**No. 17-2002**

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**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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BRIAN DAVISON,

*Plaintiff–Appellee*,

v.

PHYLLIS RANDALL,

*Defendant–Appellant*.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

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# BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, ACLU OF VIRGINIA, ACLU OF MARYLAND, ACLU OF NORTH CAROLINA, ACLU OF SOUTH CAROLINA, AND ACLU OF WEST VIRGINIA IN SUPPORT OF PLAINTIFF-APPELLEE

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## STATEMENT REGARDING ORAL ARGUMENT

Should this Court decide to order formal briefing and oral argument in this case per Local Rule 34(b), *amici curiae* respectfully seek leave to participate in the oral argument because their participation may be helpful to the Court. Specifically, *amici curiae* may aid in addressing the novel and important issues presented by this appeal, including their effect on the constitutional rights of the public. *See* Fed. R. App. P. 29(a)(8).

## INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan public interest organization of more than 1.5 million members dedicated to defending the civil liberties guaranteed by the Constitution. The ACLU of Virginia, ACLU of Maryland, ACLU of North Carolina, ACLU of South Carolina, and ACLU of West Virginia are state affiliates of the national ACLU. The protection of the First Amendment rights of free speech and petition are of special concern to the ACLU, which has been at the forefront of numerous state and federal cases addressing those rights.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), counsel for *amici curiae* certify that all parties have consented to *amici* filing a timely brief in support of Plaintiff–Appellee's opposition to Defendant–Appellant's appeal. Counsel for *amici* have calculated that the correct filing date is November 27. This case involves cross appeals, and *amici* support Mr. Davison as appellee, not appellant. Rule 29(a)(6) provides that *amici* may file their brief "no later than 7 days after the principal brief of the party being supported is filed." Here, the principal brief that *amici* support is Plaintiff–Appellee's opposition to Defendant–Appellant's appeal, filed on November 17. Because November 24 is a court holiday, counsel have calculated that the correct filing date for this brief is November 27. Counsel additionally certify that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

## SUMMARY OF ARGUMENT

This case raises an issue of first impression in the Fourth Circuit: whether the First Amendment constrains a public officeholder from blocking a person from commenting on her social media page. Answering this question requires determining whether the official is acting as a private speaker who retains her First Amendment rights to speak and associate freely, or as a government actor who is prohibited by the First Amendment from restricting private speech based on viewpoint. It also requires determining whether or to what extent the social media page at issue is 1) a public forum, 2) a conduit for government speech, or 3) an avenue for offering government services or receiving public feedback. In each of these circumstances, the government may not prohibit individuals from viewing the page. In addition, when the government designates a social media page a public forum or an avenue for offering responsive government services, the government may not prohibit individuals from posting messages and may not delete particular messages based on disagreement with the viewpoint expressed.[2]

[2] Access to a social media account, like the Facebook page at issue here, can typically be limited in three ways. First, by blocking a user from the page, which prevents him from posting comments, but not from viewing the page. This is the course Defendant–Appellant chose in this case, and *amici* refer to it as "blocking from commenting." Second, the owner can delete specific comments, but not prohibit the user from commenting in the future. Third, the owner may be able to block the user from viewing her social media at all, including when the user is logged out of the service. This step is rare, as it typically requires changing the entire account from public to private.

In this case, the district court correctly held that because Defendant–Appellant operates her Facebook page as a government actor and has designated the page a public forum, the First Amendment prohibits her from blocking Plaintiff–Appellee from commenting on the page based on his viewpoint.

Answering the questions outlined above is necessary not only to resolve this case, but also to provide guidance to the increasing numbers of public officials—and their constituents, including members of *amici* organizations—who use Facebook, Twitter, and other social media. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–36 (2017) ("Governors in all 50 States and almost every Member of Congress have set up accounts [to receive petitions from and engage with users]."); *see also* Congressional Research Service, *Social Media in Congress: The Impact of Electronic Media on Member Communications* at 7 (May 26, 2016) ("By January 2013 . . . virtually all Members of Congress had at least one official congressional social media account.").[3] As our democracy increasingly moves online, it is crucial that courts properly apply existing First Amendment law to the digital acts of government to ensure that the Internet does not offer the government a haven to bypass constitutional rules.

