted in her dissent, once Reisch was sworn into office in January 2017,

> Reisch did not tweet a single request for campaign donations, or make any reference to "#TeamCheri." Instead, the majority of Reisch's tweets and retweets after January 2017 reported on new laws ("MO citizens will now have a choice to get Real ID compliant license"); provided information about the Missouri legislature's work ("A big thanks to House Communications for doing this great story on this piece of legislation that was passed"); and informed the public of Reisch's own official activities ("I spoke [on the Missouri House floor] about my 34 years experience with prevailing wage. Repeal it. Save taxpayers $.").

Slip Op. at 10-11 (Kelly, J., dissenting).

Despite the general prohibition against raising new arguments on appeal, the majority not only considered Reisch's novel campaign speech argument but reversed the judgment based on it, "given the district court's attention to the subject" and the fact that "Reisch has argued all along that she did not act under color of state law." Slip opinion at 3-4. The district court's "attention" to Reisch's campaign consists of *three* (out of 43) paragraphs in its Findings of Fact (that she listed the address of her campaign website address on her Twitter account, Add. 3, ¶19; that she tweeted a copy of a letter seeking contributions on campaign stationery *a year before her election*, Add. 4, ¶24; and that she posted tweets about her campaign *before her election*, Add. 4, ¶26) and three sentences in its Conclusions of Law (that the creation of her account coincided with the start of her campaign *18 months before her election*, Add. 12; that she "uses her Twitter account to indicate her positions on political issues, and to promote her campaign and legislative agenda," Add. 13; and that Reisch "tweets about campaign events, promotes her agenda, and tweets about her political positions relative to other public officials," Add. 14).

As for the majority's assertion that "Reisch has argued all along that she did not act under color of state law," Slip Op. at 4-5, the Record says otherwise. As noted above, Reisch never discussed her "campaign," much less "campaign speech," in either her motion to dismiss briefing or her Answer to the First Amended Complaint. At trial, Reisch's counsel made a single reference to "whether there is action under color of state law" in his opening statement, Tr. 10:6-7, but did connect the issue to

Appellate Case: 19-2994 Page: 11 Date Filed: 02/10/2021 Entry ID: 5003331

campaign speech. And Reisch's only testimony about using her Twitter account for campaign purposes referred to the start of her campaign, *a year and a half before she was elected*:

> Q. In fact, you created the Twitter account to launch your campaign for the seat in the House; isn't that right?
> A. No, I didn't create it, my nephew did.
> Q. But he created it for that purpose, for your run for the House.
> A. He just thought I needed to get out in the social media world.

Tr. 42:25-43:8.

> Q. Now, over the next year after this account was created, you used your Twitter account to campaign for a seat in the House; isn't that right?
> A. That's only part of my life.

Tr. 44:3-6. To the extent Reisch argued that she did not act under color of state law prior to her appeal, she focused exclusively on the third-party ownership of Twitter and the universal ability of all Twitter users to use the blocking function. *See* Reisch's Suggestions in Support of Motion to Dismiss at 9-12. She *never* argued her Twitter account was "campaign speech."[2]

To be sure, appellate courts have "discretion to consider an issue for the first time on appeal where the proper resolution [of that issue] is beyond any doubt ... or

[2] The majority notes that "[t]he Trump and Davison courts were not concerned with distinguishing an official page from a campaign page as we are, and so they do not offer much guidance for deciding this case." Slip Op. at 8. But that observation only underscores the fact that the district court *in this case* was not concerned with distinguishing an official page from a campaign page either because Reisch never made that argument in the trial court.

when the argument involves a purely legal issue in which no additional evidence or argument would affect the outcome of the case." *Weitz Co., LLC v. Lloyd's of London*, 574 F.3d 885, 891 (8th Cir. 2009) (internal citation omitted); *see also 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."). Neither of those exceptions applies here. Given Judge Kelly's dissent, it cannot be said that "the proper resolution" of Reisch's campaign speech argument "is beyond any doubt." Nor does Reisch's argument involve a "purely legal issue on which no additional evidence or argument would affect the outcome of the case." Had Reisch argued below that she used her Twitter account primarily for campaign speech, she could have been cross-examined on the subject and impeached with her own tweets. But that never happened because Reisch never made the argument. Allowing her to sandbag at trial only to raise the issue for the first time on appeal is an "inherent injustice." *Stafford*, 790 F.2d at 706.

II. The panel reversed the district court's finding of fact without any showing of clear error.

In 42 numbered paragraphs, the district court made factual findings after trial regarding Reisch's use of her Twitter account. Presumably based on her testimony and the exhibits accepted into evidence, the court found that Reisch's account was originally established when she announced her campaign for office in September 2015, Add. 3, ¶22; and that "[t]hroughout the first ten months of 2016, Defendant

posted dozens of tweets about her campaign for the Missouri House, frequently using the hashtags #MO44 and #TeamCheri." Add. 4, ¶26. Once she was elected on November 8, 2016, however, the district court found that "[d]uring her first 18 months in office, Defendant 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." Add. 4, ¶28. The district court identified 14 individual tweets made while Reisch was in office in which she "used her Twitter page to engage in discourse about political topics and/or to indicate her position relative to other government officials." Add. 4, ¶¶28(a)-(n)6; Add. 6, ¶32. By contrast, the district court made *no* factual findings that Reisch used her Twitter account for campaign purposes *once she was elected* in November 2016.

