Hot Issues in Social Media

Friday, February 1, 2019 | 8:00 am to 9:00 am &
Saturday, February 2, 2019 | 8:30 am to 9:30 am
and 11:30 am to 12:30 pm

Program Description

This workshop will discuss the challenges posed by social media platforms and practices. We’ll
discuss litigation concerns, including preservation, authentication and admissibility of social
media posts; the right of access to, and the right to comment on, social media sites of public
officials and public figures; copyright concerns, including the fallout of the embedding decision in
Goldman v. Breitbart News Network; social media platforms’ terms and conditions; the tension
between free speech and social media platforms blocking certain speakers; and newsroom
responses to harassment or threats to employees via social media and other newsroom
employer-employee issues.

Lead Facilitator

Monica Dias, Frost Brown Todd | Cincinnati, OH

Facilitators

- Jerry Birenz, Sabin Bermant & Gould | New York, NY
- Katie Fallow, Knight First Amendment Institute at Columbia University | New York, NY
- Mara Gassmann, Ballard Spahr | Washington, D.C.
- Patrick Groshong AXIS PRO | Kansas City, MO
- Lo-Mae Lai, Airbnb, Inc. | Los Angeles, CA
- Gregg Leslie, Arizona State University Law School First Amendment Clinic | Phoenix, AZ
- Andy Mar, Facebook, Inc.
- Matthew Schafer, BuzzFeed, Inc.
- Regina Thomas, Oath Inc. | Dulles, VA
Program Materials

1. Topics in Social Media
   a. Online Harassment of the News Media
   b. Tension Between Free Speech and Blocking Speech
   c. Right of Access to, and Right to Comment on, Social Media Sites of Public Officials
   d. Insurance Cover for Claims arising from Social Media
   e. Copyright Concerns, Goldman and Originality in the Age of Smartphones
   f. Recent Developments in Litigation and Social Media: Preservation, Authentication and Admissibility
   g. “Data scraping” and Journalists’ Liability under the CFAA
   h. Compliance with Social Media Terms & Conditions
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**Topic: Online Harassment of the News Media**
by Mara Gassman, Ballard Spahr LLP

*Traditional Harassment*

- Harassment “in real life” (IRL) has traditionally been addressed with anti-stalking and anti-harassment laws. California passed the first anti-stalking law in 1990, see California Penal Code 646.9, and now all 50 states have some form of an anti-stalking law on their books. See Criminal Stalking Laws, Victims of Crime, http://victimsofcrime.org/our-programs/stalking-resource-center/stalking-laws/criminal-stalking-laws-by-state. The legal definitions vary among states: Some require that the perpetrator make a credible threat of violence against the victim while others require only that the stalker’s conduct constitute an implied threat.

- There have been criminal prosecutions and civil lawsuits arising out of physical stalking or harassment of news media figures.
  - Sports journalist Erin Andrews was awarded $55 million in her civil lawsuit, alleging privacy violations, emotional distress, and negligence, against an individual who recorded her through hotel peepholes and then posted nude video of her online, and the owner and former operator of a Marriott where one of the recordings was made. See Third Amended Compl., Andrews v. Marriott Int’l, Inc., No. 11C-4831 (Tenn. Cir. Ct. 2010), http://thesmokinggun.com/file/erin-andrews-75m; see also Daniel Victor, Erin Andrews Awarded $55 Million in Lawsuit Over Nude Video at Hotel, N.Y. Times (Mar. 7, 2016), https://www.nytimes.com/2016/03/08/business/media/erin-andrews-awarded-55-million-in-lawsuit-over-nude-video-at-hotel.html. Prior to Andrews’ initiation of the civil suit, her stalker was convicted in federal court and sentenced to 2.5 years imprisonment. See Andrews’ stalker gets 2½ years in prison, Associated Press (Mar. 15, 2010), http://www.espnn.com/espn/news/story?id=4998324.
  
  - A Los Angeles man who made over a dozen threatening phone calls to the Boston Globe was indicted and, as of this publication, had pled not guilty in a federal court. See Man Charged With Threatening Boston Globe Reporters Pleads Not Guilty, CBS (Sept. 24, 2018), https://boston.cbslocal.com/2018/09/24/boston-globe-threats-indictment-robert-chain-president-trump/.

