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> "My use of social media is not presidential—it's MODERN DAY PRESIDENTIAL."
>
> - President Donald Trump[1]

Social media has redefined the global boundaries of communication.[2] By reconceptualizing the marketplace of ideas,[3] social media literacy has cultivated individual empowerment.[4] As of 2019, nearly eight-in-ten Americans used social media to connect with one another, engage with news content, and share information.[5] Amongst the general public, Facebook[6] is the most popular social media platform.[7] However, the 2016 presidential race and the subsequent election of President Donald Trump unleashed Twitter[8] as a vital political tool.[9] While campaigning for office and after becoming president, Donald Trump revolutionized political communication by redefining the use of social media as a tool for political promotion, government

1. Donald J. Trump (@realDonaldTrump), Twitter (July 1, 2017, 6:41 PM), https://twitter.com/realdonaldtrump/status/881281755017355264?lang=en.

2. *See* Farhad Manjoo, *Social Media's Globe-Shaking Power*, N.Y. Times (Nov. 16, 2016), https://www.nytimes.com/2016/11/17/technology/social-medias-globe-shaking-power.html (defining social media as a "world-shattering force" with "real power to change history in bold, unpredictable ways").

3. *See* Brian Miller, *There's No Need to Compel Speech. The Marketplace Of Ideas Is Working*, Forbes (Dec. 4, 2017), https://www.forbes.com/sites/briankmiller/2017/12/04/theres-no-need-to-compel-speech-the-marketplace-of-ideas-is-working/ (defining the marketplace of ideas as a social process where the ultimate truth prevails from the free dissemination of ideas). The marketplace of ideas is a fundamental aspect of the Supreme Court's first amendment jurisprudence. *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853, 866 (1982) (holding that the local school board should not have the discretion to remove books from the high school and junior high school libraries because the First Amendment protects students' access to discussion, debate, information, and ideas); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981) (holding that imposing a $250 limitation on contributions to committees in support of, or against, ballot measures contravenes the speech guarantees of the First Amendment's marketplace of ideas); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537–38 (1980) (stating that inserts in monthly bills that advocate a matter of public policy are prohibited, as they violate the principle of a free marketplace of ideas).

4. Jeremy Harris Lipschultz, Social Media Communication: Concepts, Practices, Data, Law and Ethics 6 (Routledge, 1st ed. 2015).

5. *Social Media Fact Sheet*, Pew Res. Ctr. (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/social-media/.

6. "Facebook is an online social media platform that allows users to create their own individual profiles for the purpose of connecting and interacting with others." Hargis v. Bevin, 298 F. Supp. 3d 1003, 1007 (E.D. Ky. 2018).

7. *See Social Media Fact Sheet*, *supra* note 5 (finding that 69 percent of U.S. adults use Facebook, which makes it the most popular social media platform); *see also* Lipschultz, *supra* note 4, at 305.

8. Twitter is a social networking site where users can post (or "tweet") their own messages, respond to other users' tweets, and send a message directly to other users. *Hargis*, 298 F. Supp. 3d at 1006.

9. *See* Matt Anthes, *Social Media As A Vital Engagement Platform For Government Outreach*, Forbes (Oct. 2, 2017), https://www.forbes.com/sites/forbesagencycouncil/2017/10/02/social-media-as-a-vital-engagement-platform-for-government-outreach/.

outreach, and score-settling.[10] A great many modern government officials communicate positively with the public through social media.[11] However, social media can also be used as a tool to diminish diversity of opinion and stifle debate about public affairs.[12] This presents modern society with a double-edged sword: social media both fosters speech and compels silence.[13]

In *Hargis v. Bevin*, the U.S. District Court for the Eastern District of Kentucky decided a case of first impression concerning First Amendment protections of political speech in the context of "metaphysical" forums.[14] The *Hargis* court is one of the first to grapple with the application of the First Amendment public forum doctrine to modern technology.[15] The public forum doctrine is an analytical framework used to determine the government's authority to regulate private speech

10. *See, e.g.*, Michael Barbaro, *Pithy, Mean and Powerful: How Donald Trump Mastered Twitter for 2016*, N.Y. Times (Oct. 5, 2015), https://www.nytimes.com/2015/10/06/us/politics/donald-trump-twitter-use-campaign-2016.html; Frank Newport, *Deconstructing Trump's Use of Twitter*, Gallup (May 16, 2018), https://news.gallup.com/poll/234509/deconstructing-trump-twitter.aspx (noting that Trump's use of Twitter as his primary means of presidential communication is "unprecedented" and has in some ways come to function much like an old-fashioned press release or press conference statement); Maurice Hall, *He Said What?*, Inside Higher Ed (Oct. 10, 2018), https://www.insidehighered.com/views/2018/10/10/president-trumps-use-social-media-and-why-we-cant-ignore-it-opinion ("Instead of the media coverage being dictated largely by newsroom editors in print and broadcast outlets across the country, Trump's tweeting has ensured that the media agenda is often set—and is just as often disrupted—by responding to what the president tweets on a daily basis."); Manjoo, *supra* note 2 (defining Donald Trump's election as the starkest illustration that social networks are helping to fundamentally rewire society and government).

11. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735–36 (2017) ("Governors in all 50 States and almost every Member of Congress have set up [social media] accounts[.]").

12. *See* Claire Cain Miller, *How Social Media Silences Debate*, N.Y. Times (Aug. 26, 2014), https://www.nytimes.com/2014/08/27/upshot/how-social-media-silences-debate.html (discussing the results of research on the effect of the internet on how individuals engage in discussion of newsworthy topics). According to a 2014 research report published by the Pew Research Center and Rutgers University, people on social media are less likely to voice their opinions if they think their opinions differ from those of their friends. *Id.* The report also noted: "Those who use social media regularly are more reluctant to express dissenting views in the offline world." *Id.*

13. *See* Peter Suderman, *The Slippery Slope of Regulating Social Media*, N.Y. Times (Sept. 11, 2018), https://www.nytimes.com/2018/09/11/opinion/the-slippery-slope-of-regulating-social-media.html (discussing how social media is subject to political control by the use of blocking). Social media compels silence in instances where social media platforms, such as Facebook, delete posts and suspend accounts that support and publish disfavored perspectives. *Id.*

14. 298 F. Supp. 3d 1003 (E.D. Ky. 2018). The Supreme Court has characterized a metaphysical forum as an intangible forum that is not "spatial or geographic." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995). The Second Circuit has stated that "[a] public forum, as the Supreme Court has also made clear, need not be 'spatial or geographic' and 'the same principles are applicable' to a metaphysical forum." Knight First Amend. Inst. v. Trump, 928 F.3d 226, 237 (2d Cir. 2019) (quoting *Rosenberger*, 515 U.S. at 830).

15. *See Hargis*, 298 F. Supp. at 1009. To date, only two circuit courts have considered whether a government official's social media account constitutes a public forum under the First Amendment. *See Knight First Amend.*, 928 F.3d at 226 (holding that President Donald Trump's Twitter account constitutes a public forum and blocking users from his Twitter violated the First Amendment); Davison v. Randall, 912 F.3d 666 (4th Cir. 2019) (holding that an elected county official's Facebook page is subject to the public forum doctrine, and blocking individuals from her Facebook page violates the First Amendment).

in certain public places.[16] Moreover, the *Hargis* court was one of the first to apply the government speech doctrine to public officials using privately-owned channels of communication.[17] The government speech doctrine insulates the government's speech from First Amendment restrictions, and thus, the government is not required "to maintain viewpoint neutrality when its officers and employees speak about governmental endeavors."[18] The *Hargis* court had to determine whether a government official's social media activity could fall within the scope of this doctrine.