The two core First Amendment principles at issue here—first, that an individual does not lose her First Amendment rights upon gaining public office

[3] *Available at* https://fas.org/sgp/crs/misc/R44509.pdf.

and, second, that the government cannot limit access to a forum, public information, or public services based on viewpoint—can be reconciled. They require only that the Court begin its analysis by asking who controls the social media at issue: a private speaker or a government actor. If the answer is "private speaker," then that individual retains the ability to choose and limit the audience.

If, on the other hand, the answer is "government actor," the Court must assess what role the social media at issue plays in order to determine what the Constitution requires. When the government designates social media a public forum, the First Amendment prohibits it from limiting the discourse based on viewpoint. When it uses social media to make government information generally available, the First Amendment prohibits it from blocking critics in a manner that prevents them from viewing that information. And when it uses social media to offer responsive services to constituents, the First Amendment requires that the government provide them all with the opportunity to petition for those services, regardless of their viewpoint.

The practical harms of allowing viewpoint-based discrimination in any of these circumstances highlight why the Constitution proscribes it. When a government actor bans critics from speaking in a forum, it silences and chills dissent, warps the public conversation, and skews public perception. When only critics are blocked from viewing information or petitioning the government for

services, the restriction operates as a punishment for holding political viewpoints that the government actor disfavors.

This Court should not allow such results. Applying the proposed framework to a particular case will almost certainly be a fact-intensive inquiry. Here, the district court correctly held that Defendant–Appellant violated the First Amendment by blocking Plaintiff–Appellee from commenting on her social media page. Accordingly, this Court should affirm the decision of the district court.

## FACTUAL BACKGROUND

This case arises from a public official's decision to block a critic from her Facebook page. Defendant–Appellant has chaired Loudoun County's governing body, the Board of Supervisors, since January 1, 2016. Dkt. 132 ("Mem. of Dec.") ¶ 3 (citing Tr. 68). The day before she was sworn into office, she created a Facebook Page[4] titled "Chair Phyllis J. Randall" (hereinafter "Chair Page"). *Id.* ¶ 10 (citing Tr. 133, 176).

Defendant–Appellant uses her Chair Page to communicate with her constituents, which she considers to be part of her job. *Id.* ¶ 3 (citing Tr. 185). She uses the page to address Loudoun County residents and to share information of

[4] Facebook distinguishes between a "personal account" and a "Page," which it defines as "represent[ing] something other than yourself (example: your business)." Facebook Help Center, *Why should I convert my personal account to a Facebook Page?* (2017), https://www.facebook.com/help/201994686510247.

interest with them. *Id.* ¶ 12 (citing Tr. 176, 196). Her posts reflect government work: "many of Defendant's posts . . . relate to her work as Chair," "document meetings" of the County Board, and are "expressly addressed to 'Loudoun'—Defendant's constituents." *Id.* ¶¶ 17, 20, 23. In addition, the posts include announcements about the Board's official work, *id.* ¶ 20, and "document events . . . Defendant attended in her official capacity as Chair," *id.* ¶ 21.

Indeed, Defendant–Appellant categorizes her Chair Page as her "Government Official" page. *Id.* ¶ 16 (Tr. 129–31).[5] In addition to the Chair Page, she also maintains a personal Facebook profile, which she generally uses to discuss family matters, and a "Friends of Phyllis Randall" Facebook page, which she used for her campaign and continues to use to discuss politics. *Id.* ¶ 10 (citing Pl. Exh. 221), ¶ 28 (citing Tr. 95–96, 217–18). She refers to her Chair Page as her "County Facebook Page," *id.* ¶ 10 (citing Pl. Exh. 221), ¶ 18, and includes a link to the Chair Page in the official newsletters her office regularly releases, *id.* ¶ 26 (citing Tr. 115–17, 128; Pl. Exhs. 17–31).

