137 S.Ct. 1730
Supreme Court of the United States

Lester Gerard PACKINGHAM, Petitioner

v.

NORTH CAROLINA.

No. 15–1194.
Argued Feb. 27, 2017.Decided June 19, 2017.

Opinion
Justice KENNEDY delivered the opinion of the Court.

In 2008, North Carolina enacted a statute making it a felony for a registered sex offender to gain access to a number of websites, including commonplace social media websites like Facebook and Twitter. The question presented is whether that law is permissible under the First Amendment's Free Speech Clause, applicable to the States under the Due Process Clause of the Fourteenth Amendment.

I

A

North Carolina law makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N.C. Gen. Stat. Ann. §§ 14–202.5(a), (e) (2015)

. . .

The statute includes two express exemptions. The statutory bar does not extend to websites that "[p]rovid[e] only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform." § 14–202.5(c)(1). The law also does not encompass websites that have as their "primary purpose the facilitation of commercial transactions involving goods or services between [their] members or visitors." § 14–202.5(c)(2).

According to sources cited to the Court, § 14–202.5 applies to about 20,000 people in North Carolina and the State has prosecuted over 1,000 people for violating it.

B

In 2002, petitioner Lester Gerard Packingham—then a 21–year–old college student—had sex with a 13–year–old girl. He pleaded guilty to taking indecent liberties with a child. Because this crime qualifies as "an offense against a minor," petitioner was required to register as a sex offender—a status that can endure for 30 years or more. See § 14–208.6A; see § 14–208.7(a). As a registered sex offender, petitioner was barred under § 14–202.5 from gaining access to commercial social networking sites.

In 2010, a state court dismissed a traffic ticket against petitioner. In response, he logged on to Facebook.com and posted the following statement on his personal profile:
"Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent..... Praise be to GOD, WOW! Thanks JESUS!" App. 136.

At the time, a member of the Durham Police Department was investigating registered sex offenders who were thought to be violating § 14–202.5. The officer noticed that a " 'J.R. Gerrard' " had posted the statement quoted above. 368 N.C. 380, 381, 777 S.E.2d 738, 742 (2015). By checking court records, the officer discovered that a traffic citation for petitioner had been dismissed around the time of the post. Evidence obtained by search warrant confirmed the officer's suspicions that petitioner was J.R. Gerrard.

. . . Petitioner was ultimately convicted [under § 14–202.5] and given a suspended prison sentence. At no point during trial or sentencing did the State allege that petitioner contacted a minor—or committed any other illicit act—on the Internet.

Petitioner appealed to the Court of Appeals of North Carolina. That court struck down § 14–202.5 on First Amendment grounds, explaining that the law is not narrowly tailored to serve the State's legitimate interest in protecting minors from sexual abuse. 229 N.C.App. 293, 304, 748 S.E.2d 146, 154 (2013) . . .The North Carolina Supreme Court reversed, concluding that the law is "constitutional in all respects." 368 N.C., at 381, 777 S.E.2d, at 741.

The [Supreme] Court granted certiorari, and now reverses.

II

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. See *Ward v. Rock Against Racism,* 491 U.S. 781, 796, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.

While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, *Reno v. American Civil Liberties Union,* 521 U.S. 844, 868, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), and social media in particular. Seven in ten American adults use at least one Internet social networking service. Brief for Electronic Frontier Foundation et al. as *Amici Curiae* 5–6. One of the most popular of these sites is Facebook, the site used by petitioner leading to his conviction in this case. According to sources cited to the Court in this case, Facebook has 1.79 billion active users. *Id.,* at 6. This is about three times the population of North America.

Social media offers "relatively unlimited, low-cost capacity for communication of all kinds." *Reno, supra,* at 870, 117 S.Ct. 2329. On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. See Brief for Electronic Frontier Foundation 15–16. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics "as diverse as human thought." *Reno, supra,* at 870, 117 S.Ct. 2329 (internal quotation marks omitted).

The nature of a revolution in thought can be that, in its early stages, even its participants may be unaware of it. And when awareness comes, they still may be unable to know or foresee where its changes lead. Cf. D. Hawke, Benjamin Rush: Revolutionary Gadfly 341 (1971) (quoting Rush as observing: " 'The American war is over; but this is far from being the case with the American revolution. On the contrary, nothing but the first act of the great drama is closed' "). So too here. While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.

This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.

III

This background informs the analysis of the North Carolina statute at issue. Even making the assumption that the statute is content neutral and thus subject to intermediate scrutiny, the provision cannot stand. In order to survive intermediate scrutiny, a law must be "narrowly tailored to serve a significant governmental interest." *McCullen v. Coakley,* 573 U.S. ——, ——, 134 S.Ct. 2518, 2534, 189 L.Ed.2d 502 (2014) (internal quotation marks omitted). In other words, the law must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.,* at ——, 134 S.Ct., at 2535 (internal quotation marks omitted).

For centuries now, inventions heralded as advances in human progress have been exploited by the criminal mind. New technologies, all too soon, can become instruments used to commit serious crimes. The railroad is one example, see M. Crichton, The Great Train Robbery, p. xv (1975), and the telephone another, see 18 U.S.C. § 1343. So it will be with the Internet and social media.

There is also no doubt that, as this Court has recognized, "[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 244, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). And it is clear that a legislature "may pass valid laws to protect children" and other victims of sexual assault "from abuse." See *id.,* at 245, 122 S.Ct. 1389; accord, *New York v. Ferber,* 458 U.S. 747, 757, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). The government, of course, need not simply stand by and allow these evils to occur. But the assertion of a valid governmental interest "cannot, in every context, be insulated from all constitutional protections." *Stanley v. Georgia,* 394 U.S. 557, 563, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

It is necessary to make two assumptions to resolve this case. First, given the broad wording of the North Carolina statute at issue, it might well bar access not only to commonplace social media websites but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com. The Court need not decide the precise scope of the statute. It is enough to assume that the law applies (as the State concedes it does) to social networking sites "as commonly understood"—that is, websites like Facebook, LinkedIn, and Twitter.

Second, this opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue. Specific criminal acts are not protected speech even if speech is the means for their commission. See *Brandenburg v. Ohio,* 395 U.S. 444, 447–449, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*). Though the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor. Specific laws of that type must be the State's first resort to ward off the serious harm that sexual crimes inflict. (Of importance, the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not an issue before the Court.)

Even with these assumptions about the scope of the law and the State's interest, the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. *Supra,* at 1735 – 1736. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many 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. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. 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." *Reno,* 521 U.S., at 870, 117 S.Ct. 2329.

In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.

IV

The primary response from the State is that the law must be this broad to serve its preventative purpose of keeping convicted sex offenders away from vulnerable victims. The State has not, however, met its burden to show that this sweeping law is necessary or legitimate to serve that purpose. See *McCullen,* 573 U.S., at ——, 134 S.Ct., at 2540. It is instructive that no case or holding of this Court has approved of a statute as broad in its reach. The closest analogy that the State has cited is *Burson v. Freeman,* 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992). There, the Court upheld a prohibition on campaigning within 100 feet of a polling place. That case gives little or no support to the State. The law in *Burson* was a limited restriction that, in a context consistent with constitutional tradition, was enacted to protect another fundamental right—the right to vote. The restrictions there were far less onerous than those the State seeks to impose here. The law in *Burson* meant only that the last few seconds before voters entered a polling place were "their own, as free from interference as possible." *Id.,* at 210, 112 S.Ct. 1846. And the Court noted that, were the buffer zone larger than 100 feet, it "could effectively become an impermissible burden" under the First Amendment. *Ibid.*

The better analogy to this case is *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987), where the Court struck down an ordinance prohibiting any "First Amendment activities" at Los Angeles International Airport because the ordinance covered all manner of protected, nondisruptive behavior including "talking and reading, or the wearing of campaign buttons or symbolic clothing," *id.,* at 571, 575, 107 S.Ct. 2568. If a law prohibiting "all protected expression" at a single airport is not constitutional, *id.,* at 574, 107 S.Ct. 2568 (emphasis deleted), it follows with even greater force that the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture.

* * *

It is well established that, as a general rule, the Government "may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition,* 535 U.S., at 255, 122 S.Ct. 1389. That is what North Carolina has done here. Its law must be held invalid.

The judgment of the North Carolina Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice ALITO, with whom THE CHIEF JUSTICE and Justice THOMAS join, concurring in the judgment.

The North Carolina statute at issue in this case was enacted to serve an interest of "surpassing importance." *New York v. Ferber,* 458 U.S. 747, 757, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)—but it has a staggering reach. It makes it a felony for a registered sex offender simply to visit a vast array of websites, including many that appear to provide no realistic opportunity for communications that could facilitate the abuse of children. Because of the law's extraordinary breadth, I agree with the Court that it violates the Free Speech Clause of the First Amendment.

I cannot join the opinion of the Court, however, because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks. *Ante,* at 1735 – 1736. And this language is bound to be interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites, including, for example, teenage dating sites and sites designed to permit minors to discuss personal problems with their peers. I am troubled by the implications of the Court's unnecessary rhetoric.

I

A

The North Carolina law at issue makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N.C. Gen. Stat. Ann. §§ 14–202.5(a), (e) (2015). And as I will explain, the statutory definition of a "commercial social networking Web site" is very broad.