*Harassment Online*

- As the world migrated online, so too did harassment. Members of the news media may become victims of numerous forms of online harassment or even cyber-stalking. Journalists are frequent targets of such harassment because of the public nature of their work. The current political atmosphere has contributed to the hostility directed toward the media, including online.

*Prevalence of the Harassment Online*

- According to a July 2017 report published by the Pew Research Center, 41% Americans have experienced online harassment. See Maeve Duggan, Online Harassment 2017, Pew Research Center (July 11, 2017), https://www.pewinternet.org/2017/07/11/online-harassment-2017. 1 in 5 have endured severe forms of harassment, such as physical
threats, stalking, and/or sexual harassment. And women journalists endure harassment and other commentary that is uniquely sexual and pervasive. See Gina Masulla Chen et al, *Women Journalists and Online Harassment* (Apr. 2018), The University of Texas at Austin Center for Media Engagement, [https://mediaengagement.org/research/women-journalists/](https://mediaengagement.org/research/women-journalists/).

- When asked about the most effective way to stop the problem of online harassment, thirty-one percent of respondents in the Pew survey believed that stronger online harassment laws were the most effective way. The only response that rated higher was better tools and policies by the online companies (35%).

- It is by now clear that, especially for people in the public eye such as working journalists:
  - There is no more “IRL” versus online. For many, the online experience is an integral part of professional and personal life, and there is no meaningful divide.
  - The people who engage in online harassment may also target journalists physically.
    - Cesar Sayoc, arrested for sending 14 undetonated bombs to prominent Donald Trump critics, was active online and, in particular, posted hostile racist content, although to date there is no allegation he engaged in targeted online harassment of any specific individual.

**Legal Treatment of Online Harassment**

- Typically, harassment, stalking, privacy, and similar claims will fall under state law. Nearly all states have updated existing states to expressly prohibit electronic harassment, or have codified laws on cyberbullying:
  - Under California’s anti-stalking law: “Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear
for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking.”

- Here, “harasses” means “engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose,” and “credible threat” means “a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. Constitutionally protected activity is not included within the meaning of ‘credible threat.’” Cal. Pen. Code 646.9 (emphasis added).

- Other states have adopted similar or identical language. See, e.g., Florida Code 784.048.

- New York has adopted a model sexual harassment policy that recognizes the impact of third party sexual harassment, defining a “perpetrator of sexual harassment” as “a superior, a subordinate, a coworker or anyone in the workplace including an independent contractor, contract worker, vendor, client, customer or visitor…” See Model Sexual Harassment Policy, New York State, https://www.ny.gov/combating-sexual-harassment-workplace/employers.

- First Amendment limits to cyberbullying and electronic harassment laws:
  - The New York Court of Appeals overturned a county law criminalizing cyberbullying, finding it overbroad and in violation of the First Amendment. See People v. Marquan M., 2014 WL 2931482 (Ct. App. NY July 1, 2014). It appears to be the first case in which a U.S. court weighed the constitutionality of criminalizing cyberbullying.
  - In a case arising out of the suicide of a young girl following online targeting by the mother of a classmate, a federal court vacated the jury verdict finding the mother guilty of a misdemeanor violation of the Computer Fraud and Abuse Act. See United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009). The jury had acquitted on three other more serious counts.) The court determined that the alleged conduct of the mother—violations of MySpace’s terms of service—did not run afoul of the Act. The government did not appeal.

**Steps by News Organizations to Combat Harassment Online**

- News organizations can take steps to protect their employees from online harassment, or minimize the disruption it produces.
PEN America has released an Online Harassment Field Manual, https://onlineharassmentfieldmanual.pen.org, with sections for working journalists and for employer news organizations. In particular, it recommends that employers:

- Adopt social media policies that provide guidance on how an employee should use social media, including engagement with the public, retweeting, blocking or muting other users, and expressing views.
- Consider relief valve mechanisms that give employees a break from social media or designate someone else within the company to manage an employee’s social media account during periods of hostile activity.
- Consider giving employees access to physical security support personnel.