This Case Comment contends that the *Hargis* court correctly assessed the applicability of the government speech doctrine but incorrectly concluded that the doctrine applied. First, the court erred in expanding government speech precedent from *Pleasant Grove City v. Summum* and *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* because the court incorrectly compared traditional monuments and license plates to the modern outlet of social media.[19] Second, the court erred by ignoring the test established by the Supreme Court in *Matal v. Tam* when determining whether the government speech doctrine applies.[20] Third, the court should have applied the First Amendment public forum analysis to Governor Matt Bevin's social media accounts.[21] The court's holding undermines the inherent purpose of social media, which is the unrestricted exchange of First Amendment speech.[22] As a result,

16. *See* Note, *Strict Scrutiny in the Middle Forum*, 122 Harv. L. Rev. 2140, 2141 (2009) (defining the public forum doctrine as "a central role in First Amendment analysis" that "provides the most coherent means of balancing the government's interest in excluding nongovernmental expressive activity on its property with the individual right of free expression in government settings"); Ross Reinhart, *"Friending" and "Following" the Government: How the Public Forum and Government Speech Doctrines Discourage the Government's Social Media Presence*, 22 S. Cal. Interdis. L.J. 781, 792 ("The [public forum] doctrine . . . represents the balancing of citizens' First Amendment interests against the government's managerial interest in regulating its property.").

17. *See* Danielle K. Citron & Helen Norton, *Government Speech 2.0*, 87 Denv. U. L. Rev. 889, 901 (2010) (noting that the government speech doctrine has only applied in the context of "traditional forms of expression").

18. *Knight First Amend.*, 928 F.3d at 239 (quoting *Matal*, 137 S. Ct. at 1757).

19. 555 U.S. 460, 469 (2009); 135 S. Ct. 2239, 2245 (2015). In *Summum*, the Court held that the display of a privately-owned monument in a public park constituted government speech. 555 U.S. at 470–71. Similarly, in *Walker*, the Court held that specialty license plates constituted government speech. 135 S. Ct. at 2249. *But see Matal*, 137 S. Ct. at 1760 (holding that *Summum* and *Walker* must be limited to avoid dangerous extension and misuse of the government speech doctrine).

20. 137 S. Ct. 1744, 1760 (2017).

21. *See Knight First Amend.,* 928 F.3d at 237; Davison v. Randall, 912 F.3d 666, 718 (4th Cir. 2019).

22. *See Packingham*, 137 S. Ct. at 1735–37 (emphasizing that social media is one of the most important places for the exchange of First Amendment speech); *Davison*, 912 F.3d at 682 (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)) ("Congress [has] recognized the internet and interactive computer services as offering 'a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.'"); *Knight First Amend.*, 928 F.3d at 239 (noting that in the social media era, "the conduct of our government and its officials is subject to wide-open, robust debate," which "encompasses an extraordinarily broad range of ideas and viewpoints and generates a level of passion and intensity the likes of which have rarely been seen"); *see also* Manjoo, *supra* note 2 (finding that social networks become "strikingly more powerful as they grow" because they are based on "various permutations of interactions among people").

there is neither a clear nor consistent standard for analyzing government speech in this new and unsettled area of law.[23] Absent that clear and consistent standard, government officials will not know the permissible boundaries of their communication on social media, which poses a threat to free speech and the marketplace of ideas.[24]

Following the trend of many modern government officials,[25] Governor Bevin of Kentucky, the defendant in *Hargis*, maintained official Facebook and Twitter accounts[26] to communicate his visions, policies, and activities to his constituents.[27] Bevin's office enforced a policy that allowed feedback from the public regarding "on-topic" issues addressed in his posts, but disallowed "off-topic" or obscene comments.[28] If members of the public repeatedly made "off-topic" comments, whether they were positive or negative, Bevin's office permanently blocked them from the ability to comment on his posts.[29]

Mary Hargis and Drew Morgan[30] are Kentucky residents who used their social media accounts to view Bevin's official Facebook and Twitter accounts, and post comments regarding matters of public concern.[31] In February 2017, Bevin's office permanently blocked Hargis on Facebook after she criticized his policies.[32] A few months later, his office blocked Morgan on Twitter for tweeting about Bevin's overdue property taxes.[33] Thereafter, the Plaintiffs could not view the Governor's

23. *See* Peter Kourkouvis, *You're Blocked! Should Public Officials Be Allowed to Stifle Speech on Social Media?*, Timely tech (Apr. 22, 2019), http://illinoisjltp.com/timelytech/youre-blocked-should-public-officials-be-allowed-to-stifle-speech-on-social-media/ (discussing the "unsettled issue" of whether the government can block individuals on social media without violating the First Amendment).

24. *See* Suderman, *supra* note 13.

25. *See Packingham*, 137 S. Ct. at 1735–36 (noting that almost all governors and members of Congress have set up social media accounts to directly engage with the public); *see also* Matt Anthes, *Social Media As A Vital Engagement Platform For Government Outreach*, Forbes (Oct. 2, 2017), https://www.forbes.com/sites/forbesagencycouncil/2017/10/02/social-media-as-a-vital-engagement-platform-for-government-outreach/.

26. Governor Matt Bevin (@GovMattBevin), https://www.facebook.com/GovMattBevin/ (last visited Apr. 5, 2020); @GovMattBevin, https://twitter.com/govmattbevin?lang=en (last visited Apr. 5, 2020). Bevin served as governor of Kentucky from 2015–2019. Campbell Robertson, *In Kentucky, the Governor Who Picked Fights Loses a Big One*, N.Y. Times (Nov. 14, 2019), https://www.nytimes.com/2019/11/14/us/kentucky-governor-race-matt-bevin.html.

27. Hargis v. Bevin, 298 F. Supp. 3d 1003, 1006 (E.D. Ky. 2018).

28. *Id.* at 1008. Governor Bevin claimed that "off-topic comments detract from the conversation by obscuring the chosen subject of [his] communication and diverting the public's attention to different matters." *Id.*

29. *Id.*

30. Collectively, the "Plaintiffs."

31. Verified Complaint at 2, Hargis v. Bevin, 298 F. Supp. 3d 1003 (E.D. Ky. 2018) (No. 3:17CV-00060-GFVT).

32. Specifically, Hargis criticized Governor Bevin's right-to-work policies and skilled labor apprenticeship program. *Hargis*, 298 F. Supp. 3d at 1008.

33. *Id.* at 1006. Governor Bevin posted: "If we are to be the best version of ourselves it is going to take us doing simple things like living by the golden rule." Morgan replied, "and paying our property taxes." *Id.* at 1008.

social media pages, comment on the content, or view the political dialogue of others who posted comments.[34] The Plaintiffs contended that their comments on Bevin's social media accounts were not obscene, abusive, defamatory, or in violation of either platform's Terms of Service.[35] Bevin did not deny that he had intentionally blocked the Plaintiffs from his social media accounts.[36]

The Plaintiffs sought a declaration from the U.S. District Court for the Eastern District of Kentucky, arguing that Bevin's policy of blocking individuals on social media platforms was an unconstitutional speech restriction.[37] In particular, the Plaintiffs alleged that Bevin's actions violated their First Amendment rights pursuant to 42 U.S.C. § 1983[38] because the Plaintiffs could neither comment on the Governor's Facebook account nor view the posts and comments of others on his Twitter account.[39] Additionally, the Plaintiffs sought a preliminary injunction[40] requiring the Governor to unblock their accounts and preventing him from blocking anyone else in the future.[41]

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34. Verified Complaint, *supra* note 31, at 8–10. Blocked users can still view the page as an unregistered user. They cannot, however, interact with anyone. *Hargis*, 298 F. Supp. 3d at 1006.

