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**REGULATE ME ONLINE? REGULATE ME NOT?: A FORUM-  
BASED ANALYSIS EXAMINING THE GOVERNMENT’S ABILITY  
TO REGULATE CONSTITUENTS ONLINE**

Sterling Gutierrez\*

Over the past decade, local governments and municipalities have begun to create policies governing their constituents’ actions on government-managed social media profile pages.<sup>1</sup> Is this sort of regulation a violation of our First Amendment rights? While authors have examined various interconnections of social media sites and First Amendment jurisprudence,<sup>2</sup> this Note will explore and argue that government-managed social media pages that incorporate content-moderation policies should generally be labeled public fora created by government designation; to put it another way, these fora have been opened by the government for the sole purpose of allowing specifically regulated communication to occur between the government officials regulating that account and their constituents. As social media accounts can constitute different features or parts of the specific medium that make up that social media platform,<sup>3</sup> not all of these features fall within the forum label of a designated public forum. Therefore, some social media features will not be found to be a designated public

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\* Special thanks to Rick Su, Professor of Law at the University of North Carolina School of Law, for his comments and suggestions.

<sup>1</sup> See *Social Media Comments Policy*, LOUDOUN CNTY. VA., <https://www.loudoun.gov/2779/Social-Media-Comments-Policy> (last visited Nov. 28, 2020); see also *Fairfax County Social Media Policy & Guidelines for Official Accounts*, FAIRFAX CTY. VA. (May 2015), <https://www.fairfaxcounty.gov/publicaffairs/sites/publicaffairs/files/assets/documents/fairfax-county-social-media-policy.pdf>; *Public Social Media Comments Policy*, GREENSBORO N.C., <https://www.greensboro-nc.gov/government/city-news/official-social-media-sites/public-social-media-comments-policy> (last visited Nov. 28, 2020); *Social Media Comments Policy*, BURLINGTON N.C., <https://www.burlingtonnc.gov/1181/Social-Media-Comments-Policy> (last visited Nov. 28, 2020); *Social Media Center*, CHARLOTTE N.C., <https://charlottenc.gov/newsroom/Pages/SocialMediaCenter.aspx> (last visited Nov. 28, 2020).

<sup>2</sup> See generally Lisa A. Anderson, *The First Amendment and Local Government Use of Social Media*, 99-JUL MICH. B.J. 30 (2020) (commenting on local government use of social media policies); Kathleen McGarvey Hidy, *Social Media Use and Viewpoint Discrimination: A First Amendment Judicial Tightrope Walk with Rights and Risks Hanging in the Balance*, 102 MARQ. L. REV. 1045 (2019) (analyzing the risks posed by judicial reaction to a rights-centric approach to viewpoint discrimination claims); Nick Reade, *Is There a Right to Tweet at Your President?*, 88 FORDHAM L. REV. 1473 (2020) (arguing that court rulings have unconstitutionally compelled the speech of social media companies, resulting in far-reaching ramifications).

<sup>3</sup> For example, Facebook is a social media platform that contains different features (or parts), such as the News Feed, the Timeline, the user’s inbox, and more that all constitute the specific medium that make up Facebook.

forum; instead, they may be found to be traditional public fora, while hopefully none will be found to be nonpublic fora. With this context, these social media features may be found to be covered by the open meeting label, or successfully regulated by government speech or proprietary powers. Government speech, proprietary powers, and open meeting labels have been held by the Supreme Court to be within the powers of the government to regulate through content-based restrictions.<sup>4</sup> For government speech, no forum analysis is necessary and no First Amendment violation will occur under this designation; however, for the open meeting label, content-neutral restrictions need to be found reasonable as to time, place, and manner, and content-based restrictions must be attributable to a compelling government interest; finally, the proprietary powers doctrine requires that restrictions for nonpublic fora are shown to be reasonable and without viewpoint discrimination.<sup>5</sup>

When determining the constitutionality of regulations that create speech restrictions, the Supreme Court has pointedly focused its First Amendment decisions mainly upon the content of the regulated speech.<sup>6</sup> Given how the Court targets the content of the regulated speech, as opposed to the content-based speech regulation, it is important to understand the broader picture by which the Court has defined and analyzed fora. The Court has used three major fora to encompass the spectrum of constitutional protection for expressive activity: (1) traditional public fora, (2) public fora created by government designation, and (3) nonpublic fora.<sup>7</sup>

Generally, the Supreme Court has “rejected the view that traditional public forum status extends beyond its historic confines” of streets, sidewalks, and parks.<sup>8</sup> The Court has never precisely stated what those confines are as there is no working definition for the terms “street,” “sidewalk,” or “park.”<sup>9</sup> The Court has also never strictly adhered to limiting the traditional

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<sup>4</sup> See discussion *infra* Parts I.A, I.B, I.C.

<sup>5</sup> See discussion *infra* Parts I.A, I.B, I.C.

<sup>6</sup> See, e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (stating how “content-based” regulations can restrict speech either on the basis of its subject matter or on the basis of its viewpoint).

<sup>7</sup> *Id.* at 45–6.

<sup>8</sup> *Arkansas Educ. Television Com’n v. Forbes*, 523 U.S. 666, 678 (1998).

<sup>9</sup> See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (stating how the principal purpose of traditional public fora is the free exchange of ideas, without clarifying the boundaries).

public forum category to these three historic confines.<sup>10</sup> While the Court has shown flexibility in its application of the public forum analysis when comparing different public fora to streets, sidewalks, and parks, it appears reluctant to expand the historical confines to include the web pages of a government-managed social media-based forum.

Beyond this, the Supreme Court has also recognized that the government can open non-traditional spaces for use as a public forum, labeling them as “designated public fora” and often calling them “limited public fora.”<sup>11</sup> The Court has held that the government creates this public forum “only by intentionally opening a nontraditional forum for public discourse.”<sup>12</sup> The Court “look[s] 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.”<sup>13</sup> For example, in *International Society for Krishna Consciousness, Inc. v. Lee*,<sup>14</sup> the Court determined that airports are not used for the “free exchange of ideas” and, thus, would fail to be found a public forum after analysis.<sup>15</sup> However, in *Southeastern Promotions, Ltd. v. Conrad*,<sup>16</sup> the Court determined that the Memorial Auditorium was a “public forum[] designed for and dedicated to expressive activities,”<sup>17</sup> and found the city’s refusal to permit use of its auditorium for the “Hair” musical to be a constitutional violation.<sup>18</sup>

For the third group, the Court has held that “[i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity.”<sup>19</sup> In some cases, the Court has indicated that all government properties not contained within the spectrum of traditional public fora and public fora intentionally opened by the government are nonpublic fora.<sup>20</sup> Yet, a resounding

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<sup>10</sup> See *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (finding a state fair to be a public forum); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (finding the grounds of a state capitol to be a traditional public forum).

<sup>11</sup> *Warren v. Fairfax Cnty*, 196 F.3d 186, 193 (4th Cir. 1999).

<sup>12</sup> *Cornelius*, 473 U.S. 788, 802 (1985).

<sup>13</sup> *Id.*

<sup>14</sup> 505 U.S. 672 (1992).

<sup>15</sup> *Id.* at 685.

<sup>16</sup> 420 U.S. 546 (1975).

<sup>17</sup> *Id.* at 555.

<sup>18</sup> *Id.* at 562.

<sup>19</sup> *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 49 (1983).

<sup>20</sup> See *Krishna Consciousness*, 505 U.S. at 680.

characteristic that is assumed—time and again—in all Court cases addressing nonpublic fora is that “opening the nonpublic forum to expressive conduct will somehow interfere with the objective use and purpose to which the property has been dedicated.”<sup>21</sup>

When it comes to government regulation of social media comments on the Internet, the Supreme Court has yet to address how it would analyze and define government-based Internet policies and practices, as this is a relatively new and open issue. However, courts have begun to analyze whether local governments and municipalities have violated the First Amendment through their creation of “social media commenting policies” by looking at whether such a forum should be defined as: (1) government speech; (2) a proprietary power; or (3) an open meeting of the local government or municipality.<sup>22</sup>

In Part One, this Note looks to explore these three avenues and their inter-relation to the three fora—traditional, nonpublic, and government designated—the Supreme Court has used to encompass the spectrum of constitutional protection for expressive activity. In Part Two, this Note will look to simulate how the Supreme Court could potentially come out on the issue of government-based policy regulation of the Internet, specifically targeting regulation of social media comments occurring in many local governments and municipalities today. Finally, in Part Three, this Note will explore future implications of a Supreme Court decision on this issue and the trickle effect—such as the government being able to regulate your speech on the Internet—that could occur regarding one’s First Amendment rights.

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<sup>21</sup> *Warren v. Fairfax Cnty*, 196 F.3d 186, 193 (4th Cir. 1999). *See, e.g.*, *Arkansas Educ. Television Com’n v. Forbes*, 523 U.S. 666, 676 (1998); *Krishna Consciousness*, 505 U.S. at 681; *Cornelius v. NCAAP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Greer v. Spock*, 424 U.S. 828, 838 (1976); *Adderley v. Florida*, 358 U.S. 39, 47–48 (1966).

