18-1691-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KNIGHT FIRST AMENDMENT INSTITUTE
AT COLUMBIA UNIVERSITY, *et al.*,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE INTERNET ASSOCIATION AS *AMICUS CURIAE*
IN SUPPORT OF NEITHER PARTY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel certifies that the Internet Association has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

Dated: August 14, 2018

/s/ *Chad I. Golder*
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INTEREST OF *AMICUS CURIAE*[1]

The Internet Association represents roughly forty leading technology companies. Its membership includes a broad range of Internet platforms, from travel sites and online marketplaces to social networking services and search engines. The Internet Association advances public policy solutions that strengthen and protect Internet freedoms, foster innovation and economic growth, and empower small businesses and the public. It respectfully submits this Brief of *Amicus Curiae* in Support of Neither Party to encourage this Court to appropriately limit its decision to the unique facts of this case so that its decision does not reach further than necessary or unintentionally disrupt the modern, innovative Internet.

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), amicus certifies that (1) this brief was authored entirely by counsel for amicus curiae and not by counsel for any party, in whole or part; (2) no party or counsel for any party contributed money to fund preparing or submitting this brief; and (3) apart from amicus curiae, its members, and its counsel, no other person contributed money to fund preparing or submitting this brief.

All parties have consented to the filing of this brief.

INTRODUCTION

This case presents an exceedingly narrow legal question: whether certain portions of a specific Twitter account are public forums for purposes of the First Amendment. In particular, it involves a Twitter account that a public official, the President of the United States, has used "as a channel for communicating and interacting with the public about his administration." Stipulation at ¶ 32, *Knight First Amendment Institute at Columbia University v. Trump*, No. 17-5205 (S.D.N.Y. Sept. 28, 2017), ECF No. 30-1 ("Stipulation"). The case considers whether that public official may, consistent with the First Amendment, "block" other users' ability to "repost or respond to [his] messages, and to interact with other Twitter users in relation to those messages." *Id.* ¶ 13. To make this determination, this Court must consider whether the so-called "interactive spaces" associated with President Trump's Twitter account—*i.e.*, the spaces "for replies and retweets created by each tweet sent by the @realDonaldTrump account," *Knight First Amendment Institute at Columbia University v. Trump*, 302 F. Supp. 3d 541, 572 (S.D.N.Y. 2018)—are public forums.

The Internet Association takes no position as to whether President Trump's Twitter account is indeed a public forum or whether he violated the First Amendment by blocking certain users from replying to or re-tweeting his messages. The Internet Association does, however, respectfully submit that this

Court should carefully, consciously, and conspicuously limit its decision to these unique facts. In so doing, this Court should emphasize three points to prevent any confusion about the rights and legal responsibilities of Internet platforms, account-holders, and other users.

First, this Court should make clear that this case does not implicate the overwhelming majority of social media accounts throughout the Internet. In fact, it does not implicate the overwhelming majority of Twitter accounts and "interactive spaces" located throughout Twitter. "Twitter is a social media platform with more than 300 million active users worldwide, including some 70 million in the United States." Stipulation at ¶ 13. But only an extremely small number of those 70 million American users are public officials or government entities. Critically, Twitter accounts held by public officials or governmental entities are differently situated than other accounts. Unlike President Trump's Twitter account, there can be no serious argument that a *non*-public official's account is owned or controlled by the government—a key prerequisite for establishing a public forum. Thus, even if this Court were to conclude that the "interactive space" connected to a *public official's* Twitter account may be a public forum in certain circumstances, that holding would *not* apply to the tens of millions of other active Twitter accounts.

