No. 17-1988

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIAN DAVISON,

Plaintiff-Appellant

v.

DEBORAH ROSE; TRACY STEPHEN; ERIC HORNBERGER; JILL TURGEON; BRENDA SHERIDAN; JEFFREY MORSE; WILLIAM FOX; KEVIN KUESTERS; JOY MALONEY; ERIC DEKENIPP; SUZANNE DEVLIN, in their official and individual capacities; LOUDOUN COUNTY SCHOOL BOARD,

Defendant-Appellees

On Appeal from the United States District Court
For the Eastern District of Virginia, Alexandria Division

BRIEF *AMICI CURIAE* OF THE LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC. INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION VIRGINIA ASSOCIATION OF COUNTIES VIRGINIA MUNICIPAL LEAGUE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEES

Rodney A. Smolla
4601 Concord Pike
Wilmington, DE 19803
(302) 477-2278
Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 17-1988 Caption: Davison v. Rose

Pursuant to FRAP 26.1 and Local Rule 26.1,

Local Government Attorneys of Virginia, Inc.
(name of party/amicus)

who is Amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

Not Applicable for Amici

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /S/ Rodney A. Smolla Counsel for: Amici Loc. Gov. Attys of Va.

Date: December 7, 2017

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No.17-1988 Caption: Davison v. Rose

Pursuant to FRAP 26.1 and Local Rule 26.1,

International Municipal Lawyers Association
(name of party/amicus)

who is Amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES ☐ ☑ NO If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ ☐
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

Not Applicable for Amici

6. Does this case arise out of a bankruptcy proceeding? YES ☐ ☑ NO If yes, identify any trustee and the members of any creditors' committee:

Signature: /S/ Rodney A. Smolla

Counsel for: International Municipal Lawyers Aso.

Date: December 7, 2017

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 17-1988 Caption: Davison v. Rose

Pursuant to FRAP 26.1 and Local Rule 26.1,

Virginia Association of Counties
(name of party/amicus)

who is amici , makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? NO

2. Does party/amicus have any parent corporations? NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?

NO

If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

N.A.

6. Does this case arise out of a bankruptcy proceeding?

NO

identify any trustee and the members of any creditors' committee:

Signature: /s/ Rodney A. Smolla

Date: December 7, 2017

Counsel for: Va. Assoc. of Counties

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 17-1988 Caption: Davison v. Rose

Pursuant to FRAP 26.1 and Local Rule 26.1,

Virginia Municipal League

(name of party/amicus)

who is amici , makes the following disclosure:

(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? NO

2. Does party/amicus have any parent corporations? NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?

NO

5. If yes, identify entity and nature of interest:

6. Is party a trade association? (amici curiae do not complete this question) YES
NO

If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

N.A.

7. Does this case arise out of a bankruptcy proceeding?

NO

If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Rodney A. Smolla

Date: December 7, 2017

Counsel for: Va. Municipal League

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 17-1988 Caption: Davison v. Rose

Pursuant to FRAP 26.1 and Local Rule 26.1,

National School Boards Association

(name of party/amicus)

who is amici , makes the following disclosure:

(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? NO

2. Does party/amicus have any parent corporations? NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) NA
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Rodney A. Smolla Date: Dec. 7, 2017

Counsel for: National School Boards Ass'n

CERTIFICATE OF SERVICE

****

I certify that on December 7, 2017 the foregoing documents were served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/S/ Rodney A. Smolla
(signature)

December 7, 2017
(date)

Statement Pursuant to Fed. R. App. P. 29(a), (c)(5)

All parties have consented to the filing of this Amicus Brief. No counsel for a party authored the Brief, in whole or in part. No counsel for a party or a party itself made a monetary contribution intended to fund the preparation or submission of this Brief. No person other than *Amici* or their Counsel made a monetary contribution to its preparation or submission.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

INTERESTS OF THE AMICI

The Local Government Attorneys of Virginia, Inc. ("LGA") is a nonprofit professional corporation created to promote the continuing legal education of local government attorneys, furnish information to local government attorneys and their offices that will enable them to better perform their functions, offer a forum through which LGA members may meet and exchange ideas of import to local government attorneys, and initiate, support or oppose legislation and litigation that, in the judgment of the LGA, is significant to Virginia's localities.. LGA has over 800 public and private attorney members currently and over 300 institutional members, comprising Virginia counties, cities, and other special units of local government..

