CONSTITUTIONAL LAW — FIRST AMENDMENT — EIGHTH CIRCUIT FINDS STATE REPRESENTATIVE NOT A STATE ACTOR WHEN BLOCKING CONSTITUENTS ON TWITTER. — *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021), *reh'g and reh'g en banc denied*, No. 19-2994, 2021 BL 76260 (8th Cir. Mar. 3, 2021).

As the "modern public square,"[1] social media platforms have profoundly shaped today's political discourse. All senators and representatives in the 115th Congress created Twitter accounts,[2] and a growing majority of local governments, especially in major cities, have set up social media profiles.[3] The increased social media presence of government officials raises questions about their constitutional responsibilities, and a series of lawsuits has arisen out of public officials' decisions to block or censor constituents on social media. Recently, in *Campbell v. Reisch*,[4] the Eighth Circuit held that a state representative did not violate the First Amendment by blocking her constituents on Twitter,[5] becoming the first U.S. Court of Appeals to find no First Amendment violation in such a situation and the first to rest the decision on the state action doctrine. While applying the same fact-intensive framework developed by the Second and Fourth Circuits, the *Campbell* court placed undue weight on the untenable factual distinction between an account's campaigning and governance purposes, a problematic approach that opened a new door for government officials to justify censoring opposing views on social media.

Cheri Reisch is a representative for the 44th District of the Missouri House of Representatives. She created a Twitter account in September 2015 when she announced her candidacy for state representative. After winning the election in November 2016, Rep. Reisch used the account to tweet about her work.[6] She operated the account under the handle "@CheriMO44" (referring to her district)[7] with a photo of her swearing-in ceremony as the banner.[8] She tweeted about specific legislation,[9]

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[1] Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (2017).

[2] JACOB R. STRAUS, CONG. RSCH. SERV., R45337, SOCIAL MEDIA ADOPTION BY MEMBERS OF CONGRESS: TRENDS AND CONGRESSIONAL CONSIDERATIONS 3 (2018).

[3] *See* Karen Mossberger et al., *Connecting Citizens and Local Governments? Social Media and Interactivity in Major U.S. Cities*, 30 GOV'T INFO. Q. 351, 354 (2013).

[4] 986 F.3d 822 (8th Cir. 2021).

[5] *Id.* at 823, 827–28.

[6] Campbell v. Reisch, No. 18-cv-04129, 2019 WL 3856591, at *2 (W.D. Mo. Aug. 16, 2019).

[7] *Id.*

[8] *Campbell*, 986 F.3d at 829. Additionally, Rep. Reisch's profile stated: "Christian, MO State Rep 44th District, Mother, Grandmother." *Campbell*, 2019 WL 3856591, at *2.

[9] *Campbell*, 986 F.3d at 824. Examples included reporting on new laws ("MO citizens will now have a choice to get Real ID compliant license[s]."), providing updates on the Legislature's work ("A big thanks to House Communications for doing this great story on this piece of legislation that was passed."), and communicating to the public about her official activities ("I spoke [on the House

posted pictures of herself on the House floor, and "touted her performance as a representative."[10]

On June 22, 2018, Rep. Reisch tweeted about Maren Jones, her political opponent in the 2018 general election: "Sad my opponent put her hands behind her back during the Pledge."[11] Another state representative, Kip Kendrick, criticized the tweet, calling it "a low blow and unacceptable."[12] Mike Campbell, one of Rep. Reisch's constituents, retweeted Rep. Kendrick's criticism.[13] After the retweet, Rep. Reisch blocked Campbell from following or commenting on her page.[14]

Campbell filed suit against Rep. Reisch under 42 U.S.C. § 1983[15] in the U.S. District Court for the Western District of Missouri.[16] Campbell alleged that Rep. Reisch's blocking of his account constituted a viewpoint-based restriction under color of state law, violating the First Amendment.[17] The court agreed with Campbell.[18] It found that his retweet was protected speech[19] and that the interactive spaces of Rep. Reisch's tweets were a designated public forum, since she used her account to promote her campaign and legislative agenda.[20] It also held that she acted under color of state law because she controlled her account in her capacity as a state legislator, referenced her elected district in her handle, and tweeted about her work as a public official.[21] The court therefore concluded that she deprived Campbell of his First Amendment rights by excluding him from the interactive spaces of her account based on his viewpoint.[22] Rep. Reisch appealed.[23]

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floor] about my 34 years experience with prevailing wage."). *Id.* at 828 (alterations in original).