BuzzFeed recommends its journalists take certain steps as well:

- Maintain public-facing and private social media accounts; during periods of hostile activity, a public account can provide a “shield” and draw the focus away from private accounts.
- Keep private information—including address, email addresses and other information—closely held.
BUZZFEED’S GUIDE TO ONLINE HARASSMENT

LET US KNOW. Contact security@buzzfeed.com if you’re being harassed, or if you believe you may be targetted in the future. Take screenshots of any concerning messages. Our first recommendation in most situations will be to complete BuzzFeed’s Digital Security Basics Guide.

1 Keep your private life, private.
Make sure your personal Facebook profile is for friends and family only — not the world. Lock your Instagram account. We want to reduce the amount of personal information that is publicly available. This information can include your home address, mobile number, and identities of family members. Eliot Stempf (eliot.stempf@buzzfeed.com) and Jason Reich (jason.reich@buzzfeed.com) are available to assist.

2 ... But keep your public life, public.
Do not lock your Twitter account or deactivate your public Facebook page (not to be confused with your personal Facebook profile!). Your public-facing social media accounts and BuzzFeed e-mail are there to “shield” your private social media.

3 Get some help from your friends.
Your public-facing social media is a shield for your personal life, but managing it while being harassed can take a toll on your emotional and psychological wellbeing. Designate a social media co-pilot (a friend or colleague) to take the keys to your accounts for a few days. They can keep track of any messages you might receive, report the trolls, and keep things in order.

KNOW WHAT’S AHEAD. The harassment will subside. In the meantime, it’s essential to support and care for yourself. Contact your HR business partner to learn what resources are available to you.
Topic: Tension Between Free Speech and Blocking Speech
by Lo-Mae Lai, Airbnb, Inc.

Statutory Protection from Liability for Banning Users


- Zeran v. American Online, Inc., 129 F.3d 327 (4th Cir. 1997): Interpreting 47 U.S.C. § 230 to not only provide immunity from blocking offensive material, but also for failing to block offensive material.

- Whether social media sites should prioritize removal of offensive material or avoiding censorship of users’ speech under 47 U.S.C. § 230. See Kate Klonick, The New Governors: The People, Rules, and Processes Governing Online Speech, 131 Harv. L. Rev. 1598, 1604-09 (April 2018) for a discussion of the paradox in the application of 47 USC § 230 to both encourage the removal of certain content and to avoid removal of content that may result in censorship of users.

Social Media Sites’ Moderation of Content

- Because of § 230 immunity, social media sites can chose which values they want to protect in regards to speech on the internet. Social media sites address concerns about free speech and the collateral censorship issue that was raised by the Zeran case when determining how to moderate their systems. See Klonick, supra, at 1618-25 for an in-depth discussion of the evolution of social media sites’ moderation systems based on American free speech norms.

- Social media sites moderate their content because of corporate responsibility and identity and economic reasons. See Klonick, supra, at 1625-30 for an in-depth discussion of these issues.

First Amendment Liability

- Relevant case law indicates that social media sites should not be considered state actors and should not face liability for barring users.
  - A private party will be considered a state actor if it provides a government function. Courts have held that social media platforms do not perform a public function and, therefore, cannot be considered to “stand in the shoes of the “State.” Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 436, 442 (E.D. PA 1996); see also Klonick, supra, at 1609-11.
  - In a 2017 Supreme Court case, the Court noted that social media sites constitute the “modern public square” and that cyberspace is the most important place for the exchange of views in modern society. Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (striking down a North Carolina law that banned registered sex offenders from certain social media sites).
  - Courts have not interpreted Packingham to find that social media sites can be liable for First Amendment violations. “Private activity becomes a ‘public function’ only if that action has been ‘traditionally the exclusive prerogative of"
the State.’” Prager University v. Google LLC, 2018 WL 1471939 (N.D. Cal. 2018). In Prager, the court dismissed plaintiff’s federal causes of action based on allegations that Youtube and Google censored videos that plaintiff had uploaded to Youtube because of plaintiff’s conservative political identity and viewpoint. The court rejected the argument that Youtube should be considered “a public forum dedicated to freedom of expression to all.” The court noted that Packingham did not address whether private social media corporations are state actors that must regulate their content in accordance with the First Amendment.

- While the social media sites are not considered a public forum, individual user accounts may be considered a public forum. Knight First Amendment Institute v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018). In this case, the court noted that Twitter is a private company but that Trump’s Twitter account should be considered a public forum.

