

Nos. 22-324 and 22-611

IN THE
Supreme Court of the United States

MICHELLE O'CONNOR-RATCLIFF, *et al.*,
Petitioners,

v.

CHRISTOPHER GARNIER, *et ux.*,
Respondents.

KEVIN LINDKE,
Petitioner,

v.

JAMES R. FREED,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH AND SIXTH CIRCUITS

**BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER
FOUNDATION, KNIGHT FIRST AMENDMENT INSTITUTE
AT COLUMBIA UNIVERSITY, AND WOODHULL FREEDOM
FOUNDATION IN SUPPORT IN SUPPORT OF PETITIONER
KEVIN LINDKE (22-611) AND RESPONDENTS
CHRISTOPHER GARNIER, *ET UX.* (22-324)**

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STATEMENT OF INTEREST¹

Recognizing the internet’s power as a tool of democratization, the Electronic Frontier Foundation (EFF) has, for nearly 30 years, worked, on behalf of its more than 39,000 dues-paying members, to protect the rights of users to transmit and receive information online. EFF has written extensively on the issues presented in this appeal² and has filed amicus briefs in similar cases, including in *Knight First Amendment Institute at Columbia University v. Trump*, 928 F.3d 226 (2d Cir. 2019), *Robinson v. Hunt County*, 921 F.3d 440 (5th Cir. 2019), and *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021).

The Knight First Amendment Institute at Columbia University is a non-partisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. The Institute’s aim is to promote a

1. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

2. See, e.g., Camille Fischer, *Can the Government Block Me on Twitter?: 2018 Year in Review*, EFF Deeplinks (Dec. 22, 2018), <https://www.eff.org/deeplinks/2018/12/can-government-block-me-twitter-2018-year-review>; David Greene & Karen Gullo, *When Tweets Are Governmental Business, Officials Don’t Get to Pick and Choose Who Gets to Receive, Comment On, and Reply to Them. That Goes for the President, Too*, EFF Deeplinks (Nov. 30, 2017), <https://www.eff.org/deeplinks/2017/11/when-officials-tweet-about-government-business-they-dont-get-pick-and-choose-who>.

system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government. The Institute is particularly committed to protecting the integrity and vitality of online forums in which citizens communicate with each other and government representatives about matters of public concern.

The Woodhull Freedom Foundation is a non-profit organization that works to advance the recognition of sexual freedom, gender equality, and free expression. Woodhull is particularly concerned with government censorship of disfavored speakers based on viewpoint, as such actions often target those with nonconforming views on human sexuality.

SUMMARY OF ARGUMENT

Given how common it is for government officials and agencies to conduct official business through social media, the First Amendment rights of persons to access such accounts and participate in their interactive spaces are critical to modern civic engagement. This Court must thus act to affirmatively protect those rights. Any rule this Court announces through the two cases it is considering that address this issue must weigh heavily in favor of preserving these First Amendment rights and not provide any easy route for public officials to disregard them.

Specifically, the Court should apply a functional state action analysis under which a public official who uses a social media account in furtherance of their official duties is engaged in state action. When an official chooses to mix governmental and non-governmental conduct on an

individual account, they must accept the First Amendment obligations that go with doing so. And in assessing the public forum question, this Court must apply the well-established ban on viewpoint discrimination in both public and nonpublic forums.

Government officials, at all levels of government, routinely use their social media accounts, regardless of whether those accounts are nominally “official” or “personal,” in furtherance of their official duties. And the information conveyed on these accounts can be so vital, and the interactions so important, that one’s First Amendment rights should not turn solely on the details of when and how the account was originally created, or whether the official is using it in their personal or on-the-clock time.

Freed’s use of a Facebook “page” to communicate with the public about administrative directives he issued as the City Manager of Port Huron, MI, *Lindke v. Freed*, 37 F.4th 1199, 1201 (6th Cir. 2022), and school district trustees O’Connor-Ratcliff’s and Zane’s uses of their Facebook and Twitter profiles “to inform constituents about goings-on at the School District and on the PUSD Board, to invite the public to Board meetings, to solicit input about important Board decisions, and to communicate with parents about safety and security issues at the District’s schools,” *Garnier v. O’Connor-Ratcliff*, 41 F.4th 1158, 1163 (9th Cir. 2022), are in no way exceptional: they are each examples of how social media are widely used by officials and agencies at all levels of government for a multitude of governmental purposes.

Public officials' use of social media has familiar historical analogs.

Participatory events like town hall meetings can be traced to colonial America.³ And American political figures have long adopted new communication technologies to engage directly with the public. Franklin Delano Roosevelt's Fireside Chats were delivered directly into Americans' homes by radio.⁴ Eisenhower broadcasted presidential announcements on public access television.⁵ And presidential candidate debates have been televised since the 1960 election.⁶

It would have been plainly impermissible for any holder of elected office to punish certain individuals by making it more difficult for them to get these broadcasted messages than other Americans. A court surely would have rejected an officeholder's attempt to get a court order barring all broadcasters from delivering their signal to certain viewers disfavored by that officeholder.

The result should be no different merely because today's social media platforms make such blocking easy.

3. Wikipedia, *Town Hall Meeting*, https://en.wikipedia.org/wiki/Town_hall_meeting.

4. Tamara Keith, *Commander-In-Tweet: Trump's Social Media Use and Presidential Media Avoidance*, NPR (Nov. 18, 2016), <https://www.npr.org/2016/11/18/502306687/commander-in-tweet-trumps-social-media-use-and-presidential-media-avoidance>.

5. *Id.*

6. Jill Lepore, *The State of the Presidential Debate*, New Yorker (Sept. 12, 2016), <https://www.newyorker.com/magazine/2016/09/19/the-state-of-the-presidential-debate>.

What might have required a court order before is now easily accomplished as a feature of these platforms. But the effect remains the same: disfavored citizens are denied their First Amendment rights.

ARGUMENT

I. GOVERNMENTS AT ALL LEVELS PERVASIVELY USE SOCIAL MEDIA TO COMMUNICATE WITH THEIR CONSTITUENTS

Both the threshold question in *Lindke v. Freed* and *O'Connor-Ratcliff v. Garnier*—whether the elected officials were state actors when they blocked the plaintiffs from their individual social media accounts—and the First Amendment questions that follow, can only be answered with a full understanding of how officials and agencies pervasively use various social media accounts to inform the public about government practices and policies, and to engage constituents in debate about public issues.

A. Government Officials Regularly Use Social Media in Furtherance of Their Official Duties

A 2015 survey of members of Congress and their staffs found that 76% of respondents felt that social media enabled more meaningful interactions with constituents, 70% found that social media made them more accountable to their constituents, and 71% said that constituent comments directed to the representatives on social media would influence an undecided lawmaker.⁷

7. Congressional Management Foundation, *#SocialCongress2015*, 10, 15 (2015), https://www.congressfoundation.org/storage/documents/CMF_Pubs/cmf-social-congress-2015.pdf.

So it is not surprising that as of 2020, “of the 715 members that have served in Congress since 2015, 711 have had one or more active accounts on Twitter and 712 have had one or more active accounts on Facebook.”⁸ Between 2016 and 2020, members of Congress “increased their Twitter followers by 300% and tweeted 81% more often. Members of Congress also increased their Facebook followers by 50% and posted 48% more often.”⁹

Likewise, all state governors currently have official accounts on one or more social media sites, and at least 10 states have adopted social media policies to guide officials in using social media to interact with their constituents.¹⁰ Some state legislators are prolific on social media; one Arizona state senator, Senator David Livingston, tweeted over 21,000 times in an eight-month period.¹¹

Public engagement has also increased. “The average number of followers for each congressional social media account has grown from roughly 15,000 followers per member of Congress in 2016, to an average of 36,878 followers on Twitter and 27,605 followers on Facebook in 2020. On congresspersons’ Twitter accounts, the average

8. Pew Research Center, *The Congressional Social Media Landscape*, n.5 (July 16, 2020), <https://www.pewresearch.org/internet/2020/07/16/1-the-congressional-social-media-landscape/#fn-26093-5>.

9. Clare R. Norins & Mark L. Bailey, *Campbell v. Reisch: The Dangers of the Campaign Loophole in Social-Media-Blocking Litigation*, 25 U. Pa. J. Const. L. 146, 153 (2023).