Packingham and the State debate the analytical framework that governs this case. The State argues that the law in question is content neutral and merely regulates a "place" (*i.e.,* the internet) where convicted sex offenders may wish to engage in speech. See Brief for Respondent 20–25. Therefore, according to the State, the standard applicable to "time, place, or manner" restrictions should apply. See *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Packingham responds that the challenged statute is "unlike any law this Court has considered as a time, place, or manner restriction," Brief for Petitioner 37, and he advocates a more demanding standard of review, *id.,* at 37–39.

Like the Court, I find it unnecessary to resolve this dispute because the law in question cannot satisfy the standard applicable to a content-neutral regulation of the place where speech may occur.

B

A content-neutral "time, place, or manner" restriction must serve a "legitimate" government interest, *Ward, supra,* at 798, 109 S.Ct. 2746and the North Carolina law

easily satisfies this requirement. As we have frequently noted, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Ferber, supra,* at 757, 102 S.Ct. 3348. "Sex offenders are a serious threat," and "the victims of sexual assault are most often juveniles." *McKune v. Lile,* 536 U.S. 24, 32, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002) (plurality opinion); see *Connecticut Dept. of Public Safety v. Doe,* 538 U.S. 1, 4, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003). "[T]he ... interest [of] safeguarding the physical and psychological well-being of a minor ... is a compelling one," *Globe Newspaper Co. v. Superior Court, County of Norfolk,* 457 U.S. 596, 607, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982), and "we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights," *Ferber, supra,* at 757, 102 S.Ct. 3348.

Repeat sex offenders pose an especially grave risk to children. "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune, supra,* at 33, 122 S.Ct. 2017 (plurality opinion); see *United States v. Kebodeaux,* 570 U.S. ——, —— – ——, 133 S.Ct. 2496, 2503–2504, 186 L.Ed.2d 540 (2013).

The State's interest in protecting children from recidivist sex offenders plainly applies to internet use. Several factors make the internet a powerful tool for the would-be child abuser. First, children often use the internet in a way that gives offenders easy access to their personal information—by, for example, communicating with strangers and allowing sites to disclose their location. sSecond, the internet provides previously unavailable ways of communicating with, stalking, and ultimately abusing children. An abuser can create a false profile that misrepresents the abuser's age and gender. The abuser can lure the minor into engaging in sexual conversations, sending explicit photos, or even meeting in person. And an abuser can use a child's location posts on the internet to determine the pattern of the child's day-to-day activities—and even the child's location at a given moment. Such uses of the internet are already well documented, both in research and in reported decisions.

Because protecting children from abuse is a compelling state interest and sex offenders can (and do) use the internet to engage in such abuse, it is legitimate and entirely reasonable for States to try to stop abuse from occurring before it happens.

C

1

It is not enough, however, that the law before us is designed to serve a compelling state interest; it also must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward,* 491 U.S., at 798–799, 109 S.Ct. 2746; see also *McCullen v. Coakley,* 573 U.S. ——, —— – ——, 134 S.Ct. 2518, 2535, 189 L.Ed.2d 502 (2014). The North Carolina law fails this requirement.

A straightforward reading of the text of N.C. Gen. Stat. Ann. § 14–202.5 compels the conclusion that it prohibits sex offenders from accessing an enormous number of websites.

. . .

2

The fatal problem for § 14–202.5 is that its wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child. A handful of examples illustrates this point.

Take, for example, the popular retail website Amazon.com, which allows minors to use its services and meets all four requirements of § 14–202.5' s definition of a commercial social networking website. First, as a seller of products, Amazon unquestionably derives revenue from the operation of its website. Second, the Amazon site facilitates the social introduction of people for the purpose of information exchanges. When someone purchases a product on Amazon, the purchaser can review the product and upload photographs, and other buyers can then respond to the review. This information exchange about products that Amazon sells undoubtedly fits within the definition in § 14–202.5. It is the equivalent of passengers on a bus comparing notes about products they have purchased. Third, Amazon allows a user to create a personal profile, which is then associated with the product reviews that the user uploads. Such a profile can contain an assortment of information, including the user's name, e-mail address, and picture.[7] And fourth, given its back-and-forth comment function, Amazon satisfies the final statutory requirement.

Many news websites are also covered by this definition. For example, the Washington Post's website gives minors access and satisfies the four elements that define a commercial social networking website. The website (1) derives revenue from ads and (2) facilitates social introductions for the purpose of information exchanges. Users of the site can comment on articles, reply to other users' comments, and recommend another user's comment. Users can also (3) create personal profiles that include a name or nickname and a photograph. The photograph and name will then appear next to every comment the user leaves on an article. Finally (4), the back-and-forth comment section is a mechanism for users to communicate among themselves. The site thus falls within § 14–202.5 and is accordingly off limits for registered sex offenders in North Carolina.

Or consider WebMD—a website that contains health-related resources, from tools that help users find a doctor to information on preventative care and the symptoms associated with particular medical problems. WebMD, too, allows children on the site. And it exhibits the four hallmarks of a “commercial social networking” website. It obtains revenue from advertisements. It facilitates information exchanges—via message boards that allow users to engage in public discussion of an assortment of health issues. It allows users to create basic profile pages: Users can upload a picture and some basic information about themselves, and other users can see their aggregated comments and “likes.” WebMD

also provides message boards, which are specifically mentioned in the statute as a "mechanis[m] to communicate with other users." N.C. Gen. Stat. Ann. § 14–202.5(b)(4).

As these examples illustrate, the North Carolina law has a very broad reach and covers websites that are ill suited for use in stalking or abusing children. The focus of the discussion on these sites—shopping, news, health—does not provide a convenient jumping off point for conversations that may lead to abuse. In addition, the social exchanges facilitated by these websites occur in the open, and this reduces the possibility of a child being secretly lured into an abusive situation. These websites also give sex offenders little opportunity to gather personal details about a child; the information that can be listed in a profile is limited, and the profiles are brief. What is more, none of these websites make it easy to determine a child's precise location at a given moment. For example, they do not permit photo streams (at most, a child could upload a single profile photograph), and they do not include up-to-the minute location services. Such websites would provide essentially no aid to a would-be child abuser.

Placing this set of websites categorically off limits from registered sex offenders prohibits them from receiving or engaging in speech that the First Amendment protects and does not appreciably advance the State's goal of protecting children from recidivist sex offenders. I am therefore compelled to conclude that, while the law before us addresses a critical problem, it sweeps far too broadly to satisfy the demands of the Free Speech Clause.

II

While I thus agree with the Court that the particular law at issue in this case violates the First Amendment, I am troubled by the Court's loose rhetoric. After noting that "a street or a park is a quintessential forum for the exercise of First Amendment rights," the Court states that "cyberspace" and "social media in particular" are now "the most important places (in a spatial sense) for the exchange of views." The Court declines to explain what this means with respect to free speech law, and the Court holds no more than that the North Carolina law fails the test for content-neutral "time, place, and manner" restrictions. But if the entirety of the internet or even just "social media" sites are the 21st century equivalent of public streets and parks, then States may have little ability to restrict the sites that may be visited by even the most dangerous sex offenders. May a State preclude an adult previously convicted of molesting children from visiting a dating site for teenagers? Or a site where minors communicate with each other about personal problems? The Court should be more attentive to the implications of its rhetoric for, contrary to the Court's suggestion, there are important differences between cyberspace and the physical world.

I will mention a few that are relevant to internet use by sex offenders. First, it is easier for parents to monitor the physical locations that their children visit and the individuals with whom they speak in person than it is to monitor their internet use. Second, if a sex offender is seen approaching children or loitering in a place frequented by children, this conduct may be observed by parents, teachers, or others. Third, the internet offers an

unprecedented degree of anonymity and easily permits a would-be molester to assume a false identity.

The Court is correct that we should be cautious in applying our free speech precedents to the internet. Cyberspace is different from the physical world, and if it is true, as the Court believes, that "we cannot appreciate yet" the "full dimensions and vast potential" of "the Cyber Age," we should proceed circumspectly, taking one step at a time. It is regrettable that the Court has not heeded its own admonition of caution.

912 F.3d 666
United States Court of Appeals, Fourth Circuit.

Brian DAVISON, Plaintiff - Appellee,

v.

Phyllis RANDALL, in Her Official and Individual Capacity, Defendant - Appellant,

and

Loudoun County Board of Supervisors, in Their Official and Individual Capacities; Leo Rogers, in His Official Capacity; Tony Buffington, in His Official Capacity; Ron Meyer, in His Official Capacity; Geary Higgins, in His Official Capacity, Defendants.

Local Government Attorneys of Virginia, Inc.; International Municipal Lawyers Association; Virginia Association of Counties; Virginia Municipal League, Amici Supporting Appellant,

American Civil Liberties Union; ACLU of Virginia; ACLU of Maryland; ACLU of North Carolina; ACLU of South Carolina; ACLU of West Virginia, Amici Supporting Appellee.

Brian C. Davison, Plaintiff - Appellant,

v.

Phyllis Randall, in Her Official and Individual Capacity; Loudoun County Board of Supervisors, in Their Official And Individual Capacities, Defendants - Appellees,

and

Leo Rogers, in His Official Capacity; Tony Buffington, in His Official Capacity; Ron Meyer, in His Official Capacity; Geary Higgins, in His Official Capacity, Defendants.