- Whether Supreme Court Will Expand Public Forum Designation to Social Media Sites with the Manhattan Community Access Corp. Case.

  - The Second Circuit decision: In Halleck v. Manhattan Community Access Corp., 882 F.3d 300 (2d Cir. 2018), the Second Circuit held that a public access channel may be considered a public forum. While operated by a private non-profit corporation, the Second Circuit found a sufficient connection to government authority to make corporation a state actor (the Manhattan Borough president designated the corporation to run the channel).

  - Petition for Writ of Certiorari/Reply Brief: The petitioners argue that the Second Circuit opinion would expand the definition of state action and public forum to include social media sites because of federal and state laws regulating the sites, because the government created the Internet, and because social media sites are utilized by all levels of government. In their reply brief, petitioners discuss Alex Jones’ ban as a reason the Court should grant cert.

  - Amicus Brief: Makes argument that the Second Circuit’s decision could expand the definition of public forums to include social media sites because some companies have partnered with municipalities. It also cites to the Knight First Amendment Institute case as an example of courts giving new life to lawsuits against social media sites based on the First Amendment.

  - Respondents’ Brief: The respondent distinguishes social media sites from the regulations in place for the particular cable station at issue in this case and argue that social media sites are protected by 47 U.S.C. § 230. Respondents also explain that the Knight First Amendment Institute court only cited to the Second Circuit’s decision for a general proposition and did not use that case in its analysis of the First Amendment’s applicability to Twitter.
The Importance of Social Media Platforms

- In one of his last landmark First Amendment decisions for the Supreme Court, Justice Kennedy observed that among the “vast democratic forums of the Internet,” social media platforms are the “most important places . . . for the exchange of views” today. Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) (internal quotations and citation omitted). In particular, social media platforms like Facebook and Twitter provide “perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.” Id. at 1737. Through social media, citizens “can petition their elected representatives and otherwise engage them in a direct manner”—that is, they can interact with public officials in much the same way as they could at a town hall. Id. at 1735.

- Public officials across the country have harnessed the power of social media platforms to speak directly to their constituents and to enable their constituents to respond to them and interact with one another. President Trump communicates with the American people through numerous social media platforms, including Facebook, Instagram, YouTube—and most famously, Twitter.


- As public officials’ use of social media accounts has grown, disputes have arisen about the scope of individuals’ First Amendment right to access and post comments on those accounts. Some public officials—from across the political spectrum—have adopted the practice of blocking from their social media accounts individuals who disagree with them or criticize their official decisions.

- President Trump has blocked his critics from communicating with him on his Twitter account, @realDonaldTrump. The Governors of Maine, Maryland, and Kentucky have also reportedly blocked hundreds of users from their official Twitter and Facebook accounts. Records released by the State of California indicate that its governor has blocked “more than 1,500 individual accounts” from his official Twitter and Facebook accounts. See FAC Prompts Disclosure of California Governor Jerry Brown’s Social Media “Block Lists,” First Amendment Coalition (Sept. 26, 2017), https://firstamendmentcoalition.org/2017/09/fac-prompts-disclosure-california-governor-jerry-browns-social-media-block-lists.

Enforcement of the Right of Access/Comment

- To date, a handful of courts have addressed the question of whether and in what circumstances a public official’s blocking of an individual from his or her social media account violates the First Amendment.

  o Seven individual plaintiffs blocked by the President from his @realDonaldTrump account sued the President and his social media director, Dan Scavino, alleging that the blocking violated the First Amendment and seeking declaratory and injunctive relief. The Knight Institute, which represented the plaintiffs, also asserted a First Amendment claim based on its inability to read dissenting voices in the @realDonaldTrump comment threads because of the blocking. The DOJ and the plaintiffs filed a joint stipulation of facts establishing, among other things, that it was undisputed that the President personally blocked the seven plaintiffs based on their viewpoints.

  o On May 23, 2018, the district court granted summary judgment in favor of plaintiffs, issuing a declaration that “the blocking of the individual plaintiffs from the @realDonaldTrump account because of their expressed political views violates the First Amendment.”

