THE MODERN PUBLIC SQUARE: DIGITAL VIEWPOINT DISCRIMINATION IN THE AGE OF @REALDONALDTRUMP

Jonathan Groffman

TABLE OF CONTENTS

I. INTRODUCTION

A. @realDonaldTrump v. The First Amendment

On June 11, 2017, the Knight First Amendment Institute at Columbia University (Knight Institute) and fourteen other plaintiffs (collectively, the Plaintiffs) filed a complaint in the Southern District of New York alleging that President Donald Trump, his then-press secretary, Sean Spicer, and his director of social media, Daniel Scavino,

had violated their First Amendment rights.[1] In the complaint, the Knight Institute accused the President and his aides of violating the First Amendment rights of the fourteen plaintiffs by blocking their Twitter accounts based on the viewpoints expressed on those accounts.[2] The complaint also contends that the accounts being blocked prevented the Knight Institute from seeing the replies that the plaintiffs would have sent to the President's tweets.[3] The Plaintiffs contend that the @realDonaldTrump Twitter account that belongs to the President, and is controlled by him and his aides, is a designated public forum and therefore viewpoint discrimination is constitutionally prohibited.[4] Viewpoint discrimination means that the Twitter accounts were blocked because of views expressed on them by those in charge of the accounts[5] and the Supreme Court has repeatedly and steadfastly ruled this type of discrimination to be unconstitutional.[6] Alternatively, an account could be blocked for content-neutral reasons, such as violating Twitter's Terms of Service by posting harmful or offensive tweets.[7]

Prior to the case being heard, the defendants agreed to a stipulation to not contest the fact that they blocked these Twitter accounts because of viewpoint discrimination.[8] However, the defendants argue that this viewpoint discrimination is not prohibited because the @realDonaldTrump account is not a public forum of any kind.[9] The Supreme Court has a long history of public forum cases from which both parties pull support.[10] Through examining these cases, the Supreme

1 Complaint, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

2 *Id*.

3 *Id*.

4 *Id*.

5 Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

6 See, Carey v. Brown, 447 U.S. 455, 463, 100 S. Ct. 2286, 2291 (1980); Turner Broad. Sys. v. FCC, 512 U.S. 622, 114 S. Ct. 2445 (1994); Consol. Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 100 S. Ct. 2326 (1980); Cox v. New Hampshire, 312 U.S. 569, 61 S. Ct. 762 (1941); Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746 (1989); Ark. Educ. Tv Comm'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633 (1998); Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269 (1981); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 101 S. Ct. 2676 (1981); Gitlow v. New York, 268 U.S. 652, 45 S. Ct. 625 (1925); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 92 S. Ct. 2286 (1972); NLRB v. Fruit & Vegetable Packers & Warehousemen, 377 U.S. 58, 84 S. Ct. 1063 (1964); Child Evangelism Fellowship v. Anderson Sch. Dist. Five, 470 F.3d 1062 (4th Cir. 2006); Cable News Network, Inc. v. Am. Broad. Cos., 518 F. Supp. 1238 (N.D. Ga. 1981).

7 THE TWITTER RULES, https://support.twitter.com/articles/18311 (last visited Feb. 5, 2018).

8 Stipulation by Parties, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

9 Brief for Defendant, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed Oct. 13, 2017), (1:17cv5205). Public forums are places or modes of communication traditionally or legislatively made open and accessible to the general public.

10 *See, Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948 (1983); Cornelius, 473 U.S. at 788; Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819,

Court's viewpoint discrimination cases,[11] and three recent cases (Packingham v. North Carolina, Davison v. Plowman, and Davison v. Loudoun Cty. Bd. Of Supervisors),[12] it can be determined whether or not the President's Twitter account is a designated public forum. In doing so it becomes clear that the best way to solve the issue of viewpoint discrimination by politicians on social media, in both this case and future cases that arise, as social media becomes more prevalent in the political realm, is to expand the civil right of action against discrimination as outlined in §1983(9) of the US Code to include discrimination effected through the official social media accounts of all politicians that operate as vehicles for their political agendas, and are open to the general public as designated public forums, and thereby prohibit viewpoint discrimination on those account.[13]

B. Definitions

Before looking at the way the courts have treated public forums and viewpoint discrimination, it is essential to define these terms. There are three types of public forums recognized in American jurisprudence: traditional forums, designated forums, and non-public forums.[14] The three types of public forums as defined in Perry Educ. Ass'n v. Perry Local Educators' Ass'n,[15] encompass all possible types of public forums: the traditional forums, like streets and parks, that are accepted by society because they have been used that way since the ancient Romans built the Forum[16]; the spaces designated as public forums by governmental agencies (limited public forums)[17]; and those public areas not designated as forums by a governmental agency and are traditionally closed off to public expression (non-public forums).[18] In Perry, a local teacher's union, the Perry Education Association (PEA), was prevented from using the interschool mail system to distribute material to the teachers because the school board had recognized the competing union, the Perry Local

115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995); HAGUE v. Comm. for Indus. Org., 307 U.S. 496, 59 S. Ct. 954 (1939); ACLU v. Mote, 423 F.3d 438 (4th Cir. 2005); Warren v. Fairfax Cty., 196 F.3d 186 (4th Cir. 1999); Child Evangelism Fellowship v. Anderson Sch. Dist. Five, 470 F.3d 1062 (4th Cir. 2006); Goulart v. Meadows, 345 F.3d 239 (4th Cir. 2003).

11 *See* cases cited *supra* note 6.

12 Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017); Davison v. Loudoun Cty. Bd. of Supervisors, 227 F. Supp. 3d 605, 613 (E.D. Va. 2017); Davison v. Plowman, No. 1:16cv180 (JCC/IDD), 2017 U.S. Dist. LEXIS 4348, at 13 (E.D. Va. Jan. 10, 2017).

13 42 U.S.C. § 1983 (LexisNexis, Lexis Advance through PL 115-128, approved 2/22/18).

14 Perry Educ. Ass'n, 460 U.S. at 45-46.

15 *Id*.

16 HAGUE v. Comm. for Indus. Org., 307 U.S. at 496.

17 Perry Educ. Ass'n, 460 U.S. at 45-46.

18 *Id*.

Educators' Association, as the official union of its teachers.[19] The PEA alleged that they were being unconstitutionally excluded from a public forum.[20] The Supreme Court, on appeal, held that the mail system was not a designated public forum[21] and the exclusion was not a violation of the First Amendment, but it very clearly defined the different types of forums.[22]

All forums are subject to "time, place, and manner restrictions" that exist to maintain general public order.[23] The most important reason for distinguishing between the types of forums is that certain people and certain expression can be excluded from designated and non-public forums for additional reasons, but not from traditional forums.[24] If the government creates a designated public forum or controls a non-public forum, they may exclude certain groups of people as long as the designation is based on non-viewpoint reasons, such as noise restrictions on concerts in public parks purely for community caretaking reasons, or content-neutral reasons.[25] The government is Constitutionally prohibited by the First Amendment from restricting access to any of the three types of forums based solely on the viewpoint being expressed by persons the Government would seek to restrict.[26] The First Amendment guarantees the fundamental rights of free speech and free assembly, which the Supreme Court has come to understand as protecting the right of the people to peaceably assemble and express themselves in all public forums.[27] Viewpoint-based restrictions are different from content-neutral restrictions in that content-neutral restrictions apply to all parties regardless of their stance on the issue at hand, and do not discriminate against a certain party specifically because of their stance on the issue;[28] whereas viewpoint-based restrictions limit the ability of a specific group to express their beliefs in a public forum, while allowing other parties,

19 *Id*. at 39.