<sup>22</sup> *See, e.g.*, *Walker v. Div. Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015) (regarding government speech); *Garlock v. Wake County Bd. Of Educ.*, 211 N.C. App. 200 (2011) (regarding open meetings); *Pleasant Grove City v. Sumnum*, 555 U.S. 460 (regarding a local municipalities exercise of its proprietary powers).

## I. FREEDOM TO COMMENT OR FREEDOM TO BE REGULATED

### A. Government Speech

When it comes to how limited public fora have been analyzed under the First Amendment, there are two common levels of analysis. First, the “internal standard”<sup>23</sup> has been used “[i]f the government excludes a speaker who falls within the class to which a designated [limited] public forum is made generally available.”<sup>24</sup> In this case, the limited public forum is treated as a traditional public forum for analysis purposes.<sup>25</sup> Second, the “external standard”<sup>26</sup> restricts the “government’s ability to designate the class for whose especial benefit the forum has been opened.”<sup>27</sup> All the Supreme Court has stated regarding these limitations is that “entities of a ‘similar character’ to those allowed access may not be excluded.”<sup>28</sup> Thus the “selection of a class by the government must only be viewpoint neutral and reasonable in light of the objective purposes served by the forum.”<sup>29</sup>

In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,<sup>30</sup> the Court analyzed whether Texas specialty license plate designs were government speech, where a nonprofit organization was requesting a specialty license plate featuring a Confederate battle flag.<sup>31</sup> The Court concluded that government speech was at issue by relying on the precedent set in *Pleasant Grove City v. Summum*.<sup>32</sup> Historically, Texas, among other states, has used license plates to convey government speech such as “slogans urging action, promoting tourism, and touting local industries.”<sup>33</sup> Additionally, “Texas license plate designs ‘are

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<sup>23</sup> *Warren*, 196 F.3d at 193.

<sup>24</sup> *Id.* (quoting *Arkansas Educ. Television Com’n*, 523 U.S. at 676).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 194.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 48 (1999)).

<sup>29</sup> *Id.*; see also *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 825–27 (1985). In *Cornelius*, Justice Blackmun opines that a limited public forum, in this case, becomes analytically indistinct from a nonpublic forum. *Cornelius*, 473 U.S. at 825–27.

<sup>30</sup> 576 U.S. 200 (2015).

<sup>31</sup> *Id.* at 200.

<sup>32</sup> *Id.* at 201. For a discussion of the facts, holding, and reasoning of *Summum*, see *infra* Section I.B.

<sup>33</sup> *Walker*, 576 U.S. at 201.

often closely identified in the public mind with the [State].”<sup>34</sup> The individual plates are “government article[s] serving the governmental purposes of vehicle registration and identification.”<sup>35</sup> Texas owns all plate designs, requires every Texas vehicle owner to display the plates, and issues every Texas plate.<sup>36</sup> Finally, “Texas maintains direct control over the messages conveyed on its specialty plates, by giving the Board final approval over each design.”<sup>37</sup> Given all this, the Court determined that Texas’ specialty plates were similar enough to the monuments in *Summum* to call for the government speech label. The Court determined that the plates were not a nonpublic forum because the “government is . . . a proprietor, managing its internal operations.”<sup>38</sup> The Court reasoned that a private party’s involvement in the plate approval had no determinative standing over the “governmental nature of the message” nor did it “transform the government’s role into that of a mere forum-provider.”<sup>39</sup>

What *Walker* made clear is that the Court has “refused [t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals.”<sup>40</sup> Additionally, the Court clarified that “Texas’ specialty license plates are not a ‘traditional public forum.’”<sup>41</sup> The Court also stated that “Texas’ policies and the nature of its license plates indicate that the State did not intend its specialty license plates to serve as either a designated public forum or a limited public forum.”<sup>42</sup>

Yet, in a fiery dissenting opinion, Justice Alito wrote that the Court’s decision “categorizes private speech as government speech and thus strips it of all First Amendment protection.”<sup>43</sup> Alito argued that the majority’s reliance solely on the precedent

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<sup>34</sup> *Id.* (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009)); see *infra* Section I.B for discussion of *Summum*.

<sup>35</sup> *Walker*, 576 U.S. at 201.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 216 (citing *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992)).

<sup>39</sup> *Id.* at 217.

<sup>40</sup> *Id.* at 208 (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

<sup>41</sup> *Id.* at 215.

<sup>42</sup> *Id.* at 216.

<sup>43</sup> *Id.* at 221 (Alito, J., dissenting).

in *Summum* was a complete misunderstanding of that precedent.<sup>44</sup> Given that the central issue in *Summum* was whether the municipal government had created a forum for private speech in the park by erecting a monument there, Alito distinguished the characteristics which rendered public monuments government speech in *Summum* from the present case involving Texas' specialty plate program.<sup>45</sup> He discussed how, historically, monuments have always served to express a government message; historically, landowners have never allowed third parties to use their property to permanently house monuments that do not convey the landowners' wishes; and, spatially, parks can only accommodate a "limited number of permanent monuments" and thus serve a government purpose.<sup>46</sup> Alito found the contrast between the history of public monuments and the Texas license plate program to be incredibly vast.<sup>47</sup>

Ultimately, Alito found that this instance was not government speech but a government-designated public forum whereupon private parties exercised their right of First Amendment self-expression of speech that was being regulated by the Texas state government; concluding, he found that the forum analysis should have led to a discovery of unconstitutional content-based regulation of Texas citizens' freedom of speech.<sup>48</sup>

The contrast between the majority and dissent in *Walker* is important to note as this 2015 Supreme Court opinion sets the precedent whereupon a state or local government can theoretically call their regulation of citizens' private purchases—such as a license plate, an Internet domain name, a house, and so on—government speech, so long as: (1) these private purchases are regulated by a government agency; and (2) these purchases are generally viewable by some undisclosed number of government constituents over the course of a given period of time. This calls into question whether the government could integrate this "catch-all" approach on Internet-based government fora in the future and be given a favorable verdict by the Supreme Court against any First Amendment challenges.

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<sup>44</sup> *Id.* at 227.

<sup>45</sup> *Id.* at 229.

<sup>46</sup> *Id.* at 228–29.

<sup>47</sup> *Id.* at 230.

<sup>48</sup> *Id.* at 235–36.



Yet, the Supreme Court ruling in *Walker* came on a 5-4 split decision.<sup>49</sup> Since then, the Supreme Court has encountered major turnover: Justice Scalia passed away in 2016; Justice Kennedy retired in 2018; and Justice Ginsburg passed away in 2020.<sup>50</sup> These three justices were all replaced during Donald Trump's sole presidential term: Justice Gorsuch joined in 2017; Justice Kavanaugh joined in 2018; and, most recently, Justice Barrett joined in 2020.<sup>51</sup> Given the 5-4 split decision, this ruling could readily be overturned in the foreseeable future. Coming out the other way around—where forum analysis is conducted and finds a government-designated public forum, where heightened scrutiny is applied—there could be a finding that unconstitutional, content-based regulations were implemented by the government. To surmise, the present forum doctrine analysis, accounting for any implemented government speech defense, could soon be decided in the opposite direction. Therefore, the *Walker* decision highlights how uncertain the application of the forum doctrine and applicable forum defenses currently stand with the Internet—a relatively new and unexplored First Amendment forum—in mind.

An important question to touch on is what can cause the Supreme Court to rule a space is a nonpublic versus public forum. In *Lehman v. City of Shaker Heights*,<sup>52</sup> a candidate running for political office argued that his First Amendment rights were violated by the city's refusal to allow him to post political ads on the city transit system.<sup>53</sup> The Supreme Court plurality concluded that the city transit system was not a public forum that required it to accept payment and subsequently place Lehman's political advertisement.<sup>54</sup> Shaker Heights contracted with a third party to manage the advertising space on the city's transit system.<sup>55</sup> Lehman applied for and was denied space for his political advertising, even though space was available.<sup>56</sup> Some of the ads accepted around that same timeframe included "cigarette companies, banks, savings and loan associations, liquor

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<sup>49</sup> *Id.* at 203 (majority opinion, written by Breyer, J., and joined by Thomas, J., Ginsburg, J., Sotomayor, J., and Kagan, J.).

<sup>50</sup> See *About the Court*, SUPREME COURT OF THE UNITED STATES, [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) (last visited Apr. 29, 2021).

<sup>51</sup> *Id.*

<sup>52</sup> 418 U.S. 298 (1974).

<sup>53</sup> *Id.* at 299–301.

<sup>54</sup> *Id.* at 304.

<sup>55</sup> *Id.* at 299.

