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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The decision below holds that, in blocking users from his personal social-media account, President Trump was exercising the power of the United States government and therefore violated the Constitution. The court of appeals based that holding on its discovery of a novel First Amendment right for citizens to interact directly with a government official's personal social-media account through their own preferred accounts when the official uses his account to announce, among other things, official actions and policies. Respondents do not dispute that the constitutionality of the President's conduct is squarely presented for this Court's review. Nor do they dispute that the issues presented here are proliferating in cases around the country. Instead, respondents' primary argument for denying certiorari is simply that the decision below "correctly applied well-settled precedent." Br. in Opp. 1.

Respondents are flat wrong that there is nothing to see here as a matter of constitutional principle. As the dissent from the denial of rehearing observed, the panel "extend[ed] the First Amendment to restrict the personal social-media activity of public officials" by misapplying three separate constitutional doctrines. Pet. App. 108a, 110a-117a. Most fundamentally, the decision below muddies the distinction between the personal actions of government officials and the actions of the state, which this Court has repeatedly warned against. Certiorari is warranted to correct the court of appeals' constitutional errors and the resulting infringement of the right of the President and other officials to retain the control over their personal social-media accounts that all other individuals possess.

A. The Court Of Appeals Erred In Prohibiting The President From Using Twitter's Blocking Function Within His Personal Account

As explained in the petition (at 11-27), the decision below disregarded this Court's state-action precedents, engaged in an unwarranted expansion of the public-forum principle, and adopted inconsistent reasoning to distinguish the government-speech doctrine. Respondents' defense of that decision repeats or ignores the panel's errors.

1. Under this Court's precedents and common sense, the President's blocking of the individual respondents' accounts from his personal Twitter account cannot amount to state action that is attributed to the United States government. The court of appeals' contrary holding is the central flaw in the decision below, and respondents offer no compelling defense of that ruling. While respondents parrot this Court's definition of "state action," see, *e.g.*, Br. in Opp. 17, they ignore the

most fundamental attribute: that a government official was exercising the power *of his office* when he undertook the challenged action. See, *e.g.*, *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 50-51 (1999). Respondents do not—and cannot—contend that President Trump was exercising a "power 'possessed by virtue of [federal] law,'" such that his actions were "'made possible only because [he was] clothed with the authority of [federal] law,'" when he blocked their accounts on Twitter. *West* v. *Atkins*, 487 U.S. 42, 49 (1988) (citation omitted). To the contrary, the President was exercising the "power" that any individual user is granted by Twitter—a power that he obtained from Twitter in 2009 and that he will retain after leaving office. That should be the end of the matter.

Respondents insist that the blocking was state action because of "the context" in which it occurred, emphasizing that the @realDonaldTrump account has been used for official business. Br. in Opp. 21; see *id.* at 22 ("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.'") (citation omitted). That argument reflects the same analytical errors committed by the Second Circuit: by focusing on the wrong actions (tweets rather than blocking), it bootstraps to a finding of state action without evidence that President Trump exercised a "right or privilege created by the State" when he blocked respondents' accounts. *Sullivan*, 526 U.S. at 50 (citation omitted).

Like the court of appeals, respondents sidestep the lack of state action in the blocking by focusing on other facts about the @realDonaldTrump account. Br. in

Opp. 17-18. None of those facts, however, demonstrates that the United States government, rather than Donald J. Trump personally, blocked respondents' accounts on Twitter. Respondents argue, for example, that the @realDonaldTrump account is "identified with the office of the presidency." *Id.* at 17. But the same might be said of President Obama's Twitter account, which lists his title, and no one would suggest that former Presidents are exercising the power of the state when they block other Twitter accounts—even though that could prohibit blocked accounts from directly interacting with any past tweets about President Obama's official actions and policies. See Barack Obama, Twitter, https://twitter.com/BarackObama.

Respondents also emphasize that White House aides are involved in the operation of the @realDonaldTrump account. Br. in Op. 17. But that is beside the point here, as it is undisputed that the President himself—not any White House aide—blocked respondents' accounts. Pet. App. 142a-145a. And more generally, given that each President must "devote his undivided time and attention to his public duties," *Clinton* v. *Jones*, 520 U.S. 681, 697 (1997), White House aides have long assisted Presidents with numerous tasks that, like the blocking here, are within the "ambit of their personal pursuits," *Screws* v. *United States*, 325 U.S. 91, 111 (1945) (plurality opinion). See, *e.g.*, Michael D. Shear, *A Classified Matter at the White House: Obama's Star-Studded Galas*, N.Y. Times, Aug. 6, 2016, https://www.nytimes.com/2016/08/08/us/politics/obama-white-house-birthday-party.html (reporting that "East Wing staff members were told to expect to be working until 4 a.m." at President Obama's birthday party). If the President, for ex-

ample, required specialized dry-cleaning for his personal attire, a White House employee would likely drop it off, but the government would not pay for it, and a dispute with the dry-cleaner would not be litigated under the laws governing federal contractors. The same should be true here.