10. *Id.*

11. Stef W. Kight, *By the Numbers: Media Masters*, Axios (Oct. 20, 2021), <https://www.axios.com/2021/10/21/social-media-twitter-state-legislator-politicians>.

number of user reactions per post has grown from only six per post in 2016 to [75] per post in 2020. On Facebook, the average number of reactions per post has grown from 66 per post in 2016 to 111 per post in 2020.”¹²

B. Government Officials Use Individual Social Media Accounts, and Often Multiple Ones, in Furtherance of a Wide Range of Their Official Duties

Public officials commonly use individual social media accounts, both nominally “personal” and official, to conduct government business or in furtherance of their official duties. And members of the public seamlessly interact with these accounts alongside the social media accounts of government agencies and public offices. For the public, there is no material difference in the interactions with these various accounts when they are used for government purposes. And sometimes reaching public officials through their nominally “personal” accounts is a more effective way to advocate for policy changes.¹³

Like everyone else who switches jobs, officials frequently use their previously non-governmental accounts for government business because the switch from one account to another is burdensome and typically means the loss of existing followers, often in substantial numbers.

12. Norins & Bailey, *supra* n.9, at 153-54.

13. JoAnne Sweeny, *LOL No One Likes You: Protecting Critical Comments on Government Officials’ School Media Posts Under the Right to Petition*, 2018 Wis. L. Rev. 73, 103 (2018) (“there is substantial evidence that Texas Governor Greg Abbott’s personal Twitter account is a secret and effective way to reach the Governor to advocate for policy changes or ask for favors”).

As a result, officials tend to have more followers on those original accounts than on their new institutional ones.¹⁴

There are many examples of public officials—particularly elected officials—using their pre-current-office social media accounts for government purposes. Most famously, former President Trump chose to continue using his @realDonaldTrump Twitter account, because it garnered more followers than the official @POTUS Twitter account.¹⁵ But Trump is not exceptional. When John Kerry became Secretary of State in 2013, he inherited and used the handle @StateDept.¹⁶ But soon after he began promoting U.S. diplomatic policy through the handle @JohnKerry instead.¹⁷ Kamala Harris has used the same YouTube account to post videos and receive comments in her various offices of California attorney general, senator, and now vice president.¹⁸ Now, she regularly tweets from @KamalaHarris

14. Arthur Mickoleit, *Social Media Use By Governments*, OECD Working Paper on Public Governance No. 26, 2, 19-21 (Dec. 22, 2014), https://www.oecd-ilibrary.org/governance/social-media-use-by-governments_5jxrcmghmk0s-en.

15. Julia Fair, *Trump Now Twitter's Most Followed World Leader*, USA Today (Oct. 4, 2017), <https://www.usatoday.com/story/news/politics/onpolitics/2017/10/04/trump-now-twiters-most-followed-world-leader/732753001/>.

16. @StateDept, Twitter (Feb. 4, 2013, 6:09 AM), <https://twitter.com/statedept/status/298433014776623104>.

17. Nahal Toosi, *Nikki Haley's Twitter Account Raises Protocol Concerns*, Politico (May 20, 2018), <https://www.politico.com/story/2018/05/20/nikki-haley-personal-twitter-account-597279>.

18. @kamalaharris, YouTube, <https://www.youtube.com/@kamalaharris/videos>.

about public policy even though her vice-presidential Twitter account is @VP.¹⁹ Senator Cory Booker has used @CoryBooker since 2008 when he was Mayor of Newark, New Jersey, long before he ran for Senate in 2013.²⁰ Texas Governor Greg Abbott frequently uses both @GovAbbott and @GregAbbott_TX accounts, though the former has far more followers.²¹

19. @KamalaHarris, Twitter, <https://twitter.com/KamalaHarris>; @VP, Twitter, <https://twitter.com/VP>.

20. @CoryBooker, Twitter, <https://twitter.com/CoryBooker>.

21. @GovAbbott, Twitter (June 15, 2023, 1:38 PM), <https://twitter.com/GovAbbott/status/1669444325262999552>; @GregAbbott_TX, Twitter (June 15, 2023, 1:32 PM), https://twitter.com/GregAbbott_TX/status/1669442819897937935.



Gov. Greg Abbott ✓
@GovAbbott



I signed a law in 2021 to stop biological boys competing in girls' sports at the K-12 level.

Today, we expanded that protection to women's collegiate sports.

I thank Rep. Swanson & Sen. Middleton for bringing the Save Women's Sports Act to my desk.

bit.ly/SwSTx6



1:38 PM · Jun 15, 2023 · 103.3K Views

357 Retweets 47 Quotes 2,611 Likes 10 Bookmarks



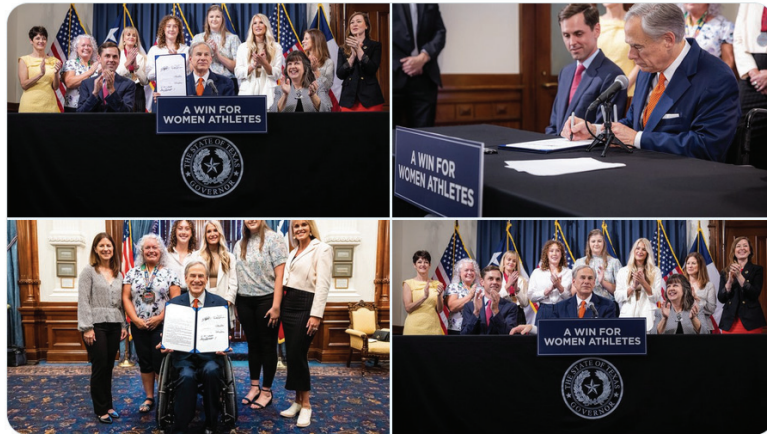
Greg Abbott 
@GregAbbott_TX



Collegiate sports help young women thrive, learn valuable life skills, & achieve their dreams.

Allowing biological men to compete against them threatens this pathway for young women to succeed.

Today, I signed the Save Women's Sports Act to safeguard women's collegiate sports.

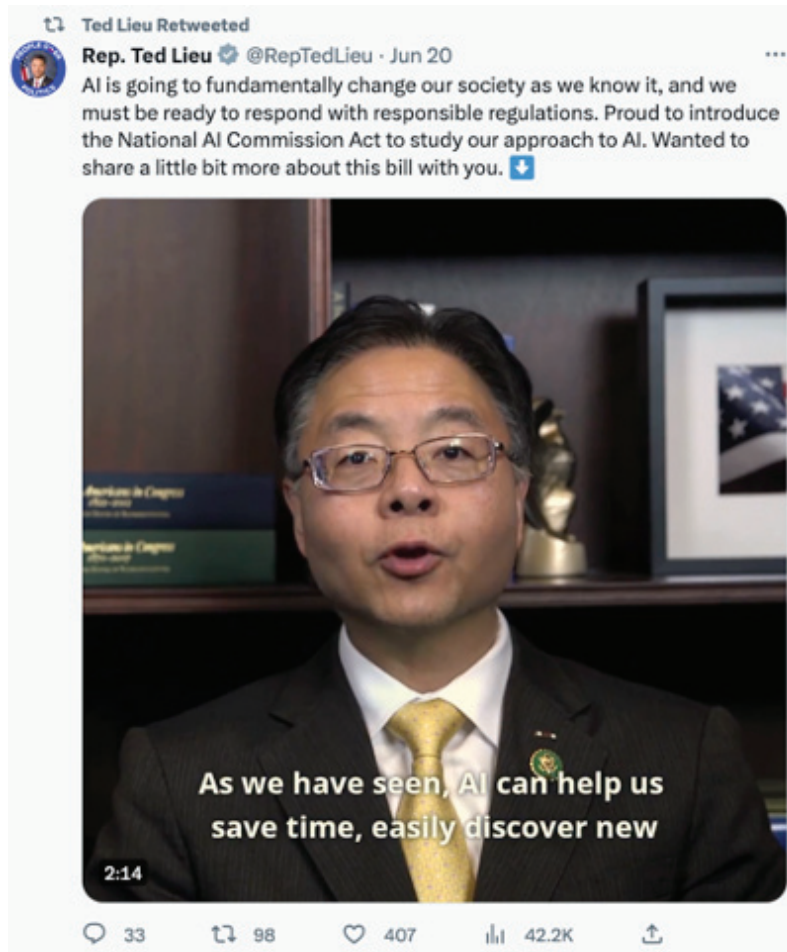


1:32 PM · Jun 15, 2023 · 85.8K Views

230 Retweets 34 Quotes 1,620 Likes 7 Bookmarks

And Representative Ted Lieu recently used one of his accounts (@tedlieu) to retweet another (@RepTedLieu).²²

22. @TedLieu, Twitter (June 20, 2023, 7:31 AM), <https://twitter.com/RepTedLieu/status/1671163869350498310>.



