

1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
2 -----x

3 KNIGHT FIRST AMENDMENT
4 INSTITUTE AT COLUMBIA
UNIVERSITY, et al.,

5 Plaintiffs,

6 v. 17 CV 5205 (NRB)

7 DONALD TRUMP, et al.,

8 Defendants.

9 -----x
New York, N.Y.
10 March 8, 2018
2:20 p.m.

11 Before:

12 HON. NAOMI REICE BUCHWALD,
13 District Judge
14

15 APPEARANCES

16 KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY
Attorneys for Plaintiffs
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19 U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION
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21 BRETT A. SHUMATE
ERIC R. WOMACK
22
23
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1 (Case called)

2 THE DEPUTY CLERK: Are the plaintiffs present and
3 ready to proceed?

4 MS. FALLOW: Yes, your Honor. Katie Fallow for the
5 plaintiffs.

6 MR. JAFFER: Jameel Jaffer also for the plaintiffs.
7 I'm here with Carrie DeCell, Alex Abdo. And I also just wanted
8 to alert the Court that three of our plaintiffs are in the
9 courtroom -- Nick Pappas, Philip Cohen, and Rebecca Buckwalter.

10 THE DEPUTY CLERK: Are the defendants present and
11 ready to proceed?

12 MR. BAER: Yes. Good morning, your Honor. Michael
13 Bare from the Department of Justice on behalf of defendants.
14 I'm joined by my colleagues -- Daniel Halainen, Eric Womack,
15 and Brett Shumate.

16 THE COURT: Who will be speaking for the defense?

17 MR. BAER: Just me, your Honor.

18 THE COURT: Then that's the only name I need to know
19 how to pronounce.

20 I have several pages of questions. So I'd like to
21 start with those, and if at the end of our discussion we
22 haven't covered some territory that you think we should, I'll
23 give you the floor.

24 So there are certain arguments that have been repeated
25 throughout the briefing that I don't find particularly

1 meaningful. So I would ask, so we can focus on more
2 significant arguments, I would appreciate counsel refraining
3 from relying on at least these two arguments: First, that the
4 President had the @realDonaldTrump account before he became
5 President; and second, that the plaintiffs are blocked from
6 generally available public information.

7 I'm going to start by asking you a few questions on
8 standing and jurisdiction. Other than my questions, I would
9 ask you to please otherwise refrain from addressing the case
10 law on the Court's power to afford plaintiffs' equitable relief
11 as I think it's been exhaustively addressed in the papers.

12 Mr. Baer, you have argued in your papers that no
13 relief can be ordered against Mr. Scavino because he didn't
14 personally block any of the plaintiffs.

15 Assume with me for the moment that if the Court were
16 to conclude that the President's blocking is unconstitutional,
17 wouldn't Mr. Scavino be under a duty to unblock the plaintiffs
18 under the government's general duty to follow the law? So, in
19 other words, couldn't effective relief be afforded against
20 Mr. Scavino?

21 MR. BAER: Your Honor, I don't believe that the
22 standing cases concerning causation create a duty that broad
23 for government officials. I think, by that logic, any
24 government official would always have a duty to step in in sort
25 of any situation, and yet in cases --

1 THE COURT: I'm not asking the director of the
2 Bureau of Prisons to come to the White House and engage in the
3 Twitter feed. We're talking about somebody here who it is
4 acknowledged has the capacity to block or unblock and who is
5 directly involved in the creation of some of the tweets.

6 MR. BAER: Absolutely, your Honor. But I don't think
7 that gets around the second prong of Article III standing
8 regarding causation. The injuries still must be fairly
9 traceable to a particular individual, and plaintiffs haven't
10 identified -- and we have not found -- a case in which someone
11 who did not cause the direct injury that plaintiffs complain of
12 can be the subject of relief.

13 And I think --

14 THE COURT: You would prefer the relief to go directly
15 to the President?

16 MR. BAER: No, your Honor, because, for the reasons
17 that your Honor has acknowledged in the papers, we don't
18 believe that the Court has the power to issue that relief.

19 Certainly if the Court concludes that it has power to
20 issue relief as to both defendants, we think the relief should
21 be issued against Mr. Scavino, but that's sort of a choice
22 between two different grounds on which the Court would lack
23 jurisdiction; that it lacks jurisdiction with respect to
24 Mr. Scavino as a defendant by virtue of the causation prong of
25 Article III, and it lacks jurisdiction with respect to the

1 President by virtue of the redressability prong.

2 THE COURT: So I understand from your papers that you
3 are vehemently opposed to the position that the Court can
4 enjoin a president to comply with the law.

5 Do you have equally strong feelings about declaratory
6 relief? And if so, would you please explain.

7 MR. BAER: Sure. In this case, your Honor, yes, we
8 do. I would start by noting that courts have analogized
9 declaratory and injunctive relief against the President.
10 Judge Bates in his decision in Newdow addressed the issue at
11 some length.

12 I think here this case illustrates why the effect of
13 the two forms of relief is the same, because if a declaratory
14 judgment would redress plaintiffs' alleged injuries, then it
15 would only do so by virtue of causing the President to engage
16 in the very action that plaintiffs seek to have the President
17 engage in via injunction.

18 In other words, while in some cases you may have a
19 declaratory judgment before someone has acted, here the effect
20 of declaratory relief and injunctive relief is the same. It's
21 to get the President to log into his Twitter account and
22 unblock the plaintiffs, and the Court doesn't have the power,
23 respectfully, to order that relief.

24 THE COURT: There is, to my recollection -- although
25 we haven't looked for it recently, but I recall using this case

1 when I was an assistant U.S. Attorney. And I recall that there
2 is a case in the Second Circuit that says that it's unnecessary
3 to enjoin the government because once the government learns
4 what the law is, the Court can presume that the government will
5 follow the law as declared by the Court.

6 Do you think that case might have some relevance here?

7 MR. BAER: So, your Honor, without knowing the details
8 of the case, I don't want to --

9 THE COURT: I don't remember the details. I believe
10 the defendant was the Department of Housing and Urban
11 Development, but it was some years ago that I was an assistant.
12 I tend not to, candidly, remember case names. But this is
13 somehow a case that I recall, maybe because I used it more than
14 once.

15 MR. BAER: Your Honor, from my understanding from the
16 principle that that case stands for, I think the application
17 would be to reaffirm the position I just articulated, which is
18 that if the point of declaratory relief is to presume that the
19 government will comply with the implications, then it is the
20 same effect as an injunction directed at the President.

21 THE COURT: The point of the case though is that once
22 the government agency learns what the law is, they take it upon
23 themselves to comply without the necessity of being
24 specifically ordered to do so.

25 MR. BAER: But, your Honor, when the focus of the

1 declaration would be not on broad principles of law but the
2 specific question of whether a particular presidential action
3 violated the law, then, again, that presumption, to my mind,
4 simply reinforces that the point of seeking declaratory relief
5 is to have this Court, in effect if not in practice, issue a
6 decision that would force the President to take particular
7 actions in his discretionary capacity which implicates all of
8 the same --

9 THE COURT: Yes. But the other possibility is that a
10 government official -- in other words, I don't start out with
11 the assumption -- and we don't need to be speaking about the
12 President in this but just anyone who works for the government.
13 I don't start out with the assumption that that person
14 intentionally takes action knowing that it's in violation of
15 the law.

16 In other words, I start out with a good-faith
17 assumption. So the notion, I think, of that -- the principle
18 of that case is that the government actor, upon learning that
19 their good-faith assumption was in fact ill founded, would then
20 voluntarily, without being ordered, change their action because
21 at any high level -- you, me -- when we take our jobs, we swear
22 to uphold the Constitution and the laws of the United States.

23 So we may have been in something that either you or I
24 did, because there is no infallibility doctrine in the world of
25 Article III or I think even Article I, that we may be mistaken

1 and that we may need to learn.

2 MR. BAER: Absolutely, your Honor. I don't take any
3 issue with that assumption, as you've stated it. The question
4 though -- and the issue here is -- the President is different.

5 The President is different with respect to both
6 declaratory and injunctive relief, as the court recognized both
7 in plurality and Justice Scalia's concurrence in Franklin v.
8 Massachusetts.

9 Let me be clear. The President is different just with
10 respect to the Court's power to issue the relief, not with
11 regards to the nature of the assumption. So I think if the
12 Court were to issue declaratory relief directed at the
13 President -- again, the relief would have to be directed at the
14 defendants for which there is standing in this case -- the
15 effect of that relief would be for the Court to be saying that
16 the President has to take a specific action with respect to his
17 Twitter account, and that raises all of the same structural
18 separation powers issues that I gather your Honor is well
19 versed in from the briefs.

20 THE COURT: It's not that I don't think those are
21 important issues. I think they've been exhaustively addressed
22 in the papers, and I don't think it would be valuable for us to
23 spend time, since we have about 2 1/2 pages of questions as it
24 is.

25 Let me maybe just on this ask the plaintiffs whether

1 the plaintiffs see a difference between injunctive and
2 declaratory relief. And if so, what do you think the
3 difference is?

