IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DEANNA J. ROBINSON, Appellant v. HUNT COUNTY, TEXAS, et al., Appellees	Case No. 18-10238

BRIEF *AMICUS CURIAE* OF THE BRECHNER CENTER FOR FREEDOM OF INFORMATION, THE MARION B. BRECHNER FIRST AMENDMENT PROJECT, NATIONAL COALITION AGAINST CENSORSHIP THE DKT LIBERTY PROJECT AND THE FREEDOM TO READ FOUNDATION IN SUPPORT OF APPELLANT DEANNA ROBINSON

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STATEMENT OF INTEREST

The Brechner Center for Freedom of Information (the "Brechner Center") at the University of Florida in Gainesville exists to advance understanding, appreciation and support for freedom of information in the state of Florida, the nation and the world. The Center's focus on encouraging public participation in government decision-making is grounded in the belief that a core value of the First Amendment is its contribution to democratic governance. Since its founding in 1977, the Brechner Center has served as a source of academic research and expertise about the law of gathering and sharing information, and the Center regularly appears as a friend-of-the-court in federal and state appellate cases nationwide where the public's right to informed participation in government is at stake. The Center is exercising the academic freedom of its faculty to express their scholarly views, and is not submitting this brief on behalf of the University of Florida or the University of Florida Board of Trustees.

The Marion B. Brechner First Amendment Project (the "Project") in the College of Journalism and Communications at the University of Florida in Gainesville is an endowed project dedicated to contemporary issues affecting the First Amendment freedoms of speech, press, thought, assembly and petition. The Project pursues its mission through a wide range of scholarly and educational activities benefiting scholars, students and the public. The Project's scholarly and

educational interest in filing this amicus brief is to bring to the Court's attention important First Amendment principles related to the following: political expression; speech about matters of public interest; public forums; and viewpoint discrimination. The Project is exercising the academic freedom of its faculty to express their scholarly views, and is not submitting this brief on behalf of the University of Florida or the University of Florida Board of Trustees.

The National Coalition Against Censorship ("NCAC") is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding, NCAC has worked to protect the First Amendment rights of artists, authors, students, readers, and the general public. NCAC has a longstanding interest in opposing viewpoint-based censorship and is joining in this brief to urge the Court to preserve the protections of the First Amendment in government-created online public speech forums. The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.

DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The Liberty Project is committed to protecting privacy, guarding against government overreach, and protecting the freedom of all citizens to engage in expression without government

interference. The Liberty Project advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties such as the right to free speech. These restrictions threaten the reservation of power to the citizenry that underlies our constitutional system. The Project has been particularly involved in defending the First Amendment, one of the most profound individual liberties and a critical aspect of every American's right (and responsibility) to function as an autonomous and independent individual.

The Freedom to Read Foundation is an organization established by the American Library Association to promote and defend First Amendment rights, foster libraries as institutions that fulfill the promise of the First Amendment, support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and establish legal precedent for the freedom to read of all citizens.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), none of the *Amici* has a parent corporation or issues stock. Consequently, there exists no publicly held corporation which owns 10% or more of the stock of any of the *Amici* participants.

I. INTRODUCTION AND BACKGROUND

The First Amendment strongly protects speech addressing matters of public concern, and its language particularly enunciates the ability of a citizen to petition government officials for the redress of grievances. A restraint on speech to government officials imperils these rights. Social media is increasingly the platform through which citizens interact with their government. To ban a concerned member of the public from discussing the performance of a local-government agency on social media because her speech is critical of the agency – no matter how harsh that criticism – is a drastic step that implicates and infringes on fundamental constitutional rights.

The Facebook page maintained by the Hunt County Sheriff's Office[1] operated as a designated public forum, in which citizens were invited to discuss the policies and practices of an agency of local government. When a county establishes a discussion forum, strong First Amendment protections attach. Two foundational First Amendment principles forbid government decision-makers from (a) enforcing "prior restraints" on speech or (b) enforcing viewpoint-based preferences as to whose speech may be heard. Hunt County's exclusion of Appellant Deanna

[1] For brevity, all Defendants-Appellees will be collectively referred to as "the County" or "Hunt County" throughout this brief.

