No. 20-197

IN THE
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

v.

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a public official who, with the aid of other government employees, uses a social media account as an extension of his office—by, for example, making official announcements, inviting members of the public to respond, and allowing members of the public to communicate with one another about matters relating to government—violates the First Amendment when he ejects members of the public from that forum based on viewpoint.

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INTRODUCTION

In this case, the Second Circuit correctly applied well-settled precedent to hold that Petitioners' act of blocking critics from the @realDonaldTrump Twitter account violated the First Amendment. The court's decision was based on undisputed record evidence showing that the @realDonaldTrump account functions as an official source of news and information about the government, and as a forum for speech by, to, and about the President. The account is akin to a digital town hall, with the President speaking from the podium at the front of the room, and citizens responding to him and engaging with one another about his statements. This Court has long held that government officials who eject individuals based on viewpoint from these kinds of open public meetings violate the First Amendment, and that is exactly what the President did here.

Petitioners' arguments for this Court's intervention are unpersuasive. There is no conflict among the lower courts, and Petitioners do not purport to identify one. At bottom, Petitioners ask this Court to correct what they see as an error in the Second Circuit's application of settled law to undisputed facts. But, as this Court has emphasized, error correction is not the Court's role.

In any event, there is no error to correct. Petitioners' argument that the Second Circuit should have examined the act of blocking the Individual Respondents[1] in

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[1] Respondents are seven individuals whom Petitioners blocked from the @realDonaldTrump account (the "Individual Respondents") and the Knight First Amendment Institute at Columbia University ("Knight Institute").

isolation—that is, divorced from any consideration of how the @realDonaldTrump account is used—simply misunderstands this Court's precedents, which emphasize that the state action inquiry must be context-sensitive. Their argument that the President's decision to block the Individual Respondents constituted government speech would transform the government speech doctrine into a broad immunity for government censorship. Petitioners' suggestion that this case involves important and novel questions about presidential power is an unconvincing effort to transform this case into something other than a dispute over censorship of political speech based on viewpoint.

Petitioners' remaining argument—that the Second Circuit's decision will chill the President and other public officials from using social media to communicate with their constituents—blinks reality. Notwithstanding the Second Circuit's decision, the President continues to use his Twitter account to communicate with the public about matters relating to government. Indeed, by Respondents' count, the President has tweeted more than 1,400 times just since Petitioners filed their petition.

This case does not warrant the Court's review. Respondents respectfully urge the Court to deny the petition.

STATEMENT

A. The Twitter platform

Twitter is a social media platform with more than 300 million active users worldwide, including some 70 million

in the United States. Pet. App. 125a–126a (J.S. ¶ 13).[2] Petitioners' description of Twitter, drawn largely from the parties' Joint Stipulation of Fact, explains the operation of the platform in some detail. Pet. 2–4. Two points are worth highlighting here.

First, the defining feature of social media platforms like Twitter is that they are interactive. Pet. App. 125a–126a (J.S. ¶ 13). Twitter's platform allows users to publish short messages, but the platform is distinctive because it also permits other users to republish those messages and to respond to them in a variety of ways. *Id.* at 131a–133a (J.S. ¶¶ 22–25). A user whose tweet generates replies will see the replies below his or her original tweet, with any replies-to-replies nested below the replies to which they respond. *Id.* at 131a (J.S. ¶ 22). The collection of replies and replies-to-replies is sometimes referred to as a "comment thread." *Id.* 131a (J.S. ¶ 23). Twitter is called a "social" media platform in large part because of comment threads, which reflect multiple overlapping conversations among and across groups of users. *Id.*

Second, a user who "blocks" another user prevents that other user from participating in the comment threads associated with the blocking user's account. *Id.* at 133a–135a (J.S. ¶¶ 28–31). A blocked user "cannot see or reply to the blocking user's tweets, view the blocking user's list of followers or followed accounts, or use the Twitter platform to search for the blocking user's tweets." *Id.* at 134a (J.S. ¶ 28). When a user blocks

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[2] "J.S." is the Joint Stipulation of Fact the parties agreed to in the district court.

another user from his or her Twitter account, the first user is effectively ejecting that second user from the forum.

B. The @realDonaldTrump account

President Trump created a verified Twitter account with the handle @realDonaldTrump in 2009. Pet. App. 135a (J.S. ¶ 32). The @realDonaldTrump "webpage," which is akin to a "home page" for an individual Twitter account, currently states that the account is registered to Donald J. Trump, "45th President of the United States of America, Washington, D.C." *Id.* at 136a (J.S. ¶ 35). Since President Trump took office, the header photographs on his account's webpage have been images associated with his official duties, showing him, for example, signing an executive order in the Oval Office, delivering official remarks at the White House and other locations, and meeting with the Pope, heads of state, and other foreign dignitaries. *Id.* at 136a (J.S. ¶ 35); *see also* J.S. Ex. B. at A139–A152, 2d Cir. ECF No. 52.