20 Perry Educ. Ass'n, 460 U.S. at 39.

21 "The First Amendment does not guarantee access to property simply because it is owned or controlled by the Government." United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. at 115.

22 Perry Educ. Ass'n, 460 U.S. at 39.

23 Perry Educ. Ass'n, 460 U.S. at 45-46; Cornelius, 473 U.S. at 818.; HAGUE, 307 U.S. at 505.

24 Cornelius, 473 U.S. at 800.

25 Ward, 491 U.S. at 781; Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015).

26 "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. 1.

27 See, U.S. Const. amend. 1.; "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action." Lovell v. Griffin, 303 U.S. 444, 450, 58 S. Ct. 666, 668 (1938).

28 Ward, 491 U.S. at 781.

similarly situated, to express different views.[29] If one group of people are allowed to express their beliefs in a public forum, all groups must be allowed to; and if one group is prohibited from doing so because of the views they wish to express, that is viewpoint discrimination.[30]

II. BACKGROUND – PUBLIC FORUM AND VIEWPOINT-BASED DISCRIMINATION

A. History of Public Forum and Viewpoint-Based Discrimination Cases

On many occasions throughout its history, the Supreme Court has been tasked with defining the boundaries of the public forum.[31] The Supreme Court has been repeatedly confronted with issues regarding the scope of public forums that arise when parties are excluded from those forums.[32] When a forum that has been open to the public is then restricted for certain groups of people, the courts have stepped in to determine whether or not the exclusion from the forum violated the public's rights as created by the First Amendment to free assembly and free speech.[33] In determining whether the exclusion violated the First Amendment the Court has applied the three part Nature of the Forum test.[34] The first step of the test is to determine which type of forum is at issue.[35] Second, the Court must decide whether the alleged discrimination needs to be adjudged by the internal or external standard of scrutiny.[36] The internal standard of scrutiny is a stricter standard and is applied when the person alleging discrimination is part of the group for whom the designated public forum was created.[37] The external standard is less rigid and is

29 Ward, 491 U.S. at 781; Carey, 447 U.S. at 463; Rosenberger, 515 U.S. at 819.

30 Lovell v. Griffin, 303 U.S. at 450.

31 See, Perry Educ. Ass'n, 460 U.S. at 37; Cornelius, 473 U.S. at 788; Goulart, 345 F.3d at; Rosenberger, 515 U.S. at 819; ACLU v. Mote, 423 F.3d 438 (4th Cir. 2005); Warren v. Fairfax Cty., 196 F.3d 186 (4th Cir. 1999); Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n, 429 U.S. 167, 175, 97 S. Ct. 421, 426 (1976); Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 547, 95 S. Ct. 1239, 1241 (1975).

32 *Id*.

33 See, U.S. Const. amend. 1; Carey, 447 U.S. at 463; Turner Broad. Sys., 512 U.S. at 622; Consol. Edison Co., 447 U.S. at 530; Cox v. New Hampshire, 312 U.S. at 569; Ward, 491 U.S. at 781; Ark. Educ. Tv Comm'n, 523 U.S. at 666; Widmar, 454 U.S. at 263; Child Evangelism Fellowship, 470 F.3d at 1062; Cable News Network, Inc., 518 F. Supp. at 1238; United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. at 114; Gitlow, 268 U.S. at 652; Police Dep't of Chi. v. Mosley, 408 U.S. at 92; NLRB v. Fruit & Vegetable Packers & Warehousemen, 377 U.S. at 58.

34 ACLU v. Mote, 423 F.3d at 438.

35 *Id*.

36 ACLU v. Mote, 423 F.3d at 444.

37 *Id*.

applied when the person alleging discrimination is not part of the designated group.[38] Lastly, the Court decides whether the person alleging discrimination is of a group similar enough to other groups who are not restricted from utilizing the public forum.[39]

In determining the type of forum, the Supreme Court has defined and redefined the bounds of the forums, but since the seminal Perry case there have been three clearly defined types of public forums.[40] As detailed above, the three categories are traditional forum, designated forum, and non-public forum.[41] Once the Court has determined which type of forum is at the center of the issue, it moves on to an analysis of the person alleging the discrimination, and the alleged reasons why they were excluded.[42] If the forum is a traditional forum open to everyone, then anyone alleging discrimination would be considered part of the class.[43] If the forum is a designated public forum and was opened for a specific purpose, the level of scrutiny will depend upon the group for whom the forum was opened, and whether the person alleging discrimination is part of that group.[44] If the person being excluded is part of the group for whom the forum is generally made available, then the strictest scrutiny will be applied.[45] For example, in Widmar v. Vincent, a university created a designated public forum for student groups, but then sought to exclude a student group because it wanted to use the space for religious meetings.[46] The Court held that the internal standard applied since it was a student group, and under that level of scrutiny the university could not single this one group out of all other student groups without a legitimate content-neutral reason.[47] If the accuser does not qualify as a member of the group for whom the forum was designated, then the more relaxed standard applies, and the restriction need only be content-neutral and reasonable in light of the purposes for which the forum was created in order to be allowed.[48]

Lastly, the nature of the forum test requires the court to determine whether the person alleging discrimination, regardless of whether they are part of the class for whom the forum was designated or not, should be

38 *Id*.

39 *Id*.; This is "admittedly, a somewhat amorphous inquiry . . . " but is determined by analyzing the nature of the restriction in part, and in part by analyzing the purpose of the public forum itself. Goulart, 345 F.3d at 252.

40 Perry Educ. Ass'n, 460 U.S. at 39.

41 *Id*.

42 Ark. Educ. Tv Comm'n, at 677.

43 *Id*.

44 *Id*.

45 Ark. Educ. Tv Comm'n, at 677.

46 Widmar, 454 U.S. at 265.

47 *Id*.

48 ACLU, 423 F.3d at 443; Warren, 196 F.3d at 194.

treated the same as the rest of the class.[49] An example of this arose in the 1998 case of Ark. Educ. Tv Comm'n v. Forbes when a state-owned public television station did not include Forbes, a political candidate, in a televised debate because he was not as popularly supported as the other candidates.[50] The station made clear that he was excluded because the station did not consider him a serious enough candidate to include in the debate, and not because of his views.[51] The Supreme Court decided that since the station was public and government-owned it did have to abide by public forum doctrine in order to prevent "skewing the electoral dialogue."[52] Yet, even though Forbes sought to express his views just like the other politicians, the Court held that because the station did not exclude him for viewpoint-based reasons, they were not required to include him in the debate.[53] Essentially, this case exemplifies the right of those who control public forums to create viewpoint neutral, not viewpoint based, distinctions between members of the same group of speakers.[54]

In spite of this historically tested analysis, the Court has held that regardless of the type of forum, or the level of scrutiny required, if the discrimination is plainly viewpoint-based, it is prohibited in all forums.[55]

B. History of Social Media and the First Amendment Cases

Despite social media being an integral part of 21st century life, with over two billion people in the world having Facebook accounts[56] and over three hundred million having Twitter accounts,[57] the judicial system has not addressed it much. In fact, there have only been a few cases litigated

49 Goulart, 345 F.3d at 250.

50 Ark. Educ. Tv Comm'n, at 677.

51 "[T]he news organizations also did not consider him a serious candidate." Ark. Educ. Tv Comm'n, at 682.