Robinson from the Hunt County Sheriff's Office Facebook page (hereinafter, "HCSO Facebook page") violated these bedrock principles.

The court below erred, first, in denying Robinson's motion for preliminary injunction to preclude further acts of prior restraint by the County, and second, in dismissing Robinson's complaint entirely on the merits. This brief will focus on the former, and specifically on two critical errors that this Court should rectify: (1) Finding that the County could justify viewpoint-based removal of Robinson's comments by relying on a set of Community Standards by which Facebook governs *itself* as a private company, and (2) permitting a government agency to prospectively ban a speaker from a designated public forum based on the agency's belief that the speaker has spoken "inappropriately" in the past.

II. DISCUSSION AND CITATION TO AUTHORITY

A. Robinson's Speech Was Highly Protected Because it Addressed Matters of Public Concern

As a threshold issue, the speech involved in this dispute is at the apex of the First Amendment's protection because it relates to matters of public concern. The Supreme Court has said that it does not consider all speech of equal First Amendment importance. *Hustler v. Falwell* 485 U.S. 46, 56 (1988) (quoting *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.,* 472 U.S. 749, 758 (1985)). Speech on public issues "occupies the highest rung of the hierarchy of First Amendment

values, and is entitled to special protection." *Connick v. Myers,* 461 U.S. 138, 145 (1983). The First Amendment reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open. *New York Times v. Sullivan,* 378 U.S. 254, 270 (1964).

What constitutes a public concern has been a matter of some debate, but should not be at issue in this matter and does not appear to have been contested (or considered) at the court below. Speech deals with matters of public concern when "it can be fairly considered as relating to any matter of political, social or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder v. Phelps,* 562 U.S. 443, 453 (2011) (*internal citations omitted*). Importantly, the "inappropriate or controversial character of a statement is irrelevant to the question whether it deal with a matter of public concern." *Id.* (*citing Rankin v. McPherson,* 483 U.S. 378, 387 (1987)).

The comments that led to the underlying action directed criticism and commentary at several public officials and a public entity, funded by tax dollars and enforcing the laws of the jurisdiction. It also involved the participation in an online discussion about the efficacy of the taxpayer-funded police function in the County. The issue does not appear to have been addressed at the Court Below, but the County cannot seriously dispute that Robinson's speech addresses matters of

public concern and that it is therefore "more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74–75 (1964). Robinson's speech is undeniably entitled to "special protection" and is "at the heart of the First Amendment's protection." *Dun & Bradstreet, Inc.,* 472 U.S. at 758-759.

B. The Terms of a Social Media Site Cannot Compel, or Legitimize, Viewpoint Discrimination by a Government Agency User

In finding that Hunt County could lawfully remove Robinson's comments and exclude her from the county-run discussion board, the trial court erroneously relied on Facebook's Community Standards, as if those standards could be applied by a governmental user of Facebook without regard to the First Amendment boundaries that constrain a state entity's power to regulate speech. They cannot. While Facebook is free to police account-holders' use of its proprietary service, Hunt County is a state actor constrained by the First Amendment in using its governmental authority to pick and choose who is allowed to speak or be heard.

1. The County is forbidden from discriminating based on the speaker's viewpoint regardless of the nature of the medium the speaker uses.

A social-media discussion board used by a government agency for official purposes should enjoy especially robust constitutional protection as a "designated public forum." But in analyzing the violation here, this Court may pretermit any

forum analysis[2] as it is axiomatic that a government agency is never permitted to engage in "viewpoint discrimination" by silencing only speech that is critical or unflattering. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (when property does not qualify as a "forum" for public expression, content-based regulation of speakers' use of the property must be "reasonable in light of the purpose served by the forum and … viewpoint neutral").