The International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is composed of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal

issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

The Virginia Association of Counties (VACo) is a non-profit, statewide, independent association organized in 1934 to support county officials and to represent, promote and protect the interests of counties to better serve the people of Virginia. VACo's membership includes 94 Virginia counties.

The Virginia Municipal League is a statewide, nonprofit, nonpartisan association of city, town and county governments established in 1905 to improve and assist local governments through legislative advocacy, research, education and other services. The membership includes all 38 cities in the state, 160 towns and eight counties.

The National School Boards Association (NSBA) through its state associations of school boards represents the nation's 95,000 school board members who, in turn, govern approximately 13,800 local school districts serving more than 50 million public school students, or approximately 90 percent of the elementary and secondary students in the nation. Many of these school board members establish personal social media accounts as a means of communicating their personal and political views to the public. Through its Council of School Attorneys, NSBA also serves approximately 3000 lawyers who advise school boards on their legal responsibilities.

SUMMARY OF ARGUMENT

This Amicus Brief addresses only one of the myriad issues raised in this Appeal, the question of whether a public official's personal Facebook page should be treated, for First Amendment purposes, as a public forum.

Two opinions from two different Federal District Judges in the United States District Court for the Eastern District of Virginia reached opposite conclusions on this question within days of one another. Both decisions have been appealed to this Court.

This appeal, *Davison v. Rose*, No. 17-1988, arises from the decision by District Judge Anthony J. Trenga, in *Davison v. Rose*, No. 1:16CV0540 (AJT/IDD), 2017 WL 3251293 (E.D. Va. July 28, 2017). Dismissing Brian Davison's claims against the Defendants (Appellees here) in their individual capacity on grounds of sovereign immunity, Judge Trenga in his opinion below concluded:

> Here, the law is less than settled as to whether the Plaintiff had a right to post on a Facebook page maintained by a public official and that this right was violated when those postings were removed or when Plaintiff was prevented from posting his comments. Plaintiff contends that Facebook is a public forum. . . . Traditional public forums include streets, sidewalks, and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) . . . Limited or designated public forums are "public property which the state has opened for use by the public as a place for expressive activity." *Id.* at 45 . . . Where there is no traditional history of use of a space as a public forum, "[t]he government does not create a public forum by inaction or by permitting

> limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1984).
>
> It is not clear as a legal matter whether the Facebook pages at issue in this litigation can be said to constitute either type of public forum. In any event, it cannot be said that such a First Amendment right was a "clearly established" right, "of which a reasonable person would gave known." These Individual Defendants are therefore entitled to qualified immunity for the actions they took against Plaintiff with respect to their Facebook pages.

Davison v. Rose, at *10.

In contrast, District Judge James C. Cacheris reached the opposite conclusion in another decision from the Eastern District of Virginia in which Davison was also a party, *Davison v. Loudoun Cty. Bd. of Supervisors*, No. 1:16CV932 (JCC/IDD), 2017 WL 3158389 (E.D. Va. July 25, 2017). That decision is also pending on Appeal in this Court, under the appellate caption *Davison v. Randall*, No. 17-2002.[1]

In his opening Brief, Brian Davison asserts that a public official's personal Facebook page should indeed be deemed a public forum, and characterizes this conclusion as "settled law." Brief of Appellant at 20. Davison's authority for the

[1] An Amicus Brief in the *Davison v. Randall* Appeal was filed in this Court on November 7, 2017, by many of the same Amici participating in this Brief, represented by the same Counsel of Record. The Amicus Brief filed here in *Davison v. Rose* presents substantive First Amendment arguments regarding the public forum status of the private social media pages of public officials identical to the arguments filed by many of the same Amici in the parallel appeal in *Davison v. Randall*.

law being "settled" is the decision by Judge Cacheris in his favor in the *Davison v. Randall* litigation.