No. 17-2002, No. 17-2003
Argued: September 26, 2018
Decided: January 7, 2019
Amended: January 9, 2019

Before KEENAN, WYNN, and HARRIS, Circuit Judges.

Affirmed by published opinion. Judge Wynn wrote the opinion, in which Judge Keenan and Judge Harris concurred. Judge Keenan wrote a separate concurring opinion.

WYNN, Circuit Judge:

Phyllis Randall, Chair of the Loudoun County, Virginia, Board of Supervisors (the "Loudoun Board"), brings this appeal, arguing that the district court erred in concluding that she violated the First Amendment rights of one of her constituents, Brian Davison, when she banned Davison from the "Chair Phyllis J. Randall" Facebook page she administered…For the reasons that follow, we affirm.

I.
A.

Randall has chaired the Loudoun County Board of Supervisors since January 1, 2016. The day before she was sworn in as chair, Randall created the "Chair Phyllis J. Randall" Facebook Page (the "Chair's Facebook Page"). According to Facebook, Inc., unlike personal Facebook profiles, which are for non-commercial use and represent individual people, Facebook "Pages"—like the Chair's Facebook Page—"help businesses, organizations, and brands share their stories and connect with people." "Pages are managed by people who have personal profiles," the company explains. In addition to the Chair's Facebook Page, Randall created and maintained two other Facebook profiles: a personal profile and a Page devoted to her campaign. Randall classified her campaign page as belonging to a "politician" and used no designation for her personal profile, but she designated the Chair's Facebook Page as a "governmental official" page.

Randall and her Chief of Staff, Jeanine Arnett, share administrative control over the Chair's Facebook Page, although Randall almost exclusively controls the page's content. On her campaign page, Randall characterized the Chair's Facebook Page as her "county Facebook page" stating:

> I really want to hear from ANY Loudoun citizen on ANY issues, request, criticism, complement or just your thoughts. However, I really try to keep back and forth conversations (as opposed to one time information items such as road closures) on *my county Facebook page (Chair Phyllis J. Randall)* or County email (Phyllis.randall@loudoun.gov). Having back and forth constituent conversations are Foiable ([Freedom of Information Act]) so if you could reach out to me on these mediums that would be appreciated.

The Chair's Facebook Page includes three columns. The left column, which is topped by a picture of Randall, includes several links to allow visitors to quickly navigate the contents of the Chair's Facebook Page.

The middle column, which is organized in reverse chronological order similar to a personal profile's News Feed, is composed of posts by Randall and comments by Facebook users on those posts. Randall's posts are almost always directed to "Loudoun," and deal with numerous aspects of Randall's official responsibilities. For example, Randall used the Chair's Facebook Page to notify the public about upcoming Loudoun Board meetings, and the subjects to be discussed during those meetings. Randall also used the page to inform Loudoun County residents about significant public safety issues. *See, e.g.*, J.A. 412 (stating that Loudoun Board had "been informed by the Sheriff's Office about the non-legitimate threat made on social media toward Dominion High School in Sterling"); J.A. 418 (reporting that she "ha[d] been briefed regarding the student falling from the water tower this morning" and advising the public to "not make any assumptions but wait for information"). And Randall used the Chair's Facebook Page to coordinate Loudoun County's response to a large snow storm, including to communicate with constituents regarding which municipal streets required plowing.

Other posts by Randall to the Chair's Facebook Page invited members of the public to apply to participate on a public commission and to participate in public meetings regarding key issues facing Loudoun County residents, such as revised flood plain zones and the Zika virus. Randall also authored posts regarding a variety of trips and meetings she had taken in furtherance of Loudoun County business. *E.g.*, J.A. 408 (reporting that Randall "address[ed] the (county) role in Treatment" at a "regional conference on Opioid and Substance Abuse Addiction"); J.A. 410 (stating that Randall represented Loudoun County at its "annual credit rating presentation" in New York); J.A. 415 (informing public of trip to Loudoun's "Sister City" in Germany); J.A. 426 (reporting that Randall was "in Richmond lobbying for [Loudoun County's] legislative program"). Finally, Randall used the page to advise the public regarding official actions taken by the Loudoun Board. *E.g.*, J.A. 433 (reporting that Loudoun Board "approved funding for new breathing apparatus for our Loudoun Firefighters"); J.A. 442 (listing several "proclamations of note" by the Loudoun Board); J.A. 443 (informing public that Loudoun Board "adopted a budget for Fiscal Year 2017 totaling $2.46 billion for the general county government and schools"). Although Randall's posts on the Chair's Facebook Page principally addressed her official responsibilities, a few posts addressed topics less closely related to her official activities such as her affection for the German language or pride in becoming an organ donor.

Members of the public, including Davison, "liked" or commented on several of Randall's posts on the Chair's Facebook Page. Each "like" or comment identified the name of the personal profile or Page of the authoring party. Many of the comments thanked Randall and the Loudoun Board for representing the public's interests. Other posts by members of the public offered feedback on various issues faced by Randall and the Loudoun Board. *E.g.*, J.A. 427 (stating that "[p]utting recreation in a flood plain is not a good idea"); J.A. 448 (stating that "more needs to be done with the explosion of Lyme disease in Loudoun"). And other comments dealt with constituent-specific issues. *E.g.*, J.A. 415 (constituent stating, in response to post by Randall regarding visit to Loudoun County's "Sister City" in Germany, that constituent's "daughter is interested in exchange programs"); J.A. 454 (stating that "there [we]re no [snow] plows to be seen" in a particular neighborhood). Finally, several comments, including a number authored by Davison, criticized the Loudoun Board, generally, and Randall, in particular, for actions taken in their official capacities. *E.g.*, J.A. 429–30 (Davison criticizing public school system budget and expenditures); J.A. 438–39 (member of public criticizing governmental entity's inspection of farm, claiming it failed to uncover animal abuse); J.A. 449 (Davison characterizing question he posed at Loudoun Board and Loudoun School Board joint town hall). On some occasions, Randall responded to these comments or criticisms.

In the right column of the Chair's Facebook Page, the page is identified as a "government official" page. It provides contact information for Randall's county office, including her office telephone number, Randall's official county email address, and the internet address for the official county website. The column also identifies how many and which Facebook personal profiles and Pages "like" and "follow" the Chair's Facebook Page. And the column includes a list of personal profiles and Pages "liked" by the Chair's Facebook Page.

Randall publicized the Chair's Facebook Page in her official "Chair Phyllis J. Randall" newsletter, which is prepared by County employees, hosted on the County's website, and distributed to Loudoun citizens using Randall's official county email account. The newsletter ends with the words "STAY CONNECTED" and a Facebook icon that hyperlinks to the Chair's Facebook Page. Randall also highlighted the Chair's Facebook Page in "Winter Storm Information" notices emailed from her official county account to Loudoun County residents, advising recipients to "Visit [the Chair's Facebook Page] for Updates." J.A. 341–42, 344.

Davison, an outspoken resident of Loudoun County, apparently largely focuses his civic engagement and expression on "the funding and ... management of public schools." J.A. 95. To that end, he has repeatedly expressed concern about "School Board members failing to disclose personal conflicts as required by law before voting on financial transactions before the School Board." J.A. 96.

On February 3, 2016, Davison attended a Loudoun town hall meeting that included the Loudoun County School Board and Randall. At the meeting, Davison submitted a question implying that certain School Board members had acted unethically in approving financial transactions. Randall volunteered to answer the question but characterized it as a "set-up question" that she did not "appreciate." J.A. 103. Shortly after Randall answered the question—and while the town hall meeting was still ongoing—Davison posted a message on Twitter in which he tagged Randall: "@ChairRandall 'set up question'? You might want to strictly follow FOIA and the COIA as well." J.A. 470–71.

Later that evening, Randall posted about the town hall meeting on the Chair's Facebook Page, describing "what was generally discussed at the meeting." J.A. 268. In response, Davison then used one of the Facebook Pages he manages through his personal Facebook profile—"Virginia SGP," which Davison frequently uses to post political commentary—to comment on Randall's post about the town hall meeting. Although neither Davison nor Randall remember the precise content of Davison's comment, Randall testified that it contained "accusations" regarding School Board members' and their families' putative conflicts of interest related to municipal financial transactions, suggesting, in Randall's opinion, that School Board members had been "taking kickback money." Randall stated that she "had no idea if any of th[e] [accusations] w[ere] correct," but she determined that the post was "probably not something [she] want[ed] to leave" on the Chair's Facebook Page. Randall then "deleted the whole post," including her original post regarding the town hall meeting, Davison's comment and replies thereto, and all other public comments. Randall also banned Davison's Virginia SGP Page from the Chair's Facebook Page, which precluded Davison from using his Virginia SGP Page from commenting on the Chair's Facebook Page. The next morning, about twelve hours later, Randall reconsidered her actions and unbanned Davison's Virginia SGP Page.

B.