35. *Hargis*, 298 F. Supp. 3d. at 1008. Twitter discourages "violent threats, whether they're direct or indirect, harassment, hateful conduct, multiple account abuse, disclosing private information . . . [and] impersonation of others." *Id.* Facebook's terms of service indicate that users should have only one personal account, but businesses and elected officials may also make pages. *Id.* at 1007. Pages are public, and page administrators can block individuals from their page and disable private messages from being sent to the page. *Id.*

36. *Id.* at 1006. Governor Bevin had apparently blocked hundreds of other individuals from his social media accounts for engaging in conduct similar to that of the Plaintiffs. Verified Complaint, *supra* note 31, at 1.

37. Verified Complaint, *supra* note 31, at 2.

38. 42 U.S.C. § 1983 outlines:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

42 U.S.C. § 1983 (2018).

39. Verified Complaint, *supra* note 31, at 3–4.

40. A preliminary injunction is "[a] temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case." *Injunction: Preliminary Injunction*, Black's Law Dictionary (11th ed. 2019). To issue a preliminary injunction, the court must consider four factors:

> (1) Whether the movant has shown a strong likelihood of success on the merits;
> (2) Whether the movant will suffer irreparable harm if the injunction is not issued;
> (3) Whether the issuance of the injunction would cause substantial harm to others; and
> (4) Whether the public interest would be served by issuing the injunction.

Id.

41. Verified Complaint, *supra* note 32, at 1. The preliminary injunction also required Governor Bevin to unblock not only the Plaintiffs accounts, but also "the hundreds of individuals . . . who have been blocked pursuant to the policy." *Id.*

The First Amendment prohibits the government from abridging freedom of speech.[42] If the speech at issue is protected by the First Amendment, courts will determine whether the public forum analysis applies.[43] The U.S. Supreme Court coined the term "public forum" in 1972.[44] In *Police Department of Chicago v. Mosley*, the Court established the public forum doctrine, which prevents the government from engaging in content-based discrimination in certain settings.[45] Thus, the government "must afford all points of view an equal opportunity to be heard, and not make selective exclusions from a public forum on the basis of content alone or by reference to content alone."[46] Thereafter, the public forum doctrine developed into a constitutional guardian of free speech in public places.[47] In 1983, the Court tailored the doctrine and outlined three categories of forums to determine the level of judicial scrutiny required[48] in assessing government restrictions: (1) traditional public forum, (2) designated or limited public forum, and (3) nonpublic forum.[49]

Traditional public forums are settings that "have immemorially been held in trust" for public use and "have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[50] Government regulations on traditional public forums are held to the highest level of judicial scrutiny, or strict scrutiny.[51] In order to survive strict scrutiny, the state must show

42. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 677 (1992); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985).

43. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 480 (2009); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998).

44. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

45. *Id.* Content-based discrimination is "[a] state-imposed restriction on the content of speech, esp. when the speech concerns something of slight social value and is vastly outweighed by the public interest in morality and order." *Discrimination: Content-based Discrimination*, Black's Law Dictionary (11th ed. 2019). Types of speech subject to content-based discrimination include obscenity, fighting words, and defamation. R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992); *see also Cornelius*, 473 U.S. at 806 (noting that the government enforces a content-based exclusion when it restricts free speech based on subject matter or speaker identity).

46. *Mosley*, 408 U.S. at 96. In *Mosley*, the Court struck down an ordinance that prohibited public picketing near a school because it contained a content-based exception, which allowed peaceful picketing of any school involved in a labor dispute. *Id.* at 99.

47. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 54–55 (1983) (noting that "[t]he key to [the *Mosley* and *Carey*] decisions . . . was the presence of a public forum" where "all parties have a constitutional right of access and the state must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject"); Carey v. Brown, 447 U.S. 455 (1980) (striking down a state statute barring all picketing of residences because its exemption, which allowed the peaceful picketing of a place of employment involved in a labor dispute, was content-based).

48. The Supreme Court has established different levels of scrutiny to be used by courts in analyzing government restrictions on public forums under the First Amendment. *Perry*, 460 U.S. at 45–46.

49. *Id.*; Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–79 (1992).

50. *Perry*, 460 U.S. at 45 (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)). For example, traditional public forums are public parks, streets, and sidewalks. *Id.* at 44–45.

51. *Id.* at 45.

that the regulation is necessary to serve a compelling state interest and narrowly tailored to achieve that end.[52] Conversely to strict scrutiny, reasonable time, place, and manner restrictions are permissible if they are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication.[53]

The second type of forum is a designated forum, or limited public forum, and it is created by the government as a public place for expressive activity.[54] Whether a forum has been designated for expressive activity is determined by the government's intent in establishing the forum.[55] Government regulations in a designated forum must be viewpoint-neutral[56] and reasonable in light of the purpose served by the forum.[57] However, if the government engages in viewpoint discrimination in a designated forum, it is subject to strict scrutiny.[58]

Lastly, a nonpublic forum is property that is owned or controlled by the government but "not by tradition or designation a forum for public communication."[59] The government may control access to a nonpublic forum on the basis of subject matter and speaker identity.[60] Government regulations in nonpublic forums are subject to a reasonableness standard.[61]

However, the public forum doctrine does not apply to the government's own speech.[62] The Supreme Court first recognized the government speech doctrine in the 1991 case *Rust v. Sullivan*.[63] Pursuant to this doctrine, when the government speaks on its own behalf, it is entitled to say what it wishes and select the views that

52. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995).

53. *Perry*, 460 U.S. at 45.

54. *Id.*

55. Cimarron All. Found. v. Oklahoma City, 290 F. Supp. 2d 1252, 1259 (W.D. Okla. 2002).

56. For a government regulation to be classified as viewpoint-neutral, it cannot be used to suppress expression merely because the government opposes the speaker's view. *Perry*, 460 U.S. at 46.

57. Pleasant Grove City v. Summum, 555 U.S. 460, 461 (2009).

58. "If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny." Ark. Educ. Tv Comm'n v. Forbes, 523 U.S. 666, 677 (1998).

59. *Perry*, 460 U.S. at 46.

60. *Id.* at 49.

61. *See id.*; Currier v. Potter, 379 F.3d 716, 730 (9th Cir. 2004) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 808 (1985)).

62. *See Summum*, 555 U.S. at 467–68 (citation omitted).