10 *Id.* at 824.

11 *Campbell*, 2019 WL 3856591, at *3.

12 *Id.*

13 *Id.*

14 *Id.* at *3–4. Apart from this incident, Rep. Reisch had blocked at least 123 other Twitter users. *Id.* at *4.

15 An individual is liable under § 1983 if, "under color of [state law]," she deprived the plaintiff of a "right[], privilege[], or immunit[y] secured by the Constitution." *Id.*

16 Campbell v. Reisch, 367 F. Supp. 3d 987 (W.D. Mo. 2019).

17 *Id.* at 990.

18 *Campbell*, 2019 WL 3856591, at *9.

19 *Id.* at *4–5.

20 *Id.* at *6–7. Several Circuits have recognized the interactive spaces of social media accounts as either designated public fora or limited public fora. *See, e.g.*, Davison v. Randall, 912 F.3d 666, 667 (4th Cir. 2019); Robinson v. Hunt County, 921 F.3d 440, 448 (5th Cir. 2019); Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 226 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amendment Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (mem.). In state-established public fora, a state's restriction on speech "must not discriminate against speech on the basis of viewpoint." Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001) (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

21 *Campbell*, 2019 WL 3856591, at *8.

22 *Id.* at *7–8.

23 *Campbell*, 986 F.3d at 823.

The Eighth Circuit reversed.[24] Writing for the majority, Judge Arnold[25] held that Campbell was not entitled to § 1983 relief because Rep. Reisch was not acting under color of state law when she blocked his account.[26] The majority examined Fourth Circuit precedent in *Davison v. Randall*[27] and Second Circuit precedent in *Knight First Amendment Institute at Columbia University v. Trump*.[28] Both cases found that officials violated the First Amendment by blocking constituents from their social media pages — pages that the courts considered official because they served official functions.[29] While adopting the framework of these cases, the majority nonetheless distinguished the current case on factual grounds. Finding that Rep. Reisch operated her account predominantly to further her campaign, the majority held that her account was private because "running for public office is not state action; it is a private activity."[30]

To reach this determination, the majority first pointed to the origin of Rep. Reisch's account, noting that it "at least began life as a private account" when she created it the day she announced her candidacy.[31] The court then reasoned that she still used her account mostly for campaign purposes after the election.[32] While acknowledging that Rep. Reisch posted updates on recently enacted state laws and the legislative process, the majority found that these tweets were "sporadic"[33] and "fully consistent" with her using the account to promote her campaign agenda.[34] Lastly, the court determined that while Rep. Reisch's Twitter

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[24] *Id.* at 828.

[25] Judge Arnold was joined by Judge Colloton.

[26] *Campbell*, 986 F.3d at 823. Because the court rejected Campbell's claim based on the color of law inquiry, it did not reach the question of whether public officials' blocking of constituents violates the First Amendment.

[27] 912 F.3d 666 (4th Cir. 2019) (holding that the chair of county board of supervisors acted under color of state law and engaged in viewpoint discrimination in violation of the First Amendment when she blocked a county resident from her Facebook page).

[28] 928 F.3d 226 (2d Cir. 2019) (holding that President Donald Trump was a government actor and engaged in unconstitutional viewpoint discrimination), *vacated as moot sub nom.* Biden v. Knight First Amendment Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (mem.). In April 2021, after *Campbell* was decided, the *Trump* opinion was vacated by the Supreme Court and remanded to the Second Circuit with instructions to dismiss it for mootness, as President Trump was no longer in office and Twitter had removed his account. *Biden*, 141 S. Ct. at 1220–21.