4 MR. JAFFER: Your Honor, let me start by saying that
5 we think the Court does have the authority to enjoin the
6 President.

7 THE COURT: I understand that.

8 MR. JAFFER: I think you're right to be asking whether
9 you need to exercise that authority even if you have it. There
10 are a couple cases in which the courts have issued declaratory
11 relief against the President after having considered the
12 possibility of issuing injunctive relief and concluded that
13 declaratory relief would be less intrusive.

14 The two I have in mind are the line-item veto case,
15 Clinton v. New York; and NTEU, which is a D.C. Circuit case
16 that we cite several times in our briefing.

17 There is a passage in NTEU that goes precisely to this
18 question that you've asked. It's at page 616 of that case. If
19 I could just read two sentences. This is after the court has
20 considered the possibility of injunctive relief: "This case
21 presents a most appropriate instance for the use of a
22 declaratory decree. Accordingly, we confine ourselves at this
23 time to a declaration of the law, that is, that the President
24 has a constitutional duty forthwith to grant" -- and it
25 explains the relief. "We so restrict ourselves at this time in

1 order to show the utmost respect to the office of the
2 presidency and to avoid, if at all possible, direct involvement
3 by the courts in the president's constitutional duties
4 faithfully to execute the laws and to avoid any clash within
5 the judicial and executive branches of government."

6 So I think that is an example of a case that is
7 essentially saying declaratory relief is less intrusive than
8 injunctive relief, which I think makes sense. A declaration
9 doesn't directly require anyone to do anything.

10 My understanding is no one can be held in contempt for
11 failing to abide by a declaration. It seems like a less
12 intrusive step. If the Court were to issue declaratory relief
13 here, we would of course like the Court to make clear that
14 should further relief be necessary, the plaintiffs could come
15 back before the Court and ask for that relief.

16 THE COURT: Mr. Baer, another question for you. I
17 think that you've argued in your papers that the President's
18 actions in blocking the plaintiffs are taken solely in a
19 personal capacity.

20 If that's the case, isn't there a minimal interference
21 with the President's exercise of executive power?

22 MR. BAER: So, your Honor, I think if I understand the
23 question correctly --

24 THE COURT: It was not perfectly phrased.

25 In other words, if there was relief ordered, given

1 that you've argued that blocking is a personal act, doesn't it
2 follow that there's a minimal interference in his exercise of
3 executive power?

4 MR. BAER: Well, your Honor, I think if there were to
5 be a declaratory judgment with respect to an act that is
6 personal, then the judgment wouldn't be addressing the act and
7 wouldn't require the President to do anything different or
8 wouldn't have any effect.

9 I think part of the challenge here, your Honor, is
10 that plaintiffs have brought an official capacity suit against
11 the President. So, at the jurisdictional phase of the
12 analysis, we have to assume that the President was taking these
13 actions in an official capacity, which is why we label the
14 decision whether to block or follow particular users on Twitter
15 one of executive discretion because if we sort of operate under
16 the assumption that it's official action, then it has to be
17 discretionary action.

18 But if, as we believe and as we've argued in the
19 papers, it is the personal action of the President, then it is
20 not subject to any First Amendment restrictions because it's
21 not state action. So a declaratory judgment wouldn't redress
22 anything stemming from non-state action on behalf of the
23 President.

24 THE COURT: Well, that sort of segues nicely into my
25 next series of questions.

1 I'd like to continue with some questions about state
2 action, although I'm not certain that analytically it is the
3 first step.

4 Do counsel -- and I want to hear from both of you --
5 agree, to the extent that you're arguing state action, that
6 that is doctrinally distinct from the public forum analysis?

7 Let the plaintiffs go first.

8 MS. FALLOW: Yes. Thank you, your Honor. We wanted
9 to say at the outset thank you for letting us divide the
10 argument. Hopefully it's not too cumbersome.

11 THE COURT: No problem. I just don't like during a
12 trial to have two lawyers objecting.

13 MS. FALLOW: We won't object.

14 I think that the state action inquiry is generally the
15 first question as to whether the First Amendment is at issue
16 here. I think that the record shows unambiguously that the
17 President operates his account in an official capacity.

18 The defendants have conceded all of the facts showing
19 that he is operating it in an official capacity, including the
20 fact that he uses it to make official pronouncements of policy
21 like his announcement this last summer about banning
22 transgender individuals from serving in the military,
23 announcing executive actions like his appointment of a new FBI
24 director. And I think the record shows clearly that White
25 House staff assist the President in administering this account.

1 So this is not a purely personal account.

2 One of the notable facts in this case is DOJ itself
3 considers tweets from the @realDonaldTrump account to be
4 official statements from the President of the United States,
5 and the courts and administrative agencies have treated his
6 tweets as official statements of the President with legal
7 effect.

8 So, if you look at the totality of the circumstances
9 and all of the facts in the record in this case, it shows that
10 he's using this account as an official account. And then when
11 he blocked the plaintiffs from that account, that is state
12 action. That's a long answer to your question. I apologize.

13 THE COURT: So there are two questions or maybe three
14 here. I'm a little puzzled as to why are you relying on state
15 action cases and the under color of state law doctrine in the
16 1983 framework given that there are no state actors here.
17 There are only federal actors.

18 Would it not be really more analytically sound to
19 argue it the way you just did, in part -- you went back and
20 forth -- between official action and personal action?

21 But the concept of state action simply isn't
22 applicable because the President is not a state actor and this
23 is not a 1983 case. So I was really very puzzled as to why
24 everybody was using these cases.

25 MS. FALLOW: I think it is a little confusing in the

1 case law. I think that my understanding is that courts have
2 treated the question of under color of law or whether it's
3 state action for purposes of 1983 or the 14th Amendment as
4 interchangeable.

5 THE COURT: Neither of those apply here. Right?

6 MR. BAER: Your Honor, if I may briefly on this.

7 THE COURT: Sure.

8 MR. BAER: I think the analogy is to state action
9 under the 14th Amendment because there the purpose of the
10 inquiry is usually to figure out whether the Constitution
11 attaches to the particular government action at issue.

12 So I think your Honor is absolutely right that
13 government action, rather than state action, would be the way
14 to frame this. But because the case law is worded in state
15 action terms, I think we've looked to cases that help
16 illustrate when you can fairly label a particular action the
17 action of the government or whether it is something that the
18 constitution doesn't attach to.

19 And as I believe Ms. Fallow just noted, the case law
20 certainly merges on the 1983 under color of law analysis and
21 the 14th Amendment state action or what we might call for
22 purposes of this action government action analysis.

23 THE COURT: So you sort of agree with me that in a
24 sort of precise way, state action really has nothing to do with
25 this case. That's not really the right phrase; that it's

1 either official action or it's government action, but it's not
2 technically state action.

3 MR. BAER: Absolutely, your Honor. I think government
4 action is probably the better way to think of it, simply by
5 virtue of the fact that anything the President does publicly as
6 the chief executive of the United States.

7 Whether it's in a campaign context or at a fundraiser
8 or at the White House, there will certainly be the trappings of
9 officialdom, and the President certainly can make official
10 statements from all of those settings, but we wouldn't treat
11 the President's activity at a campaign event, even though he's
12 announcing a new policy or initiative for the first time, as
13 actions in his governmental capacity. That would be a
14 political capacity, certainly with regards to who was allowed
15 into that campaign event.

16 THE COURT: Or who pays to get him there.

17 MR. BAER: Yes, your Honor. So that's why I think the
18 focus would be whether a particular action, not sort of an
19 overall setting is an action that can be attributed to the
20 government because that's the threshold inquiry for whether the
21 Constitution will attach to the Court's evaluation of that
22 action.

23 THE COURT: I'm a little puzzled about that argument
24 because -- are you just saying that certain things that the
25 President says -- or certain tweets that he tweets on the

1 @realDonaldTrump are government speech?

2 MR. BAER: Absolutely, your Honor. The President
3 makes official government statements from that account.

4 THE COURT: My first question though was: Do you
5 agree with me that this government action argument is
6 doctrinally different from the public forum analysis?

7 MR. BAER: Yes, your Honor, because it's a threshold
8 question.

9 THE COURT: Which is the threshold question?

10 MR. BAER: Sorry. The government action inquiry is
11 the threshold question because first there has to be government
12 action, and then the public forum doctrine, which provides the
13 substantive constitutional standard by which certain government
14 actions are evaluated, would come into the analysis.

15 THE COURT: I just want to be sure I understand your
16 argument. Your argument is that if this account is used as
17 official government action that it follows that it is a public
18 forum?

19 MR. BAER: No, your Honor. I apologize.

20 THE COURT: I didn't think you wanted to say that.

21 MR. BAER: Two points of clarification. The first is
22 that the question I think the Court should ask first is is the
23 particular action that plaintiffs are challenging the action of
24 the government or the action of the President in a
25 nongovernmental capacity.