<sup>56</sup> *Id.* at 300.

companies” and more.<sup>57</sup> Yet, in the twenty-six years of operation, the City had never accepted a “political or public . . . advertis[ments] on its vehicles.”<sup>58</sup> The plurality opinion found that the city’s transit system was a means of commerce for the city as opposed to an open space or meeting hall forum.<sup>59</sup> Thus, the plurality concluded that “the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising” did not rise to a First Amendment violation.<sup>60</sup> “The city consciously has limited access to its transit system advertising space”<sup>61</sup> without violating any constituents’ freedom of speech as the city was found to be a nonpublic forum subject to a lower level of scrutiny.<sup>62</sup> Given the reasonableness of the content-based regulations of the ads allowed, the plurality opinion concluded that Lehman’s First Amendment rights were not violated without the city government explicitly raising the government speech argument, which it would have handily won.<sup>63</sup>

However, in a dissenting opinion, Justice Brennan argued that the facts supported the creation of a public forum through which Lehman’s First Amendment rights were violated.<sup>64</sup> This is because the city purposely opened the advertisement cards for “the dissemination of information and expression of ideas when it accepted and displayed commercial and public service advertisements on its rapid transit vehicles.”<sup>65</sup> Justice Brennan highlights how the city discriminated among the forum’s users “solely on the basis of message content.”<sup>66</sup> While reasonable time, place, and manner restricts are constitutional, the city—according to Justice Brennan—attempted to justify this ban by arguing that political advertising in the transit cars is an inappropriate forum for expression and debate of that sort.<sup>67</sup> The public forum doctrine required the Court to balance the competing interests of the government, the speaker, and the audience; given the balancing of competing interests, Justice Brennan found that the plurality improperly assessed the primary

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 300–01.

<sup>59</sup> *Id.* at 303.

<sup>60</sup> *Id.* at 304.

<sup>61</sup> *Id.*

<sup>62</sup> See *R.A.V. v. St. Paul*, 505 U.S. 377, 421–22 (1992).

<sup>63</sup> *Lehman*, 418 U.S. at 304.

<sup>64</sup> *Id.* at 310 (Brennan, J., dissenting).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 311–12.

use of the city's transit system and any disruption that could occur from free expression of the advertising card spaces.<sup>68</sup> "By accepting commercial and public advertising, the city effectively waived any argument that advertising in the transit cars is incompatible with the rapid transit system's primary function of providing transportation. A forum for communication was voluntarily established . . . ."<sup>69</sup> Ultimately, Justice Brennan found a designated public forum was created and Lehman's freedom of speech should be protected from "discrimination based solely upon subject matter or content."<sup>70</sup> Justice Brennan opined that "the [fact that the] discrimination is among entire classes of ideas, rather than among points of view within a particular class, does not render it any less odious."<sup>71</sup> Finally, Justice Brennan rejected the nonpublic forum argument raised by the plurality and city, as the endorsement of an opinion expressed in advertisement on public transit is not likely to be attributed to the local government in the same way as the opinions of a speaker in a public park are not likely to be attributed to the city administration.<sup>72</sup>

The plurality opinion of *Lehman* showed that the Supreme Court found the city's transit system to be a nonpublic forum subject to lower scrutiny and didn't require the city to raise the government speech argument to justify its content-based speech restrictions. As the dissenting Justice Brennan aptly pointed out, a major purpose of the city's transit system is the exchange of transit ad space for money; inherently, it follows that there should be heightened scrutiny under the forum analysis for the city to prove that they have a compelling government interest to regulate the ad space through content-based restrictions. There is no reason that the City of Shaker Heights should have been found by the plurality to be a nonpublic forum. The forum analysis should have concluded that this is a public forum, yet the city should have raised a government speech argument to avoid forum analysis and justify the city's exclusion of content on a selective basis, as constituents would view the political ads as the government speaking—the reality is that Shaker Heights didn't need to raise the government speech argument to target exclusion of a small minority of ads, as the Court improperly

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 314.

<sup>70</sup> *Id.* at 315.

<sup>71</sup> *Id.* at 316.

<sup>72</sup> *Id.* at 321.

labeled the transit system a nonpublic forum that justified the city's content-based restrictions. Ultimately, *Lehman* highlights the fallibility of the Court's forum analysis that resulted in a minimization of the constituents' First Amendment protections, as nonpublic fora are subject to lower scrutiny.

These implications directly apply to an Internet-based forum where the major purpose would be the dissemination of information, and any local or state government could strategically argue that they have restricted certain content-based page ads, as opposed to others, solely because they moderate that Internet page and do not want these ads to be misinterpreted as views of their own. In application, this would look something like a local government providing ad-rental space on its government-controlled page, hoping to promote local municipal businesses. The local government broadcasts the following constraints for its ad space: the business must be locally owned and operated; the business must agree to pay a monthly fee; and the business must subscribe to any government-based promotions developed to increase tourism. A locally owned and operated sex toy shop, Candy, is ready to agree to all these conditions. However, when Candy seeks to rent ad space on the local government's online page, the government denies them that right, even with space available. In court, the local government raises the government speech defense to account for its desired content-based regulation of its government-controlled page. The local government argues that Candy would distort the image of the local community—one that is becoming increasingly more conservative and is populated by a majority Baptist community. Upon review, the court rules against the merits of the government's argument that the ad space is a nonpublic forum, citing the facts as contra *Lehman*; as the local government successfully argued for the ad space to be seen as government speech, the court is precluded from conducting a forum analysis on this First Amendment issue. The court determined that the ad space is government speech given the potential for the government's online viewership to incorrectly label this local community as a sex-positive municipality that desires more sex-centered culture to move there. However, the court opinion makes clear that the court would have found the ad space to be a nonpublic forum but for the government speech defense. While the Supreme Court decided *Lehman* in 1974, this opinion sets the precedent to allow a local or state government body to not have to worry about the Supreme Court's stated

adherence in *Perry*<sup>73</sup> that content-based restrictions must be supported by a compelling government interest, as the courts have shown that certain spaces can be questionably labeled nonpublic fora that have an easier time passing constitutional scrutiny. Overall, the distinction between a public and nonpublic forum seems unclear and subjective at times.

What *Walker* directly highlights and *Lehman* indirectly highlights is that government speech arguments can be successfully raised (but don't always need to be) in both public and nonpublic forum settings. Once the Supreme Court has decided that the speech "at issue" is government speech, there is no longer a burden on the government to prove the speech restrictions are content neutral. Applying this to government-controlled social media pages, the issue to determine would be whether the Supreme Court would find the government exercises enough control as to not warrant a forum analysis—as government speech makes the forum analysis inapplicable. *Walker* displayed that the Texas government could successfully argue that government speech allowed them to regulate the creation of license plates through a third-party manager. *Lehman* showcased how the city government of Shaker Heights didn't need to raise a government speech argument to successfully defend Shaker Heights' regulation of the creation of ad-based content on their public transit system, as the public transit system was found to be a nonpublic forum. These Supreme Court cases give the pretense that government regulation of their constituents' First Amendment rights extends beyond the government bodies themselves; at a minimum, this extension goes to all third-party systems that the government associates with—whether they must have a contractual relation with them is unclear.

Therefore, it is very likely that the Supreme Court would hold that a government-controlled social media page—managed by a third party such as Facebook or Twitter—could successfully argue that government speech justifies their right to make content-based restriction on their forum page. For example, if a District Attorney's (DA's) government-controlled social media page decided to regulate some of its constituents' comments—such as those questioning the DA's actions in relation to a rise in gang-related violence, during the DA's term—the DA could

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<sup>73</sup> 460 U.S. 37 (1983) (discussing how a content-based restriction must be shown to serve a compelling state interest to pass scrutiny).

claim a successful government speech defense that targets these comments. Essentially, the argued defense would show that the constituents' comments are purporting to state the view of the DA as agreeing that gang-related violence has risen in the district during the past term—at least this is how the online viewership has been interpreting these comments. The government speech defense would allow the DA's government-controlled social media page to successfully moderate such constituents' comments through deletion, without being subjected to a First Amendment violation due to content-based discrimination. For, "the Government's own speech . . . is exempt from First Amendment scrutiny."<sup>74</sup>

Of important note, the government speech defense becomes rather weak when trying to disentangle certain elements and aspects of a particular online platform.<sup>75</sup> Essentially, this would create a scenario where the Supreme Court would need to mince out each separate element of the respective online platform to ensure that each element is given a separate and distinct forum analysis. Then it would be up to the government to elicit the government speech defense for each online platform's element, as seen fit. This is highlighted most readily by the Court labeling the singular element-containing forum of a license plate on a car or the ad space on the body of a bus, as compared to the Court labeling the multifaceted, element-containing forum of a social media platform.