On November 3, 2016, Davison filed an amended complaint seeking declaratory and injunctive relief under 42 U.S.C. § 1983 against Randall, in both her official and individual capacities, and the Loudoun Board alleging that the "banning of [Davison] from commenting on [the Chair's Facebook Page] is viewpoint discrimination." J.A. 31. Davison further alleged that the ban violated his procedural due process rights protected by the Fourteenth Amendment because "Randall blocked Davison's constitutionally protected speech on [the Chair's Facebook Page], a limited public forum, without prior notice and without providing an opportunity for appealing [her] decision." J.A. 32. Davison did not challenge Randall's deletion of his post.

…

II.

On appeal, Randall argues that (A) Davison failed to establish standing to obtain prospective declaratory relief based on Randall's alleged First Amendment violation; (B) the district court erred in concluding that Randall acted under "color of state law" when she banned Davison's Virginia SGP Page from the Chair's Facebook Page; and (C) the district court erred in concluding that Randall's banning of Davison's Virginia SGP Page violated the First Amendment.

A.

Notwithstanding that she did not challenge Davison's standing below—and therefore that the district court never squarely addressed his standing—Randall now argues that Davison failed to establish Article III standing to support the district court's award of prospective declaratory relief.

. . .

In sum, Davison's evidence demonstrated—and the district court found—that Davison intends to continue to use the Chair's Facebook Page and that Davison faces a credible threat of future enforcement. *See Davison*, 267 F.Supp.3d at 723. Accordingly, Davison adduced facts establishing an injury in fact sufficient to justify the prospective declaratory relief awarded by the district court.

B.

Next, Randall asserts that the district court erred in concluding, with regard to Davison's individual capacity First Amendment claim, that Randall acted "under color of state law," as that phrase is used in Section 1983, in administering the Chair's Facebook Page and banning Davison from that page.

. . .

To state a claim under Section 1983, a plaintiff must show that the alleged constitutional deprivation at issue occurred because of action taken by the defendant "under color of ... state law." *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

. . .

Although no one factor is determinative, this Court has held that a defendant's purportedly private actions bear a "sufficiently close nexus" with the State to satisfy Section 1983's color-of-law requirement when the defendant's challenged "actions are linked to events which arose out of his official status." *Id.* at 524 . . . In the context of an alleged First Amendment violation, in particular, this Court has found that 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." *Rossignol*, 316 F.3d at 524.

Here, after thoroughly analyzing the totality of the circumstances surrounding Randall's creation and administration of the Chair's Facebook Page and banning of Davison from that page, the district court concluded that Randall acted under color of state law. *Davison*, 267 F.Supp.3d at 723. We agree.

Randall created and administered the Chair's Facebook Page to further her duties as a municipal official. She used the Chair's Facebook Page "as a tool of governance," *id.* at 713: through the Chair's Facebook Page, Randall provides information to the public about her and the Loudoun Board's official activities and solicits input from the public on policy issues she and the Loudoun Board confront. *See supra* Part I.A.

For instance, Randall used the Chair's Facebook Page to inform the public about serious public safety events and to keep her constituents abreast of the County's response to a snowstorm and to coordinate snow removal activities. And, as the district court correctly emphasized, Randall

> swathe[d] the [Chair's Facebook Page] in the trappings of her office. Among other things, (1) the title of the page includes [Randall]'s title; (2) the page is categorized as that of a government official; (3) the page lists as contact information [Randall]'s official County email address and the telephone number of [Randall]'s County office; (4) the page includes the web address of [Randall]'s official County website; (5) many—perhaps most—of the posts are expressly addressed to "Loudoun," [Randall]'s constituents; (6) [Randall] has submitted posts on behalf of the [Loudoun Board] as a whole; (7) [Randall] has asked her constituents to use the [Chair's Facebook Page] as a channel for "back and forth constituent conversations"; and (8) the content posted has a strong tendency toward matters related to [Randall]'s office.

Davison, 267 F.Supp.3d at 714. A private citizen could not have created and used the Chair's Facebook Page in such a manner. *Rossignol*, 316 F.3d at 526. Put simply, Randall clothed the Chair's Facebook Page in "the power and prestige of h[er] state

office," *Harris*, 605 F.2d at 337, and created and administered the page to "perform[ ] actual or apparent dut[ies] of h[er] office," *Martinez*, 54 F.3d at 986.

Additionally, the specific actions giving rise to Davison's claim—Randall's banning of Davison's Virginia SGP Page—"are linked to events which arose out of h[er] official status." *Rossignol*, 316 F.3d at 524. Randall's post to the Chair's Facebook Page that prompted Davison's comment informed the public about what happened at the Loudoun Board and Loudoun County School Board's joint meeting. And Davison's comment also dealt with an issue related to that meeting and of significant public interest—School Board members' alleged conflicts of interest in approving financial transactions. 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" further reinforces that the ban was taken under color of state law. *Id.* at 525. Considering the totality of these circumstances, the district court correctly held that Randall acted under color of state law in banning Davison from the Chair's Facebook Page.

C.

Third, Randall argues that the district court erred in ruling in Davison's favor on his individual capacity First Amendment claim against Randall. Randall principally challenges the district court's conclusion that the Chair's Facebook Page constitutes a "public forum" under traditional First Amendment law. We review this legal question de novo. *See Helton*, 709 F.3d at 350.

Under long-established First Amendment law, governmental entities are "strictly limited" in their ability to regulate private speech in public fora. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). The Supreme Court has recognized two categories of public fora: "traditional public forums" and "limited (or designated) public forums." *Am. Civil Liberties Union v. Mote*, 423 F.3d 438, 443 (4th Cir. 2005). "Traditional" public forums—"such as streets, sidewalks, and parks"—"have the characteristics of a public thoroughfare, a purpose that is compatible with expressive conduct, as well as a tradition and history of being used for expressive public conduct." *Id.* "Limited" or "designated" forums are forums that are "not traditionally public, but [that] the government has purposefully opened to the public, or some segment of the public, for expressive activity." *Id.* Accordingly, the hallmark of both types of public fora—what renders the fora "public"—is that the government has made the space available—either by designation or long-standing custom—for "expressive public conduct" or "expressive activity," and the space is compatible with such activity. *Id.* "Conversely, a non-public forum is one that has not traditionally been open to the public, where opening it to expressive conduct would 'somehow interfere with the objective use and purpose to which the property has been dedicated.' " *Id.* (quoting *Warren v. Fairfax Cty.*, 196 F.3d 186, 190–91 (4th Cir. 1999)).

Although neither the Supreme Court nor any Circuit has squarely addressed whether, and in what circumstances, a governmental social media page—like the Chair's Facebook Page—constitutes a public forum, aspects of the Chair's Facebook Page bear

the hallmarks of a public forum. Randall "intentionally open[ed the public comment section of the Chair's Facebook Page] for public discourse," *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985), inviting "ANY Loudoun citizen" to make posts to the comments section of the Chair's Facebook Page—the interactive component of the page—"on ANY issues, request, criticism, complement or just your thoughts." Randall placed no restrictions on the public's access to the page or use of the interactive component of the Chair's Facebook Page. And, in accordance with Randall's invitation, the public made numerous posts on matters of public concern.

The Chair's Facebook Page also is "compatib[le] with expressive activity." *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439. "Congress [has] recognized the internet and interactive computer services as offering 'a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.' " *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (quoting 47 U.S.C. § 230(a)(3)); *cf*. *Bland*, 730 F.3d at 386 (finding post to campaign Facebook page "constituted pure speech"). And the Supreme Court recently analogized social media sites, like the Chair's Facebook Page, to "traditional" public forums, characterizing the internet as "the most important place[ ] (in a spatial sense) for the exchange of views." *Packingham v. North Carolina,* —— U.S. ——, 137 S.Ct. 1730, 1735, 198 L.Ed.2d 273 (2017). An "exchange of views" is precisely what Randall sought—and what in fact transpired—when she expressly invited "ANY Loudoun citizen" to visit the page and comment "on ANY issues," and received numerous such posts and comments. J.A. 455.

Randall nevertheless argues that traditional public forum analysis should not apply to the Chair's Facebook Page for two reasons: (1) the Chair's Facebook Page is "a private website" and therefore does not constitute "public property" susceptible to forum analysis, and (2) the Chair's Facebook Page, in its entirety, constitutes "government speech" properly analyzed under the framework set forth in *Pleasant Grove*. We disagree.

Even assuming the intangible space at issue is "private property," as Randall claims—which is not at all clear from the record before us—the Supreme Court never has circumscribed forum analysis solely to government-owned property. For example, in *Cornelius*, the Court recognized that forum analysis applies "to *private property* dedicated to public use." *Cornelius*, 473 U.S. at 801, 105 S.Ct. 3439 (emphasis added); *see also Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 679, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010) ("[T]his Court has employed forum analysis to determine when a governmental entity, in regulating *property in its charge*, may place limitations on speech." (emphasis added)). And the Supreme Court and lower courts have held that private property, whether tangible or intangible, constituted a public forum when, for example, the government retained substantial control over the property under regulation or by contract. *See, e.g.*, *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547, 555, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) (holding that "a privately owned Chattanooga theater under long-term lease to the city" was a "public forum[ ] designed for and dedicated to expressive activities"); *Halleck v. Manhattan Community Access Corp.*, 882 F.3d 300, 306–07 (2d Cir. 2018) (holding that public access television

channels operated by a private non-profit corporation constituted public forums), *cert. granted* —– U.S. ——–, 139 S.Ct. 360, 202 L.Ed.2d 261 (2018) (mem.); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1122 (10th Cir. 2002) ("[F]orum analysis does not require that the government have a possessory interest in or title to the underlying land. Either government ownership or regulation is sufficient for a First Amendment forum of some kind to exist."); *Freedom from Religion Foundation, Inc. v. City of Marshfield, Wis.*, 203 F.3d 487, 494 (7th Cir. 2000) (holding that private property abutted by public park constituted public forum).