1 And if the answer to the question is it's government
2 action, the Court turns to the question of whether or not the
3 First Amendment prohibits that action. And then the public
4 forum doctrine comes in because plaintiffs have made a First
5 Amendment claim relying on public forum doctrine, and we would
6 I think then investigate whether or not the President's actions
7 by blocking particular individual plaintiffs implicate the
8 public forum doctrine, and we have arguments as to why it
9 doesn't. But you only reach that inquiry after first
10 determining whether or not there is government action in the
11 first place.

12 The second clarification I'd like to make, your Honor,
13 is I think that the Court should be focused not on the question
14 of the account as a whole but on the specific issue of whether
15 the decision to block plaintiffs is government action.

16 Here is where I do think the 1983 cases are helpful,
17 because in the 1983 cases, courts interrogate whether a
18 particular act is an act that an official has been vested with
19 state authority to perform or if it's an act that the official
20 could, as a private citizen, perform.

21 Here plaintiffs haven't identified any law or
22 authority that enables the President to block people from the
23 @realDonaldTrump. That's a personal decision that he has
24 always had the ability to make with respect to that account.

25 THE COURT: But if it were determined that the

1 @realDonaldTrump account as a whole was a forum, then the act
2 of blocking would in this case be based on viewpoint
3 discrimination.

4 In other words, to just use an analogy -- and it's not
5 an analogy that I mean to apply fully. If you had a town hall
6 and it is considered, for our purposes, a public forum and
7 people were speaking at a mike, certainly there is no statute
8 that authorizes -- gives the President the power to turn off
9 the mike.

10 But if the President turned off the mike or whoever
11 the government actor was turned off the mike because he simply
12 didn't like what the speaker was saying, that would be a First
13 Amendment problem but not because there is presidential mike
14 authority. Everybody can flip the switch on the mike.

15 So I'm not sure that I follow your logic that you
16 start with the capacity of every Twitter holder, I understand,
17 to block people from their account. I don't dispute that
18 that's factually the case.

19 By the way, just to segue, I meant to say at the
20 outset of the argument, thank you, all of you, for your really
21 excellent efforts on the stipulation of facts. It was
22 extremely professional and extremely helpful to the resolution
23 of this case. It was lawyering on the high order, and I very
24 much appreciate it.

25 MR. BAER: Your Honor, can I engage with that example

1 you just gave?

2 THE COURT: Yes.

3 MR. BAER: So I think the problem with analogizing
4 this case to that particular town hall context, there are
5 several reasons why that analogy breaks down --

6 THE COURT: I think I made it clear that I wasn't
7 adopting -- for the purposes of my question, I wasn't adopting
8 the entire argument of the plaintiffs. I was just trying to
9 respond to you about there not being any particular statute or
10 power to turn off a mike or block a Twitter account that
11 belongs to an executive official.

12 MR. BAER: Absolutely, your Honor. But in that
13 example, the place where I was going to start with the
14 distinctions, the whole holding of the town hall would be a
15 government endeavor.

16 So there would be the authority vested in the
17 officials organizing the town hall, and it would be clear that
18 if a government official were -- in the context of a town hall
19 where there is city business being discussed, if a government
20 official were to turn off a microphone, there would be no
21 question that it was the authority that that official had as an
22 organizer of the town hall or as a member of the government to
23 take that particular action.

24 So, in other words, the government action analysis is
25 sort of baked into the characterization of that as a government

1 town hall. And we, for a number of reasons, don't think that
2 that applies aptly here.

3 THE COURT: That was why I asked the question earlier.
4 Isn't the first issue analytically is it a forum, not the whole
5 state action piece of the breach that a good deal of time was
6 spent on.

7 MS. FALLOW: Your Honor, if I may. I think you're
8 absolutely right that the state action cases don't overlay our
9 situation as neatly as they should and that the main question
10 is does the President operate his account -- and the record
11 shows that he does -- in his official capacity. And thus he is
12 operating it like a virtual town hall. It is viewed with
13 official action, and his act of blocking the plaintiffs based
14 on viewpoint from that virtual forum is both state action and
15 violates the First Amendment.

16 I do think it is possible to get first to the forum
17 question and then determine whether the person who is operating
18 a public forum or running a public forum, if you had to get to
19 that question, is a state actor. But I think, regardless of
20 which way you approach it, the record shows this is an official
21 account and it is being used as a forum for speech.

22 THE COURT: Let me make it clear that when we talk
23 about blocking, we're not discussing tweets or comment threads
24 that are threatening or obscene. So just get all of that out
25 of the picture.

1 Ms. Fallow, you've just basically argued that the
2 President's use of Twitter here is government action because he
3 is using a nominally personal Twitter account for
4 overwhelmingly government purposes.

5 Is there any line drawing that you would concede was
6 appropriate? Because I don't think it's totally accurate that
7 every tweet on the account could be considered an official
8 statement of a government position. There might be a birthday
9 wish in there someplace.

10 MS. FALLOW: Right. Certainly, just as in a city
11 council meeting, a city councilor counselor could give a
12 birthday wish to someone in the audience or make personal
13 statements.

14 But I think, if you look at the record and the tweets
15 that are attached as exhibit A to the joint stipulation -- and
16 the joint stipulation itself says that the President, since he
17 was inaugurated, has used the account as a means of
18 communicating to the public about his presidency.

19 And occasionally and only sporadically, if you look at
20 the tweets, does he mention anything that's not related to his
21 presidency. There could be some cases where if you applied the
22 analysis of the totality of the circumstances, you would say,
23 this is more like a personal account than an official account,
24 but we're not even close to the line here.

25 It is overwhelmingly used for official purposes. The

1 President himself views it that way. His aides view it that
2 way. The courts and DOJ views it that way. We're not even
3 close to that. In this case the plaintiffs were blocked after
4 they tweeted replies to him about official matters.

5 THE COURT: Is there anything in the record that shows
6 how frequently the President actually responds to another
7 tweet? I'm not talking about forwarding it on is.

8 MR. BAER: Retweeting.

9 THE COURT: You can tell this is something that I
10 don't consider appropriate for judges to engage in. I do
11 understand the record. I just lost the word.

12 Leave aside retweeting. Is there anything in the
13 record that shows how often he engages in a responsive way with
14 a tweet, other than blocking them?

15 MS. FALLOW: Your Honor, in the Exhibit A -- I would
16 have to go through, and I could submit a list of the times that
17 he's actually directly replied to people who replied to him via
18 his account. They are in here.

19 THE COURT: I was snowbound yesterday. I didn't have
20 Exhibit A with me.

21 MS. FALLOW: You would have to click on the link in
22 order to see them. I do also respectfully submit that the
23 retweets also show an engagement with the speech that is in the
24 comment threads. He retweets his repliers a lot. That you can
25 just see by the RT in the spreadsheet. We could also provide

1 notes.

2 THE COURT: That's okay.

3 Mr. Baer, can the government constitutionally block
4 users from the @POTUS or @WhiteHouse accounts?

5 MR. BAER: Well, your Honor, I think that raises much
6 more difficult questions because first --

7 THE COURT: I'll take a yes or a no.

8 MR. BAER: Your Honor, the reason why I don't know
9 that I can give you a precise answer there is because I think
10 it would depend on the factual circumstances.

11 THE COURT: Again, no obscenity, no threats, a comment
12 that is not flattering or dissenting and the tweet is on the
13 @POTUS or @WhiteHouse accounts.

14 Can the government block those tweeters?

15 MR. BAER: Your Honor, if I can get to the answer by
16 virtue of proceeding with how the government thinks that
17 analysis should go, the first point of inquiry would be is
18 there some exercise of government power in the decision to
19 block there.

20 The reason why there much more likely would be is
21 because the @POTUS and @WhiteHouse accounts follow the
22 institution and office of the presidency and not the official.
23 So the only way someone is operating those accounts is by
24 virtue of power vested in them by assuming the office of the
25 presidency or by working for the President. So that would

1 clear the government action hurdle.

2 Then the question is well, what First Amendment right
3 would it violate. The public forum analysis from our briefs I
4 think would apply there as well because when you're blocking
5 someone from an account, your Honor, you're not actually
6 excluding them from a place where individuals can communicate
7 with other individuals.

8 I think it's really important to distinguish the
9 tweets that come from an account and the conversation that
10 takes place after that tweet has sort of gone out into the
11 Twitter ether.

12 The reason why that is really important to distinguish
13 is because in all of our real-world examples that we're drawn
14 to when we think about this case, we think of someone being
15 ejected from a physical space, but as the stipulation
16 acknowledges, all but one of the individual plaintiffs have
17 continued to participate in the discussions that take place in
18 response.

19 THE COURT: You're going farther afield than my
20 question.

21 My question is: Yes or no? It is constitutionally
22 acceptable to block a citizen from tweeting on the @POTUS or
23 @WhiteHouse account. Yes or no?

24 MR. BAER: So, your Honor, I think it is probably not
25 but not for public forum reasons, which I realize --

1 THE COURT: It's unconstitutional because?

2 MR. BAER: So, your Honor, I think that would raise
3 First Amendment issues. I am not sure what the right First
4 Amendment analysis would be there candidly.