### ***B. Proprietary Power***

In *Adderley v. State of Florida*,<sup>76</sup> student demonstrators argued that their First Amendment rights were violated when they entered government-owned jail grounds to protest prior arrests and city segregation policies.<sup>77</sup> The Court found that the demonstrators were arrested solely for being on "that part of the jail grounds reserved for jail uses [only]."<sup>78</sup> The Court noted that historically, there was no evidence providing that "similarly large groups of the public [had] been permitted to gather on this [private] portion of the jail grounds for any purpose."<sup>79</sup> Additionally, the Court noted that "[t]he [government], no less

<sup>74</sup> *Johanns v. Livestock Mktg. Assn.*, 544 U.S. 550, 553 (2005).

<sup>75</sup> See *supra* text accompanying note 3.

<sup>76</sup> 385 U.S. 39 (1966).

<sup>77</sup> *Id.* at 40–41.

<sup>78</sup> *Id.* at 47.

<sup>79</sup> *Id.* (footnote omitted).

than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”<sup>80</sup> This emphasis of proprietary power highlighted how the land that is under the total control of the government may be used in any capacity that the government sees fit without being found unconstitutional under a plaintiff’s claim of First Amendment violations.

Yet, in a dissenting opinion, Justice Douglas believed history supported the jailhouse as being “an obvious center for protest,” likening it to other seats of government such as “an executive mansion, a legislative chamber, a courthouse, or the statehouse itself.”<sup>81</sup> Looking toward evidence in the record, Justice Douglas found that the “jailhouse grounds were not marked with ‘No TRESPASSING!’ signs, nor [did the State] claim that the public was generally excluded from the grounds.”<sup>82</sup> Justice Douglas also found any attempt to analogize the proprietary rights of the government to that of a private owner completely off-base: “say[ing] that a private owner could have done the same if the rally had taken place on private property is to speak of a different case [.]”<sup>83</sup>

While the majority of *Adderley* made it clear that a government’s proprietary powers will be respected and used when a forum analysis is conducted to analyze whether the public’s First Amendment rights have been violated, Justice Douglas’s dissenting opinion left open the door to question whether just because the government owns something, it can do whatever, whenever it wants, with no need to account for our First Amendment rights. In a hypothetical situation where a group of constituents claim that their First Amendment rights have been violated by not being allowed to state their objections openly, on social media, toward a public official that maintains a government-controlled social media account, the government would have trouble successfully arguing that the government is exercising its proprietary powers over that account. The government does not *per se* own the Internet; it could claim ownership to things such as domain names or URL addresses that lend themselves to this concept of a government’s proprietary power, but under the current jurisprudence of First

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 49 (Douglas, J., dissenting).

<sup>82</sup> *Id.* at 52.

<sup>83</sup> *Id.*

Amendment law, it is a relatively weak argument to make. A government body can clearly exercise a domain of ownership over sections of a jail—like the government did in *Adderley*—to control their constituents’ freedom of speech. However, at this point, the same cannot be said of a government-controlled social media page.

The Supreme Court has ruled that the government can use proprietary powers to regulate constituents’ speech on the government’s property.<sup>84</sup> However, it is important to understand the Supreme Court’s stance on whether the government can successfully use proprietary powers to discriminate against a third party’s ability to build structures on the government’s property when facially similar structures have already been erected by private parties. In *Pleasant Grove City v. Summum*,<sup>85</sup> a religious organization argued that their freedom of speech was being violated when a government park—that previously erected another donated monument—declined to erect a monument desired by that organization.<sup>86</sup> The Supreme Court held that the city government was within its proprietary powers to exercise its right to erect and deny whatever monuments it desired on its land.<sup>87</sup> The public park in Pleasant Grove City had “15 permanent displays, at least 11 of which were donated by private groups or individuals[,]” including a Ten Commandments monument.<sup>88</sup> The City passed a resolution limiting monuments in the park to “those that ‘either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community.’”<sup>89</sup> The City used this resolution as the basis for rejecting Summum’s requests for erecting a monument in the park.<sup>90</sup> While the district court denied the respondents claim, the Tenth Circuit reversed on the basis that “public parks have traditionally been regarded as public for[a],” and the City needed a compelling justification that was narrowly tailored to accomplish its goal of differentiating between Summum’s requested monument and the others currently erected.<sup>91</sup> The Supreme Court analyzed whether the petitioners were “engaging in their own expressive conduct” or

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<sup>84</sup> *Adderley*, 385 U.S. 39, 48 (1966).

<sup>85</sup> 555 U.S. 460 (2009).

<sup>86</sup> *Id.* at 466.

<sup>87</sup> *Id.* at 464.

<sup>88</sup> *Id.* at 464–65.

<sup>89</sup> *Id.* at 465.

<sup>90</sup> *Id.* at 466.

<sup>91</sup> *Id.*



whether the petitioners were “providing a forum for private speech.”<sup>92</sup> The Supreme Court has generally held that “[p]ermanent monuments displayed on public property typically [showcase the government’s use of proprietary powers]”<sup>93</sup> because the government can decide what will or will not be displayed to communicate a message on government property, without a constitutional violation. Analogizing how governments use monuments to communicate messages to the way “kings, emperors, and other rulers” have used monuments to communicate messages to their subjects, the Supreme Court strengthened its analysis by noting that monuments are erected with a designated purpose.<sup>94</sup> Ultimately, property owners do not usually permit construction of monuments without rationally interpreting what message they will convey on the property owner’s behalf. As the Court observed, “[t]his is true whether the monument is located on private property or on public property[.]”<sup>95</sup>

The Supreme Court’s opinion in *Summum* makes clear that the government has the right to control and regulate what can and cannot be placed on its property when such regulation is aimed at monitoring how the government’s constituents will perceive the message. This applies to land that has traditionally been regarded as public fora, such as state and local parks. Therefore, the Court held that the resolution of Pleasant Grove City was proper in that it aimed to condition an organization’s request of erecting monuments on whether it would tend to support the viewpoints that the local government desired to espouse.

Both *Adderley* and *Summum* display that the Supreme Court allows the government to execute its proprietary powers in relation to both public and private government property, specifically regarding the affixation of any object on that property for a fixed or fluctuating time that will be perceived as the government’s own speech. To put it simply, if the government owns it, then the government can decide what can and will be put on its land. The government’s execution of its proprietary powers is exempt from heightened scrutiny that

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<sup>92</sup> *Id.* at 467.

<sup>93</sup> *Id.* at 470.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 471.

would be normally triggered by a government's regulation of its constituents' speech.<sup>96</sup>

In the case where the forum at issue is a government-controlled social media page, the government would have to exercise clear ownership over the social media site—this is a necessary condition as social media sites contain a variety of elements that each require an individual forum analysis to be conducted.<sup>97</sup> For example, the government would need to own and operate a government-specific social media site. Furthermore, a constituent would need to request to display a custom webpage design layout—such as one that has Bible verses wrapped throughout the background—that would appear on some, if not all, of that government-specific social media site's pages. Then the government would need to argue that under its proprietary powers—of that public or privately-regulated forum site—such a webpage design layout would either espouse a viewpoint the government does or does not desire to have its constituents contribute to it.

As a hypothetical, imagine a state government has created a state owned-and-operated government site. The purpose of this site is to allow candidates running for election to have a controlled forum where each candidate can advocate for themselves and for any position on the ballot up to election day. Constituents are given limited access to the site: the constituents can only view potential candidates on the ballot, ask them questions through commenting on candidates' campaign webpages, and show support to candidates through "likes" or anecdotal plugs. The state supports this owned-and-operated government site by having different private parties—throughout the state—purchase and fund candidate webpages. The private party donation is recognized on the bottom of each funded candidate page, with a short-word attribution proposed by the donor and approved by the government. Thus, a candidate's campaign page could say, "This webpage is supported by Farmer Joe of Corn Farms, Incorporated." A handful of alt-right supporters submitted their short-word attribution that stated the following: "This webpage is supported by the Ku Klux Klan of Wake-Up Media, Incorporated." The government denies this proposal and rejects all subsequent proposals by the group. The alt-right supporters bring suit, and the government defends its

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<sup>96</sup> See *id.* at 473.

<sup>97</sup> See discussion *infra* Section II.

actions by claiming proprietary power over the site. The court rules in favor of the government, stating that the campaign forum is owned-and-operated by the government; therefore, the government can moderate what is and is not purchased and placed on the site, since it could reasonably be construed that the government or that specific campaign page supports the alt-right movement.

Given the previous example and hypothetical, a fundamental issue arises when applying *Summum* and *Adderley* to a government-controlled social media site. Control is the key, determinative factor. The government simply does not control or own a social media forum, and there does not appear to exist a good basis for making such an argument. It would be one thing—like in the hypothetical—if the government bought and controlled all aspects of an Internet-based forum, but when the government is using a third-party social media site, this is not the case. In today's day and age, the most necessary component of a government exercising its proprietary powers (control) falls short of existence. The government's rights-of-ownership over the social media page are tangibly different from the government's rights-of-ownership over the social media platform. As such, any argument by the government that it can regulate constituents' comments on its social media page through its exercising of its proprietary powers should be rejected by the Supreme Court. Ultimately, this will be an argument that is best examined in a case-by-case basis, that—depending on the facts—could come out either way.