[29] *See Davison*, 912 F.3d at 673–75 (Facebook page labeled as "government official" page, used for notifying the public about safety issues, and containing the message that official "really want[ed] to hear from ANY [constituent] on ANY issues," *id.* at 673); *Trump*, 928 F.3d at 231–32 (Twitter account presented as state-run, used for announcing policies and engaging with political leaders, and described as official by both the Trump Administration and National Archives).

[30] *Campbell*, 986 F.3d at 825.

[31] *Id.* at 826.

[32] *Id.* (noting that Rep. Reisch "touted her success" in fulfilling her campaign promises and "in her performance as a legislator").

[33] *Id.* at 827.

[34] *Id.* at 826.

handle and banner resembled what the *Davison* and *Trump* courts called "trappings" of an official account,[35] these features could "quite obviously be trappings of a personal account as well" and were not sufficient to convert Rep. Reisch's Twitter account into an official one.[36] The majority concluded that the account was "more akin to a campaign newsletter,"[37] making it the type of unofficial account envisioned by the *Trump* court.[38]

Judge Kelly dissented.[39] Citing *Trump*, she noted that the court should look not at the nature of the account at its creation, but at how the official used the account after being elected.[40] Judge Kelly pointed out that the majority of Rep. Reisch's tweets after the election were about new laws, the Missouri General Assembly's work, and her official activities.[41] Judge Kelly challenged the majority's conclusion that these tweets merely served campaign purposes, arguing that such tweets could simultaneously be related to Rep. Reisch's official responsibilities and her personal goals.[42] Judge Kelly also pointed to all the "trappings" that associated the account with Rep. Reisch's position as an elected official.[43] After concluding that Rep. Reisch was acting under color of state law, Judge Kelly argued that the interactive space of the account constituted a designated public forum, and that Rep. Reisch violated Campbell's First Amendment rights by engaging in viewpoint discrimination.[44]

While applying the fact-intensive framework developed by the Second and Fourth Circuits, the *Campbell* court drew an untenable distinction between accounts used for reelection and governance purposes, allowing more freedom for public officials to justify censoring opposing views on social media. Although the court acknowledged that Rep. Reisch's Twitter page shared some features with the official accounts in *Davison* and *Trump*, it focused upon the campaign functions of the page, which neither *Davison* nor *Trump* emphasized. Such a distinction between campaign and governance purposes on social media is impractical. To overcome this tension, the court could have considered an important additional factor: whether Rep. Reisch had posted information made possible only by her official capacity. By not doing so, the court

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[35] Davison v. Randall, 912 F.3d 666, 683 (4th Cir. 2019); Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 231 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amendment Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (mem.).

[36] *Campbell*, 986 F.3d at 827.

[37] *Id.*

[38] *Id.* at 826 ("[N]ot every social media account operated by a public official is a government account." (quoting *Trump*, 928 F.3d at 236)).

[39] *Id.* at 828 (Kelly, J., dissenting).

[40] *Id.*

[41] *Id.*

[42] *Id.* at 829.

[43] *Id.* (quoting Davison v. Randall, 912 F.3d 666, 680 (4th Cir. 2019)).

[44] *Id.* at 829–30.

ignored the practical realities of social media usage and the distortionary impact of officials' censorship on political discourse.