52 *Id*. at 676.

53 "[B]eyond dispute that Forbes was excluded not because of his viewpoint but because he had generated no appreciable public interest . . . There is no substance to Forbes' suggestion that he was excluded because his views were unpopular or out of the mainstream. His own objective lack of support, not his platform, was the criterion . . . A candidate with unconventional views might well enjoy broad support by virtue of a compelling personality or an exemplary campaign organization." Ark. Educ. Tv Comm'n, at 682.

54 Goulart, 345 F.3d at 254.

55 "The ban on viewpoint discrimination is a constant." Child Evangelism Fellowship, 470 F.3d at 1067.

56 Kathleen Chaykowski, *Facebook Officially Hits 2 Billion Users*, FORBES (June 27, 2017, 1:37 PM), https://www.forbes.com/sites/kathleenchaykowski/2017/06/27/facebook-officially-hits-2-billion-users/#2b2166993708.

57 Trefis Team, *Twitter's Surprising User Growth Bodes Well For 2017*, FORBES, (Apr. 27, 2017, 1:44 PM), https://www.forbes.com/sites/greatspeculations/2017/04/27/twitters-surprising-user-growth-bodes-well-for-2017/#7daebe212e11.

regarding the right of access of the public and the press to social media.[58] The most significant so far has been the Supreme Court's 2017 ruling in Packingham v. North Carolina.[59]

The Supreme Court in Packingham heard a challenge to a North Carolina statute that barred convicted sex offenders from accessing certain websites, including social media sites, in an attempt to prevent the offenders from using the sites to contact minor children and potential sexual assault victims.[60] The Court struck down the statute for being too restrictive and not closely tailored enough to its expressed goal.[61] However, the majority discussed at length the importance of social media in society, although it did not go so far as to hold that social media must always be treated as a public forum.[62] The North Carolina statute had been challenged by Packingham, a registered sex offender found to be using social media in violation of the law.[63] He claimed that the statute violated his First Amendment rights by precluding his use of social media, which he called a hugely important tool in promoting a person's uncensored expression.[64] The Supreme Court came to the conclusion that the statute was too broad after determining that social media websites are not just for banal teenage interactions.[65] The Court says, "[t]hese websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard" which make them a very important tool for free expression in modern society.[66] They are also a main source for staying up on current events and are consistently full of people "checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."[67] Despite its exuberance over the importance of social media, the Court did not define social media accounts as public forums, but instead found the statute to be prohibitive and ill-defined, and invalidated it on those grounds.[68] Even though the majority did not go so far as to define social media accounts as public forums, the dictum of the

58 Packingham, 137 S. Ct. at 1735; Loudoun Cty. Bd. of Supervisors, 227 F. Supp. 3d at 613; Plowman, 2017 U.S. Dist. LEXIS 4348, at 13.

59 Packingham, 137 S. Ct. at 1735 (2017).

60 N.C. Gen. Stat. Ann. §§14-202.5(a), (e) (2015).

61 Packingham, 137 S. Ct. at 1743 (2017).

62 *Id*. at 1735.

63 *Id*.

64 "Uncensored expression" refers to Packingham's desire to express his views without the worry of being censored by the government. Packingham, 137 S. Ct. at 1735 (2017).

65 *Id*.

66 *Id*.

67 *Id*. at 1735.

68 "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." *Id*. at 1737.

majority opinion, as quoted above, seems to indicate a belief on the Court that social media has the same characteristics as a public forum, and is for all intents and purposes the 21st-century version of the "public square."[69] Justice Alito however, admonished the majority in his concurring opinion for "its undisciplined dicta"[70] and for, in his view, not understanding the potentially far-reaching implications of its use of the term "public forum."[71] He belittles the majority's dictum by saying that "the Court is unable to resist musings that seem to equate the entirety of the Internet with public streets and parks."[72] Yet, the dictum stands and leaves unanswered the question as to whether the Supreme Court views the Internet as a public forum.[73]

Even if social media as a whole is not declared to be a limited public forum, the question remains unanswered as to whether official political social media accounts should be defined as limited public forums.[74] This question was broached by the District Court for the Eastern District of Virginia in the Davison cases.[75] In 2017, Loudoun County, VA resident, Brian Davison, filed two lawsuits against two different local politicians who had both blocked him from their respective social media accounts.[76] In Davison v. Loudoun Cty. Bd. of Supervisors, Davison was blocked for about twelve hours from accessing the official Facebook page of Phyllis Randall, the Chair of the Loudoun County Board of Supervisors.[77] Davison was blocked after he posted a comment alleging corruption and conflicts of interest among members of the Board of Supervisors.[78] Davison contended that the Loudoun County social media policy encourages the public to use official Facebook pages to engage with their local government representatives, making the Facebook page of Supervisor Randall a designated public forum; thus, blocking him from the page was viewpoint discrimination.[79] The Defendant conceded that Davison was blocked because of the views he expressed, but argued that the Facebook page was not an official County page and therefore not a

69 *Id*. at 1735.

70 Packingham, 137 S. Ct. at 1735 (2017).

71 *Id*.

72 *Id*. at 1738

73 Packingham, 137 S. Ct. at 1735 (2017); United States v. Am. Library Ass'n, 539 U.S. 194, 123 S. Ct. 2297 (2003).

74 Complaint, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

75 Loudoun Cty. Bd. of Supervisors, 227 F. Supp. 3d at 613; Plowman, 2017 U.S. Dist. LEXIS 4348, at 13.

76 *Id*.

77 Loudoun Cty. Bd. of Supervisors, 227 F. Supp. 3d at 613.

78 Loudoun Cty. Bd. of Supervisors, 227 F. Supp. 3d at 613.

79 LOUDOUN CTY. SOC. MEDIA COMMENTS POL'Y, https://www.loudoun.gov/index.aspx?nid=2779 (last visited Feb. 5, 2018); Loudoun Cty. Bd. of Supervisors, 227 F. Supp. 3d at 609.

public forum.[80] The court rejected this because it found multiple factors indicating that the page was official: the name of the page indicated her official government job title; the content posted by the Defendant was almost exclusively about County issues; and Supervisor Randall had previously distributed the link to her page and encouraged her constituents to use it as a platform to discuss County issues with her.[81] Therefore, the court determined that blocking the Plaintiff from the official public forum was indeed viewpoint-based discrimination and violated his First Amendment rights.[82] The court also said that it did not believe designated public forums were automatically created by all uses of social media by elected officials, although it did not elaborate on exactly what uses qualify.[83]

The court in Davison v. Plowman similarly found that a designated public forum existed.[84] However, because the County's policy allowed the removal of certain posts deemed unrelated to the nature of the forum, the plaintiff lost this case.[85] In this case, Plowman, the Commonwealth's Attorney for Loudoun County, blocked Davison from posting on his official Facebook page.[86] As in the prior case, the page was designated as the official Facebook page for Plowman in his official capacity as Commonwealth's Attorney.[87] The page was used almost exclusively for posts about his duties as Commonwealth's Attorney and was governed by the County Social Media Comments Policy.[88] The Plowman court analyzed the Facebook page in question using the standard espoused in Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., that the determination must come from looking at the "policy and practice of the government."[89] This standard was also used in Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five, which held that, "Limited public forums are characterized by 'purposeful government action' intended to make the forum 'generally available'" for specific uses.[90] The Plowman court therefore looked to the County's social media policy to make its determination.[91] The policy specifically encouraged commenting and interaction between the public and officials, but also

80 Loudoun Cty. Bd. of Supervisors, 227 F. Supp. 3d at 613.

81 *Id*. at 610-11.