Second, despite this crucial difference between President Trump's Twitter account and the accounts of non-public officials, they do share one thing in

common: *all* Twitter accounts are subject to Twitter's Terms of Service. Twitter is the owner and controller of the "property" that might constitute a public forum here. Despite any First Amendment status that this Court might find in the "interactive spaces" associated with President Trump's account, Twitter retains authority to revoke access to both his account *and* the account of any user seeking to comment on President Trump's account. Twitter similarly retains authority to remove any content in that "interactive space." Although the district court acknowledged this in passing—"Twitter also maintains control over the @realDonaldTrump account (and all other Twitter accounts)," *Knight First Amendment Institute*, 302 F. Supp. 3d at 567—this Court should expressly acknowledge this essential fact to avoid subsequent confusion in this ever-developing area of law.

Third, Twitter is *not* a state actor for the purpose of the First Amendment. It is "elementary constitutional doctrine that the first amendment only restrains action undertaken by the Government." *Buckley v. American Fed'n of Television and Radio Artists*, 496 F.2d 305, 309 (2d Cir. 1974). But Twitter is not the Government. Because this case involves only a miniscule proportion of Twitter's more than 300 million users, and because Twitter itself is the ultimate owner of *all* of the space on its platform, there is a considerable risk that any decision that may recognize isolated public forums on Twitter will be misunderstood to hold that

Twitter, too, can be subject to First Amendment scrutiny. This Court should bear in mind that, despite the idiosyncratic facts of this case, Twitter itself is *not* a state actor when it blocks or withdraws access to its account-holders or users, and it is therefore not subject to the First Amendment's restraints.

At bottom, the Internet Association advocates simply that "[i]n considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution." *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 806 (2011) (Alito, J., concurring). More than two decades ago, a plurality of the Supreme Court similarly cautioned that it was "not at all clear that the public forum doctrine should be imported wholesale" into a "new and changing area"—then, the innovative area of cable television. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 749 (1996). Now faced with another cutting-edge technology, this Court should be equally cautious when making decisions at the crossroads of private property and an asserted public forum. Here, that cautious approach counsels in favor of ensuring that any decision is expressly limited to the exceptional facts of this case.

ARGUMENT

I. THE VAST MAJORITY OF TWITTER ACCOUNTS CANNOT BE DEEMED PUBLIC FORUMS.

If this Court concludes that appellees have Article III standing to raise their First Amendment claims, a central question in this appeal is whether the

"interactive spaces" connected to President Trump's Twitter account are public forums. "Because facilities or locations deemed to be public forums are usually operated by governments, determining that a particular facility or location is a public forum usually suffices to render the challenged action taken there to be state action subject to First Amendment limitations." *Halleck v. Manhattan Cmty. Access Corp.*, 882 F.3d 300, 306-07 (2d Cir. 2018). Here, however, the asserted public forum is *not* owned by the government. It is a small piece of cyberspace on a platform owned and controlled by *Twitter* that is associated with an account operated by a public official. This unique scenario raises the question whether those particular "interactive spaces" "have a sufficient connection to governmental authority to be deemed" public forums. *Id*. at 307.

Public forum analysis typically applies only to spaces that are owned and therefore controlled by the government. *E.g.*, *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings College of the Law v. Martinez*, 561 U.S. 661, 679 (2010) ("[I]n a progression of cases, this Court has employed forum analysis to determine when a governmental entity, *in regulating property in its charge*, may place limitations on speech." (emphasis added)); *West Farms Assocs. v. State Traffic Comm'n of State of Conn.*, 951 F.2d 469, 473 (2d Cir. 1991) ("[P]ublic forum analysis applies only where a private party seeks access to public property, such as

a park, a street corner, or school auditorium, in order to communicate ideas to others.").

But in rare occasions, courts have applied the public forum doctrine to property the government temporarily controls, but does not own. In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), for example, the Supreme Court applied the public forum analysis to real property that was temporarily under government control, holding that a "privately owned . . . theater under long-term lease to the city" was a public forum for First Amendment purposes. *Id*. at 547, 552.

Courts have also applied public forum analysis to privately-owned media outlets that are subject to extensive government regulation. For example, this Court recently held that a privately-owned public access television station was a public forum. *Halleck*, 882 F.3d at 300. This Court made clear, however, that its holding was fact-dependent. *Halleck* stated that where

> federal law authorizes setting aside channels for public access 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.