Although the President is the holder of the @realDonaldTrump account, White House aides regularly participate in the account's day-to-day operation. Mr. Scavino, who is Assistant to the President and Deputy Chief of Staff for Communications and who previously served as the White House Social Media Director, "assists President Trump in operating the . . . account, including by drafting and posting tweets." Pet. App. 138a (J.S. ¶ 39); *see also id.* at 125a (J.S. ¶ 12) ("Mr. Scavino posts messages on behalf of President Trump to @realDonaldTrump and other social media accounts, including @POTUS and @WhiteHouse."). President

Trump also sometimes dictates tweets to Mr. Scavino, and he and Mr. Scavino sometimes retweet the tweets of those who participate in comment threads associated with the account. *Id.* at 138a (J.S. ¶ 39). Other White House aides besides Mr. Scavino also sometimes suggest content for @realDonaldTrump tweets. *Id.* Mr. Scavino has administrative privileges to the @realDonaldTrump account, including the ability to tweet and retweet from the account, and to block and unblock users from the account. *Id.* at 125a (J.S. ¶ 12).

With the assistance of Mr. Scavino and other White House aides, President Trump has used the @realDonaldTrump account principally to communicate and interact with the public about matters relating to his office and his official actions. For example, in the eight months of @realDonaldTrump account activity covered by the parties' Joint Stipulation, Petitioners used the account to announce the nomination of a new FBI director, J.S. Ex. A at A110, 2d Cir. ECF No. 52; a new administration policy banning transgender individuals from serving in the military, *id.* at A57–A58; the firing of the President's first chief of staff, Reince Priebus, and the hiring of then–Secretary of Homeland Security General John F. Kelly, *id.* at A93; the status of the President's negotiations with the South Korean president concerning North Korea's nuclear program, *id.* at A90; the President's decision to "allow[] Japan & South Korea to buy a substantially increased amount of highly sophisticated military equipment from the United States," *id.* at A80; and a new executive order aimed at the denuclearization of North Korea, *id.* at A73. *See also* Pet. App. 138a, 139a (J.S. ¶¶ 38, 41).

The President, White House aides, and the U.S. Department of Justice have all described the @realDonaldTrump account as a source of official presidential communications. Shortly after he took office, the President tweeted, "My use of social media is not Presidential—it's MODERN DAY PRESIDENTIAL." Pet. App. 137a (J.S. ¶ 37). Soon after, the White House Press Secretary stated that President Trump's tweets should be considered "official statements by the President of the United States." *Id.* Mr. Scavino has promoted the @realDonaldTrump account interchangeably with the government-registered Twitter accounts @POTUS and @WhiteHouse as channels through which "President Donald J. Trump . . . [c]ommunicat[es] directly with you, the American people!" *Id.* The @WhiteHouse account directs Twitter users to "[f]ollow [it] for the latest from @POTUS @realDonaldTrump and his Administration," and tweets from @realDonaldTrump are frequently retweeted by @POTUS and @WhiteHouse (and vice versa). *Id.* The White House has responded to congressional requests for official White House records by referencing the President's tweets. *Id.* The Department of Justice has also stated in court filings that "[t]he government is treating" certain tweets from @realDonaldTrump "as official statements of the President of the United States." Defs.' Suppl. Submission at 2, *James Madison Project v. Dep't of Justice*, No. 1:17-cv-00144 (D.D.C. Nov. 13, 2017), ECF No. 29.

Other federal agencies also have treated the @realDonaldTrump account as a source of official

government statements. The National Archives and Records Administration has advised the White House that the President's tweets from the @realDonaldTrump account, like those from the @POTUS account, are official records that must be preserved under the Presidential Records Act. Pet. App. 138a–139a (J.S. ¶ 40).

Multiple federal courts similarly have treated tweets from the @realDonaldTrump account as official statements. *See Maryland v. United States*, 360 F. Supp. 3d 288, 294 nn.2–3 (D. Md. 2019) (citing @realDonaldTrump tweets appointing Matthew Whitaker as Acting Attorney General and nominating William Barr to the post of Attorney General); *United States v. Valencia*, No. 5:17-CR-882, 2018 WL 6182755, at *7 (W.D. Tex. Nov. 27, 2018) (analyzing @realDonaldTrump tweets to determine whether the President's appointment of Matthew Whitaker as Acting Attorney General was constitutional); *Hawaii v. Trump*, 859 F.3d 741, 773 n.14 (9th Cir. 2017) (noting the White House Press Secretary's statement that tweets from @realDonaldTrump should be treated as official statements of the President), *summarily vacated and remanded on other grounds*, 138 S. Ct. 377 (2017); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 182–83 (D.D.C. 2017), (describing @realDonaldTrump tweets as the President's "statement[s] via Twitter"), *vacated on other grounds*, *Doe 2 v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019).

In September 2017, the @realDonaldTrump account had approximately 35 million followers. Pet. App. 136a

(J.S. ¶ 36). Today, it has more than 85 million.[3] The President and his aides regularly reply to and retweet replies from the account's followers. *Id.* at 138a (J.S. ¶ 39). A tweet from the @realDonaldTrump account typically generates thousands of replies, likes, and retweets. *Id.* at 139a–141a (J.S. ¶¶ 41–43). Except through the viewpoint-based blocking at issue in this case, Petitioners have not restricted who can follow the account. *See id.* at 136a–137a (J.S. ¶ 36).