[5] Facebook offers the following types of Pages: "Local Business or Place;" "Company, Organization or Institution;" "Brand or Product;" "Artist, Band, or Public Figure;" "Entertainment;" and "Cause or Community." Facebook, *Create a Page* (2017), https://www.facebook.com/pages/create. Within "Artist, Band, or Public Figure," Facebook offers 31 more precise categories, including "Government Official," "Political Candidate," "Politician," and "Public Figure." *Id.* Of these, Defendant–Appellant categorized her Chair Page as one belonging to a "Government Official."

Defendant–Appellant explicitly invites the public to comment on her Chair Page. One of her posts reads, "I really want to hear from ANY Loudoun citizen on ANY issues, request, criticism, compliment, or just your thoughts." *Id.* ¶ 18 (citing Pl. Exhs. 201, 231). She specifically identifies her Chair Page as the space for "back and forth conversations." *Id.* Defendant–Appellant also uses the page to solicit participation in Loudoun County initiatives, *id.* ¶ 19 (citing Tr. 87–88, 90–91, 205; Pl. Exh. 112), to ask anyone in medical need during snowstorms to contact her, and to coordinate relief efforts. *Id.* ¶¶ 22, 25 (citing Pl. Exh. 196).

Despite Defendant–Appellant's stated intention to invite all constituents to discuss any thoughts, *id.* ¶ 18 (citing Pl. Exhs. 201, 231), she banned Plaintiff–Appellee from her Chair Page because she did not want him to comment on her page, *id.* ¶ 38 (citing Tr. 29–30, 213). While banned, Plaintiff–Appellee could still see and share content from the Chair Page, but could not post to the page. *Id.* ¶ 43 (citing Tr. 50–51). As described above, *see supra* note 2, this constituted "blocking from commenting." The district court found that "Defendant banned Plaintiff from her Facebook page because she was offended by his criticism of her colleagues in the County government." *Id.* ¶ 39.

## ARGUMENT

### I. Balancing the First Amendment Rights of the Public Against Those of Public Officials Requires the Court to Determine Whether a Social Media Page Belongs to a Private Speaker or a Government Actor.

Two essential First Amendment principles lie at the core of this case. First, an individual does not forfeit her First Amendment rights upon gaining public office; rather, she maintains her right to speak in her private capacity. *See Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006); *Pickering v. Bd. of Educ*., 391 U.S. 563, 568 (1968). "It is well settled that 'a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.'" *Garcetti*, 547 U.S. at 413 (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983)). This principle extends not only to career government employees, but also to elected officials. Indeed, elected officials "have an obligation" to speak out on the issues of the day "so that their constituents can be fully informed by them," "be better able to assess their qualifications for office," and "be represented in governmental debates by the person they have elected." *Bond v. Floyd*, 385 U.S. 116, 136–37 (1966).

Although "[t]he interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it," *Garcetti*, 547 U.S. at 420, "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley v. Irish-Am. Gay*,

*Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (holding that the First Amendment protects the right of a private parade organizer to exclude certain groups from marching in the parade to control the messages conveyed). That includes the right to curate who contributes to one's speech. "[W]hatever [a speaker's] reasons" for excluding certain contributors, the constitutional issue "boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Id.* at 575. Translating that principle to social media means that when a private speaker prevents someone from commenting on her social media page, she is not violating his First Amendment rights; rather, she is exercising hers.

At the same time, the government cannot bypass the Constitution by hiding behind a mask of private speech. *Cf. Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009) (cautioning that the possibility that one "speech doctrine [may] be used as a subterfuge for favoring certain private speakers over others based on viewpoint" is a "legitimate concern"). An individual representing or acting as the government cannot mischaracterize herself as a private speaker to avoid meeting the obligations the First Amendment imposes on the government when it acts to restrict speech.