5 THE COURT: Go back.

6 Why isn't it a public forum?

7 MR. BAER: It's not a public forum, your Honor,
8 because a public forum requires two things: It requires
9 government property where individuals communicate with one
10 another.

11 THE COURT: And why isn't the government's Twitter
12 account @POTUS and @WhiteHouse not a governmental account?

13 MR. BAER: Because, your Honor, the only parts of the
14 account are just government speech. The only thing that is
15 unique to that account are the tweets that are posted from a
16 government account and the other sort of images that are posted
17 to the account.

18 The actual replies to those tweets aren't a part of
19 the account, and the Court can know this because the tweets and
20 replies that are responding to another account on Twitter are
21 viewable from the pages of anyone who has responded to that
22 government statement.

23 So there is not a particular place that the government
24 can exclude people from when they block someone on Twitter. In
25 other words, you're blocking the ability to interact directly

1 with that account. You're not interfering with the ability to
2 interact with other people.

3 THE COURT: You've blocked someone's ability to
4 interact directly.

5 If we are talking about official government accounts,
6 why is that not a violation of the First Amendment?

7 MR. BAER: Because the ability to interact directly
8 with the government is not the issue the public forum doctrine
9 engages with. Your Honor, what I'm trying to say is --

10 THE COURT: I don't understand that. Go back to the
11 town hall analogy. Once it is a public forum, you can't shut
12 somebody up because you don't like what they're saying.

13 So why is it all right to block someone from an
14 official White House government-run account that precedes this
15 President, that has absolutely nothing to do with this
16 President -- or it does in some ways, but leave that aside.

17 Why is that possibly okay?

18 MR. BAER: So, your Honor, it certainly raises First
19 Amendment problems and likely would run afoul of the First
20 Amendment but not because of the public forum doctrine.

21 So, if I may, I really would like to drill down and
22 distinguish the act of blocking from the sort of town hall
23 analogy because I think that analogy is really where
24 plaintiffs' First Amendment argument rests.

25 The reason why it's not applicable is because a town

1 hall features two things: It features interaction with public
2 officials and the ability to interact with constituents and
3 other members of the public. And it's that interaction with
4 constituents that the public forum doctrine is principally
5 focused on.

6 THE COURT: The interacting with the government --
7 that doesn't count?

8 MR. BAER: That may be subject to different First
9 Amendment analyses, your Honor.

10 THE COURT: What's the difference?

11 MR. BAER: So, your Honor, I'd like the Court to look
12 at the Knight case where the Supreme Court held that there is
13 no right for individuals to a government audience or to be
14 able --

15 THE COURT: Don't get me wrong. I am not remotely
16 suggesting that citizens have the right to insist that someone
17 in the government actually read their mail. Indeed, the notion
18 that everyone who writes a letter to the President has either a
19 right or a reason to believe that the President will ever see
20 that letter is fanciful.

21 It's even more so when you consider the number of
22 comments in response to any tweet, particularly of the account
23 that we're talking about. No one has the time. There are not
24 remotely enough hours in the day to expect that everything is
25 going to be read.

1 So I'm not remotely suggesting that a citizen has a
2 right to expect that their communication to the government will
3 actually be read by anybody, but there is still the point that
4 the citizen has the right to send the communication.

5 MR. BAER: If I may, your Honor.

6 THE COURT: Yes.

7 MR. BAER: I think first what this line of inquiry
8 illustrates is that what blocking is about is exclusively the
9 interaction between the President and a constituent.

10 THE COURT: That's also not true because when you
11 block somebody, that means that the other constituents are
12 impacted by not being able to engage in the cross-communication
13 that sort of Twitter is known for.

14 So it isn't just an isolated harm to the block, but it
15 has impacts for the rest of the participating public.

16 MR. BAER: Respectfully, your Honor, I don't believe
17 that's an accurate characterization of the effect of blocking
18 because, as the stipulation acknowledges in paragraph 30 -- and
19 as an example in paragraph 57 illustrates -- blocking doesn't
20 prevent the individual who has been blocked from an account
21 from participating in the full marketplace of ideas that
22 Twitter allows individuals to engage in. If you're blocked,
23 you can still respond to everyone who has responded to one of
24 the President's tweets.

25 THE COURT: But you can't respond directly to the

1 blocker, and when you can't do that, the other people who are
2 also following this account do not immediately see what you
3 have said.

4 Look. I'm not suggesting -- your stipulation is very
5 honest about the fact that individuals who are blocked can
6 engage in work-arounds. Whether that is ultimately, if there
7 is a constitutional violation, an acceptable burden or not is a
8 very separate question.

9 But it is not the case that the only person who is
10 harmed by blocking is the blockee. So we're back to if we're
11 dealing with official government accounts like @POTUS or
12 @WhiteHouse, I would think that the answer is that you can't
13 block anybody unless they were engaging in some sort of
14 improper-type speech.

15 MR. BAER: Your Honor, I think the reason why that
16 probably is true is because -- it is probably true that
17 government cannot block individuals purely on the basis of
18 viewpoint from a government account like the @POTUS account
19 because there there isn't the same type of associational
20 interest with a particular public official that is implicated.

21 In other words, when the President is choosing not to
22 engage with someone on Twitter, just as he could if he were at
23 some sort of public conference and could walk away from someone
24 who he didn't want to engage with -- even though I should note
25 that walking away from that individual would prevent that

1 individual from directing speech at the President in a public
2 setting, around other individuals. So it would, in that sense,
3 create an additional challenge for the individual to
4 communicate with other people in a public setting -- the
5 President has an associational interest in deciding who he's
6 going to spend his time with in that setting.

7 THE COURT: Fine. Then isn't the answer he just mutes
8 the person that he finds personally offensive? Isn't that a
9 solution?

10 MR. BAER: No, your Honor, because, to use this
11 analogy of sort of the President at a public conference, the
12 President can choose not to engage someone in a number of ways.

13 He could tune someone out, he could mute them in a
14 conversation but not walk away from them, or he could move to
15 the other side of the room and never approach them in the first
16 place, which would make it harder for that individual -- which
17 would essentially prevent that individual from interacting with
18 the President.

19 In other words, blocking prevents the interaction.
20 Muting is the effect of tuning it out, but both decisions are
21 within the President's associational freedoms.

22 THE COURT: But to the extent that the reason that the
23 President has blocked these individuals is because he does not
24 welcome what they have to say, he can avoid hearing them simply
25 by muting them.

1 Is that not correct?

2 MR. BAER: That's my understanding, although I do
3 believe that there are -- there are ways you can end up seeing
4 someone's tweets who you have muted, but it requires another
5 program.

6 THE COURT: But that would require the Twitter account
7 holder to engage in some other action, but that would be
8 voluntary. So, if they subject themselves to the tweet that
9 they muted, that's their problem. I don't have to worry about
10 that.

11 MR. BAER: Yes, your Honor.

12 THE COURT: So the President's desire not to read a
13 tweet that for some reason he does not want to read can be
14 satisfied by muting. True?

15 MR. BAER: To read that content, yes. That's true.

16 THE COURT: So let's assume that I don't find that the
17 plaintiffs have an independent cause of action or right to
18 petition which is affected by the facts of this case. I don't
19 quite know why we're here.

20 In other words, why is it not a solution that serves
21 the expressed interests of both sides to, instead of blocking
22 these plaintiffs, the President mutes them? When he mutes
23 them, he doesn't affect the interaction of the other, as you
24 call them, other constituents.

25 All that goes on. The plaintiff can respond directly

1 since I agree with your proposition that there is no
2 constitutional right to be heard in the literal sense of people
3 in government have to read what you write to them.

4 Why are we here? Don't we have a solution that serves
5 the interests of the plaintiffs, serves the interests of the
6 President, assuming that there is no independent right, another
7 cause of action, for petition?

8 MR. BAER: I certainly agree with your Honor's
9 suggestion that it would not create any constitutional
10 difficulty for the President to mute these individuals on
11 Twitter.

12 The reason though why I think the government still
13 prevails when blocking is the tool used rather than muting --
14 respectfully, your Honor, the Knight case that we were
15 discussing earlier I think goes further than saying whether the
16 government has to listen.

17 What both the Knight case and the Smith case, which
18 sort of deal with dueling instances of union versus individual
19 methods of bringing grievances to the government, deal with is
20 the complete closure of a particular channel to one class of
21 individuals.

22 So, in the Knight case, it was only the union's direct
23 representative that could negotiate with government officials
24 about policies related to their professional businesses. And
25 in the Smith case, it was only individuals and not the union

1 that could file grievances with the state.

2 So what I think that helps illustrate, your Honor, is
3 that when you're talking about interactions between individuals
4 and the government, the government can at times say that it's
5 not going to interact with a particular individual through a
6 channel, and public officials can make that decision all the
7 time.