### *C. Open Meetings*

What is an open meeting? In *Garlock v. Wake County Board of Education*,<sup>98</sup> the North Carolina Court of Appeals, targeting in-person meetings, reasoned that “saying that a meeting is ‘open’ tells us very little.”<sup>99</sup> With this in mind, the N.C. Court of Appeals “generally consider[s] many factors” when analyzing whether “a meeting is truly open to the public.”<sup>100</sup> Factors can include “notice for meetings, distribution of agendas,

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<sup>98</sup> 211 N.C. App. 200 (2011) (discussing how Wake County Board of Education held an open meeting where the Board's last-minute adoption of a ticketing policy improperly excluded members of the public from a Committee of the Whole (“COW”) meeting, in violation of the Open Meetings Law).

<sup>99</sup> *Id.* at 217 (citing Ann Taylor Schwing & Constance Taylor, *Open Meeting Laws* 2d § 5.1 (2000)).

<sup>100</sup> *Id.*

preparation and availability of minutes of meetings, location and characteristics of the meeting place, recordation of minutes,” and more.<sup>101</sup> Thus, the N.C. Court of Appeals gives a baseline for how to analyze in-person meetings. These factors are useful as they provide a baseline through which one can begin to analyze whether an open meetings law violation can occur if such a meeting does not occur when a government “body” meets physically or digitally—such as an open meeting occurring on a 24/7 basis through a government-controlled social media account that is solely directed at answering questions as they arise.

As stated in *Garlock*, when a meeting is “held in secret and without prior notice, or [when] no member of the public is permitted to attend and no media access is permitted,”<sup>102</sup> this is great evidence supporting the fact that an open meetings law violation occurred. While such open meetings laws are generally directed at and meant to govern authorized meetings of government “bodies,” open meetings have never been expressly defined or made exclusionary.<sup>103</sup> So, a 24/7 government body open meeting occurring online could theoretically be possible. During a government body review, courts analyze open meeting violations *de novo* as they are a question of law.<sup>104</sup> “[E]ach official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting.”<sup>105</sup> *Garlock* gives an important understanding on how courts have analyzed violations of open meetings laws that have generally been directed at in-person meetings, whether broadcast online or held in a city hall. These laws have been put in place to ensure that the government bodies can “meet as groups to deliberate or take action on public [matters]” that are then open and accessible to the public.<sup>106</sup> Applying *Garlock* to a government-controlled social media page is most sensible when that page is streaming a live Q&A session, but it is not entirely clear how it would apply when such a forum labels itself as open 24/7 to address and answer concerns. Furthermore, it is unclear how the agenda of such a meeting would be updated, or if it would transpire under a broad agenda that can address and answer anything that such a

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See *Access to Government Meetings*, DIGITAL MEDIA LAW PROJECT, <http://www.dmlp.org/print/1385> (last visited Nov. 12, 2020).

<sup>104</sup> *Garlock*, 211 N.C. App. at 214.

<sup>105</sup> N.C. GEN. STAT. § 143-318.10(a) (2009).

<sup>106</sup> *Access to Government Meetings*, *supra* note 103.

government-controlling entity regularly does in the course of their business.

In *Perry Education Association v. Perry Local Educators' Association*,<sup>107</sup> while discussing public fora, the Supreme Court stated that a government is entitled to make “[r]easonable time, place and manner regulations” and content-based speech regulations must be “narrowly drawn to effectuate a compelling state interest.”<sup>108</sup> Governments may reserve nonpublic fora for intended purposes, communicative or otherwise, as long as the speech regulation is reasonable and not “an effort to suppress expression.”<sup>109</sup> Applying this doctrine to the hypothetical, 24/7 government-controlled social media open meeting, the Supreme Court could readily find constitutional any content-based speech restrictions, so long as the restrictions were narrowly tailored to accomplish that particular government body’s day-to-day expressive activity—such as moderating the day’s open meeting agenda to focus solely on building permits, while excluding all other issues.

On the other hand, an example of impermissible content-based speech restrictions would be highlighted by a District Attorney’s (DA’s) social media page given the following constraints: the page is used primarily to discuss the DA’s campaign for re-election; the page is moderated by one of the DA’s information technology (IT) employees; some of the DA’s constituents have begun to comment on the social media page, questioning how the DA will crack down on the increased gang violence in the area, given his previous track record; finally, the IT moderator has begun to delete these comments as they are detracting from the DA’s re-election traction. Given that the *Perry* doctrine highlights that content-based restrictions must be narrowly tailored to accomplish a compelling government interest, the IT moderator’s actions would be unconstitutional toward the commenting constituents’ First Amendment rights. That is because these content-based speech exclusions are clear examples of viewpoint discrimination, solely deleted by the IT moderator because of the bad publicity they are causing the DA’s re-election campaign.

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<sup>107</sup> 460 U.S. 37 (1983).

<sup>108</sup> *Id.* at 46 (citation omitted).

<sup>109</sup> *Id.*

The next question to address is whether an online government social media profile could ever be viewed as a public or nonpublic forum. In *United States Postal Service v. Council of Greenburgh Civic Associations*,<sup>110</sup> the Court's majority and dissenting opinions answered the question as to whether a letterbox was a public forum.<sup>111</sup> The Court debated whether a letter box should be regarded as a public forum because letters are a traditional means for public communication, or as a nonpublic forum because the government specifically reserved the use of letterboxes for the delivery of letters.<sup>112</sup> The issue at hand was whether the U.S. Postal Service was violating the First Amendment right of the Council of Greenburgh Civic Associations when the Postal Service communicated that it would fine the continued practice of the Council's placement of unstamped notices in the letterboxes of private homes.<sup>113</sup>

The Majority found that if a letterbox is designated as an "authorized depository" of the Postal Service, then "it becomes an essential part of the nationwide system for delivery and receipt of mail."<sup>114</sup> Such a designation does not then transform the letterbox into a "public forum" through which the First Amendment guarantees access to all.<sup>115</sup> Additionally, there is neither historical nor constitutional support for "characterization of a letterbox as a public forum."<sup>116</sup> The Court has recognized that the constitution "does not guarantee access to property" due to government ownership or control.<sup>117</sup> The Majority keenly noted that the Council never claimed that the Postal Service was treating their unstamped notices differently because of their "content"—a triggering word for most First Amendment claims where the Court would subject the government to heightened scrutiny.<sup>118</sup> Therefore, the Majority concluded that the letterbox is a nonpublic forum.<sup>119</sup>

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<sup>110</sup> 453 U.S. 114 (1981).

<sup>111</sup> *Id.* at 128; *id.* at 136 (Brennan, J., concurring); *id.* at 147 (Marshall, J. dissenting); *id.* at 152 (Stevens, J. dissenting).

<sup>112</sup> *Id.* at 128-29.

<sup>113</sup> *Id.* at 114 (majority opinion).

<sup>114</sup> *Id.* at 128.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 129.

<sup>118</sup> *Id.* at 127; *Cornelius v. NCAAP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 807 (1985) (discussing how content-based restrictions trigger heightened analysis to ensure a First Amendment violation did not occur); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (discussing how a content-based restriction must be shown to serve a compelling state interest to pass scrutiny).

<sup>119</sup> *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 132.

However, in Justice Marshall's dissent he stated that "the concept of a public forum" properly opens "varied governmental locations to equal public access for free expression subject to" proper "time, place, or manner" constraints as necessary.<sup>120</sup> Comparing the Court's definition of public fora to the traditional function of the mailing system—being so inherently a part of society—Marshall embraces Holmes' words<sup>121</sup> by stating that it "is almost as much a part of free speech as the right to use our tongues."<sup>122</sup> This led to Marshall's conclusion that the Postal Service is a public forum, given its "pervasive and traditional use as purveyor of written communication."<sup>123</sup> Taking his analysis even further, Justice Marshall entertained the argument that the government has full control of the mailing system; then he reasoned that the Council's purpose in using the government property is well in line with the purpose it is designated for: reception of written communication.<sup>124</sup> Ultimately, Justice Marshall rejected the Majority's finding that the government owns the mailing system, as letterboxes are privately owned.<sup>125</sup> "Under the Court's reasoning, the Postal Service could decline to deliver mail unless the recipients agreed to open their doors to the letter carrier—and then the doorway, or even the room inside could fall within Postal Service control."<sup>126</sup>

*Greenburgh Civic Associations* serves as a good illustration for how the forum of the Internet could be examined. The Internet is a relatively new medium through which communication has been revolutionized by allowing "various computer networks around the world to interconnect."<sup>127</sup> Because of this globalization of communication, anyone with access to a computer can access anyone on the Internet at any time. This includes instant messages, communications on social media, and the like. Given the recency of the Internet, there is limited historical precedent where the Supreme Court has discussed access to and the role of the Internet generally.<sup>128</sup> Yet,

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<sup>120</sup> *Id.* at 147 (Marshall, J., dissenting).