As the following examples demonstrate, whether the social media account is nominally “official” or “personal” or something else is often both functionally irrelevant and imperceptible. Determining whether any social media accounts of public officials were used before an official was in office, or are ever used for other purposes, is often unknowable without an evidentiary hearing.

1. Policy Debates & Advocacy

Government officials commonly use their social media accounts, sometimes multiple ones, to make policy pronouncements, to engage in policy discussions with their colleagues, and to encourage constituents to take action.

For example, Representative Dan Crenshaw recently used his Facebook account (/RepDanCrenshaw) to boost a video from his YouTube channel (@RepDanCrenshaw) that featured him speaking in a congressional committee, advocating to block government grants to hospitals that provide gender-affirming treatments to minors.²³



23. Rep. Dan Crenshaw, Facebook (June 14, 2023, 1:58 PM), <https://www.facebook.com/RepDanCrenshaw/posts/835784787916086>.

Representative Crenshaw's YouTube account has over 107,000 followers and the video was viewed approximately 19,000 times over a week and commented on 150 times.²⁴

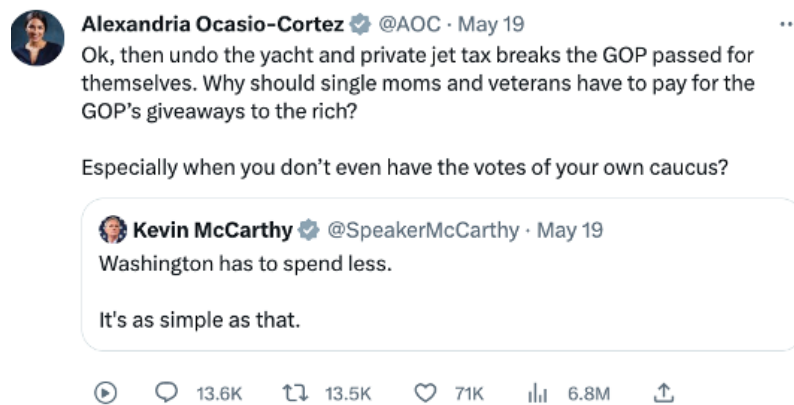
Senator Jon Ossoff last year used his Twitter account (@ossoff) to urge readers to sign a petition in support of a ban on stock trading by members of Congress.²⁵



24. Rep. Dan Crenshaw, *Dan Crenshaw Speaks on Blocking Program Funding for Hospitals Providing Gender Transition for Minors*, YouTube (June 14, 2023), <https://www.youtube.com/watch?v=GFA86SyUa7w> (last accessed June 26, 2023).

25. @ossoff, Twitter (Jan. 26, 2022, 4:59 PM), <https://twitter.com/ossoff/status/1486504158769389571>.

Government officials also commonly use their social media accounts to debate policy issues with each other, such as in this Twitter exchange between Representative Alexandria Ocasio-Cortez (@AOC) and Speaker Kevin McCarthy (@SpeakerMcCarthy) on federal taxes and spending.²⁶



26. @AOC, Twitter (May 19, 2023, 1:07 PM), <https://twitter.com/AOC/status/1659651986944303118>.

Similarly, then-Houston Chief of Police (@ArtAcevedo) engaged with Senator John Cornyn (@JohnCornyn) on gun control.²⁷



Legislators commonly extend public debate in their chambers to social media forums. In New York, debates over funding and employee salaries between the legislature and the governor's office took place on Twitter.²⁸ In Iowa, a state senator took to Twitter to express his frustration

27. @ArtArcevedo, Twitter (Sept. 15, 2018, 5:04 PM), <https://twitter.com/ArtAcevedo/status/1041115660313608192>.

28. Tom Precious, *Cuomo and Lawmakers Start New Year on Nasty Note, Via Twitter and Speeches*, Buffalo News (Jan. 4, 2017), https://buffalonews.com/news/local/cuomo-and-lawmakers-start-new-year-on-nasty-note-via-twitter-and-speeches/article_211feb38-4bdf-5dad-9f66-c76fcc6c8f9e.html.

with an extended chamber debate about child labor laws.²⁹ And in Georgia, representatives engaged in heated debate over the removal of confederate monuments.³⁰

2. Public Health & Safety

Government officials also employ social media to disseminate critical public safety information in the face of natural disasters and man-made crises.

For example, in April 2023, when deadly tornadoes tore through the Midwest, Arkansas Governor Sarah Huckabee Sanders used her individual Twitter account (@SarahHuckabee), which she has had since 2007, to tell survivors where they could find temporary shelter and other disaster resources from FEMA.³¹

29. KCCI-TV Des Moines, *Iowa Senate Debate Over Child Labor Laws Goes Deep Into the Night* (April 18, 2023), <https://www.kcci.com/article/child-labor-laws-debate-goes-deep-into-the-night-iowa-senate/43629755>.

30. Greg Bluestein, *Georgia Lawmaker: Talk of Ditching Confederate Statues Could Cause Democrat to 'Go Missing'*, *Atlanta Journal-Constitution* (Aug. 29, 2017), <https://www.ajc.com/blog/politics/georgia-lawmaker-talk-ditching-confederate-statues-could-cause-democrat-missing/wI2hOiNAe2LLD59qEpNrJ/>.

31. @SarahHuckabee, Twitter (April 11, 2023, 6:41 PM), <https://twitter.com/SarahHuckabee/status/1645965414919290890>.



Sarah Huckabee Sanders @SarahHuckabee · Apr 11

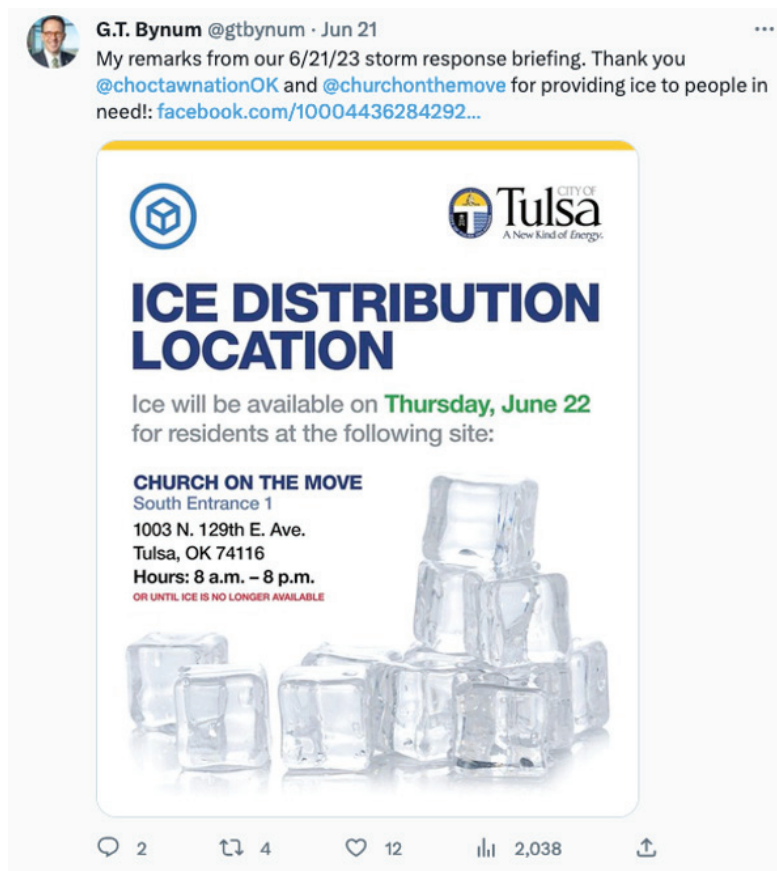


FEMA now has a fixed facility in Wynne at Bridgeview Baptist Church. Visit [HelpArkansas.com](https://www.helparkansas.com) for resources and ways to help.



1,810 417 1,976 215.4K

Tulsa Mayor Ted Bynum used his individual Twitter account (@gtbynum) to provide information about ice distribution following severe thunderstorms in June 2023,³² and also to link to his official remarks as republished on his Facebook page.³³



32. @gtbynum, Twitter (June 21, 2023, 3:50 PM), <https://twitter.com/gtbynum/status/1671651712099291138>.