82 *Id*. at 612.

83 "The Court is not required to determine whether any use of social media by an elected official creates a limited public forum, although the answer to that question is undoubtedly 'no.'" *Id*. at 611.

84 Plowman, 2017 U.S. Dist. LEXIS 4348, at 12.

85 *Id*.

86 *Id*.

87 *Id*.

88 *Id*. at 15.

89 Cornelius, 473 U.S. at 802.

90 Child Evangelism Fellowship, 470 F.3d at 1067 (quoting Goulart, 345 F.3d at 250).

91 Plowman, 2017 U.S. Dist. LEXIS 4348, at 17.

reserved the right to remove certain types of posts.[92] The policy reserved the right to remove posts that were profane, posts that contained or condoned illegal activity, sexual harassment, and more.[93] The court took into consideration the fact that the County encouraged discussion but set limits on what would be tolerated to conclude that the County's intention was to open a designated forum for public use.[94]

III. POLITICS AND SOCIAL MEDIA – DIGITAL VIEWPOINT DISCRIMINATION

A. Official Political Social Media Accounts Need to Be Defined as Designated Public Forums

The Supreme Court has only granted certiorari on a few cases regarding the Internet and its classification as a potential public forum.[95] In United States v. Am. Library Ass'n (2003), the Court decided that Internet in public libraries did not constitute either a traditional public forum or a designated limited public forum.[96] As discussed above, this idea was challenged, but not overruled, in the Packingham decision.[97] The majority in Packingham did not explicitly state that it considered the Internet to legally be a public forum, just that it has similar characteristics.[98] If the Supreme Court had decided on the designation of social media as a public forum in Packingham the issue in the Knight Institute's lawsuit would have been moot.[99] If it were clear that social media accounts should be legally defined as traditional or limited forums, then it would be clear that President Trump could not legally block users on Twitter solely based on the views they express without violating the First Amendment.[100] If the issue remains unresolved, then the possibility for unregulated viewpoint discrimination remains open.[101] As is detailed

92 *Id*.

93 LOUDOUN CTY. SOC. MEDIA COMMENTS POL'Y, https://www.loudoun.gov/index.aspx?nid=2779 (last visited Feb. 5, 2018).

94 Plowman, 2017 U.S. Dist. LEXIS 4348, at 17.

95 See, Am. Library Ass'n, 539 U.S. at 205-06; Packingham, 137 S. Ct. at 1730; Loudoun Cty. Bd. of Supervisors, 227 F. Supp. 3d at 613; Plowman, 2017 U.S. Dist. LEXIS 4348, at 13.

96 Am. Library Ass'n, 539 U.S. at 205-06.

97 Packingham, 137 S. Ct. at 1735.

98 *Id*.

99 Brief for Defendant, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

100 Stipulation by Parties, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

101 "By hewing to well-established doctrine, this Court can prevent modern venues like Twitter from being exploited by government officials to silence critics and bask in artificial adulation." Brief for Knight First Amend. Inst.- Joshua Gelzter as Amicus Curiae Supporting Plaintiffs, Knight

in the Knight Institute complaint and conceded by the defendants in that case, blocking a person because of the views they express on social media is prima facie viewpoint discrimination.[102] Since the @realDonaldTrump account is available to anyone on Twitter, the group of people who should have access to the forum is anyone with a social media account who does not violate the Twitter policies or the government social media comment policies.[103] Therefore, had Packingham defined social media as a designated public forum, then the viewpoint discrimination would clearly be unconstitutional.[104]

Based on the Supreme Court's dicta regarding social media in Packingham and the District Court's analysis of official political social media in Plowman, it seems that the most effective way to prevent viewpoint discrimination on social media by public officials would be to officially designate as limited public forums social media accounts that are (1) operated by political officials, (2) in a manner which promotes their political agenda and career, and (3) are generally available to the public.[105]

B. Blocking Private Citizens and the Press on Official Political Social Media Accounts is Viewpoint Discrimination

It is essential to designate official political social media accounts as limited public forums in order to provide people with the same First Amendment protections they receive in other public forums.[106] The Constitution protects the right of the people to access public forums even if the state or federal government was not required to create the forum in the first place.[107] The Supreme Court has extended this to cover university conference facilities (Widmar), local school board meetings (City of Madison Joint School District v. Wisconsin Employment Relations Comm'n), and municipal theaters (Southeastern Promotions, Ltd. v. Conrad), and now the social media accounts of public officials should be included as well.[108]

First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

102 Complaint, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205); Stipulation by Parties, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

103 THE TWITTER RULES, *supra* note 7; LOUDOUN CTY. SOC. MEDIA COMMENTS POL'Y, https://www.loudoun.gov/index.aspx?nid=2779 (last visited Feb. 5, 2018).

104 Complaint, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

105 Packingham, 137 S. Ct.; Loudoun Cty. Bd. of Supervisors, 227 F. Supp. 3d; Plowman, 2017 U.S. Dist. LEXIS 4348.

106 Perry Educ. Ass'n, 460 U.S. at 45-46.

107 *Id*.

108 See, Widmar, 454 U.S. at 263; Madison Joint School District, 429 U.S. at 167; Se.

The Court in Southeastern found the theatre in question to be a public forum since, even though privately owned, it was under a long-term lease to the city which made it government property.[109] Therefore the theatre was considered government property that was generally made open to the public.[110] The school board meeting in Madison was a public meeting, set up by the local school board as a government entity, expressly open to everyone in the city for the purpose of direct citizen engagement.[111] Thus, the Court found that excluding teachers who would be "most vitally concerned"[112] with the meeting constituted viewpoint discrimination.[113] This reasoning can be applied to social media accounts as well.[114] Since the Internet is open to the public, and anyone who does not violate standard content-neutral restrictions can have a social media account, it is equivalent to the Southeastern and Madison designated public forums.[115] The government may not own the Internet but they do regulate its use and the social media accounts in question are operated by government officials.[116]

Once the government creates a forum for public use, it may then choose to close the forum by preventing the public from using it.[117] However, without the affirmative act of closing it off to everyone, the forum must stay open and be treated as a traditional or limited public forum.[118] For example, in United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, the government enforced a criminal statute precluding persons from putting unstamped mailable envelopes into private mailboxes.[119] The statute was upheld because it (a) contained an affirmative action that closed off the public mail service to a certain group of people; (b) advanced a legitimate government interest in community caretaking; and (c) was content-neutral.[120] Traditional and limited forums are also subject to the reasonable time, place, and manner restrictions often referred to as community standards.[121] These types of restrictions must be neutral – not viewpoint based – and be narrowly construed to

Promotions, Ltd., 420 U.S. at 546; Complaint, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

109 Se. Promotions, Ltd., 420 U.S. at 547.

110 *Id*.

111 Madison Joint Sch. Dist., 429 U.S. at 175.

112 *Id*.