63. 500 U.S. 173 (1991); *see* Joseph Blocker, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. Rev. 695, 723 (2011). In *Rust v. Sullivan*, recipients of family planning funds under Title X of the Public Health Service Act, and the doctors who supervised the funds, brought suits challenging the Department of Health and Human Services regulation. *Rust*, 500 U.S. at 173. The regulation prohibited Title X projects from engaging in abortion counseling and activities advocating abortion as a method of family planning. *Id.* The petitioners argued, among other things, that the regulations "facially discriminate on the basis of the viewpoint of the speech involved." *Id.* at 183. However, the Court rejected this argument and reasoned that:

it wants to express.[64] This doctrine is founded on the principle that the government must speak freely in order to govern effectively.[65] In 2009 and 2015, the Court elaborated on this doctrine in its *Summum* and *Walker* decisions, respectively.[66] In *Summum*, a religious organization alleged that city officials violated its First Amendment rights by rejecting a request to erect a privately-owned monument in a public park.[67] The Court held that, although the park is a traditional public forum, the display of the permanent monument constitutes government speech and therefore, is not subject to the strict scrutiny analysis under the First Amendment.[68] The Court reasoned that the government has used monuments to speak to the public "throughout our nation's history" and based on this historical practice, the display of a permanent monument constitutes government speech.[69]

Similarly, in *Walker*, a nonprofit organization alleged that the State of Texas violated its First Amendment rights when it rejected the organization's application to design a specialty license plate.[70] The Court held that license plates are government speech because from a historical perspective, Texas and other states have long used

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity at the exclusion of the other.

Id. at 193. The Court never explicitly used the term "government speech doctrine," but subsequent courts have credited the *Rust* Court for establishing the doctrine. *See* Nelda H. Cambron-McCabe, *When Government Speaks: An Examination of the Evolving Government Speech Doctrine*, 274 Ed. Law Rep. 753, 755 (Feb. 16, 2012).

64. *See* Blocker, *supra* note 63, at 695–97 (outlining the history of the government speech doctrine and that the doctrine allows the government, when speaking on its own behalf, to be exempt from First Amendment scrutiny); *see also* Matal v. Tam, 137 S. Ct. 1744, 1757 (2017) (holding that government officials are not restricted by the First Amendment when they articulate the government's policies); United States v. Am. Library Ass'n, 539 U.S. 194, 204 (2003) (finding that the government speech doctrine applies when the government announces official policies).

65. *See* Bd. of Regents v. Southworth, 529 U.S. 217, 235 (2000) ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) (stating that when the government "convey[s] a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee").

66. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245–46 (2015) ("[G]overnment statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas."); Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009) ("A government entity has the right to 'speak for itself.' Indeed, it is not easy to imagine how government could function if it lacked this freedom.").

67. *Summum*, 555 U.S. at 460.

68. *Id.*

69. *Id.*

70. *Walker*, 135 S. Ct. at 2251.

license plates to convey government messages.[71] However, despite its decision in *Walker*, the Court has recently held that the government speech doctrine is "susceptible to dangerous misuse" and requires the "exercise [of] great caution."[72]

The Supreme Court has not yet determined whether social media constitutes a "public forum" under the First Amendment public forum doctrine. Only the Second and Fourth Circuits have considered this issue, and both concluded that a government official's social media account may constitute a public forum.[73] The two circuits' holdings are consistent with those of the Supreme Court, as the Court has held that the public forum doctrine applies to intangible "metaphysical" settings that are not "geographic or spatial."[74] Further, the Court has noted that social media is one of the most important spatial places for the exercise of First Amendment rights.[75] Therefore, it appears that the Supreme Court is not averse to classifying social media as a metaphysical forum under the public forum doctrine. However, absent binding precedent,[76] the categorization of social media remains unclear.

The Plaintiffs argued that when Bevin blocked them on Facebook and Twitter, he prevented them from contributing to the political dialogue and engaging in public discourse.[77] They further argued that Facebook and Twitter should be classified as traditional public forums, which would subject Bevin's actions to a strict scrutiny

71. *Id.* at 2249. Given that license plates are government-issued, bear the state's name, and oftentimes depict state insignia, state-approved designs on license plates intend to convey, or have the reasonable effect of conveying, a government message. *Id.* at 2250. In other words, a state's control over the approval process for proposed license plate designs allows the state to choose how to present itself and its constituents by only accepting those designs or messages that the state wishes to be associated with. *Id.* at 2249. For example, the Texas state legislature has enacted statutes expressly authorizing plates with messages such as "Keep Texas Beautiful" and an image of the World Trade Center with the words "Fight Terrorism." *Id.* at 2244.

72. Matal v. Tam, 137 S. Ct. 1744, 1758 (2017). In *Matal*, the Court specifically referenced and distinguished its prior decisions in *Summum* and *Walker* based on a three-factor test derived from *Walker*. *Id.* at 1758–60.

73. *See* Knight First Amend. Inst. v. Trump, 302 F. Supp. 3d 541, 575 (S.D.N.Y. 2018), *aff'd*, 928 F.3d 226, 239 (2d Cir. 2019) (holding that President Donald Trump's Twitter account constitutes a public forum and blocking Twitter users violated the First Amendment); Davison v. Loudoun Cty. Bd. of Supervisors, 267 F. Supp. 3d 702, 723 (E.D. Va. 2017), *aff'd sub nom.* Davison v. Randall, 912 F.3d 666 (4th Cir. 2019) (holding that an elected official's Facebook page is subject to the public forum doctrine and blocking individuals from her Facebook page violated the First Amendment).

74. *See generally* Christian Legal Soc'y Ch. of the Univ. of Cal. v. Martinez, 561 U.S. 661, 669–70 (2010); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 801 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46–47 (1983); *Davison*, 912 F.3d at 666; *Knight First Amend.*, 928 F.3d at 237.

75. Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017). "In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Id.* at 1737.

76. Binding precedent is "precedent that a court must follow." *Precedent: Binding Precedent*, Black's Law Dictionary (10th ed. 2014).

77. Verified Complaint, *supra* note 31, at 10. Protected political discourse is political speech regarding government action, which is protected under the First Amendment. Hargis v. Bevin, 298 F. Supp. 3d 1003, 1003 (E.D. Ky. 2018).

analysis by the court.[78] Conversely, Bevin argued that his social media accounts should be classified as designated or limited public forums, where government restrictions are subject to lower levels of judicial scrutiny.[79] Under such analysis, Bevin's actions would be constitutional so long as they were reasonable and viewpoint neutral.[80]

Ultimately, the court found that neither party adequately addressed the threshold issue of whether Bevin's actions constituted government speech.[81] Relying on *Summum* and *Walker*, the court held that Bevin's actions constituted government speech and thus, the public forum doctrine did not apply.[82] The court found that Bevin was "speaking on his own behalf" because he had intentionally created his Facebook and Twitter accounts to communicate his own speech.[83] Similar to how the government was permitted to control the displayed message on license plates in *Walker* and the choice to erect monuments on public land in *Summum*, Bevin was permitted to tailor his Facebook and Twitter accounts to present an image that he desired.[84] The court further noted that without the ability to block "off-topic" users, it would have been impossible for Bevin to effectively convey his messages and manage his accounts.[85] Since the public forum analysis was inapplicable, the court determined the Plaintiffs did not have a constitutional right to be heard[86] and denied their motion for preliminary injunction.[87]

The court erred on several grounds. First, the court incorrectly expanded the reach of the government speech doctrine outlined in *Summum* and *Walker*.[88] The Supreme Court has clearly stated that courts must exercise great caution before extending government speech precedents.[89] In the 2017 case *Matal v. Tam*, the U.S. Trademark Office denied the plaintiff's trademark application to register his band's

78. Verified Complaint, *supra* note 31, at 11.

79. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985).

80. *Hargis*, 298 F. Supp. 3d at 1010.

81. If Governor Bevin's actions constitute government speech, the public forum doctrine would not apply. *See id.* ("However, neither party adequately addressed the threshold question of whether forum analysis even applies in this context. This Court finds that it does not.").