The record reveals clearly that the County enforced viewpoint-discriminatory standards on citizen submissions to the County Facebook page. The County picked sides: Harsh language directed at police critics was allowed to remain on the page, but Robinson's comparably harsh anti-police posts were removed. Indeed, the manager of the page admitted his partiality, telling users that "POSITIVE comments" about the Sheriff's Office were welcomed. This admission of viewpoint discrimination means that this Court need go no further.

The fact that critical comments about police were removed while laudatory comments about police were not only permitted to remain on the site but were invited by the agency is textbook viewpoint discrimination. As this Circuit has recognized, whether a decision to exclude speech was motivated by viewpoint discrimination is a question of fact that is not readily resolved by the court at the earliest stages of a case. *See, e.g., Chiu v. Plano Independent School Dist.*, 339

[2] See Section B.2, *infra.*

F.3d 273, 282 (5th Cir. 2003) (whether school applied its literature-distribution policies in a viewpoint-discriminatory manner was a fact issue).

That Robinson chose harsh and offensive language to express her distaste for law enforcement is of no moment. Even offensive and hateful rhetoric receives the fullest First Amendment regard when directed to matters of public concern, as the Supreme Court has found many times. In 1989's *Texas v. Johnson,* the court found notably that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 491 U.S. 397, 414 (1989). Two decades later, the Court again refused to allow civil culpability in protecting the virulent and offensive protesting of a fallen Marine's funeral. *Snyder*, 562 U.S. at 458. In that matter, Chief Justice Roberts, writing for an eight-justice majority, presciently found that:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here— inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. *Id.* at 461.

As of May 24, 2018, the Hunt County Sheriff's Facebook page was being followed by 11,794 people, in a county with a total population of not quite 90,000. By comparison, the circulation of the local newspaper serving the community, the

Herald-Banner, is 5,855. It is readily apparent that Facebook is a uniquely impactful way of reaching a mass audience in the Hunt County community in hopes of influencing the discourse on the performance of government officials. That the County selectively censors a widely read conduit for expression based on the viewpoint of the speaker—and specifically to silence public criticism of public actors—is of no small consequence. The First Amendment's creation and maintenance of the marketplace of ideas cannot abide government distortion.

2. The social-media discussion board maintained by Hunt County was a "designated public forum" to which strong First Amendment protections attach.

Government creates a "forum" when it opens a space for speech by which citizens may interact with public agencies and comment on matters of public concern. "[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech." *Cornelius*, 473 U.S. at 802; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). In determining whether government officials have created a designated public forum, courts consider the forum's compatibility with expressive activity and whether the government's overall "policy and past practice" shows that the forum is intended to be used for speech by the public. *See Paulsen v. Cty. of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991); *see also Cornelius*, 473 U.S. at 802.

It does not matter that the forum that government creates is not one that occupies a physical or geographic plane, such as a public park or building. *See, e.g.*, *Rosenberger v. Rector and Visitors of Univ. of Virginia,* 515 U.S. 819, 830 (1995) (describing a university's student activity fee system as a "metaphysical" forum facilitating expression). The Hunt County Sheriff's Office Facebook Page is a digital space where anyone with a Facebook account may respond to the statements and news posted in the "comment" section below each of the posts. The Fourth Circuit has suggested that the government may open a forum for speech by creating a website that includes a " 'chat room' or 'bulletin board' in which private viewers could express opinions or post information," or that otherwise "invite[s] or allow[s] private persons to publish information or their positions." *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275, 284 (4th Cir. 2008).

The choice of Facebook as opposed to a static website on which only the County or its authorized representatives may post was a purposeful one. The County sought public input and indeed participation. This desire was obvious: the manager of a Facebook page could have chosen to allow only preapproved group members' speech to be posted on its Facebook group, but that is not the option that Hunt County chose. Instead, the County chose a configuration that allows anyone who "likes" the page to post a visible comment, which in turn can elicit responsive

comments (or reactions such as "likes"). As a result, the Hunt County Sheriff's Office affirmatively solicited comments from the public, creating a public forum.