  o The court held that the “interactive space” associated with each tweet from the @realDonaldTrump account—meaning the space where users can reply directly to the President—constituted a “public forum” for First Amendment purposes. The court rejected the defendants’ argument that the @realDonaldTrump account was a personal, not government, account, and therefore not subject to the First Amendment. Instead, the court found that “the President presents the @realDonaldTrump account as being a presidential account as opposed to a personal account, and more importantly, uses the account to take actions that can be taken only by the President as President.” Therefore, “because the President and Scavino use the @realDonaldTrump account for governmental functions,” they exercise governmental control over the relevant aspects of the forum. The district court concluded that the interactive space is a designated public forum because it is consistent with expressive activities and because the President and his staff hold the @realDonaldTrump account open to the public at large on a social media platform that is undeniably compatible with expressive activity. The court also rejected the defendants’ argument that speech within the interactive space is government speech that is not subject to the rule of viewpoint neutrality, concluding that the “replies to the President’s tweets remain the private speech of the replying user.”

  o Having held that defendants had created a public forum, the court held that, in blocking the individual plaintiffs from accessing the @realDonaldTrump account, defendants had “indisputably” engaged in unconstitutional viewpoint discrimination. The court also held that the defendants’ unlawful blocking of the individual plaintiffs from the @realDonaldTrump account violated the Knight Institute’s right to read their dissenting views in the “interactive space” associated with the account.

  o The President and Scavino appealed the decision, which is now pending before the Second Circuit, with a decision expected later this year.
  
  o Brian Davison, a Loudoun County parent and politically active citizen, filed suit *pro se* against Phyllis Randall, Chair of the Loudoun County Board of Supervisors, after Randall blocked Davison from her “Chair Phyllis J. Randall” Facebook page. As in the case involving President Trump, Randall argued that the “Chair Phyllis J. Randall” page was not subject to the First Amendment because it was a personal, not government, account. In 2017, the district court ruled in Davison’s favor and granted him declaratory relief. The court rejected Randall’s argument that her page was not subject to the First Amendment, finding instead based on evidence introduced in a one-day bench trial that Randall used her “Chair Phyllis J. Randall” Facebook page as a “tool of governance” in furtherance of her official duties. The court then concluded that Randall had operated her Facebook page as a public forum because she allowed the public at large to place comments on the page, without any restriction as to speakers or subject matters. The court held that Randall’s temporary ban of Davison was based on impermissible viewpoint discrimination, which is unlawful in any type of forum, and determined that declaratory relief was sufficient to remedy Davison’s constitutional injury.

  
  o Two individuals sued Maine governor Paul LePage after they were banned from commenting on or sharing posts from his “Paul LePage, Maine’s Governor” Facebook page. LePage moved to dismiss the complaint, arguing that he had set up his Facebook page as a “politician” before he was elected governor, and therefore his actions of banning the plaintiffs could not be considered state action to support a First Amendment claim. The district court denied the motion to dismiss, holding that the complaint’s allegations that the governor used his Facebook page to conduct official business were sufficient to allege state action. The court also rejected LePage’s argument that his Facebook page represented government speech because he effectively “curated” comments by private individuals on his Facebook page when he decided to block them or not.

  
  o Two individuals blocked by Kentucky governor Matt Bevin from his official Twitter and Facebook accounts filed First Amendment claims and sought a preliminary injunction requiring that he unblock them. The district court denied the motion for preliminary relief, holding that the plaintiffs were unlikely to prevail on their claims. Although the governor’s attorneys conceded that the accounts were limited public forums, the district court opined that the social media accounts were not forums at all but instead represented governor’s “persona” speech as a public official.
MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

This case requires us to consider whether a public official may, consistent with the First Amendment, "block" a person from his Twitter account in response to the political views that person has expressed, and whether the analysis differs because that public official is the President of the United States. The answer to both questions is no.

Our analysis proceeds as follows. We first set forth the background facts regarding Twitter as a platform, the @realDonaldTrump account that is the center of this dispute, the plaintiffs, and this case's procedural history. Because defendants object to our adjudication of this case based on plaintiffs' lack of standing, we then turn — as we must — to the consideration of those jurisdictional arguments. We conclude that the plaintiffs have established the prerequisites to our jurisdiction: they have experienced a legally cognizable injury, those injuries are traceable to the President and Daniel Scavino's conduct, and a favorable judicial decision on the merits is likely to redress those injuries.