The issue is far from "settled." The issue is rather a breaking question of first impression across the United States. It appears as if the first two decisions of any state or federal court in the United States on this question were the two conflicting decisions rendered by Judge Trenga and Judge Cacheris, reaching opposite conclusions from each other within a matter of days. There appears to be no appellate court decision from any state or federal court in the United States on the issue.

Amici argue that the better view is that social media pages operated by government entities may be public forums, but personal social media pages operated by public officials, even when used to discuss public policy issues, may not.

Only a governmental unit may create a public forum. Traditional "color of law" and "state action" doctrine must be kept analytically distinct from the First Amendment principles that govern the creation of a public forum.

A public forum does not come into existence through adverse possession. Unless the forum is a traditional public forum, such as a street, sidewalk, or park, the government itself must act intentionally to turn its property or program into a public forum. Social media platforms such as Facebook or Twitter are not themselves government property or programs, and cannot be public forums. Nor are

the personal social media accounts of users, even users who are public officeholders, public forums. The Internet and social media are vast venues for the exchange of expression. But they are private venues, not government owned and operated public forums.

In public forum analysis, courts must distinguish between the office and office-holder. Those who hold public office have a dual character. At times they act in furtherance of the duties of their office. At other times they act as private political actors who *hold* office, but are engaged in expression and association in their *political* capacities. Public officials do not check their First Amendment rights when they take their oath of office. When speaking from their private platforms, they retain their First Amendment rights to compose their own messages, and to determine the messages of others with which they will or will not associate, endorse, or propagate. In turn, members of the public have a concomitant right to receive the views of public officeholders. The public officeholders and their citizen constituents possess venerated First Amendment rights to exchange views, and to associate or not associate with others in that exchange, in their personal social media venues.

This Court should establish a bright-line division between the First Amendment principles that govern public forums on government property and within government programs, and the very different First Amendment principles that

govern the private choices of political officeholders on their personal social media platforms.

Attorneys who advise school boards and countless other government entities, and the officeholders who populate them, will be hopelessly mired in uncertainty if the law evolves to adopt the view that officeholders who use their private social media platforms to express their views on policy and invite comment from their constituents do so at their peril. A clean and simple rule, aligned with classic First Amendment doctrine and principle, and far better calculated to enhance the vibrancy of our political discourse, is that government social media platforms may be public forums, but the personal social media platforms of officeholders may not.

ARGUMENT

I. THE PRIVATE SOCIAL MEDIA ACCOUNTS OF PUBLIC OFFICEHOLDERS ARE NEITHER TRADITIONAL NOR DESIGNATED PUBLIC FORUMS

A. Only a Governmental Unit May Create a Public Forum

Only a governmental unit may create a public forum. The rich body of First Amendment public forum law consists *exclusively* of "cases in *which a unit of government creates* a limited public forum for private speech." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (emphasis added). *See also Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009) ("*a government entity* may create a forum that

is limited to use by certain groups or dedicated solely to the discussion of certain subjects") (emphasis added).

Politicians *of course* use social media such as Facebook or Twitter to express views on government and public policy. There is virtually always a "nexus," perhaps even a "close nexus," between the private expressive activity of the politician and the official activity of government. This is not the sort of "close nexus," however, that transforms otherwise private activity into action "under color of law" or "state action" when dealing with First Amendment doctrine governing the creation of a public forum.

B. Public Forums May Only Exist on or Within Government Owned and Operated Property or Programs

All public forums are either government property (the most common) or government programs. Individual government officials who engage in action not officially authorized or endorsed by a government entity may at times be deemed to be acting "under color of law" in violating a person's federal rights. An individual government official cannot, however, convert private property into government property in physical space, or turn a privately-owned forum into a publicly operated forum in cyberspace.