82. *Id.* at 1012–13 ("Governor Bevin is permitted to cull his desired message through his Facebook and Twitter page, much like Pleasant Grove and Texas were allowed to engage in viewpoint discrimination when they did not allow certain monuments and did not allow certain specialty license plates.").

83. *See id.* at 1010–11 (quoting Walker v. Tex. Div., Sons of Confederate Veterans, 135 S. Ct. 2239, 2250 (2015)) (stating that when the government speaks on its own behalf, "the First Amendment strictures that attend the various types of government-established forums do not apply").

84. *See Hargis*, 298 F. Supp. 3d at 1012–13.

85. *Id.* at 1012. "[W]here the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place." Pleasant Grove City v. Summum, 555 U.S. 460, 480 (2009).

86. *Hargis*, 298 F. Supp. 3d at 1012.

87. *Id.* at 2014.

88. 555 U.S. 460 (2009); 135 S. Ct. 2239 (2015).

89. *Matal*, 137 S. Ct. at 1758.

name because it expressed offensive ideas.[90] The government argued that because trademarks constitute government speech, it can deny registration to any trademark deemed offensive without violating the applicant's First Amendment rights.[91] The Court held that trademarks are not government speech and distinguished the case from *Summum* and *Walker*, reasoning that a trademark does not share any of the characteristics of a monument or license plate.[92] Specifically, trademarks have not traditionally been used to convey a government message, the viewpoints expressed by trademarks have not played a role in the decision whether to place them on the principal register, and there is no evidence that the public associates the contents of trademarks with the federal government.[93] Therefore, the Court held that expanding the reach of what is considered government speech "would constitute a huge and dangerous extension of the government speech doctrine."[94] Recognizing that the government speech doctrine "is susceptible to dangerous misuse," the Court demanded the exercise of "great caution before extending our government-speech precedents."[95]

Moreover, in the 2018 case *Knight First Amendment Institute at Columbia University v. Trump*, the Second Circuit followed the Supreme Court's cautionary approach outlined in *Matal* and declined to expand the government speech doctrine to President Trump's Twitter account.[96] Parallel to the facts of *Hargis*, the plaintiffs[97] in *Knight First Amendment* were blocked from President Trump's Twitter account after criticizing his presidency and policies.[98] Although Trump's tweets qualified as government speech, the court held that his blocking individuals from following his Twitter account did not.[99] The court based its holding on "[President Trump's] supervision of the interactive features of the Account," specifically, that the account

90. *Id.* at 1751–54. Simon Tam is the lead singer of the band, which he named "The Slants." *Id.* at 1754. He chose this name to "reclaim" and "take ownership" of stereotypes about Asian people. *Id.* The U.S. Trademark Office found that "Slants" is a derogatory racial term and denied Tam's application to trademark the band name. *Id.* at 1751.

91. *Id.* The government primarily relied on *Summum* and *Walker* to support its government speech argument. *Id.* at 1759–60.

92. *Id.* at 1760. The Court noted that *Walker* "marks the outer bounds of the government-speech doctrine" and that "*Summum* is similarly far afield." *Id.* at 1759–60.

93. *Id.* at 1760.

94. *Id.*

95. *Id.* at 1758.

96. 928 F.3d 226, 239–40 (2d Cir. 2019).

97. The *Knight First Amendment* plaintiffs included seven individuals who each tweeted a message critical of the President in reply to a tweet from his Twitter account, @realDonaldTrump, which resulted in the President blocking each plaintiff. *Id.* at 232–33; *see also Hargis*, 298 F. Supp. 3d at 1006 (explaining that individual plaintiff Hargis was blocked by Kentucky Governor Matt Bevin on Facebook after criticizing the Governor's right-to-work policies).

98. Knight First Amend. Inst. v. Trump, 302 F. Supp. 3d 541, 549–55 (S.D.N.Y. 2018). The President stated that he used his Twitter account on a daily basis "as a channel for communicating and interacting with the public about his administration." *Knight First Amend.*, 928 F.3d at 235.

99. *Id.* at 239.

was "generally accessible to the public at large without regard to political affiliation or any other limiting criteria" and that the President did not attempt "to limit the Account's interactive feature to his own speech."[100] Moreover, the court noted that the speech the users can view on the President's account comes from multiple sources, the content of which is beyond his control.[101] The court concluded that "the retweets, replies, and likes of other users in response to [the President's] tweets are not government speech under any formulation."[102]

In *Hargis*, the court failed to recognize that the application of the government speech doctrine in *Summum* and *Walker* should be limited.[103] Although it acknowledged the innate differences between monuments, license plates, and social media, the *Hargis* court expanded *Summum* and *Walker* to Governor Bevin's social media accounts.[104] By dismissing the *Matal* Court's warning, the court justified its expansion based on a minor aspect of the *Walker* opinion that addressed the physical parameters of the speech.[105] Specifically, the *Walker* Court noted that the holding in *Summum* "was not dependent on the precise number of monuments found within the park."[106] As such, the *Hargis* court similarly concluded that the physical parameters of social media should not be a factor its analysis. However, this erroneous conclusion, and the subsequent application of the government speech doctrine, is the type of result the Court seeks to prevent.[107] In this new and developing area of law, the *Hargis* court should have relied on the Supreme Court's limited, cautionary approach to the government speech doctrine.[108]

100. *Id.* The court reasoned that the President and his subordinates used the Twitter account to conduct official business such as "engag[ing] with foreign leaders" and "announc[ing] foreign policy decisions and initiatives." *Id.* at 236. The court further reasoned that the President "uses the 'like,' 'retweet,' 'reply,' and other functions of the Account to understand and to evaluate the public's reaction to what he says and does." *Id.* Thus, "[the] account has interactive features open to the public, making public interaction a prominent feature of the account." *Id.*

101. *Id.* at 239.

102. *Id.* (finding that the interactive space between the President's tweets was a public forum and blocking tweets from that space was unconstitutional viewpoint discrimination).

103. Matal v. Tam, 137 S. Ct. 1744, 1758–60 (2017).

104. Hargis v. Bevin, 298 F. Supp. 3d 1003, 1012 (E.D. Ky. 2018).

105. *Id.* In *Walker*, the Supreme Court stated "our holding in *Summum* was not dependent on the precise number of monuments found within the park." Walker v. Tex. Div., Sons of Confederate Veterans, 135 S. Ct. 2239, 2251 (2015). Therefore, the *Hargis* court concluded that "*Walker* made clear that the holdings in *Summum* are not contained to the exact parameters of monuments in a public park," and thus, can apply to government use of social media. *Hargis*, 298 F. Supp. 3d at 1012.

106. *Walker*, 135 S. Ct. at 2251.

107. *Matal*, 137 S. Ct. at 1758.