In sharp contrast to district court's findings of fact, the majority found that Reisch used her Twitter account "overwhelmingly for campaign purposes: She created the account the day she announced her candidacy; she solicited donations to her campaign on the account; and, for over a year, she sought to convince her audience to support her election bid." Slip Op. at 6-7. "[T]he mere fact of Reisch's election did not magically alter the account's character," the majority reasoned; "her post-election use of the account is too similar to her pre-election use to suggest that it had morphed into something altogether different." *Id.* at 7.

This Court reviews a district court's factual findings for "clear error." *Schaub*, 638 F.3d at 915. A finding is clearly erroneous when "although there is evidence to

Appellate Case: 19-2994 Page: 14 Date Filed: 02/10/2021 Entry ID: 5003331

support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson*, 470 U.S. at 573. The clear error standard "does not entitle a reviewing court to reverse the finding of the trier of fact simply because it would have decided the case differently if finding the facts de novo." *Schaub*, 638 F.3d at 915. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, *this court may not reverse it* even though convinced [it] would have weighed the evidence differently if sitting as the trier of fact." *Id.* (emphasis added). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* "When findings are based on witness credibility, Rule 52(a) demands even greater deference to the trial court's findings." *Id.*

In the absence of any clear error, the factual findings of the trial court should not be disturbed.

III. The majority opinion shields savvy public officials' social media accounts from public forum analysis.

Whether they are announcing new legislation, reporting on testimony at committee hearings, or advocating for specific economic policies, Twitter allows elected officials to communicate instantly and directly with voters without the filter (or fact-checkers) of traditional news outlets. Social media's interactive nature and nearly infinite space for comments create unprecedented and unrivaled opportunities for public debate between and among the people and their elected officials.

Appellate Case: 19-2994 Page: 15 Date Filed: 02/10/2021 Entry ID: 5003331

This technology also enables state actors to limit their detractors' participation in that public debate. For this reason, the Second and Fourth Circuits have both held that that the interactive space associated with a social media account used by a government official to communicate with the public is susceptible to the public forum analysis. *See generally Knight*, 928 F.3d 226, and *Davison*, 912 F.3d 666. Comparing the comment section of a public official's Twitter or Facebook account to a public park or an open town hall meeting, the Second and Fourth Circuits have ruled that the public's right to access and respond in these electronic forums may not, consistent with the First Amendment, be restricted based on the viewpoint of the speaker.

Adopting the reasoning of *Knight* and *Davison*, the district court in this case found that Reisch used her Twitter account to promote her legislative agenda, discuss her work as a state representative, and inform the public about her actions in office. The account was originally created to help Reisch campaign for office, but once she was elected, Reisch clothed her Twitter account with the trappings of public office and used it as a tool of governance. By choosing an inherently interactive medium to communicate with her constituents, Reisch opened a designated public forum for others to respond to her announcements and engage in the kind of core political speech the First Amendment was adopted to protect.

Without disputing the reasoning of the *Knight* and *Davison* decisions, the majority opinion creates a roadmap for savvy public officials to exclude unpopular viewpoints from their social media accounts simply by claiming to be engaged in

"campaign speech." Even as it allowed for the possibility that "the essential character of a Twitter account" can change, the majority opinion offers no test or standard for determining when it does. So long as at least some of the statements made by "lawmakers carrying out their official duty to communicate information to constituents … harken back to some campaign promise or another," Slip Op. at 12, the majority would allow them to restrict access and preclude contrary viewpoints. Such an exception swallows the rule. It is hard to conceive of any social media communication between a competent lawmaker and her constituents that would *not* harken back to a campaign promise.

Two of this Court's sister circuits have applied public forum analysis to the interactive space associated with social media accounts used by government officials to communicate with their constituents. The Eighth Circuit has an opportunity to weigh in on that debate and offer guidance to lower courts on an emerging issue that is bound to arise again and again. This Court should grant rehearing *en banc*.

CONCLUSION

For the reasons stated above, Appellee Mike Campbell respectfully requests rehearing by the panel or by the Court *en banc*.

Respectfully submitted,

TGH LITIGATION LLC

/s/ J. Andrew Hirth
J. Andrew Hirth
MO Bar No. 57807

28 N 8th St, Suite 317
Columbia, MO 65201
(573) 256 – 2850
(573) 213 – 2201 (fax)
andy@TGHLitigation.com

Attorneys for Appellee
Mike Campbell

Appellate Case: 19-2994 Page: 18 Date Filed: 02/10/2021 Entry ID: 5003331

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. 35 and 40 because (exclusive of caption, tables, signature block, and certificates) it contains 3,838 words as determined by the word counting feature of Microsoft Word 365.

2. This document 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 document has been prepared in the proportionally spaced typeface of 14-point Garamond.

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: 19 Date Filed: 02/10/2021 Entry ID: 5003331

CERTIFICATE OF SERVICE

I certify that on February 10, 2021, 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: 20 Date Filed: 02/10/2021 Entry ID: 5003331