As argued *supra,* matters of public concern or interest lie at the core of the First Amendment's protections, and once a government entity opens a designated public forum, it may not simply delete or censor speech because it disagrees with its message or content. *See Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 716 (E.D. Va. 2017). Online pages are akin to modern-day town halls, and when the government blocks users or deletes comments, it suppresses dissent. Censoring citizens' criticism of government officials during town-hall gatherings constitutes a First Amendment violation. *See, e.g., City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n,* 429 U.S. 167, 176, (1976) ("[W]hen the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of ... their speech."); *Mesa v. White,* 197 F.3d 1041, 1044 (10th Cir.1999) (noting consensus that the public comment period of a county commission meeting is a designated public forum); *White v. City of Norwalk,* 900 F.2d 1421, 1425 (9th Cir.1990) ("City Council meetings like Norwalk's, where the public is afforded the opportunity to address the Council, are the focus of highly important individual and governmental interests.... [S]uch meetings, once opened, have been regarded as public forums, albeit limited ones."); *Jones v. Heyman,* 888 F.2d 1328, 1331

(11th Cir.1989) ("[T]he city commission designated their meeting a public forum when the commission intentionally opened it to the public and permitted public discourse on agenda items.").

A federal court recently examined an analogous issue in a suit brought against President Donald J. Trump, who had blocked certain users from seeing his tweets and responding to him on his @realdonaldtrump Twitter feed. A Twitter feed is a social-media page where members of the public are invited to share comments not unlike the Facebook page at issue in this litigation. In that case, the federal court found that the President's official Twitter feed is a designated public forum, because it is government-managed even if not government-owned. *See Knight First Amend. Inst. v. Trump*, ___ F.Supp.3d ___, No. 17 Civ. 5205 (S.D.N.Y. May 23, 2018) at *41-44 (applying forum analysis to president's Twitter account). As the court held in analyzing the status of the president's official Twitter account, the fact that the Twitter company retains substantial control over the use of an account does not deprive it of its "governmental" character. The matter involving President Trump's Twitter feed is analogous particularly for its holding that when the governmental actor exercises authority to post content and to remove or retain the posts of others, the property qualifies as a designated public forum, regardless of its ownership. *Id.* at *43-44

Once a forum is established, the Supreme Court has held that the governmental actor has only a limited ability to regulate expressive activity. Any content-based exclusion of speech is subject to strict scrutiny, meaning that the government must show the exclusion "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n,* 460 U.S. at 45; *accord Ark. Educ. Television Comm'n*, 523 U.S. at 677; *see also Rosenberger,* 515 U.S. at 828 ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.").

As argued in Section A, *supra,* the "discussion of public issues" and "debate on the qualifications of candidates" for public office have always been "integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo,* 424 U.S. 1, 14 (1976). The First Amendment therefore "affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas,' " since "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *Buckley,* 424 U.S. at 14-15. It cannot be seriously argued that the censorship of Plaintiff's speech, and the prior restraint of future speech, does not qualify as a discussion of public issues.

The public forum doctrine applies even if government uses private rather than public property to establish a space for expression. *See, e.g., Southeastern*

Promotions Ltd. v. Conrad, 420 U.S. 546, 555 (1975) (holding that a *privately owned* theater leased by a city was a public forum) ("Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint"); *Am. Broad. Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) (applying public forum doctrine to private campaign headquarters); *Davison*, 2017 WL 3158389, at 10 (applying public forum analysis to county official's Facebook page); *see also Denver Area Ed. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 792 (1996) (Kennedy, J., concurring in part) (public fora are not "limited to property owned by the government"); *Cornelius*, 473 U.S. at 801 (noting that public forum analysis applies to "public property or private property dedicated to public use").