113 *Id*.

114 Complaint, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

115 *Id*.

116 *Id*.; FED. COMMC'NS COMM'N, https://www.fcc.gov/about/overview (last visited Mar. 3, 2018).

117 Cable News Network, Inc., 518 F. Supp. at 1238.

118 Perry Educ. Ass'n, 460 U.S. at 45-46.

119 United States Postal Serv., 453 U.S. at 115.

120 *Id*.

121 Perry Educ. Ass'n, 460 U.S. at 45-46; THE TWITTER RULES, *supra* note 7.

promote a legitimate state interest.[122] This category of restrictions would, for example, include creating content-neutral noise-level restrictions on performances in a public park, which the government instituted to protect neighboring residents.[123] The Court in Perry elaborated on the fact that "[f]or the State to enforce a content-based [i.e. viewpoint] exclusion, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[124] This concept of the preclusion being narrowly drawn enforces the Court's desire to prevent broad exclusions of people from public forums for purely viewpoint-based reasons.[125] If, for example, a restriction on noise in a public park surrounded by homes prohibited excessive noise after 10pm on weeknights it would be considered narrow and making the community a nicer, better place to live.[126] However, if the restriction also prohibited excessive noise on Saturday afternoons when it was known that the park was a common place for hosting Saturday protests, and there was no discernable legitimate community caretaking reason, then the restriction would likely be considered to be prohibiting too much free speech and would not be enforceable.[127]

The issue of viewpoint discrimination in designated public forums often arises, as it does in the Knight Institute case, when certain members of groups are allowed to access a public forum while other members of that same group are not.[128] This is a common set of facts for viewpoint discrimination cases as seen in Police Dep't of Chi. v. Mosley, where a city ordinance was struck down because it prohibited the defendant protester from peacefully picketing a high school's alleged racial discrimination but allowed all other types of peaceful picketing in the same location.[129] In a case of alleged viewpoint discrimination, the source will either be a statute or the actions of a government official.[130] The Court determined that since a party accused of discrimination would be in the best position to provide an alternative explanation for the discrimination, the burden should be on the accused to discredit the presumption of discrimination.[131] When the discrimination is grounded in a statute, as in NLRB v. Fruit & Vegetable Packers & Warehousemen,

122 Gitlow, 268 U.S. at 652; Mosley, 408 U.S. at 95 ("…the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment.").

123 See, Ward, 491 U.S. at 781.

124 Perry Educ. Ass'n, 460 U.S. at 45-46.

125 *Id*.

126 Ward, 491 U.S. at 781.

127 Gitlow, 268 U.S. at 652; Mosley, 408 U.S. at 95.

128 Complaint, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

129 Mosley, 408 U.S. at 101.

130 Mosley, 408 U.S. at 101; Complaint, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

131 NLRB, 377 U.S. at 69; Cable News Network, Inc., 518 F. Supp. at 1238.

the alternative explanation would have to exist in the legislative history behind the passage of the discriminatory law.[132] The party accused of discrimination would need to show that the limitation on the rights of the parties alleging discrimination were based not in a desire to prevent that member's expression of ideas, but instead on a desire to maintain content-neutral order within the forum.[133] However, the burden of proof is harder to meet when a government official is the one being accused of discrimination,[134] for in such cases, there is not necessarily a paper trail of the thought process behind the decision.[135]

There is a trend in public forum cases for petitioners to argue that their right of access has been infringed upon.[136] However, the Supreme Court explicitly declared in Houchins v. KQED, "[t]his Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control,"[137] meaning that it does not read into the First Amendment a right of American citizens and the press to access to all information within the government's control.[138] The Court expresses further that there is an indisputable right of the media to gather news from all sources, even when those sources are not compelled by subpoena to disclose information.[139] Additionally in the case of Pell v. Procunier (a case in which federal prisoners sued to gain the right to speak freely with the media),[140] the Supreme Court affirmed that "[t]he First and Fourteenth Amendments bar government from interfering in any way with a free press."[141] Taken together, Pell and Houchins stand for the proposition that if information is released to the public generally, then the public and the media have the right under the First and Fourteenth Amendments to access it.[142]

In the Knight Institute case, and in cases involving all forms of social media, this translates to the idea that official releases by government officials cannot be restricted, and doing so will be considered a violation of the First Amendment.[143] The government argues that the

132 NLRB, 377 U.S. at 69.

133 Perry Educ. Ass'n, 460 U.S. at 45-46.

134 Complaint, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205); Cable News Network, Inc., 518 F. Supp. at 1238.

135 Cable News Network, Inc., 518 F. Supp. at 1238.

136 Houchins v. KQED, Inc., 438 U.S. 1, 9, 98 S. Ct. 2588, 2593-94 (1978); Pell v. Procunier, 417 U.S. 817, 833, 94 S. Ct. 2800, 2810 (1974).

137 Houchins v. KQED, Inc., 438 U.S. at 9 (The Supreme Court upheld the public and the media's right to access information made available to them by the government but held that they could not compel the government to give them access to prisons for purposes of assessing the conditions).

138 *Id*.

139 *Id*.

140 Pell, 417 U.S. at 833.

141 *Id*.

142 Houchins, 438 U.S. at 9.

143 Complaint, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017),

@realDonaldTrump Twitter account is not an official political account but instead the private account of the President.[144] If this were true, then it would not be a violation of the public forum doctrine to block people from accessing the account based on their viewpoints.[145] However, this is a very weak argument for three reasons. First, the account has been routinely used for official government purposes, such as announcing the administration's decision to ban transgender people from serving in the military.[146] The second reason that this argument will likely fail is because the account has been referred to as containing the official statements of the President by the White House Press Secretary,[147] the Department of Justice in a brief submitted to the District Court of the District of Columbia and in oral arguments before the Fourth Circuit,[148] and President Trump himself (in a July 1, 2017 tweet from his @realDonaldTrump account stating, "My use of social media is not Presidential - it's MODERN DAY PRESIDENTIAL").[149] Lastly, the judiciary also previously considered the Twitter account to contain official statements when the 9th Circuit in Hawaii v. Trump, and the 4th Circuit in Int'l Refugee Assistance Project v. Trump identified the account as standing as the official position of the President and the administration.[150]

(1:17cv5205).

144 Complaint, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

145 *Id*.

146 *See*, @realDonaldTrump, TWITTER, https://twitter.com/realDonaldTrump (Announcing ban of transgender people in the military; announcing and defending the travel ban; announcing the repeal of DACA); Plowman, 2017 U.S. Dist. LEXIS 4348, at 4.

147 Sean Spicer, Fmr. White House Press Sec'y, White House Daily Press Briefing, "The President is President of the United States so [his tweets] are considered official statements by the President of the United States." (June 6, 2017).

148 "[T]he government is treating the statements upon which plaintiffs rely—including presidential tweets—as official statements of the President of the United States." James Madison Project v. DOJ, 2018 U.S. Dist. LEXIS 1674, *24, 2018 WL 294530 (November 13, 2017); Transcript of Oral Argument at 36:07, International Refugee Assistance Project v. Donald Trump, No. 17-2231 (4th Cir.)

149 "My use of social media is not Presidential - it's MODERN DAY PRESIDENTIAL." @realDonaldTrump, TWITTER (July 1, 2017, 3:41 PM), https://twitter.com/realDonaldTrump/status/881281755017355264.