108. *Id.*

Had the *Hargis* court adhered to the rulings set forth in *Matal*,[109] the government speech doctrine would not have been expanded to social media.[110] In accordance with the Second and Fourth Circuits, the *Hargis* court should have concluded that Bevin was not engaging in government speech when he blocked the Plaintiffs from his social media account. In shielding Bevin from First Amendment scrutiny through the government speech doctrine, the *Hargis* court fosters the discriminatory practices that the Supreme Court explicitly sought to prevent.[111]

The second failure of the court was that it did not apply the *Matal* Court's three-factor test to determine whether the government speech doctrine applies.[112] First, courts must determine whether the government has historically used the speech in question "to convey state messages."[113] Second, courts must decide whether the speech is "often closely identified in the public mind" with the government.[114] Lastly, courts must look at the extent to which the government maintains "direct control over the messages conveyed."[115] In applying this test, the Court in *Matal* held that the government speech doctrine is inapplicable to trademarks.[116] The Court reasoned that trademarks have not traditionally been used to convey a government message and there was no evidence that the public associates the content of trademarks with the government.[117] Further, the Court noted that the government's control over the registration of trademarks cannot be a determinative factor because it would allow the government to "silence or muffle the expression of disfavored viewpoints."[118]

The Second Circuit has relied on the three factor *Walker/Summum* test to determine the applicability of the government speech doctrine.[119] In *Wandering Dago, Inc. v. Destito*, the government rejected a food vendor's permit application to serve

109. *Id.* In *Matal*, the Court distinguished its prior decisions in *Summum* and *Walker* based on a three-factor test derived from *Walker*. *Id.* at 1758–60.

110. This outcome is supported by the holdings of the Second Circuit in *Knight First Amend. Inst. v. Trump* and the Fourth Circuit in *Davison v. Randall*, which both state that the government speech doctrine does not apply to the social media accounts of government officials. 928 F.3d 226, 239–40 (2d Cir. 2019); 912 F.3d 666, 691 (4th Cir. 2019).

111. *See Matal*, 137 S. Ct. at 1758.

112. *Id.* at 1759–60. As it was derived from the *Walker* and *Summon* decisions, this Case Comment refers to the test as the "*Walker*/*Summum* test."

113. *Id.* at 1760 (quoting *Walker*, 135 S. Ct. at 2248).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* The Court concluded that the registration of trademarks is "vastly different" from the monuments in *Summum*, and the license plates in *Walker*. *Id.* at 1759. Therefore, "[n]one of our government speech cases even remotely supports the idea that registered trademarks are government speech." *Id.*

118. *Id.*

119. Wandering Dago, Inc. v. Destito, 879 F.3d 20, 34 (2d Cir. 2018). When faced with an issue of first impression, the Eastern District of Kentucky is "guided by . . . relevant decisions of other jurisdictions." ClubSpecialists Int'l., LLC v. Keeneland Ass'n, No. 5:16-CV-345-KKC, 2018 U.S. Dist. LEXIS 73832, at *8 (E.D. Ky. May 1, 2018) (quoting Arms v. State Farm Fire & Cas. Co., 731 F.2d 1245, 1249

food at an event to be held on government-controlled property[120] because the vendor branded its products with ethnic slurs.[121] Relying solely on the *Walker/Summum* test, the court held that the government speech doctrine did not apply.[122] First, the court found that the government did not point to any record evidence of a well-established history of the government controlling the names of food vendors in order to tailor a government message.[123] Second, unlike the monuments in *Summum* and license plates in *Walker*, the record contained no basis for believing that food vendors are closely identified with the government "in the public mind."[124] Lastly, because food vendors are by their nature impermanent fixtures, the public would not generally infer that the food vendors expressed a message actively endorsed by the government.[125]

In *Hargis*, the court should have applied the three-factor *Walker/Summum* test. Had the court applied the test, it would have found that the government speech doctrine was inapplicable to Governor Bevin's social media accounts.[126] Unlike the monuments in *Summum*, and license plates in *Walker*, social media has not been traditionally used to convey a government message.[127] Additionally, social media is not "often closely identified in the public mind" with the government.[128] In *Walker*, the Court found that license plates are closely identified with the government because they are manufactured, owned, and designed by the State, and serve as a form of government identification.[129] *Hargis* is distinguishable from *Walker* because social media is a modern form of technology that the public uses "to engage in a wide array of protected First Amendment activity"—its use is not limited to government officials nor is its primary purpose government communication.[130] Therefore, social media neither has the historical roots nor the government association that would justify its classification as government speech.

(6th Cir. 1984)). Therefore, the *Hargis* court should have relied on the Second Circuit even though it is not binding precedent.

120. 879 F.3d 20, 24 (2d Cir. 2018).

121. *Id.* at 28–29. Wandering Dago's application included a proposed menu with sandwiches named: "Dago," "Castro," "American Idiot," "Goombah," "Guido, "Polak," "El Guapo," and "KaSchloppas." *Id.* at 28.

122. *Id.* at 38.

123. *Id.* at 35.

124. *Id.*

125. *Id.*

126. *See* Price v. City of New York, No. 15-Civ-5871-KPF, 2018 U.S. Dist. LEXIS 105815, at *36 (S.D.N.Y. June 25, 2018) (applying the public forum analysis to a city official's social media accounts because the official's conduct was not classified as government speech).

127. *Id.* at *35. *See also* Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2249 (2015); Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 470–80 (2009).

128. *See generally Website and Social Media Basics*, U.S. Dep't of the Interior (Feb. 11, 2020), https://www.doi.gov/employees/dmguide/website-and-social-media-basics ("Engaging with others on social media puts a face to a bureaucratic federal agency—expanding the government's outreach capabilities.").

129. *Walker*, 135 S. Ct. at 2249.

130. Packingham v. North Carolina, 137 S. Ct. 1730, 1735–36 (2017).

Moreover, the government maintains no "direct control over the messages conveyed."[131] Although Bevin controlled his social media messages on Facebook and Twitter, he did not own the platforms, have control over the platforms, or have control over what other people posted.[132] Even if Bevin had total control of the messages he posted, this one factor should not be decisive in the analysis. As the *Walker* court noted in its analysis of license plates, not every element in the *Summum* decision was relevant because the particular characteristics of the speech at issue must be taken into account.[133] Had the *Hargis* court looked at the differing characteristics of social media, monuments, and license plates, it would have found that the government had no "direct control over the messages conveyed." Thus, if the *Hargis* court applied the *Walker/Summum* test, it would have likely found that Bevin's social media actions were not government speech because none of the factors are satisfied.[134]

The third failure of the *Hargis* court was that it applied the government speech analysis incorrectly. If the government speech analysis had been properly conducted, the court would have concluded that the government speech doctrine was inapplicable, and thus, the court would have applied the First Amendment public forum analysis.[135] Neither the U.S. Court of Appeals for the Sixth Circuit nor the Supreme Court has addressed the application of the public forum analysis to government use of social media.[136] When faced with an issue of first impression, the Eastern District of Kentucky has stated that it is "guided by applicable principles of state law and by relevant decisions of other jurisdictions."[137] Absent applicable state law,[138] the *Hargis* court should have relied on persuasive precedent.[139] Because the Eastern District of

131. *Walker*, 135 S. Ct. at 2249.

132. Facebook and Twitter are privately controlled platforms. *See* Citron, *supra* note 17; *Packingham*, 137 S. Ct. at 1735–36.

133. *Walker*, 135 S. Ct. at 2249.

134. The Plaintiffs used social media to engage in protected political speech. Hargis v. Bevin, 298 F. Supp. 3d 1003, 1008 (E.D. Ky. 2018). Political speech is "speech on matters of public concern" which "fall[s] within the core of First Amendment protection." Engquist v. Or. Dep't of Agric., 553 U.S. 591, 600 (2008).

135. Price v. City of New York, No. 15-Civ-5871-KPF, 2018 U.S. Dist. LEXIS 105815, at *33–36 (S.D.N.Y. June 25, 2018) (applying the public forum doctrine to a city official's social media accounts after he blocked the plaintiff from his Twitter account).