We then proceed to the substance of plaintiffs' First Amendment claims. We hold that portions of the @realDonaldTrump account — the "interactive space" where Twitter users may directly engage with the content of the President's tweets — are properly analyzed under the "public forum" doctrines set forth by the Supreme Court, that such space is a designated public forum, and that the blocking of the plaintiffs based on their political speech constitutes viewpoint discrimination that violates the First Amendment. In so holding, we reject the defendants' contentions that the First Amendment does not apply in this case and that the President's personal First Amendment interests supersede those of plaintiffs.
Finally, we consider what form of relief should be awarded, as plaintiffs seek both declaratory relief and injunctive relief. While we reject defendants’ categorical assertion that injunctive relief cannot ever be awarded against the President, we nonetheless conclude that it is unnecessary to enter that legal thicket at this time. A declaratory judgment should be sufficient, as no government official — including the President — is above the law, and all government officials are presumed to follow the law as has been declared.

I. Background

The facts presented below are drawn almost entirely from the stipulation of facts between the parties, see Stipulation, Sept. 28, 2017, ECF No. 30-1, which "applies exclusively to this litigation and does not constitute an admission for purposes of any other proceeding," Stip. at 1.[1]

A. The Twitter Platform

"Twitter is a social media platform with more than 300 million active users worldwide, including some 70 million in the United States." Stip. ¶ 13. A "user" is an individual who has created an account on the platform." Stip. ¶ 14. "A Twitter user must have an account name, which is an @ symbol followed by a unique identifier (e.g., @realDonaldTrump), and a descriptive name (e.g., Donald J. Trump). The account name is called the user's 'handle.'" Stip. ¶ 16.

Twitter "allows users to post short messages," Stip. ¶ 13, which are called "tweets," Stip. ¶ 14. Tweets may be "up to [280] characters in length,"[2] may "include photographs, videos, and links," and are posted "to a webpage on Twitter that is attached to the user's account." Stip. ¶ 14. "An individual 'tweet' comprises the tweeted content (i.e., the message, including any embedded photograph, video, or link), the user's account name (with a link to the user's Twitter webpage), the user's profile picture, the date and time the tweet was generated, and the number of times the tweet has been replied to ..., retweeted by ..., or liked by ... other users." Stip. ¶ 17.

The Twitter webpage that displays the collection of a user's tweets is known as the user's "timeline." Stip. ¶ 15. "When a user generates a tweet, the timeline updates immediately to include that tweet," and "[a]nyone who can view a user's Twitter webpage can see the user's timeline." Stip. ¶ 15. "A user's Twitter webpage may also include a short biographical description; a profile picture, such as a headshot; a 'header' image, which appears as a banner at the top of the webpage; the user's location; a button labeled 'Message,' which allows two users to correspond privately; and a small sample of photographs and videos posted to the user's timeline, which link to a full gallery." Stip. ¶ 16. "By default, Twitter webpages and their associated timelines are visible to everyone with internet access, including those who are not Twitter users. However, although non-users can view users' Twitter webpages (if the accounts are public), they cannot interact with users on the Twitter platform." Stip. ¶ 18.

A defining feature of Twitter is a user's ability "to repost or respond to others' messages, and to interact with other Twitter users in relation to those messages." Stip. ¶ 13. "Beyond posting tweets ..., Twitter users can engage with one another in a variety of ways." Stip. ¶ 21. First, "they can `retweet' — i.e., repost — the tweets of other users, either by posting them directly to their own followers or by `quoting' them in their own tweets. When a user retweets a tweet, it appears on the user's timeline in the same form as it did on the original user's timeline, but with a notation indicating that the post was retweeted." Stip. ¶ 21. Second, "[a] Twitter user can also reply to other users' tweets. Like any other tweet, a reply can be up to [280] characters
an in length and can include photographs, videos, and links." Stip. ¶ 22. This reply may be viewed in two places: "551 when a user sends a reply, "the reply appears on the user's timeline under a tab labeled 'Tweets & replies.'" However, the reply may also be accessed from the feed of the user sending the tweet being replied to: "by clicking on the tweet that prompted the reply[,] the reply will appear below the original tweet, along with other users' replies to the same tweet." Stip. ¶ 22. Third, "[a] Twitter user can also 'favorite' or 'like' another user's tweet by clicking on the heart icon that appears under the tweet. By 'liking' a tweet, a user may mean to convey approval or to acknowledge having seen the tweet." Stip. ¶ 24. Fourth, "[a] Twitter user can also 'mention' another user by including the other user's Twitter handle in a tweet. A Twitter user mentioned by another user will receive a 'notification' that he or she has been mentioned in another user's tweet." Stip. ¶ 25. Finally, "Twitter users can subscribe to other users' messages by 'following' those users' accounts. Users generally can see all tweets posted or retweeted by accounts they have followed." Stip. ¶ 19. "Tweets, retweets, replies, likes, and mentions are controlled by the user who generates them. No other Twitter user can alter the content of any retweet or reply, either before or after it is posted. Twitter users cannot prescreen tweets, replies, likes, or mentions that reference their tweets or accounts." Stip. ¶ 26.