33. Mayor GT Bynum, Facebook (June 21, 2023, 3:45 PM), <https://www.facebook.com/100044362842922/posts/pfbid021sQeXHwFAwZSuBCy828tjXtq151WmyD1mm36RbLtkvz0j2x6CvMFeDiNdyUKr1XLL>.

In June 2023, New York Mayor Eric Adams used both his office's Twitter account (@NYCMayorsOffice) and his own Facebook page (/NYCMayor) to offer safety advice when the city's air quality reached dangerous levels due to wildfire smoke.³⁴



34. @NYCMayorsOffice, Twitter (June 7, 2023, 6:59 AM), <https://twitter.com/NYCMayorsOffice/status/1666444774675566596>; Mayor Eric Adams, Facebook (June 8, 2023, 12:24 PM), <https://www.facebook.com/photo.php?fbid=814716353342127>.

 **Mayor Eric Adams** 
June 8 at 12:24 PM · 

The Air Quality Health Advisory has now been extended until 11:59 pm Friday, June 9.
Please continue to limit your outdoor activities and mask up.
More updates: <http://on.nyc.gov/airqualityNYC>



Reduce Your Smoke Exposure

- ✓ Stay inside with doors & windows closed
- ✓ Use an air purifier if available
- ✓ If you must be outside, wear an N95 mask
- ✓ Be aware of changing smoke conditions

   71

152 comments 16 shares

 Like  Comment  Share 

Mayor Adams also used his individual Twitter account (@NYCMayor), rather than the “Mayor’s Office” account, to retweet a tweet from the City’s Department of Health & Mental Hygiene about air quality.³⁵



Mayor Eric Adams ✓
@NYCMayor



🚨 Update on air quality conditions from @nycHealthy:

nychealthy ✓ @nycHealthy · Jun 11

UPDATE: Air quality conditions in NYC remain unhealthy for people with sensitivities on Sunday, June 11. Children, older adults and people with breathing or heart problems should limit time outdoors.

See real-time air quality: on.nyc.gov/airquality

UPDATE: Air quality conditions have improved in NYC on Friday, June 9th, but may still be unhealthy for some people.

Air quality is expected to improve over the weekend, but may vary. If the air quality index worsens to above 150, all New Yorkers should limit outdoor activities.

People with heart or breathing problems and older adults may still be sensitive to current conditions. These people should limit time outdoors and should avoid prolonged and intense outdoor activities.

- Listen to your body – if your eyes are watering or your throat is sore or you are out of breath – go indoors.
- Call 911 if you’re having trouble breathing.

For children and families:

- Children with asthma are especially sensitive to poor air quality and should limit time outdoors
- Families should consider the amount of time children spend outdoors this weekend and take more frequent breaks indoors if needed
- Watch for watery eyes, sore throats and shortness of breath. If a child is experiencing these conditions, bring them indoors. Call 911 if they are having trouble breathing.

N95 masks are available for pick up at local police precincts and firehouses citywide. Wearing a high quality mask, such as an N95, can reduce your exposure to harmful pollutants.

9:09 AM · Jun 11, 2023 · 32.1K Views

9 Retweets 3 Quotes 36 Likes

Officials widely used their social media accounts to disseminate key public health resources and policy updates throughout the COVID-19 pandemic.

35. @NYCMayor, Twitter (June 11, 2023, 9:09 AM), <https://twitter.com/NYCMayor/status/1667927035946074112>.

In August 2021, soon after the first vaccines became available to the public, Wisconsin Governor Tony Evers used Twitter (@GovEvers) to widely publicize a vaccine incentive program.³⁶



ICYMI: This week we announced that any Wisconsinite who gets their first #COVID19 vaccine dose between August 20th and September 6th will be eligible to receive a \$100 gift card! For more info, click here 100.wisconsin.gov



3:03 PM · Aug 29, 2021

55 Retweets 5 Quotes 104 Likes

36. @GovEvers, Twitter (Aug. 29, 2021, 3:03 PM), <https://twitter.com/GovEvers/status/1432101689822167041>.

Madison, Wisconsin Mayor Satya Rhodes-Conway used two Twitter accounts (@src2 and @MayorofMadison) to share COVID-19-related policy stances and city resources with her constituents.³⁷



Satya Rhodes-Conway
@src2



I stand with [@usmayors](#) calling on Congress to make federal support available to all cities. The response on the ground to [#COVID19](#) is being led by local officials who are devoting every available resource as revenues are vanishing. [@tammybaldwin](#) [@RonJohnsonWI](#) [@repmarkpocan](#)

2:56 PM · Apr 18, 2020

3 Retweets 16 Likes

37. @src2, Twitter (April 18, 2020, 2:56 PM), <https://twitter.com/src2/status/1251630792041738240>; @MayorOfMadison, Twitter (June 14, 2023, 4:01 PM), <https://twitter.com/MayorOfMadison/status/1669117825586286594>.



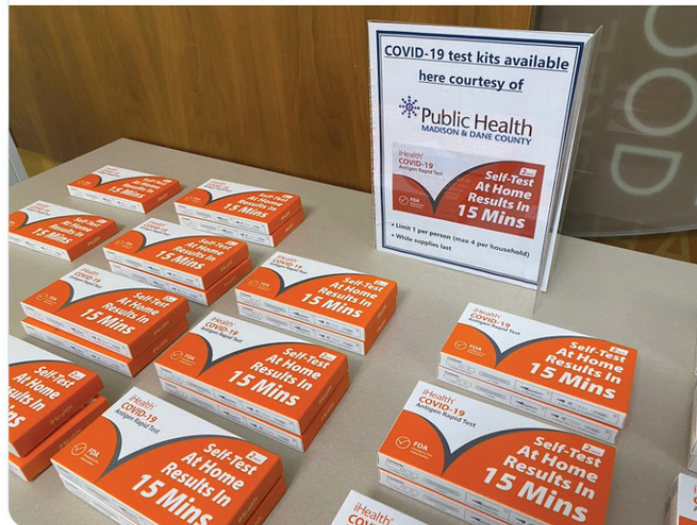
Mayor of Madison @MayorOfMadison · Jun 14

Covid is still out there folks, remember you can get a free Covid test kit to take home and a good book in Madison public libraries!

@publichealthmdc @PublicHealthMDC · Jun 14

Running low on COVID tests? Stop by your closest public library! Pick one up for your family to have on hand in case you need it. Just call ahead to check on supply.

Find a library near you: bit.ly/43EdwxO



3 8 1,006

3. Interacting With Constituents

Officials' "[s]ocial media accounts are used both to broadcast information and to gather feedback from users," and constituents "use social media pages to express opinions, concerns, complaints and appreciation."³⁸ These

38. United Nations, *E-Government Survey 2022: The Future of Digital Government*, 106 (2022), <https://publicadministration.un.org/egovkb/en-us/Reports/UN-E-Government-Survey-2022>.

forums by their nature, and often by default, are open to large segments of the population—potentially every person with access to the internet around the world—and, unlike physical spaces, are not constrained by size, capacity, or time.

During Hurricane Harvey in 2017, Houston Mayor Sylvester Turner conversed with his constituents on Facebook not only to deliver but also to receive important information from constituents, in one case ensuring that emergency medical services could attend to a baby whose breathing machine would soon lose power.³⁹

39. Mayor Sylvester Turner, Facebook (Aug. 27, 2017), <https://www.facebook.com/houstonmayor/posts/10155313481337535>.



Mayor Sylvester Turner ✓

August 27, 2017 · 🌐

911 services are at capacity. If you can shelter in place do so, a few inches in your home is not imminent danger. Only call if in you're in imminent danger.

👍🙄🙄 608

133 Comments 607 Shares

↪ Share



Sandra Nunez Lechuga There is a baby on a ventilator on the last battery they've been waiting to be rescued. Address 10529 Aves st Houston 77034 please help them before they lose their baby!

👍🙄🙄 8

2y

^ Hide 13 Replies

Most Relevant is selected, so some replies may have been filtered out.



Sandra Nunez Lechuga Christina Linza Itkonen no one is getting to them.. I'm simply trying to help. I would post the picture the family posted but unable to post

👍 1

2y



Mayor Sylvester Turner ✓ Christina Linza Itkonen this is a false rumor

👍🙄 16

2y · Edited



Mayor Sylvester Turner ✓ Sandra Nunez Lechuga, we've submitted to dispatch - ^M.R.D.\

👍 5

2y

And Representative Elise Stefanik used her Twitter account (@EliseStefanik) to solicit legislative and investigative suggestions from constituents.⁴⁰



Elise Stefanik ✓
@EliseStefanik



Do you have any advice for me? I want to hear from you about what fights you think I should be taking on in Congress. Republicans are in the MAJORITY, and we have a HUGE opportunity to take on the Left. Let me know what bills you want passed and what you want us to investigate.