136. The U.S. Court of Appeals for the Sixth Circuit is binding on the U.S. District Court for the Eastern District of Kentucky. Hargis v. Bevin, 298 F. Supp. 3d 1003, 1009 (E.D. Ky. 2018).

137. ClubSpecialists Int'l., LLC v. Keeneland Ass'n, No. 5:16-CV-345-KKC, 2018 U.S. Dist. LEXIS 73832, at *8 (E.D. Ky. May 1, 2018) (quoting Arms v. State Farm Fire & Cas. Co., 731 F.2d 1245, 1249 (6th Cir. 1984)).

138. The Kentucky Supreme Court has only heard one case involving the First Amendment's public forum analysis. Champion v. Commonwealth, 520 S.W.3d 331 (Ky. 2017). Absent binding precedent, the court relied on "case law and normative considerations" to determine whether panhandling is constitutionally protected speech. *Id.* at 334–35.

139. Persuasive precedent is defined as "[a] precedent that is not binding on a court, but that is entitled to respect and careful consideration." *Precedent: Persuasive Precedent*, Black's Law Dictionary (11th ed. 2019).

Virginia is the only court to address the issue at hand, the *Hargis* court erred in declining to follow its case law.[140]

In *Davison v. Loudoun County Board of Supervisors*, Loudoun County official Phyllis J. Randall, the defendant, used her Facebook page[141] to conduct county business, such as corresponding with her constituents about her work in the local government.[142] Randall blocked the plaintiff, a Virginia resident, after he commented on Randall's Facebook post accusing her colleagues of corruption.[143] The court held that Randall's Facebook page constitutes a public forum because Randall deliberately allowed public comments and "unfettered discussion" on her page, and "affirmatively solicited comments" from her constituents.[144] The court noted that "[w]hen one creates a Facebook page, one generally opens a digital space for the exchange of ideas and information."[145] According to the court, "[t]his sort of governmental 'designation of a place or channel of communication for use by the public' is more than sufficient to create a forum for speech."[146] The Fourth Circuit unanimously affirmed.[147] Upholding the District Court's determination that Randall's Facebook page constitutes a public forum, the Fourth Circuit reasoned that Randall had opened the public comment section of her Facebook page to "ANY Loudoun citizen on ANY issues request, criticism, complement [*sic*], or just your thoughts."[148] This behavior, reasoned the court, creates a public forum "compatible with expressive activity."[149]

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140. The *Hargis* court recognized that "[o]nly a single case on this issue has been decided and it was in the Eastern District of Virginia, which . . . this Court declines to follow." *Hargis*, 298 F. Supp. 3d at 1009. The court correctly declined to follow *Davison v. Plowman* because, unlike *Hargis*, the plaintiff in *Davison* was blocked by a county official after repeatedly posting lengthy comments that were intended to place pressure on the official to address plaintiff's political concerns. 247 F. Supp. 3d 767, 773–74 (E.D. Va. 2017). However, the court failed to acknowledge a similar case in the Eastern District of Virginia, *Davison v. Loudoun Cty. Bd. of Supervisors*, which falls parallel to the facts of *Hargis*. *See* 267 F. Supp. 3d 702 (E.D. Va. 2017) (holding that an elected official's Facebook page is subject to the public forum doctrine and blocking individuals from her Facebook page violates the First Amendment), *aff'd sub nom.* Davison v. Randall, 912 F.3d 666 (4th Cir. 2019). The *Hargis* court also noted there was "a case pending against the President of the United States in the Southern District of New York," which was decided two months after the *Hargis* decision. *Hargis*, 298 F. Supp. 3d at 1009 n.2; Knight First Amend. Inst. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) *aff'd* 928 F. 3d 226 (2d Cir. 2019).

141. Randall's Facebook page is titled "Chair Phyllis J. Randall, Government Official" and governed by Loudoun County's Social Media Policy. *Davison*, 267 F. Supp. 3d at 707–08.

142. *Id.* at 708.

143. *Id.* at 711. Specifically, the plaintiff's comment included allegations of corruption and conflict involving Randall's colleagues on the Loudoun County School Board. *Id.*

144. *Id.* at 716.

145. *Id.*

146. *Id.* (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 801 (1985)).

147. Davison v. Randall, 912 F.3d 666, 682 (4th Cir. 2019).

148. *Id.* at 686.

149. *Id.*

Like the official in *Davison*, Governor Bevin maintained a Facebook "Page," which is a public-facing platform that allowed him to engage with his audience.[150] Moreover, Bevin encouraged feedback from the public regarding his vision, policies, and activities.[151] This is similar to *Davison*, where Randall used her Facebook Page to communicate with constituents regarding "numerous aspects of [her] official responsibilities."[152] Like Bevin, Randall encouraged feedback from the public on issues that concerned them.[153] Had the *Hargis* court viewed *Davison* as persuasive authority because of these substantial similarities, it would have properly concluded that Bevin's social media account was a public forum.[154] Governor Bevin's policy evinces his "purposeful choice" to open his accounts for certain kinds of public speech.[155] As held in *Davison*, such "purposeful government action" creates a public forum.[156]

Furthermore, viewpoint discrimination[157] that intentionally excludes individuals is a violation of the First Amendment regardless of the forum in which it occurs.[158]

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150. Hargis v. Bevin, 298 F. Supp. 3d 1003, 1006 (E.D. Ky. 2018); Davison v. Loudoun Cty. Bd. of Supervisors, 227 F. Supp. 3d 605, 610 (E.D. Va. 2017).

151. *Hargis*, 298 F. Supp. 3d at 1008.

152. *Davison*, 912 F.3d at 673–74.

153. *Id.*

154. *See* Knight First Amend. Inst. v. Trump, 928 F.3d 226, 237 (2d Cir. 2019) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)) (holding that "opening an instrumentality of communication 'for indiscriminate use by the general public' creates a public forum"). The Second Circuit found there that President Trump's conduct on his Twitter account "created a public forum" because the account was intentionally opened for public discussion, the President repeatedly used the account as an official vehicle for governance, and the interactive features of the account were accessible to the public without limitation. *See generally id.*

155. *Id.*

156. *Id. See also* Child Evangelism Fellowship v. Anderson Sch. Dist. Five, 470 F.3d 1062, 1067 (4th Cir. 2006); Goulart v. Meadows, 345 F.3d 239, 250 (4th Cir. 2003). The Supreme Court has emphasized the political nature of Facebook and Twitter: "On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. . . . And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner." Packingham v. North Carolina, 137 S. Ct. 1730, 1735–36 (2017).

157. Viewpoint-discrimination is:

> Content-based discrimination in which the government targets not a particular subject, but instead certain views that speakers might express on the subject; discrimination based on the content of a communication . . . . For example . . . if speech favorable to the [government] is allowed and opponents are denied the opportunity to respond, the restriction would constitute viewpoint discrimination.

Discrimination: Viewpoint-Discrimination, Black's Law Dictionary (10th ed. 2014). In order to be viewpoint-neutral, the government cannot suppress expression merely because they oppose the speaker's view. *Perry*, 460 U.S. at 46.