All decisions of the Supreme Court and this Court articulating the contours of public forum law *presuppose* that a public forum is either government property or a government program. The "Court has recognized that members of the public have

free speech rights on other types of *government property* and in certain other *government programs* that share essential attributes of a traditional public forum." *Pleasant Grove v. Summum*, 555 U.S. at 469 (emphasis added). As the Supreme Court has summarized:

> We have recognized two kinds of public fora. The first and most familiar are traditional public fora, like streets, sidewalks, and parks, which by custom have long been open for public assembly and discourse. . . . "The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public"

Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C., 518 U.S. 727, 791 (1996) (citations omitted). *See also International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) ("property that the State has opened for expressive activity by part or all of the public"); *Arkansas Educ. Television Commission v. Forbes*, 523 U.S. 666, 677 (1998) (same); *Warren v. Fairfax County*, 196 F.3d 186, 190 (4th Cir. 1999) (en banc) ("courts should evaluate First Amendment rights *on government owned property* under a public forum analysis") (emphasis added).

To be sure, public forum analysis also extends to government property outside the physical realm, including government programs, and virtual or metaphysical property. *See Matal v. Tam*, 137 S. Ct. at 1763 (2017) (public forum principles are applicable when "government creates such a forum, in either a literal or

'metaphysical' sense"). But in all cases it must be the *government's* "property," physically or virtually, that is in play. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995) (student organization program at the University of Virginia "is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."); *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1069 (4th Cir. 2006) ("the money constitutes a forum 'more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.'"), *quoting Rosenberger* at 830.

C. Classifying the Public Forum

Judge Trenga in his opinion below properly focused on classifying the public forum, as either a traditional or a designated public forum. Judge Trenga's analysis, quoted above in the Summary of Argument, expressed appropriate skepticism that a personal Facebook page could be either a traditional or designated forum, Judge Cacheris in his *Loudoun County* opinion (on Appeal here as *Davison v. Randall*), skipped this classification step. In skipping the classification exercise, Judge Cacheris may have fallen into a blind spot regarding the salient First Amendment principles governing public forum analysis.

Courts must not lose sight of the distinction between the public realm and the private realm that is fundamental to all First Amendment public forum law. Private

speakers may engage in viewpoint discrimination. Private speakers may choose for themselves what viewpoints to espouse, or not espouse, and what associations with other speakers they choose to indulge. So too, when the government speaks in its own voice, viewpoint discrimination is allowed, because the principles applied to "government speech" permit viewpoint discrimination, on the supposition that the government is simply entering the marketplace of ideas on its own accord, joining private speakers in the marketplace, who are *also* entitled to engage in viewpoint discrimination. *Walker v. Texas Div., Sons of Confederate Veterans, Inc*., 135 S. Ct. 2239 (2015). It is only when the government intentionally opens its own property or programs up to private speakers that public forum principles may be activated.

D. Public Forums Come into Existence Only Through the Intentional Policies of Government Units, and Not through Mere Acquiescence

Public Forums do not come into existence through adverse possession. The Supreme Court and this Circuit have repeatedly emphasized that public forums come into existence only through the intentional policies of government, and not through mere acquiescence or inaction:

> Merely allowing some speech on property that is not a traditional public forum does not automatically create a designated public forum. The Supreme Court recently clarified the distinction. The government creates a designated public forum when it purposefully makes property "generally available" to a class of speakers.

Warren v. Fairfax Cty., 196 F.3d. at 193, *citing Arkansas Educ. Television* 523 U.S. at 677. *See also Am. Civil Liberties Union v. Mote*, 423 F.3d 438, 443 (4th Cir. 2005) (holding that while it was true that the University of Maryland at College Park had generally allowed members of the public to express themselves on the campus, the practice was "not determinative because '[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.'") *quoting Cornelius*, 473 U.S. at 802; *Child Evangelism Fellowship*, 470 F.3d at 1067 ("Limited public forums are characterized by 'purposeful government action' intended to make the forum 'generally available.'").

"A government 'does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.'" *Walker*, 135 S. Ct. at 2251. A public forum may only exist when "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose." *Pleasant Grove v. Summum*, 555 U.S. at 469. *See also Verlo v. Martinez*, 820 F.3d 1113, 1139 (10th Cir. 2016) ("Thus, the government's intent is the focus of this inquiry."); *General Media Communications, Inc. v. Cohen*, 131 F.3d 273, 279 (2nd Cir. 1997) ("Governmental intent is said to be the 'touchstone' of forum analysis.").