Significantly, even assuming the relevant aspects of the Chair's Facebook Page constitute private property—which, again, is not entirely clear from the record before us—Randall, acting under color of state law, retained and exercised significant control over the page. She created the Chair's Facebook Page. She designated the page as belonging to a "governmental official." She clothed the page in the trappings of her public office. She chose to list her official contact information on the page. And she curated the links in the left column of the page and the lists of Facebook Pages or profiles "liked" by the Chair's Facebook Page in the right column.

Of particular importance, Randall had complete control over the aspect of the Chair's Facebook Page giving rise to Davison's 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. *Cf. Knight*, 302 F.Supp.3d at 566–67 (holding that the interactive component of the President's Twitter account constituted public forum because the President and his advisors "exercise control over various aspects of the ... account," including the power to block other users from accessing the account).

The Second Circuit's decision in *Halleck* dealing with privately operated public access television channels is instructive. Federal law allows cable franchising authorities to require cable operators to designate channel capacity for public use. *Halleck*, 882 F.3d at 302. Likewise, New York regulations oblige cable operators to designate at least one channel for full-time public use. *Id.* Pursuant to that authority, the City of New York entered into a cable franchise agreement with a cable company requiring the company to make available four public access channels, which channels were operated by a private, non-profit corporation, MNN. *Id.* Several producers of public access programming sued MNN, alleging that MNN violated the producers' First Amendment rights by indefinitely suspending them from using the public access channels "because of disapproval of the content of a TV program" they had submitted for airing. *Id.*

The Second Circuit concluded that the public access channels constituted a public forum, notwithstanding that they were operated by a private company. *Id.* at 306–08. The court reached that conclusion for two reasons. First, it pointed to the similarities between public access channels and traditional public forums, like parks, describing "[a] public access channel [a]s the electronic version of the public square." *Id.* at 306. Second, the court emphasized the extensive government involvement with, and control over, public access channels by virtue of the federal and state regulatory schemes. *See id.* ("[W]here, as

here, federal law authorizes setting aside channels to be 'the electronic marketplace of ideas,' state regulation requires cable operators to provide at least one public access channel, a municipal contract requires a cable operator to provide four such channels, *and a municipal official has designated a private corporation to run those channels*, those channels are public forums." (emphasis added)).

Although not subject to the extensive federal and state regulatory regime applicable in *Halleck*, the Chair's Facebook Page is in many ways analogous to the privately-operated public access channels considered by the Second Circuit. Just as the federal government sought to establish an "electronic marketplace of ideas" by mandating provision of public access channels, Randall expressly sought to—and did, in fact—create an "electronic marketplace of ideas" by inviting "ANY" constituent to post to the Chair Page on "ANY issues." Likewise, just as the City of New York chose to have a private corporation operate the public access channels, Randall chose to create her electronic marketplace of ideas, the Chair's Facebook Page, on a private platform, Facebook. Indeed, the present case provides a stronger basis for treating the interactive component of the Chair's Facebook Page as a public forum because whereas the private corporation in *Halleck*, MNN, exercised control over the aspect of the public access channel giving rise to the First Amendment claim—banning the public access program producer—a public official, Randall exercised unconstrained control over the aspect of the Chair's Facebook Page giving rise to Davison's claim—banning of other Facebook profiles and Pages.

Not only does case law contradict Randall's argument that public forum analysis never applies to private property, her argument also fails because it makes no legal sense to establish a bright-line rule that forum analysis applies only to government-owned property. Why, for example, should the First Amendment allow a municipality to engage in viewpoint discrimination in curating a public library branch in leased space but not allow the municipality to engage in such discrimination in a library branch on municipally owned property? *Cf. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870–71, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982) (plurality op.) ("If a Democratic school board, motivated by partisan affiliation, ordered removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books."). Or why should a municipality be allowed to engage in viewpoint discrimination when holding a virtual public meeting hosted on a private website when such discrimination would be unconstitutional if the meeting was held in a governmental building? *Cf.* Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. Rev. 1975, 1996 (2011) ("Just as the government can rent a building to use as a forum for public debate and discussion, so, too, can it 'rent' a social media page for the promotion of public discussion."). We do not believe the First Amendment draws such arbitrary lines.

Randall's second argument—that the Chair's Facebook Page amounts to "government speech"—fails to recognize the meaningful difference between Randall's posts to the Chair's Facebook Page and the public comments and posts she invited in the page's interactive space. To be sure, Randall's comments and curated references on the Chair's Facebook Page to other Pages, personal profiles, and websites amount to governmental

speech. *See Sutliffe v. Epping School Dist.*, 584 F.3d 314, 329–30 (1st Cir. 2009) (holding that municipality's refusal to place hyperlink on municipal website to website of group opposed to municipal budget constituted government speech); *Page v. Lexington Cty. School Dist. One*, 531 F.3d 275, 283–85 (4th Cir. 2008) (holding that School District's refusal to place hyperlink on its website to website of group that opposed School District's position on pending legislation constituted government speech because, in part, "the links to other websites were selected by the School District alone as ones that supported *its own message*"); *Knight*, 302 F.Supp.3d at 571 ("[T]he President's tweets are [not] susceptible to forum analysis ... because the content is government speech.").

But the interactive component of the Chair's Facebook Page—the portion of the middle column in which the public can post comments, reply to posts, and "like" comments and posts—is materially different. *See Knight*, 302 F.Supp.3d at 572 (distinguishing a government official's tweets and "the interactive space for replies and retweets"). Randall placed no formal limitations on the ability of Facebook personal profiles and Pages to access the Chair's Facebook Page and make comments and posts to the interactive component of the page. On the contrary, she expressly invited posts to the page "from ANY Loudoun citizen on ANY issues, request, criticism, complement or just your thoughts." J.A. 455. And comments and posts by users cannot be mistaken for Randall's own speech because they identify the posting or replying personal profile or Page, and thereby distinguish that user from Randall.

Contrary to Randall's argument that the Chair's Facebook Page, in its entirety, amounts to government speech, the present case also is meaningfully distinguishable from the government speech framework identified in *Pleasant Grove*. There, a municipality denied a private religious group's request to allow it to erect a "monument in a city park in which other donated monuments were previously erected," including a monument depicting a prominent symbol of a different religion. 555 U.S. at 464, 129 S.Ct. 1125. The plaintiff religious group sought relief under the First Amendment, arguing that the city park constituted a traditional public forum, and therefore that the city could not reject the religious group's proposed monument when it had previously allowed construction of a monument associated with another religion. *Id.* at 466, 129 S.Ct. 1125.

The Supreme Court held that the city did not violate the First Amendment because the government speech framework, rather than forum analysis, applied to the conduct at issue. In reaching that conclusion, the Court emphasized that the city never "opened up the Park for the placement of whatever permanent monuments might be offered by private donors." *Id.* at 472–73, 129 S.Ct. 1125. "Rather, the City has 'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection." *Id.* at 473, 129 S.Ct. 1125. The Court further emphasized that "[t]he forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program." *Id.* at 478, 129 S.Ct. 1125. A city park, however, "can accommodate only a limited number of permanent monuments," and therefore a municipality cannot—and need not—provide park space for all who wish to erect a monument. *Id.*

Here, Randall "effectively controlled" certain aspects of the Chair's Facebook Page: she curated the Chair's Facebook Page's left and right columns and made posts to the middle column. *Id.* at 472, 129 S.Ct. 1125. But Randall also expressly opened the Chair's Facebook Page's middle column—its interactive space—for "ANY" user to post on "ANY issues," and therefore did not retain "final approval authority" over that aspect of the Chair's Facebook Page, *Pleasant Grove*, 555 U.S. at 473, 129 S.Ct. 1125. Just as the parkland surrounding monuments in *Pleasant Grove* continued to constitute a public forum, even though the monuments themselves constituted government speech, so too the interactive component of the Chair's Facebook Page constitutes a public forum, even though Randall's curation of and posts to the Chair's Facebook Page amount to government speech. Additionally, the interactive component of the Chair's Facebook Page does not face the same spacial limitations as those of the park in *Pleasant Grove*, but instead is "capable of accommodating a large number of public speakers without defeating [its] essential function." *Id.* at 478, 129 S.Ct. 1125. Accordingly, *Pleasant Grove* supports, rather than undermines, our conclusion that the interactive component of the Chair's Facebook Page constitutes a public forum.

Upon concluding that interactive component of the Chair's Facebook Page amounts to a public forum, we would normally need to determine whether it constitutes a traditional public forum or designated or limited public forum. In the present case, however, we need not decide that question because Randall's ban of Davison amounted to "viewpoint discrimination," which is "prohibited in all forums." *See Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 n.2 (4th Cir. 2006). "Viewpoint discrimination ... 'targets not subject matter, but particular views taken by speakers on a subject.' " *Id.* (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)). Viewpoint discrimination is apparent, for example, if a government official's decision to take a challenged action was "impermissibly motivated by a desire to suppress a particular point of view." *Cornelius*, 473 U.S. at 812–13, 105 S.Ct. 3439.