Protecting private speech and holding government action to constitutional account are compatible goals. To ensure that both are achieved—and because the

First Amendment checks government, but not private, action—the Court must begin by asking who controls the social media at issue: a private speaker, or a government actor.

## II. A Public Official Who Maintains a Social Media Page Under the Auspices of Government Is Engaging in Government Action.

To assess whether a private speaker or a government actor controls a social media account, the Court should apply a Fourteenth Amendment "state action" analysis.[6] This inquiry enables the two principles described above to be reconciled: It allows courts to preserve "an area of individual freedom by limiting the reach of federal law," while also "assur[ing] that constitutional standards are invoked when . . . the State is responsible." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (internal marks and alterations omitted); *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999); *Screws v. United States*, 325 U.S. 91, 111 (1945) ("acts of officers in the ambit of their personal pursuits are plainly excluded," while "[a]cts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it.").

[6] In the context of individual government actors, the test for state action under the Fourteenth Amendment is identical to the test for 42 U.S.C. § 1983's "under color of state law" requirement. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982); *United States v. Price*, 383 U.S. 787, 794, n.7 (1966); *UAW, Local 5285 v. Gaston Festivals*, 43 F.3d 902, 906 (4th Cir. 1995). Accordingly, this section relies on cases from both contexts.

There is no single test for what constitutes government action. The inquiry "is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood*, 531 U.S. at 295. In general terms, an individual engages in government action when she exercises government power or authority, or acts to fulfill the function or goals of the government. *See United States v. Classic*, 313 U.S. 299, 326 (1941), *accord Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled in part on other grounds by Monell v. N.Y. City Dept. of Soc. Servs.*, 436 U.S. 658, 695–701 (1978); *see also Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Polk Cty. v. Dodson*, 454 U.S. 312, 320 (1981).

In applying this test, the Supreme Court has repeatedly held that function matters over form. Even "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans v. Newton*, 382 U.S. 296, 299 (1966). For example, a "physician's function while working for the State," rather than "the amount of time he spends in performance of those duties or the fact that he may be employed by others to perform similar duties," determines whether he acts under color of state law. *West v. Atkins*, 487 U.S. 42, 56 (1988). Similarly, a public defender is not a government actor when she advocates for her client, but may be one when she "perform[s] . . .

functions" for the state, notwithstanding the fact that the state is her employer in both cases. *Polk Cty.*, 454 U.S. at 325.

Thus, the government action inquiry is "necessarily fact-bound." *Lugar*, 457 U.S. at 939. Because "generalizations do not decide concrete cases," a court must "sift[] facts and weigh[] circumstances" to determine whether a particular case involves government action. *Evans*, 382 U.S. at 299 (internal marks and citation omitted). No single fact can be "a necessary condition across the board," "nor is any set of circumstances sufficient, for there may be some countervailing reason against attributing activity to the government." *Brentwood*, 531 U.S. at 288, 295.

Notwithstanding the inherently fact-intensive nature of this inquiry, two Supreme Court cases are particularly instructive here—and in cases of blocking individuals from social media webpages more broadly. In *Brentwood Academy*, the Court held that an interscholastic athletic association comprising both public and private schools acted under color of state law. The case offers a useful analogy because, like such an association, a person who holds public office acts under both private and governmental identities. In *Brentwood*, the Court explained that such an association acted under color of state law because "athletics obviously play an integral part in . . . public education"; the organization was "overwhelmingly composed of public school officials . . . exercising their own authority to meet their own responsibilities"; the meetings "were held during official school hours"; and

public schools "largely provided for the Association's financial support." 531 U.S. at 299. In other words, the determining factors included the association's fulfillment of the government's goals and duties; the association's reliance on governmental authority; and the association's use of public resources.

In the second instructive case, *Evans*, the Supreme Court held that a park that began as private property but was then held in trust by the government for decades could not be removed from the Constitution's reach by then transferring title from the government to a private party. "[W]ho . . . has title" does not override the "public character" of the space, and so access to the park remained protected by the Constitution. 382 U.S. at 302. The Court focused on the nature of the space, the services it rendered to the community, and the history of government control.