<sup>121</sup> *See* United States ex rel. Milwaukee Soc. Democratic Pub. Co. v. Burleson, 255 U.S. 407, 437–38 (1921) (Holmes, J. dissenting).

<sup>122</sup> *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 148 (Marshall, J., dissenting).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 150.

<sup>125</sup> *Id.* at 151.

<sup>126</sup> *Id.*

<sup>127</sup> Robert Kahn, *Internet*, BRITANNICA,

<https://www.britannica.com/technology/Internet> (last visited Mar. 19, 2021).

<sup>128</sup> *See, e.g.*, United States v. Am. Libr. Ass'n, Inc., 539 U.S. 194, 205 (2003)

(reasoning that Internet access in public libraries is not a traditional or designated

there has been no Supreme Court precedent regarding government-managed social media pages, upon which to rely on. Simply put, the Court in *Greenburgh Civic Associations* would find it hard to argue that the government owns the Internet. Given that the Internet is a global medium of communication, the closest argument to be made would be that the Internet exists through the establishment of privately-owned computers connected to a government-owned infrastructure. With this in mind, the Court would concede that the functional purpose and designation of this infrastructure is to allow communication between constituents. If Farmer Joe wants to chat with Friar Tuck about how many bushels of corn Friar Tuck wants delivered this week, Farmer Joe can do this without having to go through the hassle of calling or rendezvousing to meet in person. Therefore, the Internet, although not a traditional public forum,<sup>129</sup> fits favorably into the public forum category. Both the majority and dissenting opinions of *Greenburgh Civic Associations* (discussed above) would agree on this conclusion.

The next question to explore is to what extent could a government-moderated social media forum exercise control over its constituents' actions. In *Kindt v. Santa Monica Rent Control Board*,<sup>130</sup> the Ninth Circuit reviewed whether a rental property owner had his First Amendment right to free speech violated when he was ejected from a public rent control board meeting.<sup>131</sup> The court reasoned that “[c]itizens are not entitled to exercise their First Amendment rights whenever and wherever they wish.”<sup>132</sup> *Kindt* argued, inter alia, that because the rent control board meeting restricted his comments to three minutes per item at a given meeting, his First Amendment rights were being violated.<sup>133</sup> However, the Supreme Court has held that “[r]easonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling [government] interest.”<sup>134</sup>

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public forum); *Packingham v. North Carolina*, 137 S.Ct. 1730, 1738 (2017) (Alito, J., concurring) (equating the Internet to traditional fora like public streets and parks); *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 853 (1997) (noting that the Internet “constitutes a vast platform” for communication).

<sup>129</sup> *But see, Packingham*, 137 S.Ct. at 1738 (Alito, J., concurring) (comparing the Internet to traditional public fora).

<sup>130</sup> 67 F.3d 266 (9th Cir. 1995).

<sup>131</sup> *Id.* at 267.

<sup>132</sup> *Id.* at 269.

<sup>133</sup> *Id.* at 271.

<sup>134</sup> *Id.* at 270 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)).



Given this, the Ninth Circuit found that “[n]o invidious regulation of Kindt’s speech was implicated and [speech] content was not a factor” in limiting Kindt’s public comments.<sup>135</sup> The Ninth Circuit further rationalized that “the . . . structured nature of city council and city board meetings ma[de] them fit . . . neatly into the nonpublic forum niche,” yet the Ninth Circuit held the determinative factor to be the city’s limitations on speech being reasonable and content-neutral.<sup>136</sup>

With the Ninth Circuit decision in *Kindt*, and the Supreme Court decision in *Greenburgh Civic Associations*, an online government social media profile could be viewed as an open forum. If viewed as a public forum, a government-controlled social media account could most certainly operate as an ongoing, 24/7 open meeting. If viewed as a nonpublic forum, a government-controlled social media account could be interpreted to be a privately owned domain on a public-based network that falls into the open meeting label, but it would be easier for the government to argue that its limitations on speech are reasonable and content neutral or simply fall under the government speech defense.

As seen in *Kindt*, the Ninth Circuit concluded that the city board meeting was a nonpublic forum.<sup>137</sup> As seen in *Greensburgh*, the Supreme Court Majority found letterboxes to be a government-owned, nonpublic forum,<sup>138</sup> while the dissenting Justice Marshall rejected this view and found the letterboxes to be a public forum with individual, private ownership.<sup>139</sup> With these cases in mind, how would a court come out on a forum analysis of a government-controlled social media profile when analyzing whether the government’s regulation of speech is proper? If the forum analysis found the government-controlled social media profile to be a public forum, the court would evaluate the forum under *Perry* by looking to see whether the regulations are reasonable as to time, place, and manner, and whether content-based regulations serve a compelling government interest to ensure those regulations are permissible. However, if the forum analysis concludes the social media profile is a nonpublic forum, then the government will be

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<sup>135</sup> *Id.* at 271.

<sup>136</sup> *Id.* at 270–71.

<sup>137</sup> *Id.* at 270.

<sup>138</sup> *See* *United States Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 132 (1981).

<sup>139</sup> *Id.* at 147 (Marshall, J., dissenting).

analyzed under lower scrutiny. The government-based policy restrictions will only need to be found to be reasonable and not a form of viewpoint discrimination. If functioning as an open meeting, the social media profile would need to comply with all the relevant open meetings laws that apply to government bodies, while still ensuring no First Amendment violations occur under the nonpublic forum court designation.

Finally, it is important to note that even if the Court did not find a First Amendment violation based on the government-based policy restrictions in place, it is possible that there could still be an open meetings law violation. These violations are not determined through forum analysis; instead, they are determined by the specific state's laws.

## II. WHAT WOULD THE SUPREME COURT DO?

In *Davison v. Plowman*,<sup>140</sup> the plaintiff commented on the official Commonwealth Attorney's Facebook page, and the defendant both deleted that comment and proceeded to block the plaintiff from leaving further comments.<sup>141</sup> Loudoun County maintains a "Social Media Comments Policy" that reserves the County's rights to "delete submissions' that violated enumerated rules" such as vulgar language or spam.<sup>142</sup> Before the plaintiff filed his motion for summary judgment, Defendant "voluntarily restored [the] [p]laintiff's access to his office's Facebook page[,] at least partially restored [the] [p]laintiff's original comment," and revised the "Social Media Comments Policy' adopted by Loudoun County . . . ."<sup>143</sup> These revisions include the following: (1) requiring the Office of the County Administrator to "review and authorize the removal of a comment when appropriate," (2) adding a "review process through which commenters [may] contest the removal of their comments," and (3) revoking the "County's right to delete comments that are 'clearly off topic.'"<sup>144</sup> The court analyzed whether the Commonwealth Attorney's Facebook page should

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<sup>140</sup> No. 1:16cv180, 2017 WL 105984 (E.D. VA, Jan. 10, 2017) (discussing whether a constitutional violation occurred when the Loudoun County Commonwealth Attorney's official Facebook page deleted a constituent's comment that criticized the Defendant's office for failing to appoint a special prosecutor in connection with a specific instance of alleged malfeasance).

<sup>141</sup> *Id.* at \*1–2.

<sup>142</sup> *Id.* at \*1.

<sup>143</sup> *Id.* at \*2.

<sup>144</sup> *Id.*

be designated as a limited public forum.<sup>145</sup> Because the County's policy invited and delineated the type of speech the social media page intended to facilitate, the court found that the "policy indicate[d] the County's intent to open a forum for speech that the public may utilize consistent with certain restrictions."<sup>146</sup> Thus a "metaphysical" forum was created by the policy for First Amendment purposes.<sup>147</sup> The Court then analyzed whether a First Amendment violation occurred.<sup>148</sup> Due to the plaintiff's motion for summary judgment, the plaintiff's failure to "address whether his comment complied with the County's Social Media Comments Policy" left the issue open for debate.<sup>149</sup> Without further information to rely on, the district court denied the plaintiff's requested motion.<sup>150</sup>

*Flowman* displays that a county's social media policy can create a designated public forum when the government clearly articulates what can and cannot be communicated on its government-managed social media accounts, when such accounts are intended to allow communication between the government and its constituents, and when such accounts allow access and accessibility to the public at large. Although the court found that the plaintiff could not win his First Amendment suit on summary judgment, it is clear that the district court took this matter seriously and went so far as to decide whether forum analysis needed to be conducted to properly conclude whether a municipality's policy regulations violated a constituent's First Amendment right.

In *Knight First Amendment Institute v. Trump*,<sup>151</sup> an organization sued the President of the United States claiming that the President had violated their First Amendment rights on Twitter.<sup>152</sup> The district court considered whether "a public official [could], consistent with the First Amendment, 'block' a

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<sup>145</sup> *Id.* at \*3.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at \*4.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> 302 F. Supp. 3d 541 (S.D.N.Y. 2018), *aff'd*, 928 F.3d 226 (2d Cir. 2019), *vacating as moot*, Biden v. Knight First Amendment Institute, No. 20-197, 2021 WL 1240931, at \*1 (S.Ct. Apr. 4, 2021) (mem). I am analyzing the district court opinion as it gives a more in-depth analysis than the Second Circuit provides. Furthermore, the Supreme Court has ordered the lower court to vacate the judgment and dismiss the case as moot, as Trump is no longer in office. and Twitter has banned his account.