8 THE COURT: The point is, like with every case, there
9 is always a risk that you can lose. And if there is a
10 settlement which serves the interests of the respective
11 parties, it's often considered the wiser way to go because you
12 don't necessarily want to risk law being made that is actually
13 not the law you want to have on the books. So no one should
14 assume that you're definitely going to win. Nor should the
15 plaintiffs assume that they're definitely going to win.

16 MR. BAER: Absolutely, your Honor. We can certainly
17 take that suggestion that your Honor has put forward back and
18 discuss it.

19 THE COURT: I think you both should do that, but let's
20 go on.

21 MS. FALLOW: Your Honor, if I could just say very
22 quickly.

23 THE COURT: Yes.

24 MS. FALLOW: We had mentioned muting as sort of a less
25 restrictive alternative to serving the President's sort of

1 interests, and I do think that is a way of not blocking the
2 plaintiffs or other dissenting people from participating in the
3 comment threads, which is the forum at issue here, despite the
4 defendants' attempt to try to disaggregate the comments from
5 the account. That is the public forum.

6 As to the muting, I think, like you say, there is no
7 right to have a public official listen and agree with
8 everything you say. It does impact the right to petition, and
9 it serves as a kind of prior restraint where that person can
10 never then make the next tweet where that person wants to
11 report on a grievance of another sort. So I think it's not
12 necessarily a perfect solution, but it is certainly far less
13 restrictive.

14 THE COURT: The right to petition certainly is in the
15 Constitution, but I'm not sure why the petition claims, which
16 are sort of in your papers -- I don't want to quite call them a
17 throwaway, but they have a very secondary role. I'm not sure
18 why they should be analyzed separately.

19 But the second point would be, which I think is more
20 the substantive point, is that there is no question that there
21 are alternative means to petition. The @realDonaldTrump is
22 hardly the only way for a citizen to express their views to the
23 government. There are even those traditional ways that I grew
24 up with where you write a letter. I know it's close to unheard
25 of, but it's a nice tradition.

1 So there are alternative means, including bringing
2 a -- a lawsuit counts as a means of petition. And I don't
3 think, unless you tell me to the contrary, that there is
4 authority requiring the government to be receptive to
5 petitioning through every possible channel.

6 MS. FALLOW: I don't think there is authority to that
7 effect. I do think though that -- yes. This is the third
8 claim listed in our complaint, but I think for the most part
9 it's because the relief we seek for all of our First Amendment
10 claims is the same, which is an order requiring the President
11 to unblock the plaintiffs in this case and to not block people
12 based on viewpoint.

13 I do think the fact that this is admitted blatant
14 viewpoint discrimination violates the first amendment under any
15 applicable theory, regardless of whether it's a public forum,
16 access to information, or the right to petition, that that is a
17 totally impermissible government motivation to cut off an
18 avenue of petition or certainly to exclude someone from a
19 public forum.

20 THE COURT: Let's get to forum, which to me was always
21 in a sense the first question.

22 As you know, the Supreme Court has recognized that
23 some spaces are not forum or fora at all. So how do we analyze
24 as a threshold whether a space is or is not a forum? Because
25 most of the cases you're citing are about classifying types of

1 forum, not addressing the earlier question of is it a forum,
2 regardless of what kind it is, since we all understand that
3 what kind it is is in a sense irrelevant for our purposes,
4 because you can't have viewpoint discrimination in pretty much
5 any kind.

6 So how do you suggest that a court should go about
7 deciding whether something is or is not a forum?

8 MS. FALLOW: Your Honor, I think you should start
9 first from looking at what is the space involved. The
10 Supreme Court has recognized that the space can consist of a
11 channel of communication. Like in the Cornelius case, the
12 federal charity campaign drive or in the Perry case, the
13 mailboxes for the teachers.

14 You define the forum by the access that is sought by
15 the speaker. So here the access is to the @realDonaldTrump,
16 meaning the ability to follow him, read his tweets, and reply
17 directly to him without being blocked. And that is, as in I
18 think it's Justice Kennedy's words, a metaphysical space, but
19 it is clearly a channel of communication.

20 Then I think the appropriate standard is to look at
21 how the government has maintained this space and what is the
22 purpose of the space and what is the nature of this channel of
23 communication.

24 It is clearly compatible with expressive activities.
25 That's the very nature of Twitter. The President has chosen to

1 maintain this account not in any kind of protective way but
2 open to allcomers, and people do in fact, members of the
3 public, come in the thousands or tens of thousands in response
4 to each of his tweets.

5 So this is a new kind of forum, but it seems like it's
6 sort of a very good example of a government-controlled channel
7 of communication where speech by the public is happening all
8 the time and without limitation.

9 MR. BAER: Your Honor, I think there are two
10 requirements for a forum: First, there must be government
11 control their own property; and second, that property -- I mean
12 property can include sort of in the metaphysical sense, to be
13 clear. And that property needs to be a place where individuals
14 speak to one another. So using a channel of communication to
15 engage with other private citizens.

16 The problem is plaintiffs have characterized this case
17 is about the @realDonaldTrump account, but the @realDonaldTrump
18 account is actually two separate components, at least as
19 they've characterized it.

20 The first component, which is unquestionably
21 government controlled, if we've assumed government action here,
22 is the part of the account where the President speaks or the
23 President makes statements about official matters, retweets on
24 occasion individuals on Twitter.

25 All of that is certainly government controlled, but

1 no one contends that the plaintiffs have a right to be featured
2 in any of those retweets. That would clearly be a question of
3 government speech.

4 The second part of the account is what plaintiffs have
5 labeled and what the stipulation refers to as the comment
6 thread. So the discussion that takes place that is kicked off
7 by a presidential comment.

8 But that part isn't government controlled because the
9 President has no ability to exclude people from those
10 discussions. And in fact, your Honor, if the President were to
11 delete a tweet that conversation had taken place about, none of
12 the ensuing comments would be deleted whatsoever, which is
13 distinct from the Davis and Facebook case that plaintiffs rely
14 on.

15 So, unlike Cornelius where there was control over the
16 combined federal campaign, unlike the Perry case where there
17 was control over the school mailboxes, unlike the University of
18 Virginia case where there was control over the funds that were
19 directed to student groups, there is no government control over
20 who participates in the comments thread, and that's reflected
21 by the fact that those same comment threads are visible both
22 underneath the President's tweets and under the tweets and
23 replies heading of every individual who comments or responds to
24 those tweets.

25 So to label the account as a whole a forum is to, I

1 think, conflate really two very distinct things. There is a
2 place for discussion, but that place is Twitter Writ Large, and
3 the record of that discussion is reflected underneath the
4 President's tweets, as well as underneath the tweets of those
5 who have participated in the discussion. And then there is the
6 content from the President himself where he's acting as a
7 participant in that marketplace of ideas.

8 THE COURT: When he has blocked somebody, that
9 blocking affects the comment thread.

10 MS. FALLOW: Your Honor, that's exactly right. He
11 does have control. He controls access to the comment threads.
12 By blocking, you may not reply directly to the President. That
13 is the control.

14 MR. BAER: Your Honor, that control is the same
15 control that any public official exercises when he's a
16 participant in any other marketplace of ideas.

17 So, again, I think if we're going to focus on
18 real-world analogies, the better one is to a conference or
19 convention where you can imagine thousands of people milling
20 about and groups of conversations taking place.

21 And that public official is free to approach whoever
22 he wants, be approached by whoever he wants, and to say no,
23 thank you to whomever he wants and to take any number of
24 considerations into account when making those decisions.

25 If you imagine, your Honor, a protestor at that

1 convention and the President or another public official says,
2 no, thank you. I don't want to have a conversation with you
3 and walks away or even sees the protestor on the other side of
4 the room and chooses not to approach, that protestor will then
5 have a more difficult time interacting with other people who
6 are talking with that public official, but he is not prohibited
7 from doing so.

8 The protestor can still -- in this case, the analogy
9 is to individuals who can participate in the comment threads --
10 discuss the public officials' comments, views, criticize the
11 public official, praise the public official, whatever he or she
12 wants. But the public official still maintains control over
13 who or she interacts with in that setting.

14 THE COURT: Isn't that the point that we were talking
15 about earlier? The public official -- the analogy is to muting
16 the speaker that you don't want to hear. It's sort of like you
17 could be walking through this room, and you either put earplugs
18 in or cover your ears with your hands, but the person who is
19 delivering the diatribe that you don't want to hear is not in
20 any way affected in terms of what he's saying and what other
21 people can hear.

22 So isn't the muting, not the blocking, the answer to
23 your point? I don't disagree with you that a public official
24 doesn't have to stand there and constantly take it.

25 MS. FALLOW: Your Honor, I think that in the

1 convention analogy, the real analogy here is that there is a
2 conference room, a giant conference room at that convention
3 called the Presidential Debate and Speech Conference Room, and
4 the President stands at the front of the door and tells people
5 whether he can go in or out.