Translating the factors identified in *Brentwood* and *Evans* to the context of social media suggests that the relevant considerations include: (1) the social media page's purpose, including its connection to official business and fulfillment of government goals or duties; (2) whether the individual is relying on or exercising any state authority; (3) the imprimatur of the public office on the social media page; and (4) the public resources (i.e., time and money) used for the communication. *See Borreca v. Fasi*, 369 F. Supp. 906, 910 (D. Haw. 1974) (holding that an elected official excluding certain members of the press from a press conference constitutes state action when he communicates about "municipal

and county operations and concerns," "uses public buildings and public employees," and speaks on "public matters").[7]

These factors can be reflected in facts showing that the social media's function is related to government power, duties, or goals. Such facts could include: that the official uses the social media at issue to hold virtual town halls; that the social media page has a large audience, including the public official's constituents; and that many of the official's posts concern government policies, views, and other official business. Formalistic facts—like whether the individual uses the page during office hours, spends office resources to maintain the page, includes her official title or position in the name of the page, and associates her official email address or phone number with the account—are also relevant. As noted above, no one of these factors is dispositive. And because function matters over form, courts should focus less on facts like use of government resources and when the social media page was created, because expenditures on commonly used social media

[7] These factors are similar to those courts use to identify government speech—though, as discussed further below, a social media page maintained by a government actor does not necessarily constitute government speech. *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2247, 2252 (2015) (holding that expression used by the government "to speak to the public," that appears on property controlled by and associated with the government, and that the government "formally approve[s] and stamp[s]" with its imprimatur constitutes government speech).

platforms such as Facebook or Twitter are likely to be minimal, and because the nature of an individual's use of particular social media may change over time.[8]

In this case, the facts establish that Defendant–Appellant maintained the page to fulfill her official duties. She used the page to communicate with constituents and allocate emergency services, Mem. of Dec. ¶ 12 (citing Tr. 176, 196); *id.* ¶¶ 22, 25 (citing Pl. Exh. 196), and many of her posts "relate to her work as Chair" and are "expressly addressed to [her] constituents," *id*. ¶¶ 17, 20, 23. The

[8] It is also important to recognize that, where no official policy or custom governs her actions, a person may nevertheless be held liable in her individual capacity as long as she engages in government action. *See Hafer v. Melo*, 502 U.S. 21, 27–28 (1991) (holding that auditor general could be sued in her individual capacity for action taken "because of her authority," even if it exceeded her lawful authority). In this context, "individual capacity" does not mean that the individual violated the Constitution while acting as a private person; rather, it means that she violated it while cloaked in—but not necessarily pursuant to the strictures of—her public role or authority. To ignore the existence of individual capacity claims would be to accept that the "same official authority [that makes a government official responsible] insulates [her] from suit" whenever she exceeds its bounds. *Id*. at 28.

Courts in the non-digital context have long recognized that an elected official can violate the First Amendment in her individual capacity by, for example, blocking access to a limited public forum in a viewpoint-discriminatory manner. *See, e.g.*, *Hoefer v. Bd. of Educ. of the Enlarged City Sch. Dist. of Middletown*, No. 10 CIV. 3244 (ER), 2017 WL 2462660, at *8 (S.D.N.Y. June 6, 2017) (holding that an individual representative barring someone from speaking at a town hall because he was not a resident violates the First Amendment whether the representative used the policy as a pretense for viewpoint discrimination or discriminated without any policy); *Liberty & Prosperity 1776, Inc. v. Corzine*, No. CIV 08-2642(JBS), 2009 WL 537049, at *4 (D.N.J. Mar. 3, 2009) (dismissing with prejudice official capacity claims against individuals who allowed a pro-governor nonprofit, but not an anti-governor one, to table at a town hall while allowing plaintiffs to replead the individual capacity claims).