Hunt County has repeatedly admitted that it removed the Plaintiff's posts and excluded her from the forum it created based on the content of her speech. Indeed, the Magistrate's findings in the Court Below expressly recognized this by relying on Facebook's Community Standards, which are explicitly content-based. As Facebook itself states in the Standards: "[W]e have developed a set of Community Standards that outline what is and is not allowed on Facebook. Our Standards apply around the world to all types of content. They're designed to be comprehensive – for example, content that might not be considered hate speech may still be removed for violating our bullying policies." Therefore, the decisions

challenged in this case are content-based and, if justifiable at all, must survive strict scrutiny. The trial court below failed to engage in this exacting analysis which is "the most demanding test known to constitutional law." *City of Boerne v. Flores,* 521 U.S. 507, 534 (1997). Notably, Hunt County would be the entity who "bears the burden to show that its regulation is narrowly tailored to suit a compelling interest. It is not the public's burden to prove their right…" *Defense Distributed v. Dept. of State,* 838 F.3d 451, 472 (5th Cir. 2016).

In a designated public forum, government may use its managerial authority to limit speech to the purposes for which the forum was established. *Perry Educ. Ass'n.*, 460 U.S. at 50-51. But Robinson's speech here was compatible with the purposes of the forum, which was to enable the public to comment on the performance of the Sheriff's Office and related matters. Allowing Robinson's criticisms to remain readable is in no way inconsistent with the function and purpose of the forum. To the contrary, allowing critics to speak out about the Sheriff invariably will stimulate supportive counter-speech, which is the essence of a civic discussion.

The Hunt County Sheriff's Office established its Facebook page with the intention to "present matters of public interest within Hunt County, Texas." Am. Compl. 7, ECF No. 18; Ex. A, ECF No. 18-1 at 2. This is clearly a tool of governance. The Hunt County Sheriff's Office may not selectively silence citizens'

ability to use a government-provided platform for expression on the basis of a disagreeable viewpoint.

3. Facebook's "Community Standards" do not override the constitutional constraints on government agencies that use the site.

Outside of the context of a social-media platform, a government agency inarguably could not give effect to the viewpoint-discriminatory preferences of a private host. Instead of creating a Facebook discussion board, suppose the county instead decided to hold a community discussion forum at a local restaurant, whose owner has a strict "no politics" policy because of his personal tastes. If Robinson showed up at the restaurant to participate in the town-hall meeting wearing a "Make America Great Again" hat, while the restaurant owner himself may be within his rights to refuse admittance to patrons whose apparel he finds disagreeable, the county could not, consistent with the First Amendment, eject Robinson from the town meeting on the basis that her hat might offend the proprietor.

This is the decisive distinction that the trial court overlooked. That Facebook as a private actor can enforce viewpoint-discriminatory policies is beyond dispute, and is wholly immaterial. If the County truly believes that it has no choice under Facebook's terms but to remove comments sharply critical of government officials, then the County must stop using Facebook as a venue for public discourse. The County can no more host a community discussion on a platform that *requires*

viewpoint discrimination than it could host a governmental discussion forum in an exclusionary club that women cannot enter.

Moreover, the trial court erred in presuming that Facebook's Terms could or would be enforced against Hunt County as manager of the page, so that Hunt County could justify removing Robinson's speech to avoid having its page deactivated by Facebook. The trial court relied on Facebook's assertion that "we may restrict a person's ability to post on Facebook or ban the person from Facebook" for violating the Community Standards. While it might be possible to read the Standards to apply to a government agency that hosts a page, that is not the most logical reading. The more logical reading is that the penalty would fall on the *author* of the violative post, since the Standards speak of restricting the "person's ability to post" as a penalty. What makes the trial court's reading further illogical is that, if merely hosting posts that violate Facebook's standards could result in deactivation of a page, the standards would be easily gamed by pranksters or competitors. Under the trial court's formulation, any vandal who wanted to shut down a Facebook page could simply bombard it with noncompliant speech. There is no evidence that this is the way Facebook operates, nor would it be logical for Facebook to do so. [3]