6 Once he's in the room, he can decide who to talk to,
7 but he is actually controlling access into that forum.

8 MR. BAER: Your Honor, I think the better analogy
9 here, to get back to your question about muting, the President
10 can ignore the comments of a protestor and choose not to
11 engage, but the President can, if he is surrounded by a group
12 of other individuals, say, you know, I don't want to walk over
13 to the protestors in the first place, and I'm going to move
14 this conversation over here.

15 That then creates -- that makes it harder for the
16 protestors to reach the other people who are talking with the
17 President, but because he is a participant in this broader
18 marketplace of ideas, he's free to make these interactive
19 decisions that have these sort of collateral speech
20 consequences.

21 So the case law that I would point to is, again, the
22 Knight case where the court talked about how inevitably the
23 decision to engage or not engage with a particular individual
24 has amplification ramifications.

25 When a public official chooses to engage with a

1 particular constituent or to permit that constituent to direct
2 speech towards him or her, that invariably amplifies that
3 message.

4 But it does not violate the First Amendment when the
5 public official makes the sort of foundational associative
6 decision not to have that engagement, even though it means that
7 that individual who wanted to speak to the public official may
8 be worse off than he or she would have been if the public
9 official had permitted the engagement.

10 THE COURT: What's your answer to that?

11 MS. FALLOW: I think in the end, we just fundamentally
12 think that they're using the wrong analogy; that the effect of
13 blocking -- the President controls access to the ability to
14 participate in the comment threads, including by replying
15 directly to the President, and then your reply shows up in the
16 comment threads. It's not just the President turning away from
17 a conversation he doesn't like.

18 I think, as your Honor has pointed out, to the extent
19 that that's the interest he's trying to serve, you have the
20 muting option. But by blocking, you prevent the plaintiffs
21 from participating in the comment threads.

22 MR. BAER: Your Honor, the stipulation contradicts
23 that last point there. You don't prevent them from
24 participating in the comment threads. Paragraph 30 confirms
25 this. Paragraph 57 provides an example. The individual

1 plaintiffs, in fact, all but one of them, have continued to
2 participate in the comment threads after having been blocked by
3 the President.

4 I will make one note, your Honor. The real-world
5 analogies are sort of a necessary evil in trying to think
6 through how to apply the First Amendment in this new context,
7 but I don't think we can decide this case on the basis of
8 analogies alone because even in Ms. Fallow's example of sort of
9 a separate conference room, you have someone who is actually
10 excluded from the ability in real time to engage with everybody
11 else in that conference room.

12 That's not how Twitter works. Twitter is a series of
13 overlapping conversations across millions of people, millions
14 of users. It's like everyone is speaking and responding to one
15 another simultaneously.

16 All blocking does is say one individual is not
17 responding directly to the President, but it does not prevent
18 them from responding to everyone else on Twitter, and it does
19 not prevent them from what's known as mentioning the President
20 on Twitter.

21 So, if an individual who has been blocked begins a
22 tweet with the @realDonaldTrump, then everyone on Twitter who
23 can see the plaintiffs' account can see what the plaintiff says
24 about the President.

25 So this just is not like the public forum cases where

1 a microphone has been turned off. It's just the President
2 choosing not to engage with a certain set of individuals, a
3 choice that every public official has whenever he or she is in
4 a public setting.

5 MS. FALLOW: Your Honor, to be precise, the blocking
6 has the impact of preventing the plaintiffs from participating
7 fully and immediately in the comment threads. If they happen
8 to follow someone else -- they've been blocked. They can't see
9 his tweets. They're not automatically notified of his tweets.

10 But if someone else that they follow replies to the
11 President and they see that, they can't see his tweets. They
12 can't understand the context. They have to take additional
13 steps and take additional time to find out his tweets, figure
14 out the context, and then respond.

15 Yes, it is possible to reply to replies in that way,
16 but it creates all of these additional time barriers and extra
17 steps you have to take which, although it's not a total ban, it
18 still is a significant burden on their speech, and there is no
19 legitimate government interest that would justify that here.
20 This is blatant viewpoint discrimination.

21 MR. BAER: Your Honor, the additional steps that
22 plaintiffs have talked about are precisely the same kind of
23 incidental burdens that are always placed on speakers.

24 This goes back to the amplification language from
25 Knight that whenever a government official makes decisions

1 about who to engage with or not, and those decisions, as I
2 think plaintiffs would concede, in other public settings can
3 take viewpoint into account, unless the plaintiffs really are
4 of the view that our President or a public official cannot at a
5 conference choose who to have a conversation with, whose speech
6 to engage with, and whose to ignore.

7 All of the decisions a public official makes in that
8 setting have implications for the ability of other individuals
9 to engage with that public official or to get their views
10 heard.

11 So long as that public official is not actually
12 preventing them from having those conversations in that broader
13 space -- and the President is certainly not doing that with
14 respect to individual plaintiff's ability to continue to
15 communicate their views on Twitter to anyone who is a receptive
16 audience -- then it does not violate the First Amendment.

17 THE COURT: Speaking about the comment threads, the
18 question is for both of you.

19 What is your position as to whether the comment
20 threads are government speech?

21 MR. BAER: Your Honor, the government is not
22 contending that the comment threads themselves are government
23 speech. Those comments are the speech of the individuals who
24 post them.

25 MS. FALLOW: We agree.

1 THE COURT: Mr. Baer, earlier you said that for a
2 space to be a forum, the property in question or the space must
3 be either government owned or government controlled and have
4 been opened up with the intent of allowing parties to
5 communicate.

6 Where does your two-prong test come from?

7 MR. BAER: So, your Honor, it comes from the language
8 that courts I think have consistently used in describing what a
9 public forum looks like. And so in I think both our opening
10 brief and in our opposition and reply brief, we cite sort of
11 the basic requirements that it has to be government owned or
12 controlled property and that it is a place where private
13 individuals are sort of free to speak to one another.

14 I would note for the intent requirement, that that
15 comes from a number of Supreme Court cases, including, for
16 instance, the American Library Association case where the court
17 in the plurality opinion, although Justice Breyer in his
18 concurrence agreed that it was not a public forum, reasoned
19 that because the government doesn't open up libraries and give
20 access to the Internet for the purpose of facilitating speech
21 between individuals but rather for the purpose of giving access
22 to educational content, that public forum analysis was
23 inappropriate there.

24 The other example I would use is the Forbes case where
25 the court held that, at least as a general matter, public

1 broadcasting is not subject to forum analysis because even
2 though it is government-controlled property and even though it
3 is a place where others speak, the purpose is not to open up a
4 forum for discussion between citizens. It's to facilitate the
5 provision of certain content that requires, that necessitates,
6 some kind of editorial discretion.

7 So there those are the two cases I would invite
8 your Honor to consider for the purposes of where intent is sort
9 of at the forefront of the Court's analysis.

10 THE COURT: But one of those cases is in a public
11 forum/non public forum context rather than forum/not a forum
12 distinction.

13 MR. BAER: No, your Honor. Forbes is particularly
14 clear on this. Forbes, to be sure, ultimately holds that a
15 candidates' debate is a nonpublic forum, or it may have used
16 the phrase "limited public forum," which courts sometimes use
17 interchangeably.

18 But Forbes talks about how forum analysis writ large
19 is generally applicable to public broadcasting and uses the
20 fact that that viewpoint is sort of inherently taken into
21 account when a public broadcasting station is trying to decide
22 what content to produce.

23 And there the analogy I would draw, your Honor, is
24 similarly when an official is in a public setting and deciding
25 which constituents or which individuals to engage with,

1 viewpoint is one of many factors that are invariably taken into
2 account when a public official is deciding how to spend his or
3 her time or with whom to interact.

4 THE COURT: Do you want to say anything?

5 MS. FALLOW: I think those cases are inapplicable
6 because they involve things like library selection or, in the
7 Finley case, awarding art grants or, in the Forbes case, public
8 broadcasting where there was such a level of editorial
9 discretion or selectivity. That is simply not the case here.

10 I think that the appropriate test is articulated in
11 *Cornelius*, in the Second Circuit's decision in *Paulsen*, and in
12 many other cases where you look at what is the forum, and you
13 determine the government's intent -- it can be inferred from
14 whether the forum is compatible with expressive activities and
15 whether the government has, through its policy and practice,
16 opened the forum to speech by the public.

17 Applying that here, as we've done in our briefs, we
18 argue that Twitter is inherently compatible with expressive
19 activities and that the President has maintained this
20 completely open account where everyone can follow it. There
21 are no limitations. And there is speech by the public
22 occurring in the thousands or tens of thousands, and he is
23 aware of that speech and in fact retweets some of the messages
24 and replies directly to others.

25 THE COURT: So beyond the President's selection of

1 Twitter, is there other evidence that he intended to open up
2 his Twitter account as a forum for private individuals to
3 communicate?

4 MS. FALLOW: Well, I think, first of all, it's
5 important to note, as in the Paulsen case, that when
6 determining what the government's intent is, you don't just
7 accept the bare assertions of the government defendant that
8 they didn't mean to open up a forum.