fact that she also maintains a personal profile and campaign page, *id.* ¶ 10 (citing Pl. Exh. 221), ¶ 28 (citing Tr. 95–96, 217–18), similarly suggests that she uses the Chair Page specifically for government work. Furthermore, Defendant–Appellant categorizes her Chair Page as belonging to a "Government Official," *id*. ¶ 16 (Tr. 129 – 31), refers to it as her "County Facebook Page," *id.* ¶ 10 (citing Pl. Exh. 221), ¶ 18, and includes a link to it in her office's regular newsletters, *id.* ¶ 26 (citing Tr. 115–17, 128; Pl. Exhs. 17–31). Thus, the court below correctly held that Defendant–Appellant controlled the Chair Page as a government actor, not a private speaker.

## III. A Government Actor Cannot Block Individuals From Commenting on a Designated Public Forum, From Viewing Generally Available Government Information, or From Petitioning for Government Services Based on Viewpoint.

Once the Court determines, as it should in this case, that an individual controls her social media as a government actor, the Court must consider whether the viewpoint-based blocking infringed upon a constitutional right. The answer is "yes" in each of three scenarios: (1) when the social media constitutes a public forum (as it does in this case) and the individual is blocked from participating in the forum; (2) when the social media is generally accessible but can no longer be viewed due to blocking; or (3) when the government offers responsive services

through the social media account and blocking prevents an individual from petitioning for those services.

Much like the first question, this inquiry turns on the nature of the social media at issue. Here, Defendant–Appellant holds out her Chair Page as a space for public discourse and the allocation of government benefits. As a result, the Constitution prohibits Defendant–Appellant from blocking someone from commenting on or viewing the page based on viewpoint.

### A. The Chair Page Is a Designated Public Forum and the Government May Not Restrict the Ability to Comment on it Based on Viewpoint.

"[F]rom ancient times," the use of public spaces for "assembly, communicating thoughts between citizens, and discussing public questions" has "been a part of the privileges, immunities, rights, and liberties of citizens." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). Such spaces are critical to the development of public discourse and the functioning of democracy. Certain places—including streets, parks, and sidewalks—have "immemorially been held in trust" for public conversation, *id*., while others have been designated by the government for such use in more recent times, *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

In addition to tangible, physical places, "channel[s] of communication," like social media, can be forums. *Cornelius*, 473 U.S. at 801 (holding that a charity drive is a nonpublic forum); *see also Perry Educ. Ass'n*, 460 U.S. at 46 (holding that a school mail system is a nonpublic forum).

The government creates a public forum when it designates "a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802 (1985) (internal marks and citation omitted). This can only happen deliberately. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Id.* To determine the government's intent, courts "examine[] the nature of the property and its compatibility with expressive activity," as well as "the policy and practice of the government" concerning its use of the space. *Id*. Considering Defendant–Appellant's Chair Page in light of those factors shows that she intended to—and therefore did—designate the page a public forum.

### 1. The Nature of the Chair Page is Expressive.

First, "the nature of" a Facebook page is highly compatible with expressive activity. "While 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*, 137 S. Ct. at 1735 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997)). "Social media allows users to gain access to information and communicate with one another about [that information]," and it "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Id.* at 1737; *see also Page v. Lexington Cty. Sch. Dist. One*, 531 F.3d 275, 284 (4th Cir. 2008) (recognizing that the government including "a type of 'chat room' or 'bulletin board'" on its website "in which private viewers [can] express opinions or post information" could "create a limited public forum."). In addition, much like a public park, a social media page "can provide a soapbox for a very large number of orators—often, for all who want to speak," *Summum*, 555 U.S. at 479 (noting that this capacity is a common feature of public forums).

Within the category of social media, "[o]ne of the most popular . . . sites is Facebook," which allows users to "debate religion and politics," *Packingham*, 137 S. Ct. at 1735, "like" posts, associate with individuals and groups, and generally communicate thoughts and ideas. *See, e.g., Liverman v. City of Petersburg*, 844 F. 3d 400, 407–08 (4th Cir. 2016) (recognizing that "social networking sites like Facebook have also emerged as a hub for sharing information and opinions with one's larger community"); *Bland v. Roberts*, 730 F.3d 368, 386, 388 (4th Cir.