Respondents criticize petitioners' hypotheticals as a "distraction," Br. in Opp. 19, but those examples properly draw attention to the implausible consequences of applying the court of appeals' reasoning in a consistent manner. As the petition described (at 17), for example, past Presidents did not forfeit their rights to exclude people, including political critics, from their private property merely by conducting official business or giving official addresses there. Rather than responding directly to that hypothetical, respondents modify the facts to be that the President "deliberately opened his private property to the general public for the purpose of hosting an open public meeting about matters relating to government"—essentially inserting a public forum into the fact-pattern. Br. in Opp. 19. But there is no public forum in this case. See Pet. 21-24; pp. 7-9, *infra*. And—more to the point here—respondents' reluctance to address the hypothetical on its own terms reflects the same unwillingness to squarely confront the state-action question that is evident in the decision below. It is unclear whether respondents would draw a state-action distinction based on how widely a President has opened his private property to the public, or where respondents would draw that line—but it is clear that the President's tweets from his personal account about his official actions and policies would be no less governmental if his account were restricted rather than accessible to the general public.

President Trump, like Presidents Roosevelt, Kennedy, or Bush in the petition's hypothetical, has used his own property—his personal Twitter account—to discuss governmental business. But he did not thereby transform the entire @realDonaldTrump account, and every one of its actions, into the work of the United States government. Respondents argue that the "constitutional limits" that apply to the government may also apply to private property when "public officials * * * choose to use [that] property in furtherance of their official duties." Br. in Opp. 19. But the cases respondents cite for that proposition do not remotely support its application here. *Ibid.* (citing *Southeast Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 555 (1975) (applying First Amendment to government programming restrictions for a theater "under long-term lease to the city"); *Competitive Enter. Inst.* v. *Office of Sci. & Tech. Policy*, 827 F.3d 145, 149 (D.C. Cir. 2016) (holding that agency director may not avoid Freedom of Information Act requirements by using a private email system for official communications)).

Respondents claim there "is nothing controversial" about their position, Br. in Opp. 19, but applying their reasoning to other contexts reveals the opposite. Many Presidents conduct some governmental business from their private homes, for example, as do many lower-level government employees (especially during a pandemic). But not every action taken by the employees in those homes is therefore attributable to the United States government for constitutional purposes. If a government employee were to display a sign on the window of his home office promoting his local church, for example, the Establishment Clause would not be implicated. The reasoning in the decision below, however,

would seem to reject that common-sense line. See Pet. App. 111a n.3.

By giving short shrift to the state-action analysis, the decision below risks constricting the constitutional freedoms of government employees. As respondents acknowledge, the First Amendment generally does not apply to "private actors for actions they took on their own property," even private actors who open their property for speech but exclude some speakers on the basis of viewpoint. Br. in Opp. 20. But remarkably, respondents suggest that rule does not apply to private property owners who are also governmental officials: "unlike the owner of a private shopping mall, the non-profit operator of a public access cable channel, or a privately owned broadcast licensee, [p]etitioners indisputably are government officials, so there is no question that they are imbued with state authority." *Ibid.* To the contrary, there *is* a question, and it is the very question posed by the state-action doctrine. Although government officials are sometimes "imbued with state authority," courts must still determine whether they were *exercising* that "state authority" in the challenged action. If they were not, then the First Amendment has no application.*

2. Respondents' public-forum analysis, like the court of appeals', is also tainted by the failure to differentiate between private and state action. Respondents

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* Similarly, respondents offer no response to the petition's observation (at 13 n.1) that their decision to sue President Trump in his official capacity makes little sense given that his *successor* will not be a proper defendant here. That mismatch highlights the key problem with respondents' First Amendment claims: they do not actually challenge any official state action that could be redressed by a component of the United States government.

do not dispute that in order to create a designated public forum, "the government must make an affirmative choice to open up its property for use as a public forum," *United States* v. *American Library Ass'n*, 539 U.S. 194, 206 (2003) (plurality opinion), which can be accomplished "only by intentionally opening a nontraditional forum for public discourse," *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Respondents insist that test is satisfied here because, on the "uncontested facts," the government "intended to open a forum for speech by the public at large" in the @realDonaldTrump account. Br. in Opp. 24. But there are no such facts, uncontested or otherwise.

Instead, the key uncontested facts are that Donald J. Trump created an account on a private company's website as a private citizen in 2009 and will retain it after he leaves office. Respondents emphasize that the account is part of an interactive social-media platform. Br. in Opp. 24-25. But the United States government had no role in the creation of the account or the selection of its features. Instead, the platform's interactive features have always been under the control of a private company, Twitter. It makes little sense for the public-forum analysis to turn on the commercial decisions of a private company, as applied to an account that the government had no role in creating.