C. Petitioners' blocking of the Individual Respondents

As Petitioners have conceded, the Individual Respondents were blocked by President Trump because they "posted tweets that criticized the President or his policies." Pet. App. 123a (J.S. 1). For example, Respondent Pappas was blocked after he replied to the President's tweets defending the administration's "Travel Ban" by writing, "Trump is right. The government should protect the people. That's why the courts are protecting us from him." *Id.* at 145a (J.S. ¶ 52). Respondent Neely was blocked after he responded to a tweet by President Trump relating to the opening of a new coal mine by writing, "Congrats and now black lung won't be covered under #TrumpCare." *Id.* at 144a (J.S. ¶ 50); *see generally id.* at 142a–145a (J.S. ¶¶ 46–52) (describing the circumstances surrounding the blocking of each of the seven Individual Respondents).

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[3] Donald J. Trump (@realDonaldTrump), Twitter, https://twitter.com/realdonaldtrump (last visited Sept. 21, 2020).

As a result of being blocked, the Individual Respondents could no longer participate in the "comment threads" associated with the account. Without using burdensome and time-consuming workarounds, *id.* at 145a–149a (J.S. ¶¶ 55–60), they could not view the President's tweets, reply directly to those tweets, or view the comment threads associated with those tweets while they were logged into their Twitter accounts. *Id.* at 145a (J.S. ¶ 54).[4]

D. Proceedings below

Respondents filed suit in July 2017. The complaint alleged that Petitioners unconstitutionally excluded the Individual Respondents from a public forum based on viewpoint and violated the Knight Institute's right to hear speech that the Individual Respondents would have engaged in had they not been blocked. The complaint also alleged that the blocking unconstitutionally infringed the Individual Respondents' right to access governmental information and their right to petition the government for redress of grievances. Respondents sought declaratory and injunctive relief.

In May 2018, the U.S. District Court for the Southern District of New York entered declaratory judgment in

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[4] Although Respondent Knight Institute was not blocked from the @realDonaldTrump account, the Institute "desire[d] to read comments that otherwise would have been posted by the blocked [Individual Respondents], and by other accounts blocked by @realDonaldTrump, in direct reply to @realDonaldTrump tweets." Pet. App. 149a (J.S. ¶ 61). Petitioners' blocking of the Individual Respondents prevented the Institute from hearing the speech in which the Individual Respondents would otherwise have engaged.

favor of Respondents, holding that "the blocking of the individual [Respondents] as a result of the political views they have expressed is impermissible under the First Amendment." Pet. App. 82a. The district court also held that the blocking of the Individual Respondents violated the Knight Institute's right to hear dissenting voices in the comment threads associated with the @realDonaldTrump account. *See id.* at 53a–55a, 83a.

A panel of the Second Circuit unanimously affirmed. Characterizing the evidence as "overwhelming," *id.* at 11a, the court concluded that the @realDonaldTrump account is used as an "important tool of governance and executive outreach" and reflects state action, *id.* at 15a. The court rejected Petitioners' argument that the act of blocking should be considered in isolation, reasoning that "the President excluded the [Individual Respondents] from government-controlled property when he used the blocking function of the Account to exclude disfavored voices." *Id.* at 15a–16a. The court further reasoned that the President created a public forum when he, "upon assuming office, repeatedly used the Account as an official vehicle for governance and made its interactive features accessible to the public without limitation." *Id.* at 17a–18a. The court held that the President had violated the First Amendment by blocking the Individual Respondents from the @realDonaldTrump account based on viewpoint, even though they could still "engage in various 'workarounds'" to access the President's tweets. *Id.* at 20a. As the court explained, "[w]hen the government has discriminated against a speaker based on the speaker's

viewpoint, the ability to engage in other speech does not cure that constitutional shortcoming." *Id.* Finally, the court rejected Petitioners' argument that the account was government speech. The court reasoned that, while the President's tweets were government speech, the "retweets, replies, and likes of other users in response to his tweets" were not. *Id.* at 21a–22a.

The Second Circuit denied Petitioners' request for rehearing en banc. In a statement respecting the denial of rehearing, Judge Barrington Parker wrote that the court of appeals' decision was "unusual only in that it involves Twitter, a relatively new form of public, interactive communication, and the President," but otherwise the decision was simply "a straightforward application of state action and public forum doctrines, congruent with Supreme Court precedent." *Id.* at 92a.

REASONS FOR DENYING THE PETITION

I. There is no disagreement among the Circuits.

Petitioners identify no conflict of authority in the lower courts warranting this Court's review. The only other court of appeals to have addressed the application of the First Amendment to a public official's blocking of critics on social media ruled in accordance with the decision below. Similarly, the district courts have had no difficulty with the "straightforward application of state action and public forum doctrines" to cases involving public officials' use of social media. Pet. App. 92a. As this Court has previously recognized, "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's

command, do not vary' when a new and different medium for communication appears." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790 (2011) (citation omitted). There is no confusion in the lower courts about those basic principles.