150 Hawaii v. Trump, 859 F.3d 741, 773 n.14 (9th Cir. 2017); Int'l Refugee Assistance Project v. Trump, Nos. 17-2231, 17-2232, 17-2233, 17-2240, 2018 U.S. App. LEXIS 3513, at *60 (4th Cir. Feb. 15, 2018).

IV. CONCLUSION

A. Implications

"[O]n 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."[151] As Justice Kennedy wrote in his opinion in Packingham, most American politicians are using social media to interact with their constituencies, raise their public profiles, and discuss their political agendas.[152] As this mode of communication continues to become more ingrained in our political system, it is vital that we protect the ability of the public to express views contrary to those held by their elected representatives.[153] In the era of President Trump, and his incessant Twitter battles[154] it is necessary to legally designate the official social media accounts of political officials, which are titled as such, are used to promote political agendas, and are generally open to the public, as limited public forums.

As the Internet and social media become increasingly integral to the worldwide political system, it is necessary to modernize the guaranteed protections of the First Amendment to match the interconnectivity made possible in the digital age.[155] When the whole world can be connected with the click of a button, the barrier to entry into the ever-raging geopolitical debate is vastly lowered.[156] Additionally, with new technologies people are able to communicate and spread ideas unlike ever before.[157]

If people have increased connectivity to the world beyond their borders – as in the case of East Germans, who had access to West German television – then they learn how other people live and think, and what other people have that they lack. Ideas can spread rapidly, and people can connect and organize. The Arab uprisings showed how citizen activists

151 Packingham, 137 S. Ct. at 1737.

152 *Id*.

153 Complaint, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

154 @realDonaldTrump, TWITTER, Mr. Trump Criticizing Shawn Carter (Jay-Z) (Jan. 28, 2018, 5:18 AM), https://twitter.com/realDonaldTrump/status/957603800579297280; @realDonaldTrump, TWITTER, Mr. Trump Mocking North Korean Leader Kim Jong-Un (Sept. 23, 2017, 8:08 PM), https://twitter.com/realdonaldtrump/status/911789314169823232?lang=en; @realDonaldTrump, TWITTER, Mr. Trump Hosts Fake News Awards (Jan. 17, 2018, 5:00 PM), https://twitter.com/realDonaldTrump/status/953794085751574534.

155 U.S. Const. amend. 1.

156 Chatham House Royal Institute of International Affairs, *Globalization & World Order*, LONDON CONF. ON GLOBAL. & WORLD ORDER, May 2014, at 9.

157 *Id*.

made effective use of social media to coordinate, bringing down the governments of Tunisia, Egypt, Libya and Yemen in what have been called 'Twitter Revolutions'.[158]

As the Chatham House Royal Institute of International Affairs reminded their audience at the 2014 London Conference on Globalization and World Order, access to information is possibly the greatest catalyst to revolution there is.[159] Without information, the East Germans would not have known what existed on the other side of the Berlin Wall, and the Arab Spring revolutions of 2012 would not have had the force and success that they did.[160] As information and ideas flow more freely through the Internet and social media, it is important to protect the right of the people to share and access that information.[161] However, it is equally important to protect against abuse of this right.[162] The susceptibility of this new medium was most recently exemplified in the 2016 US Election when Internet trolls, attempting to influence elections, inundated social media with fake or misleading information meant to sway public opinion.[163] Due to the potential abuses of the free flow of information on the Internet it is very important to maintain order and protect the ability of the general public to engage in the online debate.[164] One way to do this is to adapt the traditional rules of public forums to provide protections for those wishing to speak their minds in the modern public forums in which this debate is constantly raging.[165] The best way to protect those people is by upholding the First Amendment's guarantees of free speech, free press, and free assembly, and protecting against viewpoint discrimination.[166]

By designating official political social media accounts as limited public forums it would then be unconstitutional for a political official to block or restrict access to an account to a person or group of persons purely based on the views that those people express.[167] This will help to

158 *Id*.

159 *Id*.

160 *Id*.; The ease with which people all over the world communicate and spread ideas is the modern way to show the rest of the world exactly what is happening, the way the East Germans saw what was happening by accessing West German television.

161 *Id*. at 15.

162 Devlin Barrett, et. al., *Russian Troll Farm, 13 Suspects Indicted in 2016 Election Interference*, WASH. POST: NAT'L SEC. (Feb. 16, 2018), https://www.washingtonpost.com/world/national-security/russian-troll-farm-13-suspects-indicted-for-interference-in-us-election/2018/02/16/2504de5e-1342-11e8-9570-29c9830535e5_story.html?utm_term=.ec9a8bb7661b.

163 *Id*. Internet trolls are groups of skilled computer users who use hacking and algorithms to target specific groups of people for insidious purposes.

164 *See*, Packingham, 137 S. Ct. at 1735.

165 *See*, Packingham, 137 S. Ct. at 1735; Complaint, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

166 *Id*.

167 Complaint, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017),

ensure the debate can continue unfettered by government censorship or interference.[168] This does not mean that all social media accounts run by politicians must be entirely open to the public.[169] It is perfectly within their rights to have personal accounts through which they post their personal opinions outside of their elected office.[170] However, when an account is used primarily for the purpose of promoting that politicians political agenda, and the page is identifiable as the official page of the politician, then it would need to remain open to the general public.[171]

In response to the growing impact on politics worldwide, Twitter has announced that it would not take disciplinary action against world leaders whose use of the platform technically violates their terms of service because "[b]locking a world leader from Twitter or removing their controversial Tweets would hide important information people should be able to see and debate. It would also not silence that leader, but it would certainly hamper necessary discussion around their words and actions."[172] If Twitter will not block world leaders and politicians for expressing their views, those same politicians should not be able to block other Twitter users from taking part in the debate caused by their tweets.[173]

B. Knight Institute Lawsuit Counterarguments & Decision

In analyzing the Knight Institute's arguments against the President, it is necessary to consider his main defense.[174] As articulated in the response submitted by the defendants the main defense is that the @realDonaldTrump account is a private account.[175] The strongest part of this argument is that when Mr. Trump created the account in March 2009 he was a private citizen and therefore was not capable of creating a public forum.[176] This is of course countered by the reasoning in Southeastern,

(1:17cv5205).

168 Brief for Knight First Amend. Inst.-Joshua Gelzter as Amicus Curiae Supporting Plaintiffs, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

169 Loudoun Cty. Bd. of Supervisors, 227 F. Supp. 3d at 611.

170 *Id*.

171 Loudoun Cty. Bd. of Supervisors, 227 F. Supp. 3d at 613; Stipulation by Parties, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

172 Twitter, Inc., *World Leaders on Twitter*, TWITTER CO. BLOG (Jan. 5, 2018), https://blog.twitter.com/official/en_us/topics/company/2018/world-leaders-and-twitter.html.

173 See, Int'l Refugee Assistance Project v. Trump, Nos. 17-2231, 17-2232, 17-2233, 17-2240, 2018 U.S. App. LEXIS 3513, at *60 (4th Cir. Feb. 15, 2018); Brief for Knight First Amend. Inst.-Elec. Frontier Found. as Amicus Curiae Supporting Plaintiffs, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

174 Brief for Defendant, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

175 *Id*.