This Court's decision in *Page v. Lexington Cty. Sch. Dist. One*, 531 F.3d 275, 284 (4th Cir. 2008), is instructive. *Page* held that a school district's website was *government speech*, holding "we conclude that the School District established its own message and effectively controlled the channels of communication through which it disseminated that message, as required for application of the government speech doctrine." *Page*, 531 F.3d at 285. The Court in *Page* then observed: "Had a linked website somehow transformed the School District's website into a type of 'chat room' or 'bulletin board' in which private viewers could express opinions or post information, the issue would, of course, be different." *Id.* The court proceeded to hold that the school district had not so operated its website, and thus had not created a public forum. *Id.* at 285-88. *Page* underscores that public forum law requires the intentional creation of a forum *by the government* on *government property*, including a *government website*—very different from converting the social media page of a government official into a public forum.

If public forums may only be created by intentional governmental action, it follows as well that entities such as school boards, in determining whether to create a public forum, must make their determination in the their corporate capacity, and not through the actions of individual board members, who cannot exercise the power of the school board itself as private individuals. Virginia vests power in school boards *as boards*. *See* Va. Const. Art. 8, § 7 ("The supervision of the schools in

each school district shall be vested in a school board . . .”). *See also* Va. Code Ann. §§ 22.1-7; 22.1.71.

E. Personal Social Media Platforms Such as Facebook or Twitter Used by Public Officeholders Are Not Traditional Public Forums

Traditional public forums “are open for expressive activity regardless of the government’s intent.” *Arkansas Educ. Television* 523 U.S. at 678. Public streets and parks are the “archetype of a traditional public forum.” *Frisby v. Schultz*, 487 U.S. 474, 480, (1988). These government spaces occupy a “special position in terms of First Amendment protection.” *United States v. Grace*, 461 U.S. 171, 180 (1983). For “‘[t]ime out of mind’ public streets and sidewalks have been used for public assembly and debate.” *Snyder v. Phelps*, 562 U.S. 443, 456 (2011), *quoting Frisby*, 487 U.S. at 480. As this Court has often and correctly recognized, “[i]n the traditional public forum, which includes the streets, sidewalks, parks, and general meeting halls, speakers’ rights are at their apex.” *Steinburg v. Chesterfield County Planning Comm’n*, 527 F.3d 377, 384 (4th Cir.2008).

There does not appear to be any American state or federal case that has ever held that an individual’s Twitter or Facebook account is a traditional public forum.

In arguing to the contrary, Davison and his *Amici* placed great emphasis on the Supreme Court’s decision in *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017). *Packingham*, however, did not address the issue here. The pertinent passage from the Supreme Court’s opinion reads:

> A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. . . . Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.
>
> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, . . . and social media in particular. Seven in ten American adults use at least one Internet social networking service. . . . One of the most popular of these sites is Facebook, the site used by petitioner leading to his conviction in this case. According to sources cited to the Court in this case, Facebook has 1.79 billion active users. . . . This is about three times the population of North America.

Packingham, at 137 S.Ct. at 1735.

To unpack *Packingham*, consider first the meaning of the passage above in light of the Court's actual holding. The Court in *Packingham* held unconstitutional a North Carolina law enacted in 2008, making it a felony for a registered sex offender to gain access to many websites, including social media platforms such as Facebook and Twitter. The Court in *Packingham* did *not* hold that Facebook and Twitter, both private companies, were governmentally owned and operated traditional public forums. Nor did it hold that the hundreds of millions of Americans who have

Facebook and Twitter accounts and open them generally to the public for postings are thereby operating public forums. Nor did the Court in *Packingham* hold that the millions of Facebook and Twitter users who are government employees are operating public forums.