1. Only one other court of appeals has reached the merits of whether a public official's social media account can be a public forum for First Amendment purposes. In *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019), the Fourth Circuit answered this question exactly as the Second Circuit did in the decision below, applying the same legal framework to an analogous record involving a public official who blocked a user from a social media account, used for official purposes, after the user posted a critical comment. The defendant in that case—Phyllis Randall, Chair of the Board of Supervisors of Loudoun County, Virginia—operated the "Chair Phyllis J. Randall" Facebook page, which she used to inform Loudoun County residents about Board meetings, public safety issues, and her official actions. *Id.* at 673–74. When a constituent, Brian Davison, posted a comment questioning the ethics of other Loudoun County officials, Randall deleted the comment and temporarily banned him from posting any other comments to the page. *Id.* at 675–76.

Affirming the district court's holding that Randall violated Davison's First Amendment rights, the Fourth Circuit first considered whether Randall's creation and administration of the Chair's Facebook page, and her banning of Davison from the page, constituted state action. *Id.* at 679–80. It then analyzed whether the Chair's Facebook page was a "public forum" subject to

the First Amendment or was instead government speech. *Id.* at 681–82, 686. After finding state action and concluding that the account was a public forum, the court held that Davison's ban violated the First Amendment. *Id.* at 688.

Petitioners do not contend that circuit courts disagree about the legal framework under which courts should assess First Amendment challenges to public officials' blocking of users from their social media accounts. Pet. 29. Nor is such conflict likely: the two-part framework applied both by the court below and by the Fourth Circuit follows directly from this Court's state action and First Amendment jurisprudence. *See infra* Part II; *Davison*, 912 F.3d at 679–83. Recent Eleventh and Fifth Circuit decisions applying the same standard to similar facts, at the motion to dismiss stage, should further dispel any concern regarding lower court confusion. *See Attwood v. Clemons*, 818 F. App'x 863, 867-68 (11th Cir. 2020) (affirming district court's denial of Eleventh Amendment and legislative immunity to a Florida state representative who blocked a constituent from the representative's official Twitter and Facebook accounts after the constituent criticized the representative's stance on gun control); *Robinson v. Hunt Cnty.*, 921 F.3d 440, 447–48 (5th Cir. 2019) (reversing the dismissal of a First Amendment claim raised by a constituent who was banned from the sheriff's office's Facebook page after criticizing the office and its social media policy).

2. District courts likewise have encountered no difficulties in resolving First Amendment suits against public officials who ban or block users from their official

social media accounts. They have used the same legal framework the Second and Fourth Circuits used. *See, e.g.*, *Faison v. Jones*, 440 F. Supp. 3d 1123, 1132–35 (E.D. Cal. 2020) (on a preliminary injunction motion, ordering sheriff to "unban" plaintiffs who posted comments on the sheriff's Facebook page calling for oversight of the sheriff's office); *Clark v. Kolkhorst*, No. A-19-CV-0198, 2020 WL 572727, at *3–4 (W.D. Tex. Feb. 5, 2020) (on a motion to dismiss, holding constituent plausibly alleged First Amendment claims against Texas state senator who banned the constituent from the senator's Facebook page after the constituent criticized legislation the senator supported); *One Wis. Now v. Kremer*, 354 F. Supp. 3d 940, 950–56 (W.D. Wisc. 2019) (on a summary judgment motion, holding that three Wisconsin state assembly members who blocked a non-profit organization from their official Twitter accounts "acted under color of state law" and "engaged in content-based discrimination"); *Campbell v. Reisch*, 367 F. Supp. 3d 987, 991–92, 994–95 (W.D. Mo. 2019) (on a motion to dismiss, holding constituent sufficiently alleged a First Amendment claim against a Missouri state representative for blocking him from her Twitter account because he retweeted criticism of her); *Windom v. Harshbarger*, 396 F. Supp. 3d 675, 680–83 (N.D. W. Va. 2019) (on a motion to dismiss, holding constituent plausibly alleged First Amendment claims against a state representative who banned the constituent from the delegate's Facebook page because of constituent's criticism of a bill the delegate supported); *Garnier v. Poway Unified Sch. Dist.*, No. 17-cv-2215-W, 2019 WL 4736208, at *6–9 (S.D. Cal. Sept. 26, 2019) (on a summary judgment motion, holding that school board members

who banned parents from their respective Facebook pages had opened public forums and engaged in state action, but that there was a genuine dispute over whether the ban was a content-neutral regulation of "repetitive and unrelated" posts); *Leuthy v. LePage*, No. 1:17-CV-00296, 2018 WL 4134628, at *8, *11–15 (D. Me. Aug. 29, 2018) (on a motion to dismiss, holding two Maine residents had plausibly alleged First Amendment claims against the governor of Maine, who had banned them from the "Paul LePage, Maine's Governor" Facebook page after they posted criticism of his treatment of the media); *cf. Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1010–13 (E.D. Ky. 2018) (on preliminary injunction motion, holding that public official's social media account was a private account for personal speech, to which First Amendment did not apply).

While Petitioners complain that "lawsuits against public officials for blocking social media users on non-governmental accounts have proliferated," Pet. 28, they do not contend that courts have been confused about what legal framework applies in these suits. Accordingly, this case does not warrant the Court's intervention.

II. The decision below was correct.

A. The Second Circuit correctly concluded that Petitioners' blocking of the Individual Respondents from the @realDonaldTrump account was state action.