176 Public forums are created through affirmative actions by state and federal governments. See,

because the theatre in that case was not built by the government, but was taken over by the government at a certain point, and made available to the public, thereby creating a public forum.[177] Analogously, when Mr. Trump became an official candidate, and was then elected to office, he became a government agent and therefore capable of creating and operating a public forum.[178]

The private account defense is also weakened by the fact that Twitter has been to Mr. Trump what televised debates were to President Kennedy.[179] Without the ability to directly communicate with people, it's possible that neither would have become President.[180] If the @realDonaldTrump account were to be considered a private account then it would be removing from the political sphere the President's most important tool.[181]

As the Supreme Court discussed in the Forbes case, televised debates were the population's main source of interaction with candidates and were the "primary source of election information" for most of the country.[182] That has changed in the digital age and people no longer need to wait for a scheduled debate to ask questions to and hear the opinions of candidates and elected officials.[183] This has become an ingrained part of society, and the world, and President Trump has embraced it more than any other politician before him, and he even said that without Twitter he probably would not have been elected.[184] Therefore, trying to call his Twitter account merely a private account is to undermine his entire political strategy.[185]

The defense could also argue that the Supreme Court in Forbes said

Consol. Edison Co. v. Public Serv. Comm'n, 447 U.S. 530; Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746 (1989); Ark. Educ. Tv Comm'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633 (1998); Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269 (1981); Perry Educ. Ass'n, 460 U.S. at 37; Cornelius, 473 U.S. at 788.

177 Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

178 ACLU at 443.

179 President Kennedy won the 1963 election due in large part to massively successful performances in the first televised debates against Richard Nixon. See, Kayla Webley, *How the Nixon-Kennedy Debate Changed the World*, TIME MAGAZINE, (Sept. 23, 2010) http://content.time.com/time/nation/article/0,8599,2021078,00.html; Steven Levingston, *Masters of their Medium: JFK on TV, Trump on Twitter*, WASH. POST (MAY 18, 2017), http://wapo.st/2pOyDKU?tid=ss_mail&utm_term=.7f45b70de13d.

180 *Id*.

181 Levingston, *supra* note 180.

182 Ark. Educ. Tv Comm'n at 673 (citing Congressional Research Service, Campaign Debates in Presidential General Elections, summ. (June 15, 1993)).

183 Levingston, *supra* note 180.

184 Lionel Barber, Demetri Sevastopulo and Gillian Tett, *Donald Trump: Without Twitter, I would not be here*, FINANCIAL TIMES (Apr. 2, 2017), https://www.ft.com/content/943e322a-178a-11e7-9c35-0dd2cb31823a.

185 Levingston, *supra* note 180; Brief for Knight First Amend. Inst.-Elec. Frontier Found. as Amicus Curiae Supporting Plaintiffs, Knight First Amend. Inst. v. Trump, (S.D.N.Y filed July 11, 2017), (1:17cv5205).

that "[a] designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers."[186] This statement has been interpreted to mean that if a forum is opened initially to a few people but not everyone, then it is not necessarily a designated public forum.[187] This could support the defendants because Mr. Trump did not necessarily create the account for the purpose of communicating his political agenda and allowing everyone to interact with him through the account.[188] However, the major flaw in this is that Donald Trump could have made the account "private" at any time, which would have limited access to the account to everyone except those he allowed in.[189] Doing this would have made the account a private account through which Mr. Trump communicated with those few select people he allowed to see his tweets and not a public forum.[190]

Interestingly, the designation of official political social media accounts as limited public forums would also make the account holders susceptible to other First Amendment restrictions.[191] The First Amendment protects the right to practice religion freely and has been interpreted as preventing the establishment of an official religion.[192] This has been used in the past to prevent state legislatures and government officials from endorsing a specific religion, and to keep a separation between religion and the actions of the government.[193] However, almost every day since May 16, 2017 Florida Senator Marco Rubio has tweeted Bible verses from his official Twitter account and questions of whether this violates the separation of church and state have been raised.[194] Even without the designation as a public forum Sen. Rubio might be violating

186 Ark. Educ. Tv Comm'n at 673.

187 *Cf.* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 304, 120 S. Ct. 2266, 2276 (2000) *(Supreme Court held that allowing only one student per football season to lead the pre-game prayer was selective access which did create a designated public forum, and also violated the Establishment Clause)*.

188 Avery Hartman, *Donald Trump's First-Ever Tweet was a Plug for 'Late Night with David Letterman'*, BUSINESS INSIDER (May 12, 2017, 12:58 PM), https://twitter.com/realDonaldTrump/status/1698308935?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2F, www.businessinsider.com%2Fdonald-trump-first-tweet-2017-5. (The first Tweet from @realDonaldTrump account was promoting his appearance on Late Night to promote the Celebrity Apprentice).

189 THE TWITTER POLICY, *Public and Protected Tweets*, https://help.twitter.com/en/safety-and-security/public-and-protected-tweets (last visited Mar. 3, 2018).

190 *Id*.

191 FREEDOM FROM RELIGION FOUNDATION, https://ffrf.org/images/MarcoRubioTwitterbibleverses.pdf (last visited Mar. 3, 2018).

192 LIBRARY OF CONGRESS, *Thomas Jefferson's Letter to the Danbury Baptists,* https://www.loc.gov/loc/lcib/9806/danpre.html (*"…thus building a wall of separation between Church & State*."); Lemon v. Kurtzman, 403 U.S. 602, 612, 91 S. Ct. 2105, 2111 (1971) (Supreme Court case in which the Court defined the tri-partite test used to determine whether legislation violates the Establishment and Free Exercise Clauses of the First Amendment).

193 Lemon v. Kurtzman, 403 U.S. at 612 (1971).

194 FREEDOM FROM RELIGION FOUNDATION, *supra* note 192.

the First Amendment, but, should the official social media accounts of politicians become public forums, he definitely would be because his tweets would constitute a government official promoting one particular religion in a designated public forum.[195] Expanding the civil right of action in §1983 of the US Code to include the official social media accounts of political officials in the definition of designated public forums would therefore help ensure an Internet free from censorship and also uphold the guarantees of the First Amendment.[196]

C. Knight Institute Lawsuit Decision

On March 8, 2018 Judge Naomi Buchwald of the Southern District of New York ended oral arguments in the Knight Institute's lawsuit against President Trump by proposing a settlement option for the parties that would leave the question of public forums untouched.[197] The proposal was that President Trump, or another party with access to the @realDonaldTrump account, should unblock the Plaintiffs but use the "mute" function on Twitter to prevent the Plaintiffs tweets from showing up on the President's Twitter feed.[198] This proposal would, in theory, satisfy all parties by allowing the Plaintiffs to read and reply to Mr. Trump's tweets like everyone else on Twitter, but would allow Mr. Trump to not see the tweets if he did not want to.[199] This is, of course, tantamount to telling the President of the United States to just ignore the tweets of his critics, similar to the lesson also taught in most elementary schools that children should not let the mean words of bullies get under their skin.[200]

On May 23, 2018, after the parties did not accept the proposed settlement, Judge Buchwald filed her decision on the Knight Institute's lawsuit granting partial summary judgment in favor of the plaintiffs.[201]

195 Rosenberger, 515 U.S. at 828.

196 Rosenberger, 515 U.S. at 828; 42 U.S.C. § 1983 (LexisNexis, Lexis Advance through PL 115-128, approved 2/22/18).

197 John Herrman, *Judge Floats Idea to Settle @realDonaldTrump Twitter Blocking Case*, N.Y. TIMES: BUSINESS DAY (Mar. 8, 2018), https://www.nytimes.com/2018/03/08/business/trump-twitter-block.html.