Here, the district court found—as the record amply supports—that Randall banned Davison's Virginia SGP Page because Davison posted a comment using that page alleging "corruption on the part of Loudoun County's School Board involving conflicts of interests among the School Board and their family members." *Davison*, 267 F.Supp.3d at 711. Although Randall stated that she had "no idea" whether Davison's allegations were "correct," she nonetheless banned him because she viewed the allegations as "slanderous" and she "didn't want [the allegations] on the site." *Id.* at 717. Randall's decision to ban Davison because of his allegation of governmental corruption constitutes black-letter viewpoint discrimination.

Put simply, Randall unconstitutionally sought to "suppress" Davison's opinion that there was corruption on the School Board. *Cornelius*, 473 U.S. at 812–13, 105 S.Ct. 3439; *see also, e.g.*, *Rossignol*, 316 F.3d at 521 (holding that sheriff's deputies engaged in viewpoint discrimination when they seized an issue of a newspaper that criticized the county sheriff's and his deputies' performance of their official duties); *Putnam Pit, Inc. v. City of*

Cookeville, Tenn., 221 F.3d 834, 846 (6th Cir. 2000) (holding that a municipality engages in viewpoint discrimination if it refuses to link newspaper webpage to the city's website solely because the newspaper sought to expose municipal corruption); *Knight*, 302 F.Supp.3d at 575 (holding that the President engaged in viewpoint discrimination when he blocked individuals from his Twitter account because the individuals "posted tweets that criticized the President or his policies").[7] That Randall's action targeted comments critical of the School Board members' official actions and fitness for office renders the banning all the more problematic as such speech "occupies the core of the protection afforded by the First Amendment." *Rossignol*, 316 F.3d at 521 (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995)).

In sum, the interactive component of the Chair's Facebook Page constituted a public forum, and Randall engaged in unconstitutional viewpoint discrimination when she banned Davison's Virginia SGP Page from that forum.

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IV.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

BARBARA MILANO KEENAN, Circuit Judge, concurring:

I join the well-reasoned majority opinion in full. I agree that the central "aspects of the Chair's Facebook Page bear the hallmarks of a public forum." I am particularly persuaded by the facts concerning Randall's conduct of impressing the Chair Facebook Page with the trappings of a "government official" Facebook Page and of inviting citizens to comment, without restriction, on matters of public concern. Accordingly, under our precedent, I agree that Randall's conduct of banning Davison's Virginia SGP Page based on the content of a comment is attributable to the government and violates the First Amendment. *See Rossignol v. Voorhaar*, 316 F.3d 516, 523-25 (4th Cir. 2003).

I nonetheless write separately to call attention to two issues regarding governmental use of social media that do not fit neatly into our precedent. First, I question whether any and all public officials, regardless of their roles, should be treated equally in their ability to open a public forum on social media. The Supreme Court recently cited a series of decisions in which "a *unit* of government" had created a public forum. *Matal v. Tam,* ––– U.S. ––––, 137 S.Ct. 1744, 1763, 198 L.Ed.2d 366 (2017) (emphasis added) (citing cases); *see also Pleasant Grove City v. Summum*, 555 U.S. 460, 470, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009) ("a government *entity* may create a forum" (emphasis added)). However, it appears to be an open question whether an individual public official serving in a legislative capacity qualifies as a unit of government or a government entity for purposes of her ability to open a public forum. Instead, our precedent merely directs us to consider whether the challenged action "bore a sufficiently close nexus" with the government to be "fairly treated" as that of the government itself. *Rossignol*, 316 F.3d at 525 (internal quotation marks and citation omitted).

The nature and extent of a public official's authority should have some bearing on the official's ability to open a public forum on social media. While the nine-member Loudoun County Board of Supervisors (the Board) serves to set policies, adopt ordinances, and appropriate funds, the Chair simply is empowered individually to oversee meetings and to set agendas. The record before us is silent regarding the Chair's authority to take any official action on her own.

In contrast, certain elected executive officials, under given circumstances, can conduct government business and set official policy unilaterally, including through the use of social media. *See, e.g., Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F.Supp.3d 541, 567 (S.D.N.Y. 2018) (discussing President Donald J. Trump's use of his Twitter account to appoint and remove officers and conduct foreign policy), *appeal docketed*, No. 18-1691 (2d Cir. Oct. 24, 2018); *Schisler v. State*, 907 A.2d 175, 218-20 (Md. 2006) (describing the governor's unilateral power to remove certain officers). The relevance of such distinctions to a public official's ability to create a public forum on social media is a matter that should be addressed by the Supreme Court. Because this is an open question, we are bound by current precedent and, for the reasons set forth in the majority opinion, Randall as a single board member acted under of color of law and opened a public forum on Facebook.

Second, the Supreme Court should consider further the reach of the First Amendment in the context of social media. I acknowledge that the Supreme Court has referred to social media as "the modern public square," *Packingham v. North Carolina,* ––– U.S. ––––, 137 S.Ct. 1730, 1737, 198 L.Ed.2d 273 (2017), implying that First Amendment principles protecting speech from government intrusion do extend to social media. However, the interplay between private companies hosting social media sites and government actors managing those sites necessarily blurs the line regarding which party is responsible for burdens placed on a participant's speech.

For example, hate speech is protected under the First Amendment. *See Matal*, 137 S.Ct. at 1763-64 (holding that the disparagement clause of the Lanham Act violated the First Amendment free speech clause because it prohibited hate speech). But social media companies like Facebook and others have policies forbidding hate speech on their platforms.[2] Thus, while a government official, who under color of law has opened a public forum on a social media platform like Facebook, could not ban a user's comment containing hate speech, that official could report the hate speech to Facebook. And Facebook personnel could ban the user's comment, arguably circumventing First Amendment protections.

Admittedly, this question is not directly presented in the present case, given that the public official, not a Facebook employee, acted to restrict speech. Nonetheless, cases necessarily will arise requiring courts to consider the nuances of social media and their various roles in hosting public forums established by government officials or entities. Therefore, in my view, courts must exercise great caution when examining these issues, as we await further guidance from the Supreme Court on the First Amendment's reach into social media.

928 F.3d 226
United States Court of Appeals, Second Circuit.

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, Rebecca Buckwalter, Philip Cohen, Holly Figueroa, Eugene Gu, Brandon Neely, Joseph Papp, and Nicholas Pappas, Plaintiffs–Appellees,

v.

Donald J. TRUMP, President of the United States and Daniel Scavino, White House Director of Social Media and Assistant to the President, Defendants–Appellants,

Sarah Huckabee Sanders, White House Press Secretary, Defendant.

No. 18-1691-cv
August Term 2018
Argued: March 26, 2019
Decided: July 9, 2019

Before: PARKER, HALL, and DRONEY, Circuit Judges.

BARRINGTON D. PARKER, Circuit Judge:

President Donald J. Trump appeals from a judgment of the United States District Court for the Southern District of New York (Buchwald, *J.*) concluding that he engaged in unconstitutional viewpoint discrimination by utilizing Twitter's "blocking" function to limit certain users' access to his social media account, which is otherwise open to the public at large, because he disagrees with their speech. We hold that he engaged in such discrimination and, consequently, affirm the judgment below.

The salient issues in this case arise from the decision of the President to use a relatively new type of social media platform to conduct official business and to interact with the public. We do not consider or decide whether an elected official violates the Constitution by excluding persons from a wholly private social media account. Nor do we consider or decide whether private social media companies are bound by the First Amendment when policing their platforms. We do conclude, however, that the First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise–open online dialogue because they expressed views with which the official disagrees.

Twitter is a social media platform that allows its users to electronically send messages of limited length to the public. After creating an account, a user can post their own messages on the platform (referred to as tweeting). Users may also respond to the messages of others (replying), republish the messages of others (retweeting), or convey approval or acknowledgment of another's message by "liking" the message. All of a user's tweets appear on that user's continuously–updated "timeline," which is a convenient method of viewing and interacting with that user's tweets.

When one user replies to another user's tweet, a "comment thread" is created. When viewing a tweet, this comment thread appears below the original tweet and includes both the first–level replies (replies to the original tweet) and second–level replies (replies to the first–level replies). The comment threads "reflect multiple overlapping 'conversations' among and across groups of users" and are a "large part" of what makes Twitter a " 'social' media platform." App'x at 50.

The platform also allows users to directly interact with each other. For example, User A can "mention" User B in User A's tweet, prompting a notification to User B that he or she has been mentioned in a tweet. Twitter users can also "follow" one another. If User A follows User B, then all of User B's tweets appear in User A's "feed," which is a continuously–updated display of content mostly from accounts that User A has chosen to follow. Conversely, User A can "block" User B. This prevents User B from seeing User A's timeline or any of User A's tweets. User B, if blocked by User A, is unable to reply to, retweet, or like any of User A's tweets. Similarly, User A will not see any of User B's tweets and will not be notified if User B mentions User A. The dispute in this case exclusively concerns the President's use of this blocking function. The government has conceded that the account in question is not itself "independent of [Trump's] presidency," but contends that the act of blocking was private conduct that does not implicate the First Amendment. Oral Arg. R. at 1:00 – 1:15.