Respondents argue that the President's use of Twitter to "communicate with the public about matters relating to the presidency" has transformed his private Twitter account into a public forum. Br. in Opp. 25. But they ignore this Court's instruction that the use of a platform for communication does not suffice to create a public forum, because "[n]ot every instrumentality used for com-

munication, * * * is a traditional public forum or a public forum by designation." *Cornelius*, 473 U.S. at 803. Instead, courts must look to "the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Id.* at 802. Respondents have no evidence whatsoever of "the policy and practice of the *government*" in this regard. And even with respect to Donald J. Trump personally, there is no evidence that he created the account to give members of the public a forum to "assembl[e] and debate" among themselves; to the contrary, he created the account to use as a platform for his own speech, and he continues to use the account that way today.

3. Respondents offer only a limited defense of the court of appeals' government-speech analysis. As the petition explained (at 27), that analysis was inconsistent with the court's own approach to the state-action doctrine: if the President's tweets discussing governmental business rendered his blocking of respondents' accounts state action, then they likewise rendered the blocking a communicative act of government not to receive speech from certain members of the public. Respondents do not attempt to explain that inconsistency.

Instead, respondents accuse petitioners of advancing a government-speech argument that is "align[ed] with the argument that this Court rejected in" *Matal* v. *Tam*, 137 S. Ct. 1744 (2017), when it held that private trademarks are not government speech. Br. in Opp. 26. That is incorrect. Petitioners merely pointed out that if the @realDonaldTrump account is (as the court of appeals believed) a governmental platform, then the government has a right to shape the messaging on that platform. That the President could not possibly screen

each of the "tens of thousands of replies" to his tweets, *id.* at 27, does not change that basic constitutional point. Although controlling the message over an internet platform is very difficult to do comprehensively, the government's "failure to make quality-based judgments about all the material it furnishes from the Web does not somehow taint the judgments it does make." *American Library Ass'n*, 539 U.S. at 208.

The petition also argued (at 25) that if the @realDonaldTrump account is a governmental platform, then the President's blocking of respondents' accounts is constitutionally permissible because its effect is only to limit them from interacting directly with, and speaking directly on, the government's own platform for speech. Under *Minnesota State Bd. for Cmty. Colls.* v. *Knight*, 465 U.S. 271 (1984), those are not cognizable First Amendment interests. On this point, respondents disregard the key facts: that blocked users can tweet about the President and mention @realDonaldTrump in their tweets, can read the President's own tweets when they are not logged into their accounts, and can participate in the comment threads under @realDonaldTrump's tweets by replying to users who have replied to his tweets. See Pet. App. 29a-30a; *contra* Br. in Opp. 3-4 (asserting that "a user who 'blocks' another user prevents that other user from participating in the comment threads associated with the blocking user's account[,] * * * effectively ejecting that second user from the forum") (citations omitted). And to the extent respondents address *Knight* directly, they distinguish it as "inapposite" only by relying on their flawed "'public forum'" argument. Br. in Opp. 28 (citation omitted). Respondents thus offer little independent defense of the court of appeals' government-speech analysis.

B. This Court's Review Is Warranted

As the petition explained (at 27-29), the court of appeals' misapplication of the state-action, public-forum, and government-speech doctrines to constrain the President's use of his personal property warrants this Court's review. Respondents do not dispute that the constitutional questions are squarely presented here, and they identify no vehicle problems or procedural bases for denying review. Nor do they provide any sound reasons why further percolation in the circuits is necessary in these circumstances. Although no circuit conflict currently exists, the dissent from the denial of rehearing—which respondents ignore—reflects both the difference of judicial opinion on the questions presented and the importance of this Court's intervention.

As the dissent recognized, the court of appeals' holding would "have the unintended consequence of creating less speech if the social-media pages of public officials are overrun with harassment, trolling, and hate speech, which officials will be powerless to filter." Pet. App. 119a. Respondents point to @realDonaldTrump's own continued tweeting to suggest that this threat is insubstantial. Br. in Opp. 29. But the fact that President Trump refuses to be chilled by this prospect hardly guarantees that the many other public officials who maintain social-media accounts would be willing and able to do likewise. Respondents also attempt to downplay the significance of the Second Circuit's decision by suggesting that it "focused specifically on the President's account" in a fact-bound manner, *id.* at 31—but respondents themselves emphasize that other courts have reached the same conclusion with respect to other public servants' accounts, *id.* at 11-15. (At least some of

those other cases, though, have concerned truly *governmental* accounts. *E.g.*, *Robinson* v. *Hunt Cnty.*, 921 F.3d 440, 445 (5th Cir. 2019).)

The decision below blurs the lines between governmental and personal actions. It exposes state and federal employees to constitutional responsibility when using their own personal property to speak about their jobs to persons of their own choosing. Particularly because the court of appeals applied that misguided analysis to the President, further review is warranted.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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