198 The mute function on Twitter was introduced in 2014 and allows a user to remove an account's Tweets from your feed without blocking that account. Muted accounts will not know that they have been muted. *E.g.*, THE TWITTER RULES: HOW TO MUTE ACCOUNTS ON TWITTER, https://help.twitter.com/en/using-twitter/twitter-mute (last visited Mar. 10, 2018); Chris Welch, *You Can Now Mute People on Twitter*, THE VERGE (May 12, 2014, 1:36 PM), https://www.theverge.com/2014/5/12/5710380/you-can-now-mute-people-twitter.

199 Herrman *supra* note 198.

200 Herrman *supra* note 198.; *see also The Great Bully Roundup*, CTR. FOR DISEASE CONTROL & PREVENTION (Sept. 18, 2017), www.cdc.gov/bam/life/bully.html (US government recommendations for teaching kids how to handle bullying).

201 Knight First Amend. Inst. v. Trump, 302 F. Supp. 3d 541, 580 (S.D.N.Y. 2018).

More specifically, Judge Buchwald found that the blocking of the plaintiffs by the President and Mr. Scavino was viewpoint discrimination in a designated public forum.[202] This opinion was bolstered by an in-depth analysis of the history of public forum jurisprudence and viewpoint-based discrimination in those forums.[203] Judge Buchwald first determined whether the @realDonaldTrump was under government control which is required for a forum to potentially be public.[204] She came to the conclusion that it is under government control because it is operated by the President and his aide, Mr. Scavino, to conduct government business, and is presented as being the account of the United States President.[205] The judge dismissed the defendant's argument, that the creation of the account prior to Mr. Trump's election and Presidency made it a private account, because while a past history has been held to be relevant "that does not mean a present characterization about a forum may be disregarded."[206] Judge Buchwald held that the current nature of the forum rather than its history is the more heavily weighted of the two in the forum analysis.[207]

After the determination of government control, Judge Buchwald focused her opinion on whether the tweets, timeline, and interactive space of a tweet are all consistent with being public forums.[208] Citing to the Supreme Court's 2009 opinion in Pleasant Grove City v. Summum which held that the First Amendment only "restricts government regulation of private speech; it does not regulate government speech"[209] Judge Buchwald held that the content of the President's tweets, and the Twitter timeline that compiled those tweets were government speech and therefore beyond the scope of the First Amendment.[210] However, Judge Buchwald went on to determine that the interactive space that accompanies each of the President's tweets, i.e. the reply function, is not government speech because it is intended as a public interaction portal and could therefore be further considered in the forum analysis.[211] Lastly, Judge Buchwald, having determined that the interactive space of the President's tweets are a forum, she determined the classification of the forum by comparing the forum to other precedential fora, such as the

202 *Id*. at 565.

203 *Id*. at 567

204 *Id*.

205 *Id*.

206 Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 77 (1st Cir. 2004); Knight First Amend. Inst., 302 F. Supp. at 569.

207 Knight First Amend. Inst., 302 F. Supp. at 569.

208 Knight First Amend. Inst., 302 F. Supp. at 570.

209 Pleasant Grove City v. Summum, 555 U.S. 460, 467, 129 S. Ct. 1125, 1131 (2009); Knight First Amend. Inst., 302 F. Supp. at 573.

210 Knight First Amend. Inst., 302 F. Supp. at 571-72.

211 Knight First Amend. Inst., 302 F. Supp. at 573.

public parks discussed in Forbes and the university facilities in Widmar. In doing this comparison Judge Buchwald deemed the interactive space of the tweets to be a designated public forum because it has been made open to anyone with a Twitter account that has not been blocked.[212]

The analysis of the discrimination, and the determination that it was, in fact, viewpoint-based was unnecessary due to the parties stipulation to that effect, but in going through the full forum analysis and the viewpoint-based discrimination analysis, Judge Buchwald did her due diligence, and preempted the inevitable appeal over whether the court erred in its discretion.[213] The defendants have already filed notice with the Court that they plan to appeal the partial grant of summary judgment to the plaintiffs.[214] An appeal of summary judgment in First Amendment cases is subject to a de novo review.[215] This is a non-deferential standard of review, however by explicitly performing the forum analysis, Judge Buchwald's opinion has almost certainly quashed any concerns an appellate court could have.[216]

The court held that the President and Mr. Scavino effected viewpoint-based discrimination in a designated public forum and therefore implored the defendants to correct that discrimination.[217] In an effort to avoid judicial interference with government action, Judge Buchwald did not explicitly order the unblocking of the Plaintiffs, but stated that she expected Mr. Trump and Mr. Scavino to remedy the situation.[218] On the evening of June 5, 2018 the plaintiffs Twitter accounts were unblocked by @realDonaldTrump.[219] While this action solved the immediate problem at hand of allowing these fourteen plaintiffs to read and reply to the @realDonaldTrump account, the issue of public officials blocking constituents on social media still exists.[220] The Davison v. Loudoun Cty. Bd. of Supervisors case has been appealed by the defendants, and it is reported that a number of accounts are still blocked by the @realDonaldTrump account, including that of the veteran's rights organization Vote Vets.[221] Therefore, it is still imperative

212 *Id*.

213 Defendant's Notice of Appeal, Knight First Amend. Inst. v. Trump, Case 1:17-cv-05205-NRB

214 *Id*.

215 "We engage in de novo review of ultimate conclusions of law and mixed questions of law and fact in First Amendment cases." Ridley at 75.

216 Peter Nicolas, *De Novo Review in Deferential Robes: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System*, 54 Syracuse L. Rev. 531, 598 (2004).

217 Knight First Amend. Inst., 302 F. Supp. at 580.

218 *Id*.

219 Charlie Savage, *White House Unblocks Twitter Users Who Sued Trump, but Appeals Ruling*. New York Times, (June 5, 2018), https://www.nytimes.com/2018/06/05/us/politics/trump-twitter-account-lawsuit.html.

220 Davison v. Randall, No. 17-02003 (4th Cir. filed Aug. 29, 2017).

221 Davison v. Randall, No. 17-02003 (4th Cir. filed Aug. 29, 2017); Hadas Gold, *Trump*

that §1983 of the US Code is expanded to include the official social media accounts of political officials in the definition of designated public forums.[222] Without it, the issue remains open and leaves social media users vulnerable to more digital viewpoint discrimination in the future.[223]

Unblocks Some, But Not All Twitter Users, CNN Money (June 5, 2018 6:50 PM) https://money.cnn.com/2018/06/05/media/trump-twitter-block/index.html.

222 *Rosenberger*, 515 U.S. at 828 (1995); 42 U.S.C. § 1983 (LexisNexis, Lexis Advance through PL 115-128, approved 2/22/18).

223 "It's not a perfect solution, but certainly, it is a pretty good one." Larry Neumeister, *Judge to Trump: Muting, Not Blocking Followers, May End Suit*, AP News (Mar. 8, 2018), https://apnews.com/e524e6eda0d84d4ca6c8e1ebd255f8d9 (quoting Katherine Fallow, Knight First Amendment Institute).