9 I think you can look at the choice of Twitter as
10 opposed to a one-way blog or website where you would not afford
11 the opportunity to the public to speak, the fact that he didn't
12 protect his tweets or try to issue any policy that would limit
13 who could follow him, who could speak in the comment threads
14 and what can be discussed.

15 And I do think that his regular habit of retweeting
16 the messages in the comment threads shows that he is -- he and
17 Mr. Scavino, who also sometimes retweets, is paying attention
18 to that speech, is aware of it, and encourages it, because it's
19 part of the whole point of Twitter.

20 MR. BAER: Your Honor, if I may. The one thing I
21 would note is the Paulsen test that Ms. Fallow refers to only
22 comes into play once the Court has resolved the threshold
23 question of whether there is a forum in the first place.

24 And so I think the question of sort of how a
25 government official has used a particular forum in the past

1 sort of presumes the existence of a forum, and for all the
2 reasons we've been discussing, there isn't one here.

3 The one other thing though I would note about how the
4 President uses Twitter differently from how government
5 officials have used forums that plaintiffs point to in their
6 briefs -- all of the sort of town hall or city council meeting
7 examples involve events where there is a Board of Education
8 meeting or a city council meeting where the point of hosting
9 the meeting is to get government participation in a government
10 decision.

11 There is just no evidence in the record that that's
12 how the President uses his Twitter account. He uses it to
13 communicate his message. And to be sure, he sometimes retweets
14 the messages of others that he finds to be supportive, but
15 that's very different from a government official convening in a
16 government space a meeting to discuss how government decisions
17 are to be made.

18 So, again, I think this just all reinforces that the
19 President uses Twitter to communicate his views. And as he can
20 whenever he is in a public setting, a participant in the
21 marketplace of ideas, he is free to decide who to engage with
22 or not in that context, so long as he doesn't then prevent
23 others from disseminating their views and trying to reach other
24 people and convince them of their views.

25 THE COURT: However, the President has other

1 mechanisms to communicate his views. He could issue
2 press releases constantly, but he chose Twitter. So the
3 question is is there some significance to the fact that he
4 chose a medium which by definition is interactive.

5 MR. BAER: No, your Honor. For purposes of forum
6 analysis, there is no significance, just as there is no
7 significance for forum analysis to a public official attending
8 an event in a public park or attending a conference or a
9 meeting where he knows that he is going to interact with other
10 people.

11 In fact, what I would say is it is the interactive
12 notion of Twitter rather than sort of the kind of public
13 message board that a government controls function that
14 reinforces that the President's decisions are permissible here.

15 But they are the decisions of a public official
16 choosing with whom to interact, not the decisions of a public
17 official curating content in a government meeting.

18 THE COURT: Except that he opened up the account free
19 to everybody and then shut some people down when he didn't
20 apparently like what they were saying, which is I think a
21 little different.

22 MR. BAER: Just as a public official who attends a
23 conference by walking through the door is inviting anyone who
24 may be around to come up to him and engage in a conversation.
25 Again, he's free to tune them out or to walk away or, after

1 they've made their initial salvo in the conversation to say,
2 respectfully, I don't want to talk to you for the rest of this
3 conference.

4 All of those decisions are permissible, and they stem
5 from the associative freedoms that public officials maintain in
6 public office to choose who they interact with. This is an
7 example of that.

8 I do think, your Honor, that Twitter's sort of
9 interaction functions sort of reinforces that that's why the
10 frame just described is the right way to think of this
11 particular decision.

12 THE COURT: What I'd actually like to ask you to do is
13 tell me what you think my decision tree ought to go like. In
14 other words, we've been talking about forum and official action
15 and government speech.

16 If you were my law clerk, how would you suggest step
17 one, find this. Then down a decision tree.

18 So let me let the plaintiff start since it's their
19 case.

20 MS. FALLOW: Sure. I don't think this will be a huge
21 surprise, but how I would start the opinion is with a section
22 that rejects the government's argument that the First Amendment
23 doesn't apply here.

24 And part A of that could be either because this is
25 plainly an official account that is used in an official manner

1 just as the @POTUS or @WhiteHouse Twitter account are used,
2 looking at the facts in the record and applying a totality of
3 the circumstances.

4 Or an alternative is this operates as a public forum,
5 and it satisfies all of the requirements of a public forum
6 because it's a government-controlled space that the public is
7 allowed to speak in, and I don't think this is just a purely
8 personal account.

9 What I would probably do, if I were the clerk, is
10 start from A, this is an official account, and then go to why
11 his blocking of the plaintiffs violates the First Amendment,
12 because it is a public forum for the reasons I have stated.

13 THE COURT: Wait a second.

14 Is the first line in the decision tree this is a
15 public forum? Or is the first line in the decision tree the
16 President is acting in an official capacity and therefore it is
17 a public forum?

18 MS. FALLOW: As the clerk, I would say first this is
19 an official capacity. Next is public forum.

20 THE COURT: So it's because he's acting in an official
21 capacity that it creates a public forum.

22 MS. FALLOW: That makes it --

23 THE COURT: Yes?

24 MS. FALLOW: Yes.

25 THE COURT: And then it becomes easy. From your

1 perspective, at that point, it's a public forum. It's
2 viewpoint discrimination. You can't do it.

3 MS. FALLOW: Yes. It violates public forum doctrine
4 regardless of whether it's designated, limited, or nonpublic.
5 And if you want, and it also just denies access to important
6 government information purely based on this completely -- there
7 are no cases -- even the cases that the government is citing of
8 Knight or the Smith case, there is no allegation there of any
9 viewpoint discrimination. As Justice Kennedy recently stated
10 in the Tam case, when you have viewpoint discrimination, it's
11 almost always illegal, unconstitutional.

12 THE COURT: Okay.

13 MR. BAER: My suggestion, your Honor, would be to
14 proceed as follows: First, because jurisdiction always has to
15 come first, the Court would hold that there is no jurisdiction
16 here because the only defendant for whom plaintiffs satisfy the
17 first two prongs of Article III standing is the President
18 himself.

19 THE COURT: And he's above the law?

20 MR. BAER: No, your Honor.

21 THE COURT: I just want to check.

22 MR. BAER: In fact, your Honor, I would invite the
23 Court to look at Section 5 of the Nixon v. Fitzgerald opinion
24 where not only did the court reject that argument, it actually
25 rejected that phrase.

1 The dissent had charged that the court was holding
2 that the President was above the law, and I believe in footnote
3 41 or 42 of the Nixon v. Fitzgerald opinion, the majority
4 explained that to hold that a particular avenue of redress
5 through the courts is unavailable as a function of our
6 structural separation of powers is not to hold that the
7 President is above the law, in light of all of the other
8 constitutional and political checks that exist on presidential
9 power and authority.

10 But returning to your Honor's question, I would start
11 with jurisdiction first. The President is the only defendant
12 for whom the first two prongs of Article III standing could be
13 satisfied.

14 The third prong though, redressability, cannot be
15 satisfied with respect to the President. Therefore, it lacks
16 jurisdiction to enter any relief in this case. But even if
17 that were not true, the Court would then turn to the -- "Even
18 if" would be part of the structure of the opinion.

19 The next issue would be whether there is any
20 government action to which the First Amendment attaches. And
21 one reason, your Honor, to start with the government action
22 question rather than the is-this-a-public-forum question is the
23 other First Amendment claims that plaintiffs are bringing also,
24 of course, because they invoke the First Amendment, hinge on
25 the existence of government action, which I think reinforces,

1 your Honor, the value of focusing narrowly on what the specific
2 challenged action is, and that's the decision to block the
3 individual plaintiffs.

4 Because, irrespective of whether there is or is not a
5 public forum here, plaintiffs have argued that the blocking
6 decision violates the First Amendment for denying access and
7 for violating their petition clause rights and for violating
8 the Knight Institute's right to hear -- all of those claims
9 require an assumption of government action.

10 So I would write the government action section of the
11 opinion and conclude that there is no government action here
12 because the President is not exercising any government
13 authority when he makes the particular decision to block the
14 individual plaintiffs.

15 Finally, I would turn to the merits of the First
16 Amendment claim saying even if I were to hold that there is
17 government action here, the plaintiffs' First Amendment claims
18 fail on the merits.

19 First I would write the public forum section by saying
20 plaintiffs essentially allege the existence of a public forum
21 here, but the President, even if he's acting in a governmental
22 capacity, is not regulating access to a public forum.

23 Rather, he is choosing individuals that he wishes or
24 does not wish to interact with through the Twitter platform,
25 and that associational decision doesn't implicate forum

1 analysis because he is not exercising any control over a space
2 where private individuals on government property speak to one
3 another, again, no more so than he would in exercising control
4 over who he wishes to speak with in another public setting.

5 I would essentially analogize Twitter as a platform to
6 any other public setting that an official can be engaging with
7 other individuals in say that the freedom to choose who to
8 interact with in that setting is not a decision that the First
9 Amendment reaches. Rather, it falls within the ambit of
10 government speech because it's a public official making
11 associational differences.