Because a retweet or a reply to a tweet is itself a tweet, each retweet and reply, recursively, may be retweeted, replied to, or liked. "A Twitter user can also reply to other replies. A user whose tweet generates replies will see the replies below his or her original tweet, with any replies-to-replies nested below the replies to which they respond. The collection of replies and replies-to-replies is sometimes referred to as a 'comment thread.'" Stip. ¶ 23. "Twitter is called a 'social' media platform in large part because of comment threads, which reflect multiple overlapping 'conversations' among and across groups of users." Stip. ¶ 23.

In addition to these means of interaction, Twitter offers two means of limiting interaction with other users: blocking and muting. First, "[a] user who wants to prevent another user from interacting with her account on the Twitter platform can do so by 'blocking' that user. (Twitter provides users with the capability to block other users, but it is the users themselves who decide whether to make use of this capability.) When a user is signed in to a Twitter account that has been blocked, the blocked user cannot see or reply to the blocking user's tweets, view the blocking user's list of followers or followed accounts, or use the Twitter platform to search for the blocking user's tweets. The blocking user will not be notified if the blocked user mentions her or posts a tweet; nor, when signed in to her account, will the blocking user see any tweets posted by the blocked user." Stip. ¶ 28. "If, while signed in to the blocked account, the blocked user attempts to follow the blocking user, or to access the Twitter webpage from which the user is blocked, the blocked user will see a message indicating that the other user has blocked him or her from following the account and viewing the tweets associated with the account." Stip. ¶ 29.

While blocking precludes the blocked user from directly interacting with the blocking user's tweets — including from replying or retweeting those tweets, blocking does not eliminate all interaction between the blocked user and the blocking user. "After a user has been blocked, the blocked user can still mention the blocking user. Tweets mentioning the blocking user will be visible to anyone who can view the blocked user's tweets and replies. A blocked user can also reply to users who have replied to the blocking user's tweets, "552 although the blocked user cannot see the tweet by the blocking user that prompted the original reply. These replies-to-replies will appear in the comment thread, beneath the reply to the blocking user's original tweet." Stip. ¶ 30. Further, "[i]f a blocked user is not signed in to Twitter, he or she can view all of the content on Twitter that is accessible to anyone without a Twitter account." Stip. ¶ 31.

As distinguished from blocking, "[m]ut[ing] is a feature that allows [a user] to remove an account's Tweets from [his or her] timeline without unfollowing or blocking that account. Muted accounts will not know that
[the muting user has] muted them and [the muting user] can unmute them at any time." How to Mute Accounts on Twitter, Twitter (last visited May 22, 2018), https://help.twitter.com/en/using-twitter/twitter-mute [hereinafter How to Mute].[3] "Muted accounts can follow [the muting user] and [the muting user] can follow muted accounts. Muting an account will not cause [the muting user] to unfollow them." Id. If a muting user follows a muted user, "[r]eplies and mentions by the muted account will still appear in [the muting user's] Notifications tab," and "[w]hen [the muting user] click[s] or tap[s] into a conversation, replies from muted accounts will be visible." Id. By contrast, if a muting user does not follow a muted user, "[r]eplies and mentions will not appear in [the muting user's] Notifications tab," and "[w]hen [the muting user] click[s] or tap[s] into a conversation, replies from muted accounts will be not visible." Id.