<sup>152</sup> *Id.*

person from his Twitter account” when that person voiced differing political views and concluded that the answer is “no.”<sup>153</sup> The major issue of this dispute concerned “whether a public official’s blocking of the individual plaintiffs on Twitter implicat[ed] a forum.”<sup>154</sup>

The district court considered the applicability of the forum doctrine.<sup>155</sup> As a threshold issue for using forum analysis, the district court rejected “any contention that the @realDonaldTrump account as a whole is the would-be forum to be analyzed.”<sup>156</sup> As the Plaintiffs solely sought narrow access to Twitter, the forum analysis focused on: “the content of the tweets sent, the timeline comprised of those tweets, the comment threads initiated by each of those tweets, and the ‘interactive space’ associated with each tweet in which other users may directly interact with the content of the tweets.”<sup>157</sup>

The district court then analyzed whether the putative forum is owned or controlled by the government.<sup>158</sup> Although Twitter is a private company that is not government-owned, the court found this to not be dispositive.<sup>159</sup> Because the President and Scavino<sup>160</sup> exercised control over the @realDonaldTrump account in relation to the content of the tweets, the timeline compiling those tweets, and the interactive space associated with each tweet, the court found that these aspects of control over the @realDonaldTrump Trump account were “sufficient to establish the government-control element.”<sup>161</sup> The court highlighted that this control did not extend to “the content of a retweet or reply,”

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<sup>153</sup> *Id.* at 549.

<sup>154</sup> *Id.* at 564.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 566.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Having a longstanding relationship with Donald Trump, Dan Scavino held a position as the Trump Campaign’s Social Media Director; during this time-period, an anti-Semitic social media graphic of Hillary Clinton arose on Trump’s Twitter feed. See Michal Kranz, Pat Ralph & Grace Penetta, *Trump’s social media director Dan Scavino is the staffer who’s been around the longest – and he started as Trump’s caddie*, INSIDER (May 20, 2019), <https://www.businessinsider.com/dan-scavino-bio-trump-golf-caddie-turned-social-media-director-2018-4>. After Donald Trump became the 45th President of the United States, Scavino served as the White House Director of Social Media from 2017 to 2021. *Id.* Scavino would go on to violate the Hatch Act due to a tweet from his personal Twitter account in mid-2017. *Id.* Scavino jointly served as the White House Deputy Chief of Staff for Communications from 2019 to 2021. See *id.*

<sup>161</sup> *Knight First Amend. Inst.*, 302 F. Supp. 3d at 567.

showing that the court clearly delineated exactly all that the government-controlled forum encompassed.<sup>162</sup> While the defendants argued that the President established the account in 2009—before the presidential inauguration—the district court found this to be an unpersuasive justification for why no governmental control had been exercised.<sup>163</sup> The court used an analogy to convey its reasoning on the defendant’s contention: a facility that is initially developed “by the government as a military base” is plainly not a public forum, but if that military base “is subsequently decommissioned and repurposed into a public park,” then the present use of the military base as a public park would bear more heavily on the forum analysis, as opposed to its “historical origins as a military installation.”<sup>164</sup> Thus, “the President and Scavino’s present use of the @realDonaldTrump account weigh[ed] far more heavily in the [forum] analysis than the origin of the account.”<sup>165</sup>

Next the district court assessed “whether application of forum analysis is consistent with the purpose, structure, and intended use of the @realDonaldTrump account that” the court found “to satisfy the government control-or-ownership criterion.”<sup>166</sup> Forum analysis is not appropriate when “the government has broad discretion to make content-based judgments in deciding what private speech” may be made available to the public, such as a government-based broadcaster.<sup>167</sup> The Supreme Court had reasoned that public forum claims would “obstruct the legitimate purposes of television broadcasters.”<sup>168</sup> As government speech falls outside the forum analysis, the district court examined three factors that the Supreme Court has previously used to assess government speech as opposed to private speech: (1) “whether government has historically used the speech in question ‘to convey state messages,’ [(2)] whether that speech is ‘often closely identified in the public mind’ with the government, and [(3)] the extent to which [the] government ‘maintain[s] direct control over the messages conveyed.’”<sup>169</sup> The District Court used these factors to

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 569.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 570.

<sup>167</sup> *Id.* (citing *United States v. Am. Libr. Ass’n*, 539 U.S. 194, 204 (2003)).

<sup>168</sup> *Id.* (citing *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998)).

<sup>169</sup> *Id.* at 571 (citing *Matal v. Tam*, 137 S.Ct. 1744, 1760 (2017)).

reason that the “content of the President’s tweets [were not] susceptible to forum analysis,” as the content of the tweets could be used “to announce, describe, and defend [the President’s] policies; to promote his Administration’s legislative agenda; to announce official decisions;” and more.<sup>170</sup> Through this same reasoning, “the account’s timeline, which ‘displays all tweets generated by the [account]’ [was] not susceptible to forum analysis.”<sup>171</sup> However, the district court concluded that the “interactive space for replies and retweets created [through interaction with] the @realDonaldTrump account” was subject to forum analysis.<sup>172</sup> The court found that “the association that a reply has with a governmental sender of the tweet being replied to” cannot, by itself, be sufficient to “render the reply government speech.”<sup>173</sup> The court applied this same logic to the interactive space to conclude that this space is subject to forum analysis and is not government speech.<sup>174</sup>

Next, the district court analyzed how to classify the interactive space.<sup>175</sup> The court readily concluded that “the interactive space of a tweet sent by @realDonaldTrump is not a traditional public forum.”<sup>176</sup> The court stated that there is no historical practice of using the interactive space of @realDonaldTrump on the medium of Twitter for public speech.<sup>177</sup> The court then found that the “factors strongly support the conclusion that the interactive space is a designated public forum.”<sup>178</sup> These factors included how the @realDonaldTrump account was accessible to the public at large, that the President communicated directly with the other Twitter users, and that Twitter is designed for and maintained as a platform whereby users interact with each other.<sup>179</sup>

With this in mind, the district court considered “whether the blocking of the individual plaintiffs [was] permissible in a designated public forum,” focusing analysis on the interactive space, as the tweets and timeline were found to be government speech that did not violate the plaintiffs’ First Amendment

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 572.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 573.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 574.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 574–75.

rights.<sup>180</sup> Designated public fora must have restrictions “‘narrowly drawn to achieve a compelling state interest.’”<sup>181</sup> Regardless, viewpoint discrimination is impermissible when directed at speech normally allowed within the forum’s limitations.<sup>182</sup> The district court found that the individual plaintiffs “were indisputably blocked as a result of viewpoint discrimination,” and the record established that the plaintiffs criticized the President and his policies and were subsequently blocked.<sup>183</sup> Viewpoint discrimination occurred because blocking a user “limit[s] [their] right to speak in a discrete, measurable way[.]”<sup>184</sup> which in this case resulted in the plaintiffs’ inability to voice their particular opinions and beliefs.

The question to analyze becomes whether the Supreme Court would agree with the district court’s opinion in *Knight First Amendment Institute*. It seems plausible that the Supreme Court would find that a government-managed social media page has multiple elements that need to be examined. Some of those elements would not require the Court to conduct a complete forum analysis, as these elements would fall under the government speech label—in some fact-specific cases, these elements could fall under the open meeting label or even the proprietary power label. Other elements would be found to fit into a designated public forum after completion of the Court’s forum analysis.

As a hypothetical, consider a District Attorney (DA) running for re-election. That DA has a government-controlled social media account on Facebook. The DA’s social media page is mainly used to advertise his candidacy, while updating constituents on the DA’s accomplishments over his term in public office. The DA posts frequently on his Facebook page, and one of his constituents comments on a recent post. The DA’s post states how the DA is “hard on crime” and has a “track record to prove it.” The constituent comments a rebuttal and states how there are several tangible examples that display why the DA is not “hard on crime” and does not deserve to be elected again because, among other things, he is “bought off by those

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<sup>180</sup> *Id.* at 575.

<sup>181</sup> *Id.* (citing *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–79 (1972)).

<sup>182</sup> *Id.* (quoting *Rosenberger v. Rector & Visitors of U. of Va.*, 515 U.S. 819, 830 (1995)).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 577.

that can afford it.” Additionally, the constituent shares the post and writes a caption for the shared post where the constituent states: “The current DA has not only been soft on crime but has proven that he is incapable of leading our district from crime and corruption. Stand with me in voting for Candidate Blair.” In response to this, the DA’s government-controlled Facebook account proceeds to block the constituent on Facebook and delete the constituent’s post-specific comments; this causes the post the constituent shared on his account to be deleted, as his access to the original post is revoked. The DA’s government-controlled Facebook account justifies its actions under their state’s specific regulation policies that are all addressed in the “Public Officials with Government-controlled Social Media Accounts” policy handbook. In response to the DA’s actions, the constituent brings suit against the DA, claiming a First Amendment rights violation.