12 From there, I would move quickly through the remainder
13 of the plaintiffs' First Amendment claims noting that, first,
14 because there is no denial of access to generally public
15 information, all of the individual plaintiffs retain the
16 ability to see all of the President's tweets by just visiting
17 the President's Twitter web page when they're not signed into
18 their accounts.

19 And also because the petition clause does not
20 guarantee the right of individuals to petition the government
21 through a particular channel when there remains a plethora of
22 other ways to communicate their views, there is no First
23 Amendment -- there is no First Amendment claim there.

24 And then, finally, I would get to the Knight
25 Institute's claim which I suppose actually I might dispense

1 with with a footnote at the jurisdictional phase of the opinion
2 to note that they failed to adequately allege that they have
3 standing to bring their right to hear claim because they have
4 in no way identified how the President's decision to block
5 individuals prevents them from hearing specific comments or
6 views of any individual, much less the individual plaintiffs
7 here.

8 In any event, even if they were to satisfy the
9 standing bar, the question of whether they have a right to hear
10 can reach no further than the question of whether any
11 individuals have the right to speak.

12 So, on that ground, the Knight Institute can't claim a
13 right to speech that the individual plaintiffs don't have a
14 right to make in the first place, and for all of the First
15 Amendment reasons that we've discussed, there is no First
16 Amendment right for them to have access to that
17 @realDonaldTrump.

18 THE COURT: One second.

19 (Pause)

20 THE COURT: I told you at the outset that I'd give you
21 a chance to cover any territory that my questions didn't
22 address if you thought there was something that had not been
23 said well in your papers or that you wanted to especially
24 emphasize.

25 So let me give Ms. Fallow or Mr. Jaffer a chance to

1 speak if there is something we haven't covered.

2 MS. FALLOW: I think we've covered our First Amendment
3 arguments.

4 Mr. Jaffer.

5 MR. JAFFER: Thank you, your Honor.

6 Just one point on jurisdiction. As you know, the
7 government has made the argument that the Court lacks authority
8 to enjoin subordinate officials because those subordinate
9 officials were not personally involved in causing the injury.

10 In our papers, we point the Court to the Swan case in
11 which the injury in question was caused by the President. Only
12 the President could have caused the injury because only the
13 President had the authority to use the recess appointment
14 power.

15 The court nonetheless in that case enjoined
16 subordinate officials finding that it had the power to do so
17 because those officials could remedy the injury.

18 The question there wasn't whether they were personally
19 involved in inflicting the injury but, rather, whether they
20 were in a position to remedy it. In fact, Swan goes on to
21 enjoin even individuals who were not before the court, who were
22 not defendants in the case, which we're not asking the Court to
23 do here.

24 Since we've filed the reply brief, we've identified
25 other cases which state that proposition even more clearly. If

1 it would be helpful, I could just give a couple cites to the
2 Court. One is a Ninth Circuit case called Hartman, and the
3 relevant sentence is at page 1127. The relevant analysis is at
4 1127.

5 THE COURT: Let's start with the volume.

6 MR. JAFFER: Sorry. 707 F.3d 1114. Again, 1127 is
7 the pin cite. It's 2013 from the Ninth Circuit.

8 There are two sentences that I think sort of capture
9 it: "A plaintiff seeking injunctive relief against the state
10 is not required to allege a named official's personal
11 involvement in the acts or omissions constituting the alleged
12 constitutional violation. Rather, a plaintiff need only
13 identify the law or policy challenged as a constitutional
14 violation and name an official within the entity who can
15 appropriately respond to injunctive relief," which I think is
16 what we've done here by naming the subordinate officials.

17 I'm not going to quote from the other cases, but the
18 other two cases that I think the Court may find useful -- one
19 is called Parkell, Third Circuit, 833 F.3d 313, a 2016 case.
20 The other case is called Luckey v. Harris, Eleventh Circuit
21 1988, 860 F.2d 1012, and the pin cite is 1015.

22 As I said earlier, your Honor, I think the Court also
23 has the power to issue declaratory relief against all of the
24 defendants and, should it become necessary, to enjoin the
25 President, although I don't think the Court has to do that in

1 the first instance. Thank you, your Honor.

2 MR. BAER: Your Honor, I would only just briefly
3 respond to what Mr. Jaffer just discussed and note two things
4 with respect to the Swan decision.

5 First, I don't believe the Court actually issued any
6 injunctive relief there. It simply held for purposes of the
7 jurisdictional analysis that in theory it could. It therefore
8 didn't discuss the sort of causation implications of that
9 holding because ultimately, on the merits, I believe it ruled
10 against Mr. Swan.

11 More to the point, I think if the Court had engaged in
12 the Article III causation analysis that we've suggested is
13 appropriate here, would have found that there is injury fairly
14 traceable to the individuals who the court considered
15 enjoining.

16 The court didn't focus on a broad class of government
17 employees. It focused specifically on other members of the
18 board and other employees at the National Credit Union
19 Administration who would have to choose whether or not to
20 recognize Mr. Swan, the plaintiff who sought to continue to be
21 a board member of the National Credit Union Administration.

22 In other words, those employees, those specific
23 individuals, would have inflicted injury on Mr. Swan if he were
24 entitled to have maintained that position by not treating him
25 as a board member.

1 In other words, it was a classic example of a decision
2 that is made by a higher official that is implemented by lower
3 officials and then puts it into the category of cases like
4 Youngstown where you have a decision that's being implemented
5 by an official who is not the President, and therefore
6 declaratory or injunctive relief can issue against that
7 individual.

8 So that's a long way of saying, your Honor, I think
9 that even if the court had engaged in the causation analysis in
10 Swan, there would have been causation with respect to the class
11 of individuals that it had hypothesized it could enjoin, but
12 there is no argument from plaintiff here that Mr. Scavino in
13 any way, shape, or form caused the blocking of the individual
14 plaintiffs, and it's that decision, that injury, that's at
15 issue here.

16 MR. JAFFER: Your Honor, I don't think the
17 government's characterization of the relief in Swan is
18 accurate, but ultimately nothing turns on Swan in particular
19 because this is a much broader principle.

20 Kentucky v. Graham, which is a Supreme Court case
21 which we cite in our brief, makes clear that suits against
22 officials sued in their official capacity should be understood
23 as suits against the government. The relevant question there
24 for traceability purposes is whether the injury is traceable to
25 the government.

1 Whether we have standing to seek injunctive relief
2 against, for example, Mr. Scavino turns on the question of
3 whether Mr. Scavino is in a position to remedy the injury.
4 Again, the cases that I cited earlier go to that point.

5 Just one last point, your Honor. I don't mean to
6 concede that Mr. Scavino was not personally involved or is not
7 personally involved in the injury here. While it is true that
8 the President himself blocked the individual plaintiffs in the
9 first instance, the injury is a continuing injury for which
10 Mr. Scavino is partly responsible.

11 Mr. Scavino, by the government's admission, helps
12 administer the account. He has the power to block or unblock
13 individuals from the account. He is a full participant in the
14 continuing injury. He's certainly much more closely associated
15 with the injury than the defendants in Swan who were enjoined
16 by the court in that case because they were in a position to
17 remedy the injury.

18 THE COURT: So it comes down to the President hit the
19 block button versus telling Scavino to hit the block button.

20 MR. BAER: Yes, your Honor. I think that's what the
21 court in Franklin held when it -- that's what the court in
22 Franklin reasoned when it considered the import of the
23 Youngstown decision.

24 So it considered the same argument that plaintiffs
25 raised in their brief, that if Youngstown is properly decided

1 where the injunction was against the Secretary of Commerce,
2 then surely there is jurisdiction to enjoin the President. And
3 the four justice plurality and Justice Scalia in greater depth
4 in concurrence said no.

5 MR. JAFFER: Your Honor, I think that this is simpler
6 than the government is making it out to be. There is no
7 dispute that Mr. Scavino is in a position to remedy the injury
8 that's stated in the joint stipulation.

9 There is a whole line of cases -- frankly, Swan, the
10 more recent travel ban cases from the Fourth and
11 Ninth Circuits, Marbury v. Madison -- in which the Court's have
12 made clear that it is not just appropriate but required that
13 the courts assume that executive officials, including the
14 President, even if there is no injunctive relief directed at
15 the President himself.

16 I think that's the position that you, your Honor, are
17 in right now. The government has not said that President Trump
18 intends to subvert the Court's authority.

19 In the absence of that kind of statement, which I'm
20 glad they're not making, the Court is entitled to, and indeed
21 required, to assume that the President will abide by the
22 Court's authoritative declaration of the law, even if there is
23 no injunction directed at the President.

24 THE COURT: Thank you very much.

25 MR. JAFFER: Thank you.

1 THE COURT: Consider my earlier suggestion. As
2 interesting as this may be intellectually -- and it certainly
3 is -- it might be better to resolve it in a practical fashion.
4 We'll give you a decision in due course, not instantly because
5 I know what else we have to finish. Thank you very much. I
6 appreciate it.

7 MR. JAFFER: Thank you, your Honor.

8 MR. BAER: Thank you, your Honor.

9 (Adjourned)

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