While the Supreme Court has not yet addressed the issue of whether officials' use of social media accounts constitutes state action, the Second and Fourth Circuits have recognized that the determination entails a fact-specific inquiry.[45] The circuits highlighted several factors crucial to the determination, including whether the official used her social media page "as a tool of governance"[46] or "clothed [the page] in 'the power and prestige of h[er] state office.'"[47] These factors were also considered in *Campbell*. Rep. Reisch "routinely tweeted . . . about her work as a state representative."[48] Additionally, the photo of her on the House floor as her banner, her district's name in her handle, and her elected position in the account description all bear resemblance to the "trappings" of an official account identified in *Davison* and *Trump*.[49]

Although the *Campbell* court recognized these "trappings" of Rep. Reisch's account, it deviated from its sister circuits by drawing heavily on the fact that her Twitter page primarily served campaign functions. *Davison* recognized that while an incumbent official could own an entirely private campaign account on Facebook, that account was separate from the official one in question and was "classified . . . as belonging to a politician."[50] Meanwhile, the *Trump* court acknowledged that President Donald Trump's Twitter account had been purely private before he was in office but focused its inquiry on "what the [a]ccount is now."[51] Similar to *Trump*, *Campbell* involved an incumbent's account with both campaign and legislative updates; however, the *Campbell* court placed greater weight on the fact that the account had been used for campaigning prior to the election.[52] While *Campbell* acknowledged that some of Rep. Reisch's

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[45] *Davison*, 912 F.3d at 680; Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 236 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amendment Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (mem.). A state action inquiry examines whether "the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). If so, "that conduct [would] also [be] action under color of state law." *Id.* at 935.

[46] *Davison*, 912 F.3d at 679 (quoting Davison v. Loudoun Cnty. Bd. of Supervisors, 267 F. Supp. 3d 702, 713 (E.D. Va. 2017), *aff'd*, 912 F.3d 666 (4th Cir. 2019)); *see also id.* at 679–80; *Trump*, 928 F.3d at 236. Such usage includes informing the public about official activities through the page. *Davison*, 912 F.3d at 680.

[47] *Davison*, 912 F.3d at 681 (second alteration in original) (quoting Harris v. Harvey, 605 F.2d 330, 337 (7th Cir. 1979)).

[48] Campbell v. Reisch, No. 18-cv-04129, 2019 WL 3856591, at *2 (W.D. Mo. Aug. 16, 2019). Specifically, she posted about various bills and legislation, *id.* at *2; her activity as a state official, *id.* at *3 ("Toured @3M facility in my district today w/Gov @EricGreitens."); and communications with her constituents, *Campbell*, 986 F.3d at 829.

[49] *See Campbell*, 2019 WL 3856591, at *2.

[50] *Davison*, 912 F.3d at 673.

[51] *Trump*, 928 F.3d at 231.

[52] *Campbell*, 986 F.3d at 826.

postelection tweets involved legislative updates and official activities, it nonetheless characterized them as "fully consistent"[53] with serving campaign functions because "it is not obvious that their purpose was different."[54]

The *Campbell* court's factual inquiry was problematic as it drew a line between campaign and governance purposes, a line that is inherently untenable in the political context. Once elected, an official's status and the performance of her official duties are inevitably intertwined with her reelection agenda.[55] The resources associated with official capacities afford incumbents greater advantages over their out-of-office challengers, including greater publicity, interaction with constituents, and access to funding.[56] Establishing a boundary between reelection activities and official duties "is far less effective when the state official is one the public recognizes in both her personal *and* official capacities and who seeks to benefit from that publicity as a candidate."[57] This issue is heightened in the context of social media, especially when an official uses a single account for both purposes.[58]

A simple way to reveal this tension is to consider the case of elected officials who announce they will not seek reelection. Many such officials continue posting on social media and advocating for issues they care about.[59] After this case, if Rep. Reisch were to announce that she would

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[53] *Id.*

[54] *Id.* at 827.

[55] *See* Lauren N. Smith, Note, *The Constitution and the Campaign Trail: When Political Action Becomes State Action*, 70 DUKE L.J. 1473, 1504 (2021) ("[T]he line between an incumbent acting in her official capacity as a state actor and an incumbent acting in her personal capacity as a political candidate and potential state actor is blurry at best.").