158. The Eastern District of Kentucky has stated that "'[i]n light of the substantial and expansive threats to free expression posed by content-based restrictions,' the Supreme Court has only rarely found content-based restrictions to withstand constitutional muster." Rosemond v. Markham, 135 F. Supp. 3d 574, 586–87 (E.D. Ky. 2015) (quoting United States v. Alvarez, 567 U.S. 709 (2012)). *See also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (forbidding the government "from exercising

In *Hargis*, Governor Bevin admitted that he engaged in viewpoint discrimination.[159] He blocked the Plaintiffs based solely on what they said and the manner or time in which they said it.[160] Regardless of how social media is categorized under the public forum analysis, Bevin's actions should have been subject to First Amendment restriction.[161]

Finally, the court's holding undermines the inherent purpose of social media.[162] In *Packingham v. North Carolina*, the Supreme Court defined social media as the most important spatial setting "for the exchange of views" and "the exercise of First Amendment rights."[163] Therefore, courts must "proceed circumspectly" to avoid suggesting that the First Amendment provides "scant protection" for Internet users.[164] Moreover, there is a current judicial trend of affirming First Amendment rights within the platform of social media.[165] Specifically, the U.S. Court of Appeals for the Fourth Circuit has repeatedly held "that speech utilizing Facebook is subject to the same First Amendment protections as any other speech."[166] Finally, the Second Circuit highlighted the importance of "wide-open, robust debate" in contemporary society.[167]

However, the *Hargis* court concluded that the Plaintiffs failed to demonstrate a likelihood of success on their First Amendment claim because they "do not have a

viewpoint discrimination, even when the limited public forum is one of its own creation"); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Street v. New York, 394 U.S. 576, 592 (1969) ("[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

159. Hargis v. Bevin, 298 F. Supp. 3d 1003, 1013 (E.D. Ky. 2018).

160. *Id.*

161. In *Davison*, the District Court and Fourth Circuit determined that it "need not decide" the specific type of forum that Randall's Facebook page constitutes because viewpoint discrimination is "prohibited in all forums." Davison v. Randall, 912 F.3d 666, 687 (4th Cir. 2019).

162. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735–37 (2017) (emphasizing that social media is one of the most important places for the exchange of First Amendment speech); *see also* Manjoo, *supra* note 2 (emphasizing the significance of social media as an increasingly powerful cultural and political force).

163. 137 S. Ct. at 1735.

164. *Id.* at 1736.

165. *See, e.g.*, Liverman v. City of Petersburg, 844 F.3d 400, 407 (4th Cir. 2016) (holding that a police department's social media policy, which stated that negative comments about the department or an officer's conduct are not protected by the First Amendment, was a "virtual blanket prohibition on all speech critical of the government," and therefore, an unconstitutional violation of free speech); Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013) (finding that Facebook "likes" are a form of speech protected by the First Amendment); Price v. City of New York, No. 15-Civ-5871-KPF, 2018 U.S. Dist. LEXIS 105815, at *36 (S.D.N.Y. June 25, 2018); *See also* Noah Feldman, *Supreme Court Doesn't Care What You Say on the Internet*, Bloomberg (June 19, 2017), https://www.bloomberg.com/view/articles/2017-06-19/supreme-court-doesn-t-care-what-you-say-on-the-internet (stating that recent Supreme Court cases "display the free speech absolutism that has become judicial orthodoxy in recent years").

166. Davison v. Loudoun Cty. Bd. of Supervisors, 227 F. Supp. 3d 605, 611 (E.D. Va. 2017) (citing *Bland*, 730 F.3d at 385–85). *See also Liverman*, 844 F.3d at 407.

167. Knight First Amend. Inst. v. Trump, 928 F.3d 226, 240 (2d Cir. 2019).

Constitutional right to be heard by Governor Bevin in this specific format."[168] Such narrow interpretation of the First Amendment undermines the benefits of social media by suppressing public discourse.[169] Moreover, the court concluded that the Plaintiffs would not suffer irreparable harm if Governor Bevin continued to suppress their speech because there was "no actual harm in Governor Bevin's actions."[170] Conversely, the Supreme Court has stated that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[171] By failing to apply this notion to social media, the *Hargis* court suggests that online communication between political figures and the public does not deserve the same First Amendment protection as offline speech. This is contrary to the position of the Supreme Court[172] and the purpose of online communication in a democratic society.[173] Finally, the court found no "legitimate public interest that would be served by issuing the injunction."[174] This diminishes the public focus that is inherent in social media.[175] In effect, the *Hargis* court is enhancing the so-called "spiral of silence" in the context of online communication between the government and the public.[176]

This decision has substantial public policy implications. The *Hargis* holding allows governmental suppression of political speech in metaphysical settings. In this new and developing area of law, the *Hargis* court creates harmful precedent that

168. Hargis v. Bevins, 298 F. Supp. 3d 1003, 1013 (E.D. Ky. 2018).

169. The Supreme Court is primarily concerned with the preservation of the First Amendment in this innovative era. *See Packingham*, 137 S. Ct. at 1735–37 (defining social media as one of "the most powerful mechanisms available" to engage in First Amendment activity). According to the Court, the purpose of social media is for users to "engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" *Id.* at 1736. (quoting Reno v. ACLU, 521 U.S. 844, 870 (1997)).

170. *Hargis*, 298 F. Supp. 3d at 1013–14.

171. Elrod v. Burns, 427 U.S. 347, 373 (1976). *See also* Six Star Holdings, LLC v. City of Milwaukee, 821 F.3d 795, 805 (7th Cir. 2016) (holding that the First Amendment protects against "de minimis" harm); N.Y. Progress & Prot. PAC v. Walsh, 733 F.3d 483, 486 (2d Cir. 2013) (stating that loss of First Amendment freedoms even for short time constitutes irreparable injury); Lippoldt v. Cole, 468 F.3d 1204, 1221 (10th Cir. 2006) (holding nominal damages appropriate remedy for deprivation of First Amendment rights); Risdal v. Halford, 209 F.3d 1071, 1072 (8th Cir. 2000) (awarding nominal damages upon proof of First Amendment infringement).

172. The Supreme Court has rejected the notion that online speech is not worthy of the same level of First Amendment protection as other speech. *Reno*, 521 U.S. at 870.

173. *See* Miller, *supra* note 12 (explaining how social media was expected to increase political participation, connect more heterogeneous people, encourage the public to express opposing viewpoints, and give minority voices a bullhorn within our democracy).

174. *Hargis*, 298 F. Supp. 3d at 1014.

175. *See* Lipschultz, *supra* note 4, at 292 (finding that "individual empowerment has been cultivated by social media literacy"); *see also Packingham*, 137 S. Ct. at 1736 (noting that social media allows the public to "alter how [they] think, express [them]selves, and define who [they] want to be").

176. *See* Miller, *supra* note 12 (defining the "spiral of silence" as the tendency of people to remain silent when they feel that their views are in opposition to the majority view on a subject because of (1) fear of isolation or (2) fear of reprisal or more extreme isolation).

allows government officials to engage in viewpoint discrimination when creating their own subjective guidelines as to who is permitted to speak.[177] This narrow First Amendment interpretation undermines the foundation of social media, which was created in order to foster public discourse and encourage metaphysical interaction.[178] As noted by the Second Circuit, "if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less."[179] Without a consistent standard of law, neither the public nor government officials will know their permissible boundaries on social media. These issues will only multiply until the Supreme Court addresses the issue.

177. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46–47 (1983).

178. *See generally Hargis*, 298 F. Supp. 3d at 1003.

179. Knight First Amend. Inst. v. Trump, 928 F.3d 226, 240 (2d Cir. 2019).