Attempting to manufacture a conflict with the decisions of this Court, Petitioners argue that the Second Circuit misapplied the state action doctrine

when it declined to focus narrowly on Petitioners' blocking of the Individual Respondents, and instead took into consideration the nature of the account from which the Individual Plaintiffs had been blocked. But this Court's state action precedents make clear that the Second Circuit's analysis was entirely correct. This Court has repeatedly emphasized that the question of whether an act is "fairly attributable" to the government is a "necessarily fact-bound" inquiry that requires consideration of the circumstances in which the act took place. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295–96 (2001). Here, the Second Circuit properly took into account that Petitioners operated the @realDonaldTrump account as an "important tool of governance." Petitioners' disagreement about the Second Circuit's application of settled law to undisputed facts does not justify this Court's review.

1. In considering whether a claimed constitutional deprivation resulted from state action, this Court has evaluated whether the conduct at issue is "fairly attributable" to the government. *Id.* at 295; *West v. Atkins*, 487 U.S. 42, 49 (1988). Observing that "[w]hat is fairly attributable is a matter of normative judgment, and [that] the criteria lack rigid simplicity," the Court has charged the lower courts with determining whether state action exists by assessing whether there is a sufficiently "close nexus between the [government] and the challenged action." *Brentwood*, 531 U.S. at 295–96 (citation omitted).

The Court uses a two-part test to determine whether a claimed constitutional deprivation is "fairly

attributable" to the government. "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* Where, as here, the person who caused the deprivation is a government officer "whose official character is such as to lend the weight of the State to his decisions," the two parts of the test "collapse into each other." *Id.*; *see also West*, 487 U.S. at 50 ("[G]enerally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law.").

The Second Circuit's conclusion that Petitioners' operation of the @realDonaldTrump account reflects state action is fully consistent with this Court's precedents. As the Second Circuit observed, "[t]he government's contention that the President's use of the [@realDonaldTrump account] during his presidency is private founders in the face of the uncontested evidence in the record of substantial and pervasive government involvement with, and control over, the [a]ccount." Pet. App. 13a. The Second Circuit's characterization of the record was correct, as the Joint Stipulation makes clear: First, Mr. Scavino and other White House aides are involved in the day-to-day operation of the account. *Id.* at 137a–138a (J.S. ¶¶ 37–39). Second, the account is expressly identified with the office of the presidency, and displays photographs of the President carrying out his official duties. *Id.* at 136a (J.S. ¶ 35). Third, the

President and White House aides use the account to make official policy pronouncements, conduct foreign policy, and communicate with the public about matters relating to the President's office and his official actions—for example, to announce nominations and appointments, announce or defend government policies, engage with foreign leaders, and promote the administration's legislative agenda. *Id.* at 137a–138a (J.S. ¶ 38). Fourth, the President and his aides have publicly stated that tweets from the @realDonaldTrump account should be understood as official statements of the President. *Id.* at 137a (J.S. ¶ 37). Fifth, numerous federal agencies and institutions—including the Department of Justice, the federal courts, and the National Archives and Records Administration—treat the @realDonaldTrump account as a source of official presidential statements. *Id.* at 138a–139a (J.S. ¶ 40).

Despite this overwhelming—and, again, undisputed—evidence of pervasive government control over the @realDonaldTrump account, Petitioners contend that the account is nonetheless "personal" because the President created and operated the account before he assumed office, and presumably will continue to use the account after he leaves office. Pet. 13. Petitioners do not explain why this Court's intervention is warranted simply to declare that @realDonaldTrump is a personal account, but, in any event, the Second Circuit was correct to conclude that the mere fact that the account was established before the President took office (and that it might be used by him in a private capacity after he leaves office) is not determinative. The crucial point, as the court observed, is "what the

[a]ccount is *now*": a communications tool used by the President and White House aides as an instrument of governance. Pet. App. 5a (emphasis added).

Although Petitioners suggest otherwise, Pet. 14–17, there is nothing controversial about the proposition that public officials may be bound by constitutional limits when they choose to use private property in furtherance of their official duties. *See Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (applying First Amendment to government officials' decision not to allow the performance of the musical *Hair* in privately owned theater leased by the municipality); *see also Competitive Enter. Inst. v. Off. of Sci. & Tech. Pol'y*, 827 F.3d 145, 149 (D.C. Cir. 2016) (holding that an agency official may not avoid the requirements of the Freedom of Information Act by using a private email system for official communications). Petitioners' string of hypotheticals is largely a distraction. Of course, an individual who becomes a Member of Congress does not thereby lose her right as a private property owner to prevent others from placing unwanted signs on her front lawn. Pet. 14–15. It is also plainly true that presidents may host gatherings at their private residences without engaging in state action. *Id.* at 17. But the courts have never suggested that a city councilor, for example, may eject her critics from a public meeting because as a private citizen she has the right to eject her critics from a backyard barbecue. And to address Petitioners' analogy, if President Kennedy or President Bush had deliberately opened his private property to the general public for the purpose of hosting an open public meeting about matters relating to government, he would have

violated the First Amendment if he had ejected individuals from the meeting based on viewpoint. Again, all of this flows from well-settled law.