[56] *See, e.g.*, Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 569 (1999); Marlene Arnold Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815, 847 (1974); *see also* Common Cause v. Bolger, 574 F. Supp. 672, 677 (D.D.C. 1982) ("[An incumbent's] communication with constituents . . . may have a direct effect . . . in influencing the outcome of an election . . . whether the communication is part of an overt campaign effort or made simply in the normal course of [her] representative function.").

[57] Smith, *supra* note 55, at 1504; *cf.* Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961) (noting that benefits mutually conferred between actor and state indicate state participation).

[58] The difficulty of distinguishing campaign and governance purposes is also reflected in the divergence of district court holdings on this issue. *Compare* Faison v. Jones, 440 F. Supp. 3d 1123, 1134 (E.D. Cal. 2020) (finding that plaintiffs are likely to succeed in showing that sheriff acted under color of state law when he used his Facebook page to engage in discussions and inform the public about developments in a shooting), *with* Phillips v. Ochoa, No. 20-cv-00272, 2021 WL 1131693, at *3–4 (D. Nev. Mar. 24, 2021) (holding that state court judge's Facebook page was private because it was used for campaign purposes).

[59] *Compare, e.g.*, Richard Cowan & Jason Lange, *U.S. Senator Leahy Won't Seek Re-election, Putting Democratic Seat in Play*, REUTERS (Nov. 15, 2021, 12:06 PM), https://www.reuters.com/world/us/democratic-us-senator-leahy-says-he-will-not-seek-re-election-2022-2021-11-15 [https://perma.cc/P22W-7PM7], *with* @SenatorLeahy, TWITTER, https://twitter.com/SenatorLeahy [https://perma.cc/V2HU-CRMB].

not seek reelection, it is unclear how or whether her social media behavior would change.[60] The fact that her social media behavior could remain unchanged undermines the court's distinction between reelection and governance purposes: a court would have to hold either that the account remained private — implying that an official not seeking reelection is somehow still "campaigning" — or that the account suddenly became official upon Rep. Reisch's announcement that she would not seek reelection — altering the legal status of her social media behavior despite no change in the behavior itself.

In light of the inherent difficulty of distinguishing between reelection and governance purposes, the *Campbell* court should have considered an additional factor in the state action inquiry: whether Rep. Reisch posted information on her account that was made possible only by her official capacity,[61] regardless of whether those posts simultaneously served campaign functions.[62] This would encompass many of her posts, such as the updates on her performance of public duties. Such an inquiry would ensure appropriate emphasis on the perception of authority that public officials enjoy on social media by virtue of their offices and prevent courts from speculating about the motive behind their posts. This inquiry would not preclude an official from operating a private account to post about political commentary or other content not derived from her official role,[63] as many do in practice.[64]

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[60] None of Rep. Reisch's posts cited by the *Campbell* court explicitly refers to reelection, and she could very well continue posting the same types of tweets. Examples include her posts about the Real ID bill, the Right to Work legislation, and her activity as a state official ("I testified before the Senate today to repeal prevailing wage."). Campbell v. Reisch, No. 18-cv-04129, 2019 WL 3856591, at *2–3 (W.D. Mo. Aug. 16, 2019).

[61] Although the *Campbell* court eventually concluded that Rep. Reisch's account was private, it did not adopt her proposition that the court should examine only the actual action of blocking a user itself and whether such action was under color of state law. *Campbell*, 986 F.3d at 825. Rather, the *Campbell* court looked at the content in Rep. Reisch's account overall and determined that it was a campaign account, *id.* at 825–26, implying that a public official could be acting under color of state law when blocking users on social media if her account were deemed official.