What advice would you give to Elise?

As these interactions demonstrate, even though social media serves a widespread audience, the capabilities for tailored and direct responses are remarkable. On a single Tweet from a public official, citizens can respond directly and comment on policy announcements, other lawmakers

40. @EliseStefanik, Twitter (April 10, 2023, 11:43 AM), <https://twitter.com/EliseStefanik/status/1645497624420818944>.

can respond and comment on the policy, and citizens can then respond to those lawmakers' comments.

Elected officials also use social media platforms to create virtual spaces that function akin to traditional in-person “town halls.”

For example, in 2011, President Barack Obama hosted a first-of-its-kind Twitter town hall where he answered questions tweeted to him with the hashtag #AskObama about jobs, the economy, education, and more.⁴¹ Former Cleveland Mayor Frank G. Jackson held a Twitter town hall in 2017, the video for which was subsequently posted to YouTube.⁴²

Twitter also offers Spaces, a feature that allows people to organize live audio conversations.⁴³ Twitter users can also create polls, which are popular among elected officials.⁴⁴ For example, an Oregon state representative

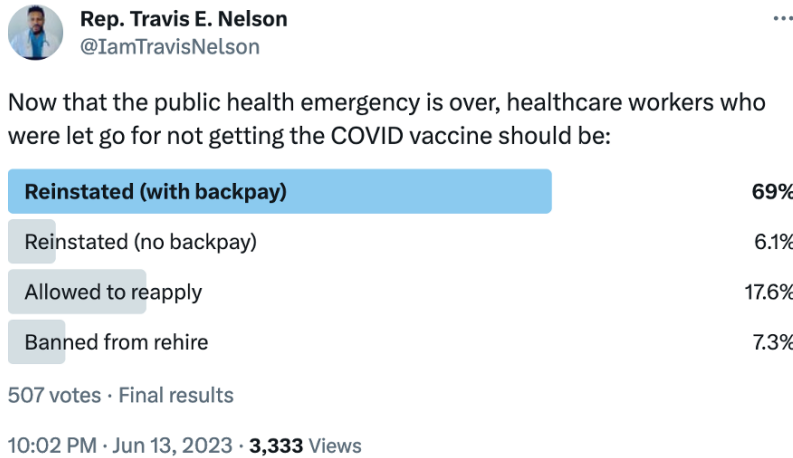
41. Chris Cillizza, *Live-Blogging the President's Twitter Town Hall (#askobama)*, Washington Post (July 6, 2011), <http://wapo.st/mSZyvG>.

42. City of Cleveland, *Twitter Town Hall With Mayor Frank G. Jackson*, YouTube (Aug. 30, 2017), <https://www.youtube.com/watch?v=AeAUr3Yx1h4>.

43. Twitter Help Center, *About Twitter Spaces*, <https://help.twitter.com/en/using-twitter/spaces>. See also Public Sector Marketing Institute, *Episode 15 – How to Use Twitter Spaces for Government and Public Sector* (May 13, 2021), <https://publicsectormarketingpros.com/twitter-spaces/> (stating that Twitter Spaces can be used as a “place to develop public trust” and to solicit “public feedback”).

44. Twitter Help Center, *About Twitter Polls*, <https://help.twitter.com/en/using-twitter/twitter-polls>.

using the handle @IamTravisNelson created a Twitter poll related to the COVID-19 vaccine.⁴⁵



15 Retweets 1 Quote 8 Likes 1 Bookmark

Facebook has a “Town Hall” feature, which elected officials can opt in to, that lets people find, follow, and call or email their representatives through the platform.⁴⁶ Government officials often also use Facebook Live to broadcast events, which people can watch and comment on in real time.⁴⁷ For example, Alaska Governor Mike

45. @IamTravisNelson, Twitter (June 13, 2023, 10:02 PM), <https://twitter.com/IamTravisNelson/status/1668846327177048064>.

46. Sarah Perez, *Facebook Officially Launches Town Hall for Contacting Government Reps, Adds Local Election Reminders*, TechCrunch (March 27, 2017), <https://techcrunch.com/2017/03/27/facebook-officially-launches-town-hall-for-contacting-government-reps-adds-local-election-reminders>. See also Facebook, *Town Hall*, <https://www.facebook.com/townhall>.

47. Meta, *Facebook Live*, <https://www.facebook.com/formedia/tools/facebook-live>.

Dunleavy held a Facebook town hall in 2019 using Facebook Live.⁴⁸

Online engagement with public officials has proven beneficial. Social scientists have found that online versions of town halls are more representative of the voting populace than their physical analogs.⁴⁹ Additionally, social media is associated with a feeling of greater political empowerment for the less educated,⁵⁰ and is associated with greater civic engagement and political activity by young people.⁵¹

48. Gov. Mike Dunleavy, Facebook (May 21, 2019), <https://www.facebook.com/GovDunleavy/videos/live-town-hall-meeting-i-hope-you-can-join-me-today-friday-may-31st-at-noon-for-614354619039103/>.

49. Tess Eyirch, *The Future of the Town Hall is Online*, UC Riverside News (Oct. 1, 2018), <https://news.ucr.edu/articles/2018/10/01/future-town-hall-online>.

50. Fumiko Sasaki, *Does Internet Use Provide a Deeper Sense of Political Empowerment to the Less Educated?*, *Information, Communication & Society*, 20:10, 1460 (2017), <https://www.tandfonline.com/doi/full/10.1080/1369118X.2016.1229005>.

51. Pew Research Center, *Civic Engagement in the Digital Age* (April 25, 2013), <https://www.pewresearch.org/internet/2013/04/25/civic-engagement-in-the-digital-age/> (“Political engagement on social networking sites is especially commonplace among the youngest Americans, as two-thirds (67%) of all 18-24 year olds (and nearly three quarters of those young adults who use social networking sites) engaged in some sort of social network-related political activity in the 12 months preceding our survey.”).

C. Government Agencies Widely Use Social Media to Communicate to the Public

Like individual officials, government agencies all over the country—indeed, all over the world—use social media platforms to disseminate important information to and interact with the public, all in a rapid and freely accessible manner. To users, whether they are interacting with an individual official, as in the examples above, or an agency, may be of little significance.

The use of social media to perform agency functions continues to grow globally. In 2018, 177 out of 193 U.N. member states (roughly 92%) included social media portals on their national websites.⁵² In 2020, 79% of city portals globally provided links to social media networks.⁵³ By 2022, 90% of respondent cities “actively” used social media “to interact with residents and engage them in e-government activities.”⁵⁴ This includes using social media “to inform the public about meetings and consultations, live-stream press conferences, invite users to public engagements and infrastructure inaugurations, issue public announcements, and answer queries.”⁵⁵ But even as far back as 2014, an OECD report recognized the power and potential of social

52. United Nations, *E-Government Survey 2018: Gearing E-Government to Support Transformation Towards Sustainable and Resilient Societies*, 119, Fig. 5.29 (2018), <https://publicadministration.un.org/egovkb/en-us/Reports/UN-E-Government-Survey-2018>.

53. United Nations, *E-Government Survey 2020: Digital Government in the Decade of Action for Sustainable Development*, 98 (2020), <https://publicadministration.un.org/egovkb/en-us/Reports/UN-E-Government-Survey-2020>.

54. *E-Government Survey 2022*, *supra* n.38, at 106.

55. *Id.*

media to “drive innovation in public service delivery and government operations.”⁵⁶

As of 2020, Federal agencies and sub-agencies registered “more than 8,200 third-party accounts and 350 mobile apps from across the federal government” with the U.S. Digital Registry.⁵⁷

In the last decade, as the use of social media has grown generally—as of 2022, 72 percent of Americans use social media⁵⁸—the political use of social media has increasingly factored in U.S. federal and state elections and legislative processes as well as the ways that government agencies at all levels offer services to the public.⁵⁹

Social media has proved to be an efficient way for government to communicate vital information to the public.⁶⁰

56. Mickoleit, *supra* n.14, at 4, 40-51.

57. U.S. General Services Administration, Digital.gov, *U.S. Digital Registry* (June 20, 2016; last updated Feb. 15, 2020), <https://digital.gov/2016/06/20/u-s-digital-registry/>.