Nor, finally, is there any merit to Petitioners' reliance on *Manhattan Community Access Corp. v. Halleck* or other cases involving the application of the First Amendment to *private* actors. *See* Pet. 15–16 (citing *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 115–16, 120–21 (1973) (opinion of Burger, C.J.)). Those cases involved efforts to enforce the First Amendment against private actors for actions they took on their own property. Here, Respondents have not sought relief against Twitter, and nothing in the Second Circuit's decision suggests that such relief would be available. Moreover, unlike the owner of a private shopping mall, the non-profit operator of a public access cable channel, or a privately owned broadcast licensee, Petitioners indisputably are government officials, so there is no question that they are imbued with state authority. *See Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1934 (observing that if a governmental actor "itself operate[d] the public access channels . . . the First Amendment might then constrain the local government's operation of the public access channels"); *Lugar*, 457 U.S. at 937 (observing that state action is present "when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions"); *West*, 487 U.S. at 50. The argument that in operating the @realDonaldTrump account, President

Trump and Mr. Scavino—who is the Deputy Chief of Staff for Communications for the Executive Office of the President, not a member of the President's household staff—are engaged "in the ambit of their personal pursuits," *Screws v. United States*, 325 U.S. 91, 111 (1945), is foreclosed by the "overwhelming" evidence in this case showing that they use the account as an instrument of governance.

2. Petitioners next argue that even if "the @realDonaldTrump account has taken on some official character," Pet. 19, the Second Circuit erred by not considering the act of blocking in isolation, *id.* at 18–19. That position finds no support in this Court's state action decisions. To the contrary, the Court's "necessarily fact-bound" state action doctrine requires the court to consider the context in which the allegedly injurious act occurred. *See, e.g.*, *West*, 487 U.S. at 55–56 (finding that private orthopedist providing medical services under contract to state prison system was acting under color of law, observing that "[i]t is the physician's function within the state system, not the precise terms of employment, that determine whether his actions can be fairly attributed to the state"); *Lugar*, 457 U.S. at 941 (finding state action in light of private oil company's "joint participation" with state actors in seizing franchisee's property); *Brentwood*, 531 U.S. at 298 ("The nominally private character of the [respondent] is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it.").

In arguing that President Trump's decision to block an account must be a private act because all Twitter users have the ability to block accounts, Pet. 18–19, Petitioners gloss over a crucial distinction: While all Twitter users have the ability to block other users from their accounts, only Petitioners have the ability to block other users from the @realDonaldTrump account, which is used as an "important tool of governance and executive outreach," Pet. App. 15a. As the Second Circuit observed, "the fact that any Twitter user can block another account does not mean that the President somehow becomes a private person when he does so." *Id.* Petitioners' argument proves too much. Just because private citizens have the ability to close a door does not mean that a public official is transformed into a private citizen when she closes the door to a public forum to exclude her critics. *Cf. Flagg Bros. v. Brooks*, 436 U.S. 149, 157 (1978) (noting that "[w]hile as a factual matter any person with sufficient physical power may deprive a person of his property, only a State or a private person whose action 'may be fairly treated as that of the State itself,' may deprive him of 'an interest encompassed within the Fourteenth Amendment's protection'" (citations omitted)).

In any event, focusing on the specific blocking of the Individual Respondents only confirms the conclusion that there is a "close nexus" between Petitioners' official status and Respondents' constitutional injuries. The Individual Respondents were blocked after responding critically to tweets about the President's official actions or policies—not to tweets about "personal pursuits." *See supra* at 8. In other words, the Individual Respondents

were blocked while responding to tweets that themselves reflected state action. Accordingly, even focusing myopically on the blocking—as Petitioners suggest the Second Circuit should have done—there is a "close nexus" between the challenged conduct and Petitioners' official status. *Brentwood*, 531 U.S. at 295.

B. The Second Circuit correctly concluded that the @realDonaldTrump Account is a public forum and that the act of blocking critics from that forum is not government speech.

The Second Circuit concluded that the @realDonaldTrump account is a designated public forum because Petitioners "intentionally opened [it] for public discussion when the President, upon assuming office, repeatedly used the Account as an official vehicle for governance and made its interactive features accessible to the public without limitation." Pet. App. 17a–18a. This conclusion was correct.

As this Court has recognized, "a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). A public forum need not be a physical space. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (holding that the "same principles" are "applicable" where the space at issue is "a forum more in a metaphysical than in a spatial or geographic sense"); *Cornelius*, 473 U.S. at 801. In determining whether government officials have created a designated public forum, this Court has considered the

forum's compatibility with expressive activity, *id.* at 802–03, as well as whether the government's overall "policy and past practice" show that the forum is intended to be used for speech by the public, *id.* at 802. These are the factors the Second Circuit considered below. Pet. App. 17a.

Petitioners do not take issue with the legal framework the Second Circuit used—nor could they, since it is the one established by this Court. Their complaints about the Second Circuit's public forum analysis are mainly repackaged versions of their complaints about the court's state action analysis, Pet. 21–24, which fail for the reasons stated above, *see supra* at 15-23. Petitioners' only other arguments likewise fail. First, Petitioners argue that the Second Circuit erred in concluding that the account is a public forum because "the President uses his account to speak to the public, not to give members of the public a forum to speak to him and among themselves." Pet. 11, 21, 23. Second, they argue that the President's decision to block the Individual Respondents from the account constituted "government speech." Pet. 11–12. The Second Circuit properly rejected both of these arguments.