Id. at 306. Based on this specific "statutory, regulatory, and contractual framework," this Court concluded that the public access channel at issue was, in fact, a public forum. *Id*. The Court declined, however, to "determin[e] whether a

public access channel is necessarily a public forum simply by virtue of its function in providing an equivalent of the public square." *Id.*

In addition, at least one court (other than the district court below) has held that interactive spaces on privately owned websites may constitute a public forum. In *Davison v. Loudoun County Board of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. 2017), a district court held that a Facebook page belonging to the Chair of the Loudoun County Board of Supervisors—the local governing body for Loudoun, County, Virginia—was a public forum. In that case, the record included 100 examples of the Chair's Facebook posts, "nearly all of which relate directly or indirectly to [her] public office." *Id*. at 714 n.3. The Court observed that "[t]here is comparably little evidence of posts of a more personal nature." *Id*. In addition, the Court explained that the Chair had "affirmatively solicited comments from her constituents" on issues of public importance. *Id*. at 716. Based on these facts, the Court concluded that the public official had opened up her Facebook page as a public forum.

This Court will no doubt wrestle with these same considerations as it evaluates whether President Trump's Twitter account qualifies as a public forum. Again, the Internet Association takes no position on that question. But no matter how this Court decides that issue in the narrow context of President Trump's

account, it can—and should—easily conclude that the vast majority of Twitter accounts are not public forums.

Most straightforwardly, tens of millions of Twitter accounts are *not* operated by government entities or public officials. That fact alone demonstrates that virtually all of the space on Twitter cannot be deemed a public forum (and therefore will not be controlled by the Court's decision in this case). *See generally* Gov't Opening Br. at 32 ("To the extent that Twitter provides the means for conversations among its many users, Twitter as a whole could be characterized as a private forum for public expression—though not a 'public forum' in the First Amendment sense, given its non-governmental character.").

President Trump's history with Twitter provides a perfect illustration. President Trump first opened his Twitter account in 2009 when he was a private citizen. For years, Citizen Trump used that account to offer his opinions "about a variety of topics, including popular culture and politics." Stipulation ¶ 32. There is no debate in this case that had President Trump remained Citizen Trump, his private Twitter account—and the "interactive spaces" connected to it—could not be a public forum. The narrow question before this Court is whether that Twitter account *became* a public forum when President Trump took office and began using it for governmental purposes.

Even if public officials have and use Twitter accounts, moreover, they may not use those accounts for government business, in which case there would be no basis for finding that the account was *controlled* by the government. Here, the district court found it significant that "President Trump sometimes uses the account to announce matters related to official government business before those matters are announced to the public through other official channels,"[2] and that "[t]he National Archives and Records Administration has advised the White House that the President's tweets from @realDonaldTrump . . . are official records that must be preserved under the Presidential Records Act." *Knight First Amendment Institute*, 302 F. Supp. 3d at 553 (citing Stipulation ¶¶ 38, 40). Likewise, the court in *Davison* emphasized that the public official used her Facebook account to make statements about public affairs and to invite comments from constituents. *See* 267 F. Supp. 3d at 716 & n.4. But very few account-holders are public officials who use their Twitter accounts to officially announce government policy about things

[2] *See* Stipulation ¶ 38 (stipulating that "President Trump uses @realDonaldTrump, often multiple times a day, 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; to challenge media organizations whose coverage of his Administration he believes to be unfair; and for other statements, including on occasion statements unrelated to official government business.").

like the ability of transgender individuals to serve in the military,[3] sensitive diplomatic and national security issues,[4] the formal resignation of Cabinet Secretaries,[5] and other official government actions.