Any and all of these holdings would have been radical departures from traditional First Amendment doctrine, obliterating in one fell swoop all of modern public forum law, including its fundamental dichotomy distinguishing the public and private sphere, and the myriad doctrines (discussed in the sections above) defining public forums as government property or programs. If the Supreme Court in *Packingham* had intended a radical break with prior First Amendment theory and doctrine so revolutionary, surely it would have made the radical revolution explicit. Yet to the contrary, the Court in *Packingham* expressly warned that it was *not* making any wholesale sweeping judgments, but was intentionally proceeding cautiously and incrementally. "While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions," the Court observed, "we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be." *Id.* at 1736. With an admonition to proceed cautiously, the Court stated, "The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow." *Id.*

What the Court in *Packingham did* hold was that the Internet and social media are now the most important *venues* for the exchange of information and ideas. *Id.* at 1735. Through the Internet and social media, people may communicate directly online, without the need to travel to a public street or park. North Carolina's restriction on access to social media violated the First Amendment because it kept Mr. Packingham from speaking and listening to others on the Internet. *Id.* at 1736-37. Nothing in the Supreme Court's opinion in *Packingham*, however, mandated that those private citizens who have Facebook or other social media accounts must *themselves* accept Mr. Packingham's posts. The *government* is not allowed to prevent Mr. Packingham from communicating with those other Facebook users. But that is not to say that those Facebook users *must* communicate with him. Facebook itself remains free, and indeed retain the First Amendment right, to block Mr. Packingham if it chooses. Individual Facebook users remain free, and indeed retain the First Amendment right, to block Mr. Packingham. The Court in *Packingham* thus heavily emphasized that *users* of social media are all exercising First Amendment rights—and users by definition must mean those who host as well as those who post. *Id.* at 1737.

Decisions invoked by the *Amici* supporting Davison all involve direct action by the government *as government*. Thus the Knight First Amendment Institute Amicus Brief in *Randall* supporting Davison states, "[W]hen the official opens the

account for expression by the public at large—for example by inviting the public to post replies and comments—the account is a designated public forum. *E.g. Steinberg v. Chesterfield County Planning Comm'n*." The *Steinburg* decision from this Court does not stand for the proposition for which it is cited. *Steinburg* involved an official county planning commission *public meeting*. Well *of course* a county's public meeting was a public forum. A government entity's official meetings are a far cry from a government official's personal Facebook page. (Moreover, this Court in *Steinburg* held that the official did *not* violate the citizen's First Amendment rights in excluding the citizen for violation of the Commission's civility and personal attack policies.).

Similarly, the ACLU Amicus Brief supporting Davison invokes *Evans v. Newton*, 382 U.S. 296 (1966). *Evans* involved a park devised to the City of Macon, Georgia, held in trust by the City. The Court held that excluding African-Americans from the park violated the Fourteenth Amendment notwithstanding the attempted subterfuge of transferring superintendence of the park to "private trustees." Critically, the Supreme Court in *Evans* concluded that "we cannot say that the transfer of title per se disentangled the park from segregation under the municipal regime that long controlled it." *Id.* at 302.

So too, the invocation the Knight *Amici* of *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), does not advance Davison's position. In *Southeastern*

Promotions, officials in Chattanooga refused to allow performances of the Broadway musical *Hair* in a Chattanooga Municipal Theatre or a private theatre "under long-term lease to the city." *Id.* at 547. The Court found the actions of the officials to be prior restraints, stating, "Respondents' action was no less a prior restraint because the public facilities under their control happened to be municipal theaters." *Id*. at 555. The theatres in *Southeastern Promotions* were public forums because they were operated by the government as the government's property. It does not matter that the government's property is leased, as in *Southeastern Promotions*, or held in trust, as in *Evans*, as long as it is still the *government* operating it.

Amici wrongly characterized the argument advanced here as an assertion that no social media page could ever be a public forum. The *government* may certainly operate a public forum through a social media page. Indeed, an earlier opinion of Judge Cacheris involving the Loudoun County litigation noted, correctly, that the County has regulations regarding creation of social media platforms. *See Davison v. Loudoun Cty. Bd. of Supervisors*, No. 1:16CV932 (JCC/IDD), 2017 WL 1929406, at *4 (E.D. Va. May 10, 2017). What matters is that the social media site be a site operated by the governmental office as an office of government, and not the personal site operated by a government officeholder.