58. Pew Research Center, *Large Increase in Social Media Use Compared With a Decade Ago* (Dec. 5, 2022), https://www.pewresearch.org/global/2022/12/06/social-media-seen-as-mostly-good-for-democracy-across-many-nations-but-u-s-is-a-major-outlier/pg_2022-12-06_online-civic-engagement_0-06/.

59. *See, e.g.*, National Conference of State Legislatures, *Legislative Social Media Sites*, <https://www.ncsl.org/about-state-legislatures/legislative-social-media-sites> (listing the websites and social media pages of state legislative bodies).

60. Some social media platforms are specifically designed for such purposes. *See, e.g.*, Everbridge Nixle, *About Us*, <https://www.nixle.com/about-us/>; CivicPlus, *Mass Notification System*, <https://www.civicplus.com/civicroady/mass-notification-system>; Colin Atagi,

For example, the U.S. Census Bureau used its Twitter account (@uscensusbureau) to promote widespread participation in the 2020 Census by encouraging followers to use a hashtag, #2020Census, and to update their social media profile pictures with a census graphic or to otherwise share it with their networks.⁶¹

Santa Rosa Shifts to CivicReady, No Longer Using Nixle, Press Democrat (Dec. 15, 2022), <https://www.pressdemocrat.com/article/news/santa-rosa-shifts-to-civicready-no-longer-using-nixle/>.

61. @uscensusbureau, Twitter (April 1, 2020, 5:00 AM), <https://twitter.com/uscensusbureau/status/1245320008504430592>.

 **U.S. Census Bureau**  ...
@uscensusbureau

Today is Census Day! Help us spread the word about the importance of the [#2020Census](#). Make this image your profile picture or post it on your timeline and make sure to tell your friends to complete the census today at [2020CENSUS.GOV!](#)



5:00 AM · Apr 1, 2020

983 Retweets **361** Quotes **850** Likes **8** Bookmarks

- 
- 
- 
- 
- 

The State Department's social media accounts routinely share travel advisories (including just prior to Russia's invasion of Ukraine), information about official visits with foreign dignitaries, and the U.S. position on world events.⁶²



62. U.S. Department of State, Facebook (Feb. 14, 2022), <https://www.facebook.com/statedept/videos/1342824042847417>.

Notably, the Administrative Office of the U.S. Courts maintains an active social media presence on behalf of the federal judiciary.⁶³



The same is seen at every level of government. Local police departments have found social media especially useful for updating the public with rapidly developing safety information.

The Boston Police Department updated the city in the aftermath of the 2013 Boston Marathon bombing, including telling residents to shelter in place and then alerting them when the bombing suspect was captured.⁶⁴

63. @uscourts, Twitter (May 22, 2023, 11:48 AM), <https://twitter.com/uscourts/status/1660719173394202625>.

64. @bostonpolice, Twitter (April 19, 2013, 5:58 PM), <https://twitter.com/bostonpolice/status/325413032110989313>.

**Boston Police Dept.** ✓

@bostonpolice



CAPTURED!!! The hunt is over. The search is done. The terror is over. And justice has won. Suspect in custody.

5:58 PM · Apr 19, 2013

101.9K Retweets 110 Quotes 36.1K Likes 91 Bookmarks

Similarly, the Nashville Fire Department used Twitter to give the community real-time updates after the March 2023 mass shooting at an elementary school, including providing live instructions as conditions progressed for parents seeking to reunite with their children.⁶⁵

**Nashville Fire Dept** ✓ @NashvilleFD · Mar 27

We are responding to an active aggressor at 33 Burton Hills Blvd Covenant School.

We can confirm we have multiple patients.

Parents coming to the school should go to 20 Burton Hills at this time. this is an active scene.

458 1,232 1,565 1.3M

**Nashville Fire Dept** ✓ @NashvilleFD · Mar 27

A reunification area has been established at 2100 Woodmont Blvd (Woodmont Baptist Church) for parents to meet their children who attend The Covenant School at 33 Burton Hills Blvd.

193 246 452 620.9K

65. @NashvilleFD, Twitter (Mar. 27, 2023, 8:39 AM), <https://twitter.com/NashvilleFD/status/1640377987685130244>; @NashvilleFD, Twitter (Mar. 27, 2023, 8:54 AM), <https://twitter.com/NashvilleFD/status/1640381880968118273>.

In a mass shooting at a videogame tournament in 2018, the Jacksonville, Florida Sheriff's Office not only used Twitter to update the public on the status of the investigation, but also to communicate directly with victims so that the police department could rescue them from their hiding spots.⁶⁶



66. @JSOPIO, Twitter (Aug. 26, 2018, 11:57 AM), <https://twitter.com/JSOPIO/status/1033790582894878725>.

D. Government Agencies Use Social Media to Interact With the Public

Like individual public officials, federal, state, and local governments commonly operate social media accounts expressly to interact with the public.

As demonstrated above, the benefits of a direct engagement forum to both government actors and the public are readily apparent in the emergency services context. A 2010 survey by the American Red Cross found that 69% of respondents expected emergency response agencies to regularly monitor social media “so they can respond promptly to requests for help posted there.”⁶⁷ During the COVID-19 pandemic, although much misinformation swirled online, government social media channels were critical to disseminating up-to-date information based on the latest science.⁶⁸ The Centers

67. Rutrell Yasin, *5 Ways to Use Social Media for Better Emergency Response*, GCN (Sept. 2, 2010), <https://gen.com/state-local/2010/09/5-ways-to-use-social-media-for-better-emergency-response/294176/>. See also Anita Saroj & Sukomal Pal, *Use of Social Media in Crisis Management: A Survey*, Intern'l Journal of Disaster Risk Reduction, Vol. 48 (Sept. 2020) (stating that Twitter is preferred during disasters “due to its simple usability, ability to make a short and quick communication instantly and most importantly, easy access to the content through its APIs without privacy and/or authorization issues”).

68. Raina M. Merchant & Nicole Lurie, *Social Media and Emergency Preparedness in Response to Novel Coronavirus*, JAMA Network (March 23, 2020), <https://jamanetwork.com/journals/jama/article-abstract/2763596> (“The Centers for Disease Control and Prevention, the World Health Organization (WHO), numerous journals, and other health care organizations are regularly posting guidance across a host of platforms.”).

for Disease Control and Prevention, for example, fielded questions from the public about COVID-19 vaccines.⁶⁹



Agencies commonly use social media to field and answer questions from the public. The Transportation Security Administration, for example, maintains a Twitter feed where individuals can submit questions about safety regulations for flying to, from, and within the United States by tweeting to the handle @AskTSA.⁷⁰

69. @BarbaraOBrien, Twitter (Jan. 25, 2023, 10:15 AM), <https://twitter.com/BarbaraOBrien/status/1618311574548287490>.

70. @AskTSA, Twitter (Feb. 24, 2020, 1:32 PM), <https://twitter.com/AskTSA/status/1232055745040076801>.



Like officials, agencies also conduct social media “town halls.” Nebraska City, Nebraska hosted a Twitter town hall in 2018, responding to questions submitted with the hashtag #NECityListens.⁷¹

71. Mike Peterson, *Nebraska City Plans Twitter Town Hall*, KMA Land (Sept. 12, 2018), http://www.kmaland.com/news/nebraska-city-plans-twitter-town-hall/article_c41f1c9a-b6c9-11e8-af27-b784b1a3676e.html. See also @JeffLollmann, Twitter (Sept. 13, 2018, 5:48 PM), https://twitter.com/Nebraska_City/status/1040402505971261440.



II. THE STATE ACTION ANALYSIS MUST FOCUS ON THE FUNCTION OF AN OFFICIAL'S SOCIAL MEDIA ACCOUNT

A. State Action Must Be Found When an Official Uses a Social Media Account to Perform Official Duties

Given that social media as a governance tool is now the rule, rather than the exception, it should make little difference that an official chooses to perform their duties using a nominally “personal” account rather than “official” account. State action must be found when the official is using their account in furtherance of their governmental duties, even if labeled otherwise. Other indicia of official

use, such as the account’s appearance, may also be pertinent to determining whether an official is using the account for governmental purposes.

The Sixth Circuit’s state action analysis as applied in *Lindke* is too narrow and does not reflect the highly common use of “personal” social media accounts for official purposes. The Sixth Circuit’s “state-official test” wrongheadedly focuses on the formalities of public office—the use of state funds, whether use of social media is an enumerated duty, whether the account is state property, and whether it is operated by supervised staff—rather than on what information is being conveyed and how the account is being used. The Sixth Circuit’s test is underinclusive—while the factors, if present, would certainly identify an official account, they do not identify all accounts being used to conduct the government’s business. As the examples above demonstrate, public officials often hold themselves out as public representatives and policymakers even when communicating through accounts that were not created using government resources or mandated by law. The Sixth Circuit’s test would allow many public officials who are using a nominally “personal” account in furtherance of their official duties to evade their First Amendment obligations.