These facts demonstrate the narrowness of the issue before this Court. Few Twitter accounts are operated by government officials, and even fewer are devoted to public use. When deciding whether President Trump's account is a public forum, this Court should expressly state that its decision does not affect virtually all of the other accounts or "interactive spaces" on Twitter (and other Internet Association members' platforms) for which there would be no basis to find ownership or control by the government—a prerequisite to any public forum analysis.[6]

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[3] Stipulation ¶ 41 ("For example, on July 26, 2017, President Trump issued a series of tweets . . . announcing 'that the United States Government will not accept or allow . . . Transgender individuals to serve . . . .'").

[4] Stipulation ¶¶ 15, 21.

[5] *Knight First Amendment Institute*, 302 F. Supp. 3d at 553 ("Since the parties' stipulation, the President has also used the @realDonaldTrump account in removing then-Secretary of State Rex Tillerson and then-Secretary of Veterans Affairs David Shulkin.").

[6] Regardless of how it rules, the Court also should affirm the district court's recognition that "the @realDonaldTrump account as a whole" is *not* "the would-be forum." *Knight First Amendment Institute*, 302 F. Supp. 3d at 566. "Plaintiffs do not seek access to the account as a whole—they do not desire the ability to send tweets as the President, the ability to receive notifications that the President would receive, or the ability to decide who the President follows on Twitter." *Id.*

II. TWITTER RETAINS CONTROL OVER TWITTER ACCOUNTS AND ANY ASSOCIATED "INTERACTIVE SPACES."

The district court correctly noted that "Twitter is a private (though publicly traded) company that is not government-owned." *Knight First Amendment Institute*, 302 F. Supp. 3d at 566. It also correctly observed that Twitter "maintains control over the @realDonaldTrump account (and all other Twitter accounts)." *Id.* at 567. But the district court did not take these observations to their logical and necessary conclusions: (1) Twitter may remove or "block" a would-be commenter in the "interactive space," even if this Court decides that a public official account-holder may not do so; and (2) Twitter can suspend or disable that public official's account, thereby eliminating the ability for anyone to participate in its associated "interactive space." While these conclusions were perhaps implicit in the district court's decision, this Court should make them explicit in its opinion on appeal, regardless of how it decides the other questions at issue.

These conclusions ineluctably flow from the terms of Twitter's User Agreement. That Agreement unambiguously provides that it "may suspend or terminate your account or cease providing you with all or part of the Services *at*

Plaintiffs challenge only the constitutionality of President Trump's decision to block the individual plaintiffs from the @realDonaldTrump account, and all they seek is a declaration that blocking the individual plaintiffs was unconstitutional and an injunction requiring the defendants to unblock the individual plaintiffs. This further demonstrates what a small plot of Twitterspace is at issue here.

any time for any or no reason." Twitter Terms of Service, *at* https://twitter.com/en/tos (emphasis added). Likewise, those Terms of Service provide that Twitter "reserve[s] the right to remove Content that violates the User Agreement, including for example, copyright or trademark violations, impersonation, unlawful conduct, or harassment." *Id.*; *see* Twitter Rules and Policies, at https://help.twitter.com/en/rules-and-policies#twitter-rules. Taken together, these provisions leave no doubt that any public forums that may exist in "interactive spaces" on Twitter's platform are subject to Twitter's control.

Courts have not faced a situation where a private actor with control over its property revokes access to a government actor operating a potential public forum on that property. But here, Twitter's ability to revoke access to a public official's account without violating the First Amendment stems from the kind of public forum that may exist on Twitter.

"The Supreme Court has recognized three types of fora across a spectrum of constitutional protection for expressive activity": traditional public forums, designated public forums, and nonpublic forums. *Make the Rd. by Walking, Inc. v. Turner*, 378 F.3d 133, 142 (2d Cir. 2004). As the district court rightly held, Twitter's "interactive spaces" cannot be "traditional public forums," *i.e.*, "places which by long tradition or by government fiat have been devoted to assembly and debate, [where] the rights of the state to limit expressive activity are sharply

circumscribed." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n* , 460 U.S. 37, 45 (1983); *Knight First Amendment Institute*, 302 F. Supp. 3d at 574 ("[W]e can first conclude that the interactive space of a tweet sent by @realDonaldTrump is not a traditional public forum. There is no historical practice of the interactive space of a tweet being used for public speech and debate since time immemorial, for there is simply no extended historical practice as to the medium of Twitter.").