President Trump established his account, with the handle @realDonaldTrump, (the "Account") in March 2009. No one disputes that before he became President the Account was a purely private one or that once he leaves office the Account will presumably revert to its private status. This litigation concerns what the Account is now. Since his inauguration in January 2017, he has used the Account, according to the parties, "as a channel for communicating and interacting with the public about his administration." App'x at 54. The President's tweets from the Account can be viewed by any member of the public without being signed into a Twitter account. However, if a user has been blocked from the Account, they cannot view the Account's tweets when logged in to their account. At the time of the parties' stipulation, the Account had more than 50 million followers. The President's tweets produce an extraordinarily high level of public engagement, typically generating thousands of replies, some of which, in turn, generate hundreds of thousands of additional replies. The President has not generally sought to limit who can follow the Account, nor has he sought to limit the kind of speech that users can post in reply to his tweets.

The public presentation of the Account and the webpage associated with it bear all the trappings of an official, state–run account. The page is registered to Donald J. Trump "45th President of the United States of America, Washington D.C." *Id.* at 54–55. The header photographs of the Account show the President engaged in the performance of his official duties such as signing executive orders, delivering remarks at the White House, and meeting with the Pope, heads of state, and other foreign dignitaries.

The President and multiple members of his administration have described his use of the Account as official. The President has stipulated that he, with the assistance of Defendant

Daniel Scavino, uses the Account frequently "to announce, describe, and defend his policies; to promote his Administration's legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; [and] to challenge media organizations whose coverage of his Administration he believes to be unfair." *Id.* at 56. In June 2017, then–White House Press Secretary Sean Spicer stated at a press conference that President Trump's tweets should be considered "official statements by the President of the United States." *Id.* at 55–56. In June 2017, the White House responded to a request for official White House records from the House Permanent Select Committee on Intelligence by referring the Committee to a statement made by the President on Twitter.

Moreover, the Account is one of the White House's main vehicles for conducting official business. The President operates the Account with the assistance of defendant Daniel Scavino, the White House Director of Social Media and Assistant to the President. The President and his aides have characterized tweets from the Account as official statements of the President. For example, the President used the Account to announce the nomination of Christopher Wray as FBI director and to announce the administration's ban on transgender individuals serving in the military. The President used the Account to first announce that he had fired Chief of Staff Reince Priebus and replaced him with General John Kelly. President Trump also used the Account to inform the public about his discussions with the South Korean president concerning North Korea's nuclear program and about his decision to sell sophisticated military hardware to Japan and South Korea.

Finally, we note that the National Archives, the agency of government responsible for maintaining the government's records, has concluded that the President's tweets are official records. The Presidential Records Act of 1978 established public ownership of the President's official records. 44 U.S.C. § 2202. Under that Act, "Presidential records" include documentary materials created by the President "in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory or other official or ceremonial duties of the President." *Id.* § 2201. The statute authorizes the Archivist of the United States to "maintain and preserve Presidential records on behalf of the President, including records in digital or electronic form." *Id.* § 2203. Accordingly, the National Archives and Records Administration has advised the White House that the President's tweets are "official records that must be preserved under the Presidential Records Act." App'x at 57.

In May and June of 2017, the President blocked each of the Individual Plaintiffs (but not the Knight First Amendment Institute) from the Account. The government concedes that each of them was blocked after posting replies in which they criticized the President or his policies and that they were blocked as a result of their criticism. The government also concedes that because they were blocked they are unable to view the President's tweets, to directly reply to these tweets, or to use the @realDonaldTrump webpage to view the comment threads associated with the President's tweets.

The Individual Plaintiffs further contend that their inability to view, retweet, and reply to the President's tweets limits their ability to participate with other members of the public in

the comment threads that appear below the President's tweets. The parties agree that, without the context of the President's original tweets (which the Individual Plaintiffs are unable to view when logged in to their accounts), it is more difficult to follow the conversations occurring in the comment threads. In addition, the parties have stipulated that as a consequence of their having been blocked, the Individual Plaintiffs are burdened in their ability to view or directly reply to the President's tweets, and to participate in the comment threads associated with the President's tweets.

While various "workarounds" exist that would allow each of the Individual Plaintiffs to engage with the Account, they contend that each is burdensome. For example, blocked users who wish to participate in the comment thread of a blocking user's tweet could log out of their accounts, identify a first–level reply to which they would like to respond, log back into their accounts, locate the first–level reply on the author's timeline, and then post a message in reply. The blocked users' messages would appear in the comment thread of the blocking user's tweet, although the blocking user would be unable to see it. Blocked users could also create a new Twitter account. Alternatively, blocked users could log out of their accounts, navigate to the blocking user's timeline, take a screenshot of the blocking user's tweet, then log back into their own accounts and post that screenshot along with their own commentary.

In July 2017, the Individual Plaintiffs and the Knight Institute sued Donald Trump, Daniel Scavino, and two other White House staff members alleging that blocking them from the Account violated the First Amendment.

. . .

Because we agree [with the District Court] that in blocking the Individual Plaintiffs the President engaged in prohibited viewpoint discrimination, we affirm.

DISCUSSION

The President's primary argument in his brief is that when he blocked the Individual Plaintiffs, he was exercising control over a private, personal account. At oral argument, however, the government conceded that the Account is not "independent of [Trump's] presidency," choosing instead to argue only that the act of blocking was not state action. Oral Arg. R. at 1:00 – 1:15. The President contends that the Account is exclusively a vehicle for his own speech to which the Individual Plaintiffs have no right of access and to which the First Amendment does not apply. Secondarily, he argues that, in any event, the Account is not a public forum and that even if the Account were a public forum, blocking the Individual Plaintiffs did not prevent them from accessing the forum. The President further argues that, to the extent the Account is government–controlled, posts on it are government speech to which the First Amendment does not apply. We are not persuaded. We conclude that the evidence of the official nature of the Account is overwhelming. We also conclude that once the President has chosen a platform and opened up its interactive space to millions of users and participants, he may not selectively exclude those whose views he disagrees with.

I.

The President concedes that he blocked the Individual Plaintiffs because they posted tweets that criticized him or his policies. He also concedes that such criticism is protected speech. The issue then for this Court to resolve is whether, in blocking the Individual Plaintiffs from the interactive features of the Account, the President acted in a governmental capacity or as a private citizen.

The President maintains that Twitter is a privately owned and operated social media platform that he has used since 2009 to share his opinions on popular culture, world affairs, and politics. Since he became President, he contends, the private nature of the Account has not changed. In his view, the Account is not a space owned or controlled by the government. Rather, it is a platform for his own private speech and not one for the private expression of others. Because the Account is private, he argues, First Amendment issues and forum analysis are not implicated. Although Twitter facilitates robust public debate on the Account, the President contends that it is simply the means through which he participates in a forum and not a public forum in and of itself.

No one disputes that the First Amendment restricts government regulation of private speech but does not regulate purely private speech.[4] If, in blocking, the President were acting in a governmental capacity, then he may not discriminate based on viewpoint among the private speech occurring in the Account's interactive space. As noted, the government argues first that the Account is the President's private property because he opened it in 2009 as a personal account and he will retain personal control over the Account after his presidency. However, the fact that government control over property is temporary, or that the government does not "own" the property in the sense that it holds title to the property, is not determinative of whether the property is, in fact, sufficiently controlled by the government to make it a forum for First Amendment purposes. *See Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547–52, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) (holding privately–owned theater leased to and operated by city was public forum). Temporary control by the government can still be control for First Amendment purposes.

The government's contention that the President's use of the Account during his presidency is private founders in the face of the uncontested evidence in the record of substantial and pervasive government involvement with, and control over, the Account. First, the Account is presented by the President and the White House staff as belonging to, and operated by, the President. The Account is registered to "Donald J. Trump, '45th President of the United States of America, Washington, D.C.' " App'x at 54. The President has described his use of the Account as "MODERN DAY PRESIDENTIAL." *Id.* at 55. The White House social media director has described the Account as a channel through which "President Donald J. Trump ... [c]ommunicat[es] directly with you, the American people!" *Id.* The @WhiteHouse account, an undoubtedly official Twitter account run by the government, "directs Twitter users to 'Follow for the latest from @POTUS @realDonaldTrump and his Administration.' " *Id.* Further, the @POTUS account frequently republishes tweets from the Account. As discussed earlier, according to the National Archives and Records Administration, the President's tweets from the Account "are official records that must be preserved under the Presidential Records Act." *Id.* at 57.

Second, since becoming President he has used the Account on almost a daily basis "as a channel for communicating and interacting with the public about his administration." *Id.* at 54. The President utilizes White House staff to post tweets and to maintain the Account. He uses the Account to announce "matters related to official government business," including high–level White House and cabinet–level staff changes as well as changes to major national policies. *Id.* at 56. He uses the Account to engage with foreign leaders and to announce foreign policy decisions and initiatives. Finally, he uses the "like," "retweet," "reply," and other functions of the Account to understand and to evaluate the public's reaction to what he says and does. In sum, since he took office, the President has consistently used the Account as an important tool of governance and executive outreach. For these reasons, we conclude that the factors pointing to the public, non–private nature of the Account and its interactive features are overwhelming.