[3] At the very least, whether Facebook's Terms do or do not apply to the entity hosting the page, so that Hunt County would be held liable by Facebook for Robinson's speech, is an issue of fact that requires further development. Even if

Since Facebook, as a private host of the public forum, is free to put *anything* it desires into its Community Standards, the trial court's resolution of this issue means that there is no stopping point to the government's ability to delete speech or exclude speakers. If Facebook revised its Standards to disallow republishing "excerpts from governing documents of world powers," then a government page manager could literally censor a post consisting of the 45 words of the First Amendment. This Court must correct the trial court's error to avoid producing such absurd results.

C. Speakers Cannot Be Prospectively Banned To Punish or Speculatively Prevent Unwanted Speech

Regardless of the County's authority to selectively delete posts from the HCSO Facebook page based on a subjective determination of "appropriateness," the County plainly overreached in barring Robinson indefinitely from participating in the discussion forum based on her past criticism of the Sheriff's Office.

A government agency may not selectively ban a speaker from future speech on the grounds that past speech was offensive, or even tortious. Even if Robinson had defamed the sheriff or otherwise engaged in unprotected speech on the

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the Terms might be capable of the strained construction urged by the County, they are inarguably capable of the contrary construction – that responsibility stops with Robinson, and that any adverse consequences fall upon her alone – and Robinson is entitled at this stage of the case to the benefit of that inference.

Facebook page, which is not reflected in the record or established thusfar, governmental authority may not be used to restrain her continued participation in the discussion board. "Prior restraints" are the most disfavored of all governmental responses to unwelcome speech. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Consequently, court after court has rejected preemptive bans on citizen speech to government agencies, regardless of the speaker's past behavior. Simply put, no government agency can stop a person from using a discussion forum based on speculation – even well-founded speculation – that she may say something offensive.

A ban of speech that is prospective is, in a First Amendment sense, the most serious consequence an agency can impose. Barring a speaker from addressing a government body is functionally a prior restraint, and as a prior restraint is presumed unconstitutional. *Southeastern Promotions*, 420 U.S. at 558. A governmental entity then "carries a heavy burden of showing justification for the imposition of such a restraint." *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971) (*citing Near v. Minnesota ex rel. Olson,* 283 U.S. 697 (1931)). As this Circuit has recognized, once a designated public forum is opened for expressive purposes, speakers may not selectively be excluded from using the forum unless the exclusion is justified by a "narrow and compelling state interest." *Gay Student Serv. v. Texas A&M Univ.*, 737 F.2d 1317, 1333 (5th Cir. 1984).

Although there is little precedent involving online forums such as a Facebook page, there significant precedent in the analogous setting of a public-comment period of municipal meetings. In that analogous setting, prospective bans on future participation are regularly found unconstitutional.

By example, In *Reza v. Pearce*, 806 F.3d 492, 501 (9th Cir. 2015), the Ninth Circuit found that an Arizona state senator violated "clearly established" law in issuing an edict banning those who "interrupt" proceedings from entering the Senate office building for two to four weeks. The court held that prospectively banning a speaker from a government building without proof of dangerousness interferes with the speaker's right to interact with elected representatives. *Id.* at 504-05.

In *Surita v. Hyde*, 665 F.3d 860 (7th Cir. 2011), the Seventh Circuit held that a mayor violated the First Amendment in refusing to allow a citizen activist to address the city council unless he first apologized for berating a city employee at a public gathering several days earlier. The court held that selectively excluding a speaker from a limited public forum based on the content of past speech *is* a content-based restriction on use of the forum, and thus is unconstitutional unless justified by a sufficiently compelling objective to survive strict scrutiny. *Id.* at 870.