1. The first of Petitioners' arguments ignores the uncontested facts demonstrating that Petitioners intended to open a forum for speech by the public at large, not a one-way communications channel. As discussed above, Twitter is not just a media platform but a social media platform, labeled "social" because it facilitates "overlapping 'conversations' among and across groups of users." Pet. App. 131a (J.S. ¶ 23).

Indeed, the defining feature of Twitter is its facilitation of real-time interaction. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (observing that social media platforms like Twitter offer "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard," in part because these platforms permit citizens to "engage with [their elected representatives] in a direct manner"). Thus, it is significant that Petitioners have chosen to use a Twitter account to communicate with the public about matters relating to the presidency—rather than, for example, a blog, a radio station, or a webpage collecting White House press releases.

Moreover, Petitioners have taken full advantage of the social aspects of Twitter's platform. They have allowed anyone with a Twitter account to follow the @realDonaldTrump account, Pet. App. 136a (J.S. ¶ 36), and they frequently retweet and reply to other users' tweets, *id.* at 138a (J.S. ¶ 39). That President Trump blocked the Individual Respondents based on the substance of their replies to the President's tweets is further evidence that Petitioners are attentive to, and engage with, the comment threads.

Based on these undisputed facts, the Second Circuit correctly held that, by using the @realDonaldTrump account "as an official vehicle for governance" and by making "its interactive features accessible to the public without limitation," Petitioners created a public forum. Pet. App. 18a. That conclusion is consistent with this Court's application of the public forum doctrine in analogous contexts. For example, the Court has long held that open public meetings are public forums in

which viewpoint discrimination is impermissible. *See City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp. Relations Comm'n*, 429 U.S. 167, 175 (1976).

2. The Second Circuit also was correct to reject Petitioners' argument that their decision to block the Individual Respondents from replying to the @realDonaldTrump account was government speech. Pet. App. 21a–22a. The government speech doctrine applies to speech (1) that has "long been used . . . to convey state messages"; (2) that is "closely identified in the public mind" with the government; and (3) where the state "maintains direct control over the message[]." *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017) (quotation marks omitted). As the Second Circuit noted, although the President's own tweets constitute government speech, the same cannot be said of speech in the comment threads, which do not satisfy any of the requirements of the government speech doctrine. Pet. App. 22a.

Petitioners seek to sidestep that obvious conclusion by characterizing as government speech only their decision to block the Individual Respondents' replies from those comment threads. Pet. 26. But if the decision to block certain replies is government speech, then so is the decision not to block—but to allow—other replies. Petitioners cannot escape this logical consequence of their argument, which aligns it with the argument that this Court rejected in *Matal*. 137 S. Ct. at 1757–1760. In *Matal*, the government argued that the viewpoint-based prohibition against "disparaging" trademarks was constitutional because the U.S. Patent and Trademark Office's decision whether to grant trademark

registration amounted to government speech. As the Court observed, however, "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Id.* at 1758. The Court held that the millions of private "catchy phrases," *id.* at 1752, registered as trademarks could in no way be seen to convey a message for the government, *id.* at 1758–59. The same is true here: The tens of thousands of replies that Petitioners have chosen to allow in the @realDonaldTrump comment threads communicate a cacophony of disparate views, not a message controlled by the White House. To paraphrase *Matal*, if Petitioners' decision to allow these tens of thousands of replies is to be considered government speech, then the government "is babbling prodigiously and incoherently." *Id.* at 1758.

In fact, the argument the Petitioners advance here would turn the public forum doctrine on its head. A government official may be expressing a viewpoint by barring a critic from a town hall or city council meeting, but this does not mean that the act is properly characterized as government speech. If the space is a public forum, the First Amendment protects the right of the critic to criticize. For good reason, this Court has described the government speech doctrine as "susceptible to dangerous misuse," and it has urged "great caution" in applying the doctrine so that it is not used to immunize censorship. *Id.* But this is precisely the effect that Petitioners' argument, if adopted, would have here.

Nor is there any merit to Petitioners' contention that by blocking, President Trump is simply exercising a government official's "prerogative not to listen." Pet. 26. Petitioners miss the point when they contend that their decision to block users from the account leaves those people "free to participate" in debate on Twitter. Pet. 25–26. Blocking people from the @realDonaldTrump account precludes those people from participating, on the same terms as others, in the public forum that Petitioners have established. *See supra* at 8-9 (noting that blocking prevents a blocked user from viewing, replying to, and retweeting tweets from the @realDonaldTrump account).[5] Thus, Petitioners are not simply closing their ears to those expressing critical views; they are preventing those critical views from being expressed at all in the relevant forum. The case they rely on—*Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 288 (1984)—is therefore inapposite. This Court made clear in that case that the plaintiffs did "not and could not claim that they have been unconstitutionally denied access to a public forum. A 'meet and confer' session is obviously not a public forum." *Id.* at 280.[6] Petitioners' effort to manufacture a conflict with this Court's precedent should be rejected.

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[5] As the Second Circuit noted, these burdens are constitutionally significant even if they do not amount to outright bans on speech. Pet. App. 20a– 21a.