Consequently, this Court must consider whether, in these unique circumstances, Twitter's interactive spaces are "designated public forums," "nonpublic forums," or no forum at all. *E.g.*, *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678-79 (1998). In any of those categories, *the government itself* has the ability to revoke access to the forum or change the nature of the forum. For example, even in "designated public forums," the Supreme Court has recognized that "a state is not required to indefinitely retain the open character of" a particular forum. *Perry Educ. Ass'n*, 460 U.S. at 46. As a logical matter, that is enough for this Court to find that Twitter can revoke a would-be re-tweeter's access to a designated public forum (the "interactive space" connected to an account)—or the forum itself (the account-holder's Twitter account itself). After all, by agreeing to Twitter's Terms of Service as a condition of opening an account, a public official necessarily agrees that *Twitter* can extinguish the "open character" of the "interactive spaces" associated with her account. *Id*. Thus,

because "the government may decide to close a designated public forum," *Make the Rd. by Walking*, 378 F.3d at 143, it also may agree to permit underlying private property owners to close that forum. Nothing in law or logic suggests that the government cannot delegate the forum-closing decision to someone else—particularly when the other entity is the actual owner of the forum's property. Accordingly, even if the Court concludes that elements of the @realDonaldTrump account constitute a public forum, nothing about that holding would prevent Twitter from continuing to exercise control over that account and access to the "interactive spaces" associated with it under the plain terms of its User Agreement.[7]

[7] The Knight Institute makes a different claim than the private plaintiffs. It does not wish to interact directly with President Trump's Twitter account. Instead, it wants to "read comments that otherwise would have been posted by the blocked Plaintiffs . . . in direct reply to @realDonaldTrump tweets." Stipulation ¶ 61. But the Knight Institute would have no First Amendment claim against Twitter if Twitter were to disable a public official's account or otherwise remove content in "interactive spaces" associated with that account. "The right to receive information in the free speech context is merely the reciprocal of the right of the speaker." *Bicknell v. Vergennes Union High Sch. Bd. of Dirs.*, 475 F. Supp. 615, 620 (D. Vt. 1979) (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 (1976)). Here, any Twitter account-holder's right to speak (or, as here, reply or re-tweet) is subject to Twitter's ultimate control. Accordingly, the Knight Institute has no First Amendment right to read content on Twitter if Twitter determines that this content should be removed under its Terms of Service. Relatedly, as explained below in Section III, Twitter is not a state actor. As such, the Knight Institute would have no First Amendment claim against Twitter.

III. TWITTER IS NOT A "STATE ACTOR."

The foregoing sections establish two principles: (1) Twitter is private property, operated by private citizens for private purposes, and the overwhelming majority of it cannot be deemed a public forum; and (2) Twitter retains ultimate control over its platform and thus can freely remove accounts or block content in "interactive spaces." Given Twitter's complete control over these communicative spaces, it is possible that some will assert that Twitter itself is a "state actor" subject to First Amendment constraints. It is not. Relatedly, if this Court concludes that certain "interactive spaces" on Twitter are public forums, some may mistakenly assert that Twitter itself is a state actor for First Amendment purposes when it takes action as to content in those public spaces. It is not. This Court should be especially careful to avoid creating confusion on these important issues.