In *Walsh v. Enge*, 154 F.Supp.3d 1113 (D. Ore. 2015), a federal district judge enjoined enforcement of an ordinance that allowed a city to indefinitely ban

speakers from city council chambers for disrupting council meetings. The challenge was brought by a disability-rights advocate who was banned from council meetings for 60 days after shouting and pounding a table when he was denied a chance to speak on a budget matter. *Id.* at 1122. The court found that creating a disturbance at a council meeting could justify one-time removal from the room, but not a ban on addressing future meetings.

In *Ritchie v. Coldwater Cmty. Sch.*, 947 F.Supp.2d 791 (W.D. Mich. 2013), a Michigan judge found a violation of "clearly established" law when the chair of a school board had a dissatisfied parent preemptively banned from attendance at future board meetings and twice directed police to arrest him when he showed up at meetings in defiance of the ban.

In *Barna v. Bd. of Sch. Dir's of Panther Valley*, 143 F. Supp. 3d 205 (M.D. Pa. 2015), a federal court in Pennsylvania found that even a speaker's concededly intemperate behavior at school board meetings -- swearing, challenging a board member to fight, struggling with a guard who attempted to restrain him -- was not enough to justify a lifetime ban from attending future meetings. Although the directive was based on non-speech conduct, it was not narrowly tailored to further an important government interest and did not leave the speaker with adequate alternative channels to be heard. *Id.* at 216.

Robinson's behavior is even less disruptive than any of these examples, and her exclusion from the Facebook discussion forum is even harder for the government to justify. Unlike speakers at an in-person government meeting where there is the threat than an unruly speaker will indefinitely monopolize the microphone or could even physically harm certain attendees, Robinson was in a position to do neither. This is the purest of "pure speech" cases, and thus the indefinite and categorical exclusion of Robinson from the Facebook page is unjustifiable.

Although, like the speakers in these cases, Robinson has other ways of making her opinion known – she certain could write letters or send emails to Hunt County commissioners, or ask for meetings with them – those alternative channels are no substitute for being able to post to the County's Facebook discussion board. Unlike an email, a comment on Facebook can reach a mass public audience and provoke a visible back-and-forth discussion among community members. This new wave of technology has expanded the capacity of the marketplace of ideas that the First Amendment was created to ensure, both for the speaker's benefit and education (if others interact with her) and for the County's (to gauge whether the speaker's opinion is an isolated or widely shared one). And unlike other forms of public communication, such as advertising, Facebook is free. This makes Facebook an unparalleled way for a citizen to discuss government functions and reach a

critical mass of potential allies. It also allows the citizen to be a part of a discussion that might change her opinions about government. As Justice Anthony Kennedy wrote in the Supreme Court's deepest and most recent exploration of the First Amendment in an online context, social media is a uniquely important venue for the exchange of political ideas because of its reach and accessibility. *Packingham v. North Carolina*, 137 S.Ct. 1730, 1735 (2017).

Even if Robinson had actually stepped beyond the bounds of the First Amendment by defaming Sheriff's Office employees – which has not been established – the proper remedy is an action for damages, not a prophylactic injunction against all speech. Prior restraints in anticipation of defamatory speech have consistently been found unconstitutional even when the speaker already has a history of defamatory remarks. A district court in the District of Columbia, for instance, recently held that a corporate board was not entitled to a gag order against a former director, even though he had already allegedly defamed his former colleagues and was expected to make additional similar statements at an impending meeting. *Gold v. Maurer*, 251 F.Supp.3d 127, 134-35 (D.D.C. 2017). In a thorough examination of the issue, Kentucky's Supreme Court held that a prior restraint on future defamatory speech is constitutional only if the remarks are actually adjudicated to be defamatory and constitutionally unprotected, and the restraint is narrowly tailored to proscribe only repetition of the proven defamatory remarks.