II. TO COMANDEER THE PRIVATE SOCIAL MEDIA PAGE OF A PUBLIC OFFICEHOLDER AND CONVERT IT TO A PUBLIC FORUM VIOLATES THE FIRST AMENDMENT RIGHTS OF THE OFFICEHOLDER AND THE CORRESPONDING FIRST AMENDMENT RIGHTS OF THE OFFICEHOLDER'S CONSTIUENTS

A. Those Who Hold Public Office Retain First Amendment Rights Protecting Against Forced Speech and Forced Expressive Association

"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). A public official's Facebook page is the official's own personal platform for expression and expressive association as a political actor within the political marketplace. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

The First Amendment grants to officeholders the right to choose the views with which to associate. "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, (1994). "A system which secures the right to proselytize religious,

political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). An official's personal reasons for wanting to dissociate from certain views are beyond the ken of the government. For "whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573-74 (1995).

Mr. Davison has every right to be a critic of individual government officials on the School Board, in Loudoun County, or in any other branch of government. But he has no right to require those officials to publish his criticism. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (holding unconstitutional a "right of reply" statute forcing a newspaper to publish the reply of a political candidate the paper had criticized.) As the Supreme Court has admonished, "we cannot improve upon what Justice Jackson wrote for the Court 70 years ago: 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'" *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2332 (2013), *quoting West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

This Court's decision in *Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) does not contradict this principle. In *Rossignol*, this Court properly held that an organized conspiracy orchestrated by a County Sheriff, various Sherrff's Deputies, and a State's Attorney to suppress and censor the expression of a private newspaper through an extraordinary plot to buy all copies of the paper's election-day edition constituted action "under color of law" in violation of the First Amendment.

For government officials to seize all the newspapers of a dissident group and prevent the newspapers from reaching members of the public was ham-handed censorship. As this Court correctly framed it, the *only* question was whether the Sheriff's personnel were acting under "color of law," for if they were, "[t]he seizure clearly contravened the most elemental tenets of First Amendment law." *Id.* at 521.

Unlike *Rossignol*, when a public official blocks a citizen from the official's personal social media account, that action does not suppress the citizen's views in the sense that the First Amendment knows suppression. Mr. Davison is perfectly free to express his views anywhere he pleases, in physical space or in cyberspace. But he has no right to commandeer the personal social media sites of public officials for that expression. Consider the proper analysis that would have applied if, in *Rossignol*, the Sheriff had not seized copies of the newspaper, but instead, had operated his own Facebook page, on which the Sheriff expressed his views, solicited

political support, and allowed others to post messages. Then imagine that a newspaper opposing him sought to express its views on the Sherriff's own Facebook page, but the Sheriff refused, and blocked the paper from posting on his Facebook page. Now *Rossignol* was decided in 2003, and Facebook was not invented until 2004, so the hypothetical posed is somewhat fanciful. But the concept is not. There is a fundamental constitutional divide between a public official's seizure or suppression of a critic's message, aggressively acting to block its publication in the marketplace, and a public official's refusal to permit a critic to participate in the public official's own personal expression, simply refusing to personally facilitate and support the propagation of the critic's message.

It is important to bear in mind what the argument advanced here is not asserting. It is not a claim that a government official's statements on social media are invisible to claims asserting federal statutory or constitutional violations. A government official's statements on a private account may be a "smoking gun" establishing discriminatory intent, or even state action itself, if the statements evidence illicit action perpetrated under color of law. An official is not immunized from an otherwise unconstitutional command because the official issues the command through a private account. An official using his or her private account to order a subordinate to block a citizen from speaking in a public park would surely be violating the First Amendment.

The argument advanced here also does not assert that statements made on a public employee's social media page cannot have legal consequences. Public employees may in some circumstances face discipline for social media statements, under the rubric the principles governing public employee speech. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006). Public employees remain fully subject to all the myriad rules of civil and criminal liability that may attach to unprotected expression, such as libel or prosecution of obscenity, or engaging in true threats. The argument here simply is that the social media platforms of public employees should not be deemed public forums.