The First Amendment's "guarantee of free speech is a guarantee only against abridgment by government, federal or state." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). To the extent the law "extend[s] protection or provide[s] redress against a private corporation or person who seeks to abridge the free expression of others" that protection is a product of common law or statute—not the Constitution. *Id.*; *Halleck*, 882 F.3d at 304 ("Because [Defendant] is a private corporation, the viability of the Plaintiffs' First Amendment claim against it and its

employees depends on whether [Defendant's] actions can be deemed state action.").[8]

> A private company like Twitter may be treated as a state actor only:
>
> (1) [when] the entity acts pursuant to the "coercive power" of the state or is "controlled" by the state ("the compulsion test"); (2) when the state provides "significant encouragement" to the entity, the entity is a "willful participant in joint activity with the [s]tate," or the entity's functions are "entwined" with state policies ("the joint action test" or "close nexus test"); or (3) when the entity "has been delegated a public function by the [s]tate," ("the public function test").

Sybalski v. Independent Grp. Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008) (quoting *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001)). As explained below—and as courts have consistently

[8] In the ordinary public forum case, there is no need to separately consider the application of these rules. As this Court recently explained, "[b]ecause facilities or locations deemed to be public forums are usually operated by governments, determining that a particular facility or location is a public forum usually suffices to render the challenged action taken there to be state action subject to First Amendment limitations." *Halleck*, 882 F.3d at 306-07; *see Knight First Amendment Institute*, 302 F. Supp. 3d at 568 (same); *Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939, at *8 (N.D. Cal. Mar. 26, 2018) (noting that Supreme Court's cases considering "private property dedicated to public use" had "addressed whether certain speech restrictions enacted *by the federal government* violated the First Amendment" (citation omitted)). Put differently, when a space is a public forum, it generally means that the government not only has control over that space, but that it exercises exclusive control. As explained above, however, that is not true here because Twitter retains control over all spaces on its platform under the terms of its User Agreement.

concluded[9]—private social media companies' operation and regulation of their own platforms do not satisfy any of these tests. Such companies are, therefore, not state actors and their activities do not trigger First Amendment scrutiny, even if a court were to find that certain "interactive spaces" on Twitter qualify as public forums, and even when Twitter takes action as to the content in those spaces.

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[9] *See, e.g.*, *Prager Univ.*, 2018 WL 1471939, at *8 (holding that YouTube and Google were not "state actors that must regulate the content on their privately created website in accordance with the strictures of the First Amendment"); *Nyabwa v. FaceBook*, No. 2:17-CV-24, 2018 WL 585467, at *1 (S.D. Tex. Jan. 26, 2018) ("Because the First Amendment governs only governmental restrictions on speech, Nyabwa has not stated a cause of action against FaceBook."); *Shulman v. Facebook.com*, No. CV 17-764 (JMV), 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017) ("The Court also notes that efforts to apply the First Amendment to Facebook . . . have consistently failed."); *Forbes v. Facebook, Inc.*, No. 16 CV 404 (AMD), 2016 WL 676396, at *2 (E.D.N.Y. Feb. 18, 2016) ("Facebook is a private corporation, and Mr. Forbes does not allege any facts that could support a claim of a 'close nexus' between Facebook and the state, such that Facebook's actions (or inaction) may be fairly attributable to the state."); *Doe v. Cuomo*, No. 10-CV-1534 (TJM/CFH), 2013 WL 1213174, at *9 (N.D.N.Y. Feb. 25, 2013) (Facebook not state actor under joint action test); *Kinderstart.com LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 WL 831806, at *14 (N.D. Cal. Mar. 16, 2007) (concluding Google was not state actor); *see also, e.g.*, *Green v. America Online (AOL)*, 318 F.3d 465, 472 (3d Cir. 2003) ("AOL is a private, for profit company and is not subject to constitutional free speech guarantees. . . . We are unpersuaded by Green's contentions that AOL is transformed into a state actor because AOL provides a connection to the Internet on which government and taxpayer-funded websites are found, and because AOL opens its network to the public whenever an AOL member accesses the Internet and receives email or other messages from non-members of AOL."); *Howard v. America Online Inc.*, 208 F.3d 741, 754 (9th Cir. 2000) (concluding that AOL was not a state actor where plaintiffs had argued that "AOL is a 'quasi-public utility' that 'involv[es] a public trust'").