The Ninth Circuit’s analysis, as applied in *O’Connor-Ratcliff*, analogizing to the question of when off-duty officials are nevertheless found to be doing on-duty work, is far better. *Garnier v. O’Connor-Ratcliff*, 41 F.4th 1158, 1170 (9th Cir. 2022). The court’s ultimate inquiry was, correctly, whether “the Trustees used their social media accounts as ‘an organ of official business.’” *Id.* at 1177 (quoting *Campbell v. Reisch*, 986 F.3d 822, 826

(8th Cir. 2021)). The court also appropriately considered the appearance of the social media accounts and their trappings of officialdom. *Id.*

Numerous courts have correctly focused on how the social media account is used in determining state action.

The Fourth Circuit relied on the account’s function in rejecting the claim by a public official—Phyllis Randall, Chair of the Loudon County, Virginia Board of Supervisors—that she operated a Facebook page in a “purely personal” capacity. *Davison v. Randall*, 912 F.3d 666, 679 (4th Cir. 2019). The court concluded that Randall’s “purportedly private actions” in running the Facebook page constituted official action because Randall used the page to further her duties as a municipal officer, including by providing information to the public about the Board’s official activities and soliciting input from the public on policy issues. *Id.* at 680.

The Second Circuit examined the totality of the circumstances and determined that President Trump used his pre-presidential Twitter profile, @RealDonaldTrump, in an official capacity because Trump “consistently used [the account] as an important tool of governance and executive outreach” since taking office, a finding supported by the fact that the account had “the trappings of an official, state-run account,” including Trump’s official title and photos of Trump engaged in official duties. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 231, 236 (2d Cir. 2019), *cert. granted, judgment vacated sub nom, Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021).

Lower courts have similarly given appropriately heavy weight to the use of social media in furtherance of one's official duties. In *One Wisconsin Now v. Kremer*, 354 F. Supp. 3d 940, 951–52 (W.D. Wis. 2019), the court looked at the totality of the circumstances and found two state legislators' social media accounts to reflect state action. The court further held that even though a third account lacked many of the external “trappings” of an official account, it nonetheless reflected state action because its “essential purpose and function” was “essentially the same” as the other two accounts: “to perform actual and apparent duties as state assemblyperson using the power and prestige of that office to communicate legislative matters and other issues with the public.” *Id.* at 952–53. And in *Felts v. Vollmer*, No. 4:20-CV-00821 JAR, 2022 WL 17546996, at *9 (E.D. Mo. Dec. 9, 2022), the court found state action because an alderman's Twitter account was used “as a tool of governance to further his duties as Aldermanic President.” *See also Biedermann v. Ehrhart*, No. 1:20-CV-01388-JPB, 2023 WL 2394557, at *3-9 (N.D. Ga. Mar. 7, 2023) (finding a substantial likelihood of success on the state action question because the state representative used her private Facebook account to communicate with her constituents and members of the public).

Truly *de minimis* use of an individual social media account to perform official duties may not amount to state action. In *Campbell v. Reisch*, 986 F.3d 822, 826 (8th Cir. 2021), the Eighth Circuit recognized that “a private account can turn into a governmental one if it becomes an organ of official business,” but the court found that a state representative's use of her social media account was not under the color of law because she “used it overwhelmingly” for non-governmental purposes; her official use was limited to “occasional stray messages.” *Id.* at 826-27.

However, courts must be careful in finding *de minimis* official use simply because the social media account had its origins as a campaign account. Public officials' duties to disclose and discuss their policy positions and actions with constituents may mirror campaign activity. But courts should not allow a "First Amendment work-around whereby public officials can exclude their critics with impunity so long as their social media account originated as, or at any point functioned as, a campaign tool."⁷² Courts "should instead resolve ambiguities about officials' post-election use of campaign-origin accounts in ways that protect private individuals' political speech and democratic engagement."⁷³

B. An Official's Use of Their Nominally "Personal" Social Media Account for Governmental Purposes Triggers Certain Duties to the Public as Their Use of Other Personal Services Does

That an individual entering public office takes on new responsibilities and faces new limitations if they continue to use their existing accounts or devices for government purposes is well accepted. In many contexts, public officials are required to keep their public and private lives largely separate. And candidates for federal office are required to segregate their personal, campaign, and office-holding activities.⁷⁴

72. Norins & Bailey, *supra* n.9, at 152.

73. *Id.*

74. See Federal Election Commission, *Personal Use*, <https://www.fec.gov/help-candidates-and-committees/making-disbursements/personal-use/>.

For example, in the analogous context of state open records laws, a federal court held that posts on nominally “personal” social media accounts were public records when they were made in connection with official government business. *Bear v. Escambia Cnty. Bd. of Cnty. Commissioners*, No. 3:19CV4424-MCR/HTC, 2022 WL 602266, at *3 (N.D. Fla. Mar. 1, 2022). State courts have similarly held that posts on nominally “personal” social media accounts are likely to be public records subject to disclosure when they are used to “conduct public business,” *West v. Puyallup*, 2 Wash. App. 2d 586, 594 (2018), or when they “prove, support, or evidence a transaction or activity of an agency” or are posted in the officeholder’s official capacity, *Penncrest Sch. Dist. v. Cagle*, 293 A.3d 783, 801–02 (Pa. Commw. Ct. 2023).

Similar obligations are imposed when private devices and email accounts are used for governmental purposes. For example, the D.C. Circuit in 2016 ordered the disclosure of emails concerning government business sent to and from the personal email account of the former head of the White House Office of Science and Technology Policy, finding that the use of a private email must not subvert citizens’ right to know what the department is up to. *Competitive Enterprise Inst. v. Office of Science & Tech. Policy*, 827 F.3d 145, 150 (D.C. Cir. 2016). *See also Brennan Ctr. v. U.S. Dep’t of Justice*, 377 F. Supp. 3d 428, 436 (S.D.N.Y. 2019) (holding that a search for responsive FOIA records that did not include searching personal email accounts was inadequate); *Democracy Forward Found. v. U.S. Dep’t of Commerce*, 474 F. Supp. 3d 69, 76 (D.D.C. 2020). State courts interpreting state records laws have ruled similarly. *See, e.g., Comstock Residents Ass’n v. Lyon County Bd. of Commissioners*, 134 Nev. 142, 149 (2018); *Toensing v. Att’y Gen. of Vt.*, 178 A.3d 1000, 1004 (Vt. 2017); *Nissen v. Pierce Cnty.*, 357 P.3d

45, 53 (Wash. 2015) (en banc); *City of San Jose v. Sup. Ct. of Santa Clara*, 389 P.3d 848, 861 (Cal. 2017).

III. A GOVERNMENT OFFICIAL INFRINGES THE FIRST AMENDMENT RIGHTS OF MEMBERS OF THE PUBLIC WHEN THEY BLOCK THEM OR DELETE THEIR COMMENTS; A TOO NARROW STATE ACTION TEST MAGNIFIES THIS INJURY

When a public official's use of their social media account constitutes state action, the public official can violate the First Amendment rights of members of the public in two ways by limiting their access to the official's social media account. For each, the First Amendment prevents the official from acting in response to the viewpoints expressed by individuals.

First, if the official generally allows the public to interact with the account, thereby creating a forum for private speech, whether public or nonpublic, the official can limit how an individual participates in the social media account's interactive spaces—where members of the public can comment, reply to, or signify with emojis responses to the official's posts. An official can prevent an individual from commenting at all. Or they can delete an individual's comments.

Second, even if the official has not created a forum for private speech by allowing reactions and comments, by blocking a user, an official can prevent or hinder the member of the public from receiving information from the social media account, thus denying them the First Amendment right to receive otherwise publicly available information.

For both, a too narrow state action test, such as that employed by the Sixth Circuit in *Lindke*, incentivizes public officials to use nominally “personal” social media accounts so they can block their constituents with impunity, denying them their First Amendment rights.