School board members, of course, may not even be "public employees" in the traditional sense, though they will typically be subject to reasonable restrictions on their expressive activity germane to their school board duties. School board members remain subject to civil and criminal liability rules. Various jurisdictions may also enact laws or school boards themselves may adopt restrictions on what board members can publicly disclose, such as restrictions on disclosing confidential matters discussed in executive session or other types of confidential information concerning personnel matters, student information, or litigation details. A school board member's actions on social media might violate such rules, and have legal consequences. That truism, however, does not transform the social media page into a public forum.

The line dividing personal and official expression does not suppress liberty, but enhances it. "[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring). The private channels of communication used by politicians and political organizations to communicate and associate must be kept analytically separate from the public forums dedicated to public expression administered by government, in physical space and virtual space. Any other regime "impermissibly burdens the right of its members to determine for themselves with whom they will associate, and whose support they will seek, in their quest for political success." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986). Unless such a "mine and thine distinct" is maintained, the expressive and associative freedom of the political actors in the marketplace will be abridged.

This Court should distinguish between the office and the office-holder. Elected officials have a dual character, official and political. At times they act in furtherance of the duties of their office. At other times they act as private political actors who hold office, but are engaged in expression and association in their *political* capacities. "For speech concerning public affairs is more than self-expression, it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S.

64, 74-75 (1964). Government officials, particularly elected government officials, do not check their First Amendment rights when they take their oath of office. *See Elrod v. Burns*, 427 U.S. 347, 372 (1976). As political actors they make speeches, hold rallies, distribute leaflets, convene caucuses and conventions, seek donations, support allies, and attack opponents. *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (freedom of association includes the right to "identify the people who constitute the association."). Officeholders retain the right to speak as political actors, and retain the right to use platforms, physical and virtual, for their personal political expression and expressive association.

B. The Public's Right to Receive Information Will be Chilled by Treating Officeholder's Personal Social Media Accounts as a Public Forums

The First Amendment protects the right of a public official's constituents to receive the official's views, undiluted by inclusion of messages with which the official disagrees. "It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster Gen. of U. S.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). "It is now well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). The First Amendment "freedom embraces the right to distribute literature, . . . and necessarily protects the right to receive it." *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943).

If a public officeholder is forced to treat his or her social media page as a public forum, the page will lose its character as the officeholder's own unique individual candid and authentic expression, and instead become a bowdlerized platform collecting the random messages of any and all, stripped of any distinctive personality or direction.

The point of a public forum is that the forum *itself* is to be neutral. The forum is an empty vessel. The forum is the space where others come to express their views. The point of an officeholder's personal social media platform is exactly the opposite. It cannot be forced neutral. It cannot be forced to be an empty vessel. It exists to be partisan, and in that existence the marketplace of ideas is enriched, not impoverished.

C. The Need for a Bright-Line Rule

Virtually all American public officeholders have social media accounts of one sort or another. The drawing of a bright line is needed. The official web pages of government agencies, deliberately opened for public comment and participation, are public forums. The private web pages of individual public officeholders, used for the exchange of views on public issues are not.

CONCLUSION

The decision of the District Court should be affirmed.

Respectfully submitted,

_____

/s/ Rodney A. Smolla

4601 Concord Pike
Wilmington, DE 19803
(302) 477-2278
rasmolla@widener.edu

December 7, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32 (a)(7) of the Federal Rules of Appellate Procedure, this Brief is in 14-Point Times New Roman proportional font and contains 6,498 words, excluding the parts exempted by Rule 32, and thus is in compliance with the word limits for amicus briefs in the United States Court of Appeals for the Fourth Circuit.

/s/ Rodney A. Smolla

December 7, 2017

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c), I certify that the foregoing was electronically filed with the Clerk of Court on November 7, 2017 using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system and to the pro se Plaintiff-Appellee, who has received leave to participate in electronic filing.

/s/ Rodney A. Smolla

December 7, 2017