As an initial matter, private social media platforms like Twitter do not operate pursuant to government control. The government has no involvement in Twitter's product design, hiring, advertising sales, raising money, or any of its other basic corporate functions. And most relevant here, Twitter enforces its Terms of Service independent of the government. Accordingly, there can be no legitimate claim that the government "exercises 'coercive power,' is 'entwined in [the] management or control' of [Twitter], or provides [Twitter] with 'significant encouragement, either overt or covert,'" nor is there any reasonable argument that Twitter "'operates as a willful participant in joint activity with the State or its agents.'" *Cranley v. National Life Ins. Co. of Vermont*, 318 F.3d 105, 112 (2d Cir. 2003) (quoting *Brentwood Acad.*, 531 U.S. at 296).[10]

Nor can courts reasonably conclude that Twitter can be treated as a state actor under the "public function" test. Under this test, "'[s]tate action may be found in situations where an activity that traditionally has been the exclusive, or near exclusive, function of the State has been contracted out to a private entity.'"

[10] To be sure, determining whether a private entity is a state actor is a "necessarily fact-bound inquiry." *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 939 (1982). But in the social media and Internet context, there is no indication of *any* "'interdependence,' 'symbiosis,' or 'nexus'" with the government. *Jensen v. Farrell Lines, Inc.*, 625 F.2d 379, 382 (2d Cir. 1980). Absent that kind of government connection or control, no court can reasonably conclude that social media platforms like Twitter are state actors under the government control prong of the "state action" test.

Grogan v. Blooming Grove Volunteer Ambulance Corps, 768 F.3d 259, 264-65 (2d Cir. 2014) (quoting *Horvath v. Westport Library Ass'n*, 362 F.3d 147, 151 (2d Cir. 2004)). As the Supreme Court has cautioned, however, "[w]hile many functions have been traditionally performed by governments, very few have been "exclusively reserved to the State." *Flagg Bros, Inc. v. Brooks*, 436 U.S. 149, 158 (1978). "[C]ourts have found state action when private parties perform such sovereign functions as medical care for prison inmates; holding local primary elections; animal control; operation of a post office; and . . . fire protection." *Grogan*, 768 F.3d at 265 (internal citations omitted). Internet platforms like Twitter do not serve anything remotely comparable to these public functions.

Nevertheless, some have tried to argue that social media websites satisfy the "public function" test because they hold out their private property as spaces for open public discourse. *See, e.g.*, *Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939, at *6 (N.D. Cal. Mar. 26, 2018) ("Plaintiff emphasizes that Defendants hold YouTube out 'as a public forum dedicated to freedom of expression to all' and argues that 'a private property owner who operates its property as a public forum for speech is subject to judicial scrutiny under the First Amendment.'" (quoting Plaintiff's Opposition to Defendants' Motion to Dismiss at 18, *Prager Univ. v. Google LLC*, No. 5:17-cv-06064-LHK (N.D. Cal. Feb. 9, 2018), ECF No. 33)). These plaintiffs have attempted to support their novel theory

with the Supreme Court's decisions in *Marsh v. Alabama*, 326 U.S. 501 (1946), and *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). In *Marsh*, the Supreme Court concluded that the First Amendment prohibited a private "company town" from imposing criminal punishment on individuals distributing religious literature. In so doing, the Court loosely stated that the "more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh*, 326 U.S. at 506. Seventy years later, *Packingham* described social media sites as "the modern public square" because they provide a space for "users to gain access to information and communicate with one another about it on any subject that might come to mind." *Packingham*, 137 S. Ct. at 1737. Based on these two decisions, some have asserted that social media platforms are modern-day "company towns" and therefore must comply with First Amendment strictures like the town in *Marsh*.