A. Members of the Public Have a First Amendment Right to Communicate With Government Officials Through Social Media When Such Channels Are Generally Open to the Public

Certain social media platforms not only allow government officials and agencies to communicate to the public, but through reply and comment features can be configured to allow the public to communicate back to the governmental entity and with each other, thus creating governmentally controlled forums for private speech. The social media platforms that federal, state, and local governments and officials most commonly use—such as Twitter, Facebook, YouTube and Instagram—can all be configured in a manner that creates such forums.⁷⁵ And, as the examples above demonstrate, both government officials and agencies and their constituents commonly use them for these democratizing purposes. *See Packingham v. North Carolina*, 582 U.S. 98, 104–05 (2017) (“[O]n Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner.”).

75. For example, compare the YouTube account of West Virginia Governor Jim Justice, which allows comments, Governor Jim Justice, *Gov. Justice holds administration update briefing – June 20, 2023*, YouTube (June 20, 2023), <https://www.youtube.com/watch?v=xh6TOoeOEqY>, with that of Kentucky Governor Andy Beshear, which does not, Governor Andy Beshear, *Gov. Andy Beshear Juneteenth Proclamation Signing Remarks-06.19.23*, YouTube (June 19, 2023), <https://www.youtube.com/watch?v=u3NOBNFSA8Y>.

Social media platforms that allow for the general public to comment upon governmental posts, communicate with officials, or otherwise participate in a public debate function like the paradigmatic public park. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1982) (identifying streets and parks as “quintessential public forums” for “assembly, communicating thoughts between citizens, and discussing public questions”) (citations omitted). Indeed, “[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear: it is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular.” *Packingham*, 582 U.S. at 104 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1977)) (explaining that a denial of access to social media was a significant abridgment of First Amendment rights given modern civic and social communication).

When the government creates such forums, it endows the public with some degree of First Amendment rights to speak in them.⁷⁶

Although what kind of forum is created will depend on how the official specifically operates it, *see Knight First Amendment Inst.*, 928 F.3d at 237; *Davison*, 912 F.3d at 687, viewpoint discrimination resulting in the targeted expulsion of individuals from these forums is barred regardless of whether the official maintains a

76. *See* Lyrissa B. Lidsky, *Government Sponsored Social Media and Public Forum Doctrine under the First Amendment: Perils and Pitfalls*, 19 Pub. Law. 2 (2011), <http://scholarship.law.ufl.edu/facultypub/626>.

public, limited or designated, or non-public forum. *Perry*, 460 U.S. at 46 (holding that even in a non-public forum, a speaker may not be excluded as “an effort to suppress expression merely because public officials oppose the speaker’s views”); *Knight First Amendment Inst.*, 928 F.3d at 237 (applying same principle to the interactive spaces of President Trump’s personal Twitter account).

Viewpoint discrimination in such forums plainly violates the First Amendment.

B. Members of the Public Have a First Amendment Right to Access the Social Media Feeds of Governmental Officials and Agencies

Given the widespread governmental use of social media, public access to relevant accounts is crucial. Since officials and agencies use social media to convey important public safety information, denying disfavored individuals access to those feeds endangers lives. And denying disfavored citizens access to policy announcements and debates hinders their ability to monitor the performance of their government officials and otherwise participate in their own governance.

For example, when the City of Vallejo, California blocked a resident from its official Twitter feed, he did not receive emergency information during a multi-day power shutdown.⁷⁷

77. @paperboy707, Twitter (Oct. 29, 2019, 12:45 PM), <https://twitter.com/paperboy707/status/1189267139359920128>.



DannyB
@paperboy707



Hey, so uhhh, if anyone knows someone at [@CityofVallejo](#) can they please unblock me so I can find out emergency information during the 4th day of a blackout. Thanks. Guess I said something, sometime that offended them.

12:45 PM · Oct 29, 2019

2 Retweets 4 Quotes 13 Likes

Such discriminatory denial of access violates the First Amendment even if the public official has not employed the interactive elements of their social media account to create a forum for private speech. When government events and communications are generally open to the public, including on social media, viewpoint-based exclusion of certain individuals is unconstitutional.

This requirement of equal access was the law before the advent of social media, when government officials and agencies communicated to the public through the press, which played a surrogate role in channeling information from the government to the public. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (explaining the press' surrogate role). Discrimination against a newspaper was held to be, in effect, discrimination against that newspaper's readers.

The Second Circuit thus held that the First Amendment rights of ABC News "and its viewing public" would "be impaired by their exclusion" from election night campaign rallies that were otherwise open to the news media. *Am. Broadcasting Co. v. Cuomo*, 570 F.2d 1080, 1083-84 (2d Cir. 1977). "[O]nce there is a public function, public

comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable.” *Id.* at 1083.

Likewise, the First Circuit made clear that no branch of government may “selectively exclude news media from access to information otherwise made available for public dissemination,” because “granting favorable treatment to certain members of the media ... allows the government to influence the type of substantive media coverage that public events will receive,” a practice that “is unquestionably at odds” with the First Amendment. *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986).

Courts around the country have applied the equal access rule in a wide variety of contexts. The rule was applied, for example, to enjoin the exclusion of a teachers’ union newspaper from the school board press room in Florida, *United Teachers of Dade v. Stierheim*, 213 F. Supp. 2d 1368, 1372-73 (S.D. Fla. 2002), and the exclusion of television stations being operated by management during a labor strike from city council meetings in Boston, *Westinghouse Broad. Co. v. Dukakis*, 409 F. Supp. 895, 896-97 (D. Mass. 1976). The equal access rule was also applied to ensure that an underground newspaper in Iowa had access to police records, *Quad-City Cmty. News Serv., Inc. v. Jebens*, 334 F. Supp. 8, 13 (S.D. Iowa 1971) (explaining that the information “has already been made available to the public insofar as other media’s reporters are the public’s representatives”), and to provide a reporter access to a press conference when the mayor of Honolulu sought to exclude the reporter for being “irresponsible, inaccurate, biased, and malicious”

in his reporting, *Borreca v. Fasi*, 369 F. Supp. 906, 907 (D. Haw. 1974).

The law should be no different now that government officials and agencies can communicate more directly with the public rather than through news media intermediaries. “The First Amendment guarantees a limited right of access to news regarding activities and operations of government. This right includes, at a minimum, a right of access to information made available to the public or made available generally to the press.” *Times-Picayune Pub. Corp. v. Lee*, Civ. A. No. 88–1325, 1988 WL 36491, at *9 (E.D. La. Apr. 15, 1988) (citations omitted).

The exclusion of individuals because of government disapproval of their viewpoints raises special concerns that officials could manipulate the public’s perception of them by disseminating their messages only through favorable filters. “Hand-picking those in attendance,” the *Borreca* court observed, “intensifies the manipulation.” 369 F. Supp. at 910.

That the public could ultimately get the information from other, less direct channels does not cure the constitutional defect. In *Southwestern Newspapers v. Curtis*, 584 S.W.2d 362, 363, 369 (Tex. Civ. App. 1979), the court enjoined a district attorney from requiring that reporters from a certain newspaper make appointments to gain access to official news sources, while he made those news sources available without appointments to all other media. As the court in *Westinghouse*, 409 F. Supp. at 896, found, access must be provided with “equal convenience.” See also *Stierheim*, 213 F. Supp. 2d at 1374 (finding First Amendment violation where reporters were “nevertheless

deprived of the same newsgathering environment and opportunities” afforded to the other news media).

Nor does it matter that the government shares the access decisions with a private actor. In *Telemundo of Los Angeles v. City of Los Angeles*, 283 F. Supp. 2d 1095, 1103 (C.D. Cal. 2003), the court found that a television station had a First Amendment right to cover the city’s official El Grito ceremony because the city and its nongovernmental co-presenters permitted another broadcaster to do so. That the city shared, and in some situations yielded, decision-making authority with a private civic organization and another broadcaster, did not diminish the city’s obligation to provide equal access. *See also Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975) (applying public forum doctrine to privately owned theater leased to the city).

The First Amendment thus protects access to governmental communications, ensuring that individuals are not denied speech alerting them in times of crisis, distributing necessary information about governmental services, and providing transparency about elected and appointed officials’ actions and statements.

CONCLUSION

Social media use by government officials around the world, at every level, is the rule now, not the exception. Government social media accounts are the predominant form of communication to and with the public. When assessing whether the use of social media is state action, courts must employ a functional test that looks first to how an account is used. Once state action is found, members of the public have a First Amendment right to participate in the forums that the government creates and to receive communications from the government that are generally available to the public. The First Amendment prohibits viewpoint discrimination in all analogous, pre-digital situations, and must do so in the context of social media used for governmental purposes.

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Respectfully submitted,

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