To evaluate this First Amendment suit, the Supreme Court would need to start off by analyzing whether the plaintiff’s speech is protected by the First Amendment. Given that the speech simply commented on the DA’s candidacy, the plaintiff’s speech would fall under speech that is protected. Then the Supreme Court would need to determine the extent of the forum to be analyzed. Given that Facebook is a privately-owned company, and the government-controlled account is simply one portion of that medium, it is logical to believe that the Supreme Court would limit its forum analysis to much less than the entire social media medium. In fact, the Court should find the target-forum to encompass the DA’s Facebook page, the DA’s posts, the DA’s private messages, and the interactive space medium between these posts and the other Facebook users, as these are the relevant sites of inquiry for this First Amendment claim.<sup>185</sup>

Next the Supreme Court would need to analyze the extent to which the government exercises control over the forum in question. Although Facebook is privately owned, the DA, and any other government employees assisting in its moderation, exercise control sufficient to establish this element. This conclusion is justified because the Facebook page is used primarily for the DA’s re-election campaign. It displays to the

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<sup>185</sup> See *id.* (discussing how the court identified the relevant forum of a social media site); see also *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (stating that forum identification should “focus[] on the access sought by the speaker”).



district's constituents anything and everything that the DA desires to have highlighted on the campaign-centered account. It also allows the DA the opportunity to answer any relevant questions that constituents may have regarding the DA's track record. While the DA may have created the Facebook page prior to his election as the DA, the current use's major focus is related to that of a public official in office, as opposed to a private citizen; after all, the current use bears most heavily on the Court's forum analysis.

Following this, the Supreme Court would next analyze whether the application of the forum analysis is consistent with the purpose, structure, and intended use of the DA's Facebook page, posts, private messages, and interactive space medium. This is where the Court should find that the government-controlled Facebook account exercises the government speech defense—or in some fact-specific cases, the open meeting or proprietary power label—over both the page and posts made on that account's timeline. This is because the government is allowed to regulate what is said when it speaks on its own behalf. However, if the Court instead finds the account's timeline to be a government-designated public forum, the restrictions at play would need to be reasonable as to time, place, and manner, and any content-based restrictions would need to serve a compelling government interest. With this in mind, it appears that the Supreme Court would find that the DA's government-controlled Facebook account timeline is reasonable as to time, place, and manner restrictions—given the statewide regulation policy currently in place. The statewide policy operates within the permissible designated public forum constraints by establishing restrictions that limit other social media users from speaking about topics outside the scope the DA set regarding content the account's page and posts target, while clearly disallowing slurs, hate speech, and related communications, which can be seen as a compelling government interest. Ultimately, the Court should conclude that the account's timeline and the content from each of the timeline's posts should be found unsusceptible to forum analysis as the timeline is regulated under the government speech defense.

However, the Supreme Court should find that the interactive space medium and private messages are outside the scope of what government speech can regulate under the First Amendment. The interactive space medium is open to the

public, and other account users can share posts to their own Facebook account timeline and comment their own thoughts related to these posts. Indeed, the essential function of the interactive space medium is to allow private speakers to engage with the content of the user-specific posts, lending itself to supporting the application of forum analysis. By focusing on the access sought by the speaker, the Supreme Court should find the interactive space medium to not be government speech. Through the same logic, private messages are created through user-specific actions to establish an open dialogue between two people. The essential function of the inbox is to allow two users to communicate, lending itself to supporting the application of forum analysis. Focusing on the forum space of the inbox, the Supreme Court should find that private messages are not regulated by government speech.

The next step for the Supreme Court would be to classify the interactive space medium and inbox fora. Given the historical precedent of traditional public fora, along with the lack of historical precedent of the Facebook medium, the Court should find that the interactive space is not a traditional public forum. However, the inbox space could very likely be paralleled to that of the streets or public park—free from content-based regulation and open to those who choose to respond to messages there. Therefore, the inbox space should be designated a public forum. Moving on to government-designated fora, it appears that the DA, by creating this government-controlled Facebook account, intended to permit a limited-topic discourse on the interactive space medium. Given that Facebook users can interact at will and the purpose of the government-controlled account is so the DA can communicate directly to the constituents, these factors lend themselves to the belief that the interactive space medium should be found to be a designated government forum. Considering whether the interactive space medium should be labeled a nonpublic forum under proprietary powers, it is clear that the Supreme Court should answer this with a resounding “no.” This is because the government neither owns Facebook nor the Internet. There is a very weak argument to be made by the DA that the government exercises ownership over this medium. While the government satisfies the control element necessary to utilize proprietary powers, the issue becomes ownership of a third-party platform. This ownership does not exist; furthermore, the government will have a hard time arguing that a social media platform should be designated a

nonpublic forum. Hence, the Court should conclude that the interactive space medium is a designated public forum.

Finally, the Supreme Court will examine whether the actions—blocking the constituent and deleting his comments, resulting in the deletion of his shared post—of the DA’s government-controlled Facebook account resulted in viewpoint discrimination, in a violation of the constituent’s First Amendment rights. This will ultimately be a fact-specific judgment. In this case, it does not appear that the constituent’s comments violated the statewide regulation policy in place. Thus, the Court should find that viewpoint discrimination occurred, as the constituent’s comments seem well within the permissible speech otherwise designated by the forum’s limitations—set by the DA’s office. Thus, blocking the constituent, as a result of comments expressed in opposition to the DA’s public office candidacy, should be found impermissible under the First Amendment.

While this will always be a fact-specific analysis, it appears that the Supreme Court would come out extremely close to how the district court did in *Knight First Amendment Institute*. This is the correct analysis, and, if *Plowman* was analyzed beyond the plaintiff’s motion for summary judgment, it should be decided the same way.

### III. IMPLICATIONS AND CONCLUSION

The implications of the Supreme Court coming out, as analyzed above, on government-controlled social media accounts would be beneficial for the continued freedom and exercise of one’s individual First Amendment rights. A bad scenario would occur if the Court found that all elements of any government-controlled social media account, on a third-party platform, are government speech. This would throw out any potential forum analysis, as this would be a complete defense against any First Amendment challenges. In turn, the government would have justified the deletion of constituents’ comments and the blocking of any who spoke against the government’s beliefs—showcasing an extremely broad-reaching application of the government speech defense capable of longterm detrimental effects. Thus, the government would more readily be able to regulate our freedom of speech in a wider capacity of fora than previously allotted. Yet, the worst-case

scenario for our freedom of speech would occur if the Court found that any of the elements of a government-controlled social media accounts were thoroughly under government control to allow the government to execute its proprietary powers. This would allow the government to avoid heightened scrutiny and essentially regulate every constituent's interaction on the government-controlled social media page, and who knows how far-reaching such a ruling could extend online. However, if the Supreme Court conducts a similar analysis to *Knight First Amendment Institute*, then there will be no concerns over greater government regulation on Internet-based fora and beyond.

Yet, a pressing concern is the fact that the Supreme Court has experienced major turnover since the 5-4 split decision in *Walker*. This has opened the door for the Supreme Court to completely disagree with the forum analysis conducted in *Knight First Amendment Institute*. This could lead the Supreme Court to decide that the government can regulate all private affairs—even those on third-party social media sites—by utilizing government speech and proprietary powers as a dual-pronged government-defense-framework through which the government avoids heightened scrutiny. This result would lead to one's First Amendment rights quickly dissipating online.

Additionally, the municipal-based regulation policies that are being created to regulate constituents' speech on government-controlled social media accounts seem to do no more than ensure that public officials are keeping in line with the established case law that has been put forth from the court system. Thus, it should not be as concerning that these policies are being created, as they appear to do no more than to formally lay down the boundaries—concerning the First Amendment—that government-controlled social media accounts can regulate within.

All things considered, this Note attempts to convey why government-managed social media pages that incorporate policies—aimed at moderating their pages—are generally public fora created by government designation. Specifically, these fora have been opened by the government for the sole purpose of allowing specific communication to occur between them and their constituents. Any such features of the social media forum not found to be labeled a designated public forum will tend not to be labeled a traditional public fora. Resultingly, these features

will ignore heightened scrutiny and would be found to be government speech, or be successfully regulated as a nonpublic forum under the government's proprietary power, which have been held by the Supreme Court to be within the powers of the government to regulate through content-based restrictions, without violating one's First Amendment rights.

There should be concern for the amount of new government regulations the future holds in store. Ultimately, what happens next is for the Supreme Court to decide. Hopefully, the Court decides well, as the impact will be greatly felt by all as we advance into an era dominated by increased Internet usage and regulation.