This argument finds no support in precedent, and it has, unsurprisingly, been soundly rejected. *E.g.*, *Prager Univ.*, 2018 WL 1471939, at *5-8. A series of post-*Marsh* Supreme Court opinions limited that case to its facts, explaining that private property can "be treated as though it were public" only where "that property has taken on all the attributes of a town, *i.e.*, 'residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places

are situated.'" *Flagg Bros.*, 436 U.S. at 159 (quoting *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 332 (1968) (Black, J., dissenting)); *Prager Univ.*, 2018 WL 1471939, at *8 (noting that Supreme Court's post-*Marsh* decisions clarified that it "'was never intended to apply' outside 'the very special situation of a company-owned town'" (quoting *Lloyd Corp. v. Tanner*, 407 U.S. 551, 562-63 (1972)). Social media sites offer their users a wide array of functions, but they are a long way from "tak[ing] on *all* the attributes" of a municipality. *Flagg Bros.*, 436 U.S. at 159 (emphasis added).

And, for all of *Packingham*'s broad language, it "did not, and had no occasion to, address whether *private social media corporations* like [Twitter] are state actors that must regulate the content of their websites according to the strictures of the First Amendment." *Prager Univ.*, 2018 WL 1471939, at *8; *see also Packingham*, 137 S. Ct. at 1738 (Alito, J., concurring in the judgment) (noting agreement with Court's holding but explaining that "I cannot join the opinion of the Court . . . because of its undisciplined dicta"). Instead, the issue before the Court was whether *a North Carolina law* violated the First Amendment because it prohibited sex offenders from *all* forms of social media. Thus, the critical feature of *Packingham* is that it involved *a State* taking action that the First Amendment barred. *Packingham* in no way suggested that the First Amendment barred a private entity like Twitter from limiting or completely prohibiting an individual's

use of its platform. Put simply, *Packingham* did *not* hold that private Internet companies were subject to First Amendment scrutiny as state actors, or that those private Internet companies could not prevent users from accessing their websites. *E.g.*, *Nyabwa v. FaceBook*, No. 2:17-CV-24, 2018 WL 585467, at *1 (S.D. Tex. Jan. 26, 2018) ("Although the Court recognized in *Packingham* . . . that social media sites like Facebook and Twitter have become the equivalent of a public forum for sharing ideas and commentary, the Court did not declare a cause of action against a private entity such as Facebook for a violation of the free speech rights protected by the First Amendment.").

In sum, for all of their control over their own property, social media platforms are *not* state actors for First Amendment purposes. Nor are they state actors because they play a vital role in modern public discourse. Even if this Court finds that certain pockets of Twitter are public forums, and even if this Court finds that government actors who operate Twitter accounts are restrained by the First Amendment, it should make clear that Twitter itself is not similarly restrained.[11]

[11] Like the district court below, the Internet Association assumes that "'it is substantially likely that the President and other executive . . . officials would abide by an authoritative interpretation of [a] . . . constitutional provision.'" *Knight First Amendment Institute*, 302 F. Supp. 3d at 579 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992)). As such, it need not opine on the proper remedy in this case. That said, it is important to emphasize that, if this Court were to conclude that President Trump violated the First Amendment by blocking the individual plaintiffs from the "interactive space" on his Twitter account, it could not order

CONCLUSION

For the foregoing reasons, this Court should carefully limit its opinion to the unique facts of this case and expressly make clear that: (1) only a small portion of Twitter is even arguably a public forum; (2) Twitter retains control over its private property under the terms of its User Agreement and can remove users or block content in its own discretion; and (3) when taking such actions, Twitter is not subject to First Amendment scrutiny because it is not a state actor.

Respectfully submitted,

Date: August 14, 2018

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Twitter to unblock the individual plaintiffs as a means of effectuating that constitutional decision. *See, e.g.*, *Hassell v. Bird*, 420 P.3d 776 (Cal. 2018).

CERTIFICATE OF COMPLIANCE

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Dated: August 14, 2018

/s/ *Chad I. Golder*
Chad I. Golder

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2018, I caused a true and correct copy of the foregoing to be served on all counsel of record through the Court's CM/ECF system.

Dated: August 14, 2018

/s/ *Chad I. Golder*
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