The government's response is that the President is not acting in his official capacity when he blocks users because that function is available to all users, not only to government officials. However, 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. Because the President, as we have seen, 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. Here, a public official and his subordinates hold out and use a social media account open to the public as an official account for conducting official business. That account has interactive features open to the public, making public interaction a prominent feature of the account. These factors mean that the account is not private. *See generally Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (applying the same principles to "metaphysical" forums as to those that exist in "a spatial or geographic sense"); *see also Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019) (holding that a public official who used a Facebook Page as a tool of her office exercised state action when banning a constituent); *Robinson v. Hunt Cty., Texas*, 921 F.3d 440, 447 (5th Cir. 2019) (finding that a government official's act of banning a constituent from an official government social media page was unconstitutional viewpoint discrimination). Accordingly, the President excluded the Individual Plaintiffs from government–controlled property when he used the blocking function of the Account to exclude disfavored voices.

Of course, not every social media account operated by a public official is a government account. Whether First Amendment concerns are triggered when a public official uses his account in ways that differ from those presented on this appeal will in most instances be a fact–specific inquiry. The outcome of that inquiry will be informed by how the official describes and uses the account; to whom features of the account are made available; and how others, including government officials and agencies, regard and treat the account. But these are concerns for other cases and other days and are ones we are not required to consider or resolve on this appeal.

II.

Once it is established that the President is a government actor with respect to his use of the Account, viewpoint discrimination violates the First Amendment. *Manhattan Community Access Corp. et al. v. Halleck et al.,* 587 U.S. ——, 139 S.Ct. 1921, 204 L.Ed.2d 405 (2019)("When the government provides a forum for speech (known as a public forum), the government may be constrained by the First Amendment, meaning that the government ordinarily may not exclude speech or speakers from the forum on the basis of viewpoint ...."); *see also Pleasant Grove*, 555 U.S. at 469–70, 129 S.Ct. 1125 (viewpoint discrimination prohibited in traditional, designated, and limited public forums); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) (viewpoint discrimination prohibited in nonpublic forums).

The government makes two responses. First, it argues that the Account is not a public forum and that, even if it were a public forum, the Individual Plaintiffs were not excluded from it. Second, the government argues that the Account, if controlled by the government, is government speech not subject to First Amendment restrictions.

A.

As a general matter, social media is entitled to the same First Amendment protections as other forms of media. *Packingham v. North Carolina*, —— U.S. ——, 137 S. Ct. 1730, 1735–36, 198 L.Ed.2d 273 (2017) (holding a state statute preventing registered sex offenders from accessing social media sites invalid and describing social media use as "protected First Amendment activity"). "[W]hatever the challenges of applying the Constitution to ever–advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503, 72 S.Ct. 777, 96 L.Ed. 1098 (1952)). A public forum, as the Supreme Court has also made clear, need not be "spatial or geographic" and "the same principles are applicable" to a metaphysical forum. *Rosenberger*, 515 U.S. at 830, 115 S.Ct. 2510.

To determine whether a public forum has been created, courts look "to the policy and practice of the government" as well as "the nature of the property and its compatibility with expressive activity to discern the government's intent." *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439. Opening an instrumentality of communication "for indiscriminate use by the general public" creates a public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The Account was intentionally opened for public discussion when the President, upon assuming office, repeatedly used the Account as an official vehicle for governance and made its interactive features accessible to the public without limitation. We hold that this conduct created a public forum.

If the Account is a forum—public or otherwise—viewpoint discrimination is not permitted by the government. *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992); *see also Pleasant Grove*, 555 U.S. at 469–70,

129 S.Ct. 1125 (viewpoint discrimination prohibited in traditional, designated, and limited public forums); *Cornelius*, 473 U.S. at 806, 105 S.Ct. 3439 (viewpoint discrimination prohibited in nonpublic forums). A blocked account is prevented from viewing any of the President's tweets, replying to those tweets, retweeting them, or liking them. Replying, retweeting, and liking are all expressive conduct that blocking inhibits. Replying and retweeting are messages that a user broadcasts, and, as such, undeniably are speech. Liking a tweet conveys approval or acknowledgment of a tweet and is therefore a symbolic message with expressive content. *See, e.g.*, *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632–33, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (discussing symbols as speech). Significantly, the parties agree that all of this expressive conduct is communicated to the thousands of users who interact with the Account. By blocking the Individual Plaintiffs and preventing them from viewing, retweeting, replying to, and liking his tweets, the President excluded the Individual Plaintiffs from a public forum, something the First Amendment prohibits.

The government does not challenge the District Court's conclusion that the speech in which Individual Plaintiffs seek to engage is protected speech; instead, it argues that blocking did not ban or burden anyone's speech. *See Knight First Amendment*, 302 F. Supp. 3d at 565. Specifically, the government contends that the Individual Plaintiffs were not prevented from speaking because "the only material impact that blocking has on the individual plaintiffs' ability to express themselves on Twitter is that it prevents them from speaking directly to Donald Trump by replying to his tweets on the @realDonaldTrump web page." Appellants Br. at 35.

That assertion is not well–grounded in the facts presented to us. The government is correct that the Individual Plaintiffs have no right to require the President to listen to their speech. *See Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 283, 104 S.Ct. 1058, 79 L.Ed.2d 299 (1984) (a plaintiff has "no constitutional right to force the government to listen to their views"). However, the speech restrictions at issue burden the Individual Plaintiffs' ability to converse on Twitter with others who may be speaking to or about the President. President Trump is only one of thousands of recipients of the messages the Individual Plaintiffs seek to communicate. While he is certainly not required to listen, once he opens up the interactive features of his account to the public at large he is not entitled to censor selected users because they express views with which he disagrees.

The government's reply is that the Individual Plaintiffs are not censored because they can engage in various "workarounds" such as creating new accounts, logging out to view the President's tweets, and using Twitter's search functions to find tweets about the President posted by other users with which they can engage.

Tellingly, the government concedes that these "workarounds" burden the Individual Plaintiffs' speech. *See* App'x 35–36, 66. And burdens to speech as well as outright bans run afoul of the First Amendment. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011) (stating that government "may no more silence unwanted speech by burdening its utterance than by censoring its content"); *United*

States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 812, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content–based burdens must satisfy the same rigorous scrutiny as its content–based bans."). When the government has discriminated against a speaker based on the speaker's viewpoint, the ability to engage in other speech does not cure that constitutional shortcoming. *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 690, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010). Similarly, the fact that the Individual Plaintiffs retain some ability to "work around" the blocking does not cure the constitutional violation. Neither does the fact that the Individual Plaintiffs can post messages elsewhere on Twitter. Accordingly, we hold that the President violated the First Amendment when he used the blocking function to exclude the Individual Plaintiffs because of their disfavored speech.

B.

Finally, the government argues that to the extent the Account is controlled by the government, it is government speech. Under the government speech doctrine, "[t]he Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak" about governmental endeavors. *Matal v. Tam*, —— U.S. ––, 137 S. Ct. 1744, 1757, 198 L.Ed.2d 366 (2017). For example, when the government wishes to promote a war effort, it is not required by the First Amendment to also distribute messages discouraging that effort. *Id.* at 1758; *see also Pleasant Grove*, 555 U.S. at 467, 129 S.Ct. 1125 ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.").

It is clear that if President Trump were engaging in government speech when he blocked the Individual Plaintiffs, he would not have been violating the First Amendment. Everyone concedes that the President's initial tweets (meaning those that he produces himself) are government speech. But this case does not turn on the President's initial tweets; it turns on his supervision of the interactive features of the Account. The government has conceded that the Account "is generally accessible to the public at large without regard to political affiliation or any other limiting criteria," and the President has not attempted to limit the Account's interactive feature to his own speech. App'x at 55.

Considering the interactive features, the speech in question is that of multiple individuals, not just the President or that of the government. When a Twitter user posts a reply to one of the President's tweets, the message is identified as coming from that user, not from the President. There is no record evidence, and the government does not argue, that the President has attempted to exercise any control over the messages of others, except to the extent he has blocked some persons expressing viewpoints he finds distasteful. The contents of retweets, replies, likes, and mentions are controlled by the user who generates them and not by the President, except to the extent he attempts to do so by blocking. Accordingly, while the President's tweets can accurately be described as government speech, the retweets, replies, and likes of other users in response to his tweets are not government speech under any formulation. The Supreme Court has described the government speech doctrine as "susceptible to dangerous misuse." *Matal*,

137 S. Ct. at 1758. It has urged "great caution" to prevent the government from "silenc[ing] or muffl[ing] the expression of disfavored viewpoints" under the guise of the government speech doctrine. *Id.* Extension of the doctrine in the way urged by President Trump would produce precisely this result.

The irony in all of this is that we write at a time in the history of this nation when the conduct of our government and its officials is subject to wide–open, robust debate. This debate encompasses an extraordinarily broad range of ideas and viewpoints and generates a level of passion and intensity the likes of which have rarely been seen. This debate, as uncomfortable and as unpleasant as it frequently may be, is nonetheless a good thing. In resolving this appeal, we remind the litigants and the public that if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less.

CONCLUSION

The judgment of the District Court is **AFFIRMED**.