Hill v. Petrotech Resources Corp., 325 S.W. 3d 302, 309 (Ky. 2010). Neither is true here; there has been no judicial determination that Robinson defamed anyone, and the prohibition broadly prevents any speech in the forum, defamatory or not.[4]

As these cases make clear, government bodies may not impose retributive penalties that interfere with citizens' ability to communicate with public officials, even if there is good reason to suspect that those communications will be hostile. The speculation that people who have spoken uncivilly in the past will do so in the future is simply too attenuated to deprive citizens of their most direct and effective means of being heard on issues of public concern.

Finally, restraining Robinson indefinitely from participating in the Facebook discussion forum was unlawful for the additional reason that Hunt County lacked any intelligible standards for determining which speakers were and were not welcome to use the page. When a government agency imposes a prior restraint on speech, such as a licensing or permitting system, the system is unconstitutional unless it is governed by clear standards that constrain the decision-maker from subjectively picking "winners" and "losers." *See City of Lakewood v. Plain Dealer*

[4] Defamation law recognizes that criticism of government employees occupies a uniquely protected status. The burden for a "public official," such as a county commissioner or sheriff, to win a defamation suit is purposefully high, recognizing the need for citizens to feel confident they can safely voice dissatisfaction with government services or dissent from government priorities. *See New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (establishing "actual malice" standard for a public official to prevail in a defamation suit against a citizen critic).

Pub. Co., 486 U.S. 750, 761 (1988) (striking down a permitting system that gave the city manager unfettered discretion to permit or deny the placement of newspaper racks on city property and holding that any permitting system imposed as a precondition for speaking must cabin the decision-maker's discretion with "neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered.").

The County set forth its policy for banning users from the Facebook page as follows: "ANY post filled with foul language, hate speech of all types and comments that are considered inappropriate will be removed and the user banned." It should go without saying that "appropriateness" is not an intelligible standard to which speakers can be held. A system of prior restraint that prohibits people with a history of "inappropriate" speech from being heard is unlawful. For this additional reason, the County's exclusion of Robinson from using the discussion board was unconstitutional, and she was entitled to injunctive relief restoring her ability to post.

Nor can the standards of a privately managed platform like Facebook furnish the "neutral criteria" that the First Amendment demands, because the platform's standards are a regularly moving target subject to change at a moment's notice with no input from either the government agency or the speaker. Indeed, the Community Standard on which Defendants/Appellants relied to validate their ban

of Robinson appears to have completely vanished from Facebook's terms. In an exhibit furnished to the trial court, OBJ. APP. 061, Facebook's then-existing Community Standards stated: "We remove credible threats to public figures, as well as hate speech directed at them – just as we do for private individuals." The reference to "hate speech" directed at public figures no longer appears in the Standards,[5] so that the only plausible Standard that might have been applied to Robinson's posts (she did not threaten violence, post nudity or otherwise come close to violating any other Facebook standard) no longer exists. This further illustrates why government agencies cannot indefinitely ban people from participation on government-maintained social-media platforms based on their previously expressed views, as Hunt County did here: Because speech deemed unacceptable on the platform today might be welcomed tomorrow.

III. CONCLUSION

The district court erred in denying Robinson preliminary injunctive relief restoring her ability to participate along with all other community members in the discussion of issues of public concern within the forum of the Hunt County Sheriff's Facebook page. The case should proceed on its merits and, during that

[5] The current version of the Community Standards is online at https://www.facebook.com/communitystandards/. They include a section about "hate speech," but the former mention of hate speech directed at public figures has been removed.

process, the County should be enjoined from banning speakers, or removing speech, on the grounds of the speaker's viewpoint, a practice the Constitution categorically forbids.

Respectfully submitted, this 29th day of May, 2018.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the typeface and volume limits of Fed. R. App. P. 32(a) and Local Rule 32.1.

1. This brief contains 5,632 words, excluding the sections exempted by Fed. R. App. P. 32(f) and Local Rule 32.2, which is less than 50 percent of that allotted for the Appellant's brief.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2017 in 14- point Times New Roman font for text and footnotes.

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