[62] Such an inquiry would have been more consistent with Eighth Circuit precedent. *Cf., e.g.*, Roe v. Humke, 128 F.3d 1213, 1215 (8th Cir. 1997) ("The traditional definition of acting under color of state law requires that the defendant . . . have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" (quoting West v. Atkins, 487 U.S. 42, 49 (1988))); Rogers v. City of Little Rock, 152 F.3d 790, 798 (8th Cir. 1998) (focusing on "the nature and circumstances of the [defendant's] conduct and the relationship of that conduct to the performance of his official duties" (quoting *Humke*, 128 F.3d at 1216)).

[63] As an analogy, U.S. Representatives are free to maintain personal social media accounts but may not utilize any "official resources." JACOB R. STRAUS & MATTHEW E. GLASSMAN, CONG. RSCH. SERV., R43477, SOCIAL MEDIA IN THE HOUSE OF REPRESENTATIVES: FREQUENTLY ASKED QUESTIONS 2 (2016). Using official resources includes filming in House rooms and offices and covering floor proceedings. *See* COMM. ON STANDARDS OF OFF. CONDUCT, 110TH CONG., HOUSE ETHICS MANUAL 125–28 (2008), https://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf [https://perma.cc/QH8B-NUXP].

[64] *See, e.g.*, @RepAOC, TWITTER, https://twitter.com/RepAOC [https://perma.cc/4SN5-E9CA];

The *Campbell* court's characterization of Rep. Reisch's account as "more akin to a campaign newsletter"[65] ignored the value of the interactive spaces of officials' accounts as potent fora for public discourse. Social media platforms are powerful tools for promoting policy agendas,[66] and they allow users to "petition their elected representatives" and "engage with them in a direct manner."[67] The comment sections of officials' accounts are critical spaces where constituents communicate their opinions and interact with a receptive audience who already has knowledge and interest in a particular subject.[68] Moreover, the court's conclusion that the place for Campbell to register his disagreement with Rep. Reisch "is at the polls" or on his own page[69] overlooked the repercussions of officials' social media pages being censored of dissenting voices and clothed in manufactured unanimity. By opening the door for political echo chambers bearing the trappings of official conduct, the *Campbell* court ignored the distortionary impact such censorship can have on American public life. With the Second Circuit's *Trump* opinion vacated on mootness grounds, and with Justice Thomas hinting at a rejection altogether of the notion that an official's social media page can constitute a public forum,[70] the constitutional status of government officials' social media behavior is becoming troublingly opaque.

@AOC, TWITTER, https://twitter.com/AOC [https://perma.cc/W3EM-KM8P]; @RepDanCrenshaw, TWITTER, https://twitter.com/RepDanCrenshaw [https://perma.cc/3RRU-4AQT]; @DanCrenshawTX, TWITTER, https://twitter.com/DanCrenshawTX [https://perma.cc/ZM48-R8YP]. While the presence of separate accounts alone does not ensure that the official is never a state actor when using a designated "personal" account, these accounts provide examples of what officials identify as official and private matters on social media.

65 *Campbell*, 986 F.3d at 827.

66 Jacob R. Straus & Raymond T. Williams, *Tweeting the Agenda: Policy Making and Agenda Setting by U.S. Congressional Leaders in the Age of Social Media*, *in* POWER SHIFT? POLITICAL LEADERSHIP AND SOCIAL MEDIA 76, 88 (Richard Davis & David Taras eds., 2020).

67 Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

68 *See* Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 2008–09 (2011); *see also* Pamela L. Morris & Susan H. Sarapin, *You Can't Block Me: When Social Media Spaces Are Public Forums*, 54 FIRST AMENDMENT STUD. 52, 53 (2020).

69 *Campbell*, 986 F.3d at 828.

70 *See* Biden v. Knight First Amendment Inst. at Columbia Univ., 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring) ("[T]he Second Circuit's conclusion that Mr. Trump's Twitter account was a public forum is in tension with, among other things, our frequent description of public forums as 'government-controlled spaces.'" (quoting Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018))). Justice Thomas dedicated most of his concurring opinion to the idea that private social media companies, instead of government officials, should be regulated for First Amendment purposes. *See id.* at 1223–27.