[6] Even if one assumes that the President has a legitimate interest in avoiding criticism, the President could achieve that result with less damage to the free speech rights of others by using Twitter's "muting" function. *See* Pet. App. 30a. Using that function would

III. Petitioners' other arguments in support of the Court's review are meritless.

As explained above, the Second Circuit's faithful application of this Court's well-settled state action, public forum, and government speech doctrines requires no correction from the Court. Nor do Petitioners' claims about the practical implications of the Second Circuit's decision justify the Court's intervention.

1. There is no merit to Petitioners' argument that denying them the power to exclude critics from the @realDonaldTrump account will deter the President from "using new technology to efficiently communicate to a broad public audience." Pet. 29. Petitioners unblocked the Individual Respondents on June 4, 2018, following the district court's ruling. Since then, the President has continued to tweet with abandon. Among the 19,126 messages he has tweeted and retweeted since unblocking the Individual Respondents, he has announced official news conferences at the White House and in Bedminster, New Jersey; that the U.S. Department of Education is "looking into" a report that California was implementing the 1619 Project in public schools; that he was "pleased to inform the American Public that Acting Secretary Chad Wolf will be nominated to be the Secretary of Homeland Security"; his rejection of a Pentagon proposal "to slash Military Healthcare by $2.2 billion dollars"; that "China and the USA are working on selecting a new site for signing of

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shield the President from muted users' criticism without preventing those critics from participating in the comment threads associated with the President's tweets.

Phase One of Trade Agreement"; his nomination of Deputy Secretary Dan Brouillette to be the new Secretary of Energy; and his "official nomination of Poland for entry into the Visa Waiver Program." *See generally* Trump Twitter Archive, http://www.trumptwitterarchive.com/archive (last visited Sept. 20, 2020). There is absolutely no evidence that the district court or Second Circuit decisions have deterred the President from continuing to use Twitter to communicate with the public at large.

Contrary to the Petitioners' suggestion, Pet. 29, the mere fact that this case involves the conduct of the President does not on its own warrant the Court's review. When the Court has granted certiorari in cases involving presidential conduct despite the absence of any circuit split, it has generally done so to address fundamental issues of executive power with implications for future presidents. *See, e.g.*, *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020) (addressing separation-of-powers concerns raised by congressional subpoenas addressed to President in his personal capacity); *Clinton v. Jones*, 520 U.S. 681 (1997) (addressing separation-of-powers concerns raised by federal court proceedings in private action against President in his personal capacity). The question presented here—whether this President can block critics from a Twitter account used for official purposes—does not present such issues, and there is little reason to believe that future presidents will struggle to conform their conduct on social media to the First Amendment's requirements. Petitioners essentially concede that this case is particular to President Trump alone and involves no broader question

of executive authority. Pet. 13–14 n.1. Petitioners' speculation that the Second Circuit's decision will impede future presidents from exercising their constitutional authority is thus without basis.

2. Petitioners' contention that the Second Circuit's decision will unfairly chill other public officials from using social media is also groundless. To begin, the Second Circuit did not decide that all public officials' social media accounts are public forums for First Amendment purposes; it focused specifically on the President's account and made abundantly clear that the outcome of other cases would turn on the facts of those cases. Pet. App. 3a.

Further, the other cases in which courts have held public officials' social media accounts subject to the First Amendment have not resulted in the widespread abandonment of social media by those or other officials. Consistent with the Second Circuit's analysis, each of these cases has turned on the specific facts of the accounts and actions at issue. *See supra* at 12-15. In some instances, public officials have chosen to unblock their critics prior to any judicial decision—an action that facilitates, rather than curtails, speech.[7] Like the President, these officials have continued to use their social media accounts to communicate actively with

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[7] *See, e.g.*, Sanford Nowlin, *Sen. John Cornyn Unblocks Critics on Twitter — After Free Speech Group Hints That It May Sue*, San Antonio Current (May 22, 2020); Michael Gold, *Ocasio-Cortez Apologizes for Blocking Critic on Twitter*, N.Y. Times (Nov. 4, 2019).

members of the public about matters related to their official duties.

Contrary to Petitioners' suggestion, *see* Pet. 28–29, the Second Circuit decision will not foreclose efforts by public officials to address certain kinds of abuse on their social media accounts. Of course, criticism—even "unpleasantly sharp" criticism, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)—is not a legitimate basis on which a public official may block speech in a forum, as the Second Circuit confirmed. But the court's decision does not preclude officials from prohibiting unprotected speech—such as true threats, incitement to violence, and obscenity—from their social media accounts. Nor does it preclude officials from imposing reasonable time, place, or manner restrictions, such as limits on the number of replies one individual may post within a specified timeframe, so long as they apply those restrictions in a consistent, viewpoint-neutral manner. *See Cornelius*, 473 U.S. at 800.

More broadly, Petitioners' argument that the Court's review is necessary to protect the ability of public officials to censor speech on their social media accounts gets the First Amendment exactly backwards. Social media is where debate about public issues now takes place. *See Packingham*, 137 S. Ct. at 1737. As the Second Circuit concluded: "This debate, as uncomfortable and as unpleasant as it frequently may be, is nonetheless a good thing," and "if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less." Pet. App. 23a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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