2013) (finding that "liking" and posting on Facebook are protected, expressive activities). Because Facebook pages are highly compatible with expressive activity, the first factor suggests that government officials intend to open public forums when they create and maintain a social media page.

### 2. The Government Intended to Designate the Chair Page a Forum.

The second factor for determining the government's intent—the public official's "policy and practice" in using the space—leads to the same conclusion here. This inquiry is likely to be more case-specific, and should focus on how the government actor takes advantage of the channel's expressive nature. In the context of social media, that includes whether the government actor invites or accepts comments from others. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 273 (1981) (finding a forum where the government "has opened its facilities for use" by others); *Walker*, 135 S. Ct. at 2252 (distinguishing government speech from government-created forums on the basis that the state "formally approve[s] and stamp[s]" the former with its imprimatur, while the latter allow "private parties, and not only the government . . . to communicate.").

Here, Defendant–Appellant's use of the Chair Page evinces a desire to designate the page a forum. She expressly invites the public to make use of the page's expressive capabilities, writing that she "really want[s] to hear from ANY Loudoun citizen on ANY issues, request, criticism, compliment, or just your

thoughts." Mem. of Dec. ¶ 18 (citing Pl. Exhs. 201, 231) (emphasis in original). In addition, Defendant–Appellant uses the page to communicate with her constituents about opportunities for children and the coordination of relief efforts. *Id*. ¶ 25 (citing Pl. Exhs. 106, 196). Perhaps most tellingly, it is the space she designates for "back and forth conversations." *Id.* ¶ 18 (citing Pl. Exhs. 201, 231).

The fact that Facebook, a private company, maintains the social media website at issue does not alter this conclusion. A speaker "seek[ing] access to . . . private property dedicated to public use . . . evoke[s] First Amendment concerns." *Cornelius*, 473 U.S. at 801. Indeed, the Supreme Court has held that a privately owned theater under lease to the government constitutes a "public forum[] designed for and dedicated to expressive activities." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975). Because it was government actors who, like Defendant–Appellant here, gated access to the privately-owned space in that case, the Court held that their action was "indistinguishable" from that of "public officials [who] had forbidden the plaintiffs the use of public places to say what they wanted to say." *Id.* at 552–53.

While the government "is not required to indefinitely retain the open character" of a designated forum, "as long as it does so it is bound by the same standards as apply in a traditional public forum." *Perry Educ. Ass'n*, 460 U.S. at 46. In a forum, any governmental "restriction must not discriminate against speech

on the basis of viewpoint, and the restriction must be reasonable in light of the purpose served by the forum." *Good News Club v. Milford Cent. Sch*., 533 U.S. 98, 106–07 (2001) (internal marks and citations omitted).[9] This means that the "government may not grant the use of [the] forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972). In this case, the district court correctly held that Defendant–Appellant violated this constitutional requirement by blocking Plaintiff–Appellee from commenting on the page because of "the type of person" he was and the views he was willing to express—including criticism of his local government. Mem. of Dec. ¶¶ 38, 39.

"Where the [government] has opened a forum for direct citizen involvement," including a space to debate public questions, "conduct public business," and "hear the views of citizens," it is difficult to find justification for excluding" particular speakers. *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175–76 (1976). This is particularly true

[9] The district court did not "endeavor to determine the precise 'nature of the forum' at issue" because it correctly held that the viewpoint discrimination at issue here is "'prohibited in all forums.'" Mem. of Dec. at 27 (quoting *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 n.2 (4th Cir. 2006)). For the same reason, this Court need not determine whether the Chair Page constitutes a designated or limited public forum. *See also Byrne v. Rutledge*, 623 F.3d 46, 54 n.8 (2d Cir. 2010); *Chiu v. Plano Indep. Sch. Dist*., 260 F.3d 330, 345–46 (5th Cir. 2001) (noting the "confusion" and "undefined" line between designated and limited public forums).

where, as here, a speaker is excluded for making comments critical of the government. Such political speech lies at the zenith of constitutional protection. The First Amendment exists to enable and protect "uninhibited, robust, and wide open" debate on public issues, *Watts v. United States*, 394 U.S. 705, 708 (1969), and "for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484 (1957). These principles can only be served as long as individuals can criticize their government's policies and practices.

Thus, the court below correctly held that Defendant–Appellant violated the First Amendment by blocking Plaintiff–Appellee from commenting on the Chair Page. Because she intended to designate the page a forum, the page is not simply a conduit for government speech. *See Summum*, 555 U.S. at 469 ("[T]he government does not have a free hand to regulate private speech on government property.").

### B. The Government May Not Block Critics From Viewing Public Information.

Even if Defendant–Appellant had not acted to designate the Chair Page a public forum, her blocking of Plaintiff-Appellant in this case might still have violated the First Amendment. For example, had Defendant–Appellant disabled comments, likes, and other private expression, thereby removing the ability of other persons to interact with her, the Chair Page could have qualified as merely a vehicle for government speech. Even in that instance, however, Plaintiff–Appellee

would have experienced a constitutional harm had the viewpoint-based blocking prevented him from viewing the contents of the page.[10] While the First Amendment does not require the government to refrain from viewpoint discrimination in the messages it conveys, "[t]his does not mean that there are no restraints on government speech." *Id.* at 468. Where the government makes a message or information generally accessible, for example, it cannot restrict an individual from accessing or viewing that message based on viewpoint. *See, e.g.*, *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) (holding that once the government makes "facilities . . . publicly available as a source of information," the First Amendment "requires that this access not be denied arbitrarily or for less than compelling reasons.").[11]

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[10] As noted above, *supra* note 2, this rarely occurs with government social media because individuals can typically view the contents of the account or feed without logging in to the service.

[11] *See also Am. Broad. Cos., Inc. v. Cuomo*, 570 F.2d 1080, 1083 (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."); *Nicholas v. City of New York*, No. 15-CV-9592 (JPO), 2017 WL 766905, at *5 (S.D.N.Y. Feb. 27, 2017).

This conclusion is also supported by cases considering "the public's right of access to information about their officials' public activities," precisely the sort of access at issue here, which recognize that the First Amendment "goes beyond [the] protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)); *see also*

### C. The Government May Not Block Critics From Petitioning For Services.

In addition, where, as here, a public official offers responsive services through a social media account, she may violate an individual's right to petition for those services if she blocks him from sending messages through the account based on viewpoint. The right to petition is "among the most precious of the liberties guaranteed by the Bill of Rights." *McDonald v. Smith*, 472 U.S. 479, 486 (1985). While the government need not grant a petition, it must give individuals the opportunity to seek redress. "The very idea of a government, republican in form, implies a right on the part of its citizens to . . . petition for a redress of grievances." *Id*. (citing *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)). Here, the district court found that Defendant–Appellant used her Chair Page to ask those in medical need during snowstorms to contact her and to coordinate relief efforts after a snow storm. Mem. of Dec. ¶¶ 22, 25 (citing Pl. Exh. 196). Had Plaintiff–Appellant been blocked from the page at those times, he would have been prevented from petitioning for those essential services in violation of his constitutional rights.

## CONCLUSION

This Court should apply the framework set forth above to affirm the district court's holding: Defendant–Appellant violated the First Amendment by blocking

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*Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

Plaintiff–Appellee, based on his disfavored viewpoint, from commenting in a public forum created by a government actor.

November 27, 2017

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because it contains 6,478 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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November 27, 2017

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I HEREBY CERTIFY that on this 27th day of November, 2017, the foregoing Brief of *Amici Curiae* American Civil Liberties Union, et al., was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Signature: /s/ Leslie C. Mehta Date: 11/27/2017

Counsel for: ACLU of VA, ACLU National, et al.

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