B. The @realDonaldTrump Account

"Donald Trump established @realDonaldTrump in March 2009. Before his inauguration, he used this account to tweet about a variety of topics, including popular culture and politics. Since his inauguration in January 2017, President Trump has used the @realDonaldTrump account as a channel for communicating and interacting with the public about his administration. He also has continued to use the account, on occasion, to communicate about other issues not directly related to official government business." Stip. ¶ 32. "The Twitter page associated with the account is registered to Donald J. Trump, '45th President of the United States of America, Washington, D.C.'" Stip. ¶ 35. "The @realDonaldTrump account is generally accessible to the public at large without regard to political affiliation or any other limiting criteria." Stip. ¶ 36. 

"[A]ny member of the public can view his tweets without being signed in to Twitter, and anyone who wants to follow the account can do so. President Trump has not issued any rule or statement purporting to limit (by form or subject matter) the speech of those who reply to his tweets." Stip. ¶ 36.

Since the President's inauguration, the @realDonaldTrump account has been operated with the assistance of defendant Daniel Scavino, "the White House Social Media Director and Assistant to the President [who] is sued in his official capacity only." Stip. ¶ 12. "With the assistance of Mr. Scavino in certain instances, President Trump uses @realDonaldTrump, often multiple times a day, to announce, describe, and defend his policies; to promote his Administration's legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; to challenge media organizations whose coverage of his Administration he believes to be unfair; and for other statements, including on occasion statements unrelated to official government business. *553 President Trump sometimes uses the account to announce matters related to official government business before those matters are announced to the public through other official channels." Stip. ¶ 38. "For example, the President used @realDonaldTrump to announce on June 7, 2017, for the first time, that he intended to nominate Christopher Wray for the position of FBI director." Stip. ¶ 38. Since the parties' stipulation, the President has also used the @realDonaldTrump account in removing then-Secretary of State Rex Tillerson[4] and then-Secretary of Veterans Affairs David Shulkin.[5] Additionally, "[t]he National Archives and Records Administration has advised the White House that the President's tweets from @realDonaldTrump... are official records that must be preserved under the Presidential Records Act." Stip. ¶ 40.

"Mr. Scavino in certain instances assists President Trump in operating the @realDonaldTrump account, including by drafting and posting tweets to the account. Other White House aides besides Mr. Scavino will, in certain instances, also suggest content for @realDonaldTrump tweets. President Trump also sometimes dictates tweets to Mr. Scavino, who then posts them on Twitter. President Trump and/or Mr. Scavino sometimes retweet the tweets of those who participate in comment threads associated with the
@realDonaldTrump account.” Stip. ¶ 39. "Mr. Scavino has access to the @realDonaldTrump account, including the access necessary to block and unblock individuals from the @realDonaldTrump account," Stip. ¶ 12, and has explained that @realDonaldTrump is a channel “through which President Donald J. Trump ... [c]ommunicat[es] directly with you, the American people!” Stip. ¶ 37 (alterations and omissions in original).

Twitter users engage frequently with the President's tweets. “Typically, tweets from @realDonaldTrump generate thousands of replies from members of the public, and some of those replies generate hundreds or thousands of replies in turn.” Stip. ¶ 41. "For example, on July 26, 2017, President Trump issued a series of tweets... announcing 'that the United States Government will not accept or allow ... Transgender individuals to serve' in the military, and after less than three hours, the three tweets, collectively, had been retweeted nearly 70,000 times, liked nearly 180,000 times, and replied to about 66,000 times.” Stip. ¶ 41 (second omission in original). "This level of engagement is typical for President Trump's tweets," Stip. ¶ 42, which "frequently receive 15,000-20,000 retweets or more," Stip. ¶ 42, and "are each replied to tens of thousands of times," Stip. ¶ 43.

C. The Individual Plaintiffs

Rebecca Buckwalter, Philip Cohen, Holly Figueroa, Eugene Gu, Brandon Neely, Joseph Papp, and Nicholas Pappas (collectively, the "individual plaintiffs"), are all Twitter users. Stip. ¶¶ 2-8. They each tweeted a message critical of the President or his policies in reply to a tweet from the @realDonaldTrump account. Stip. ¶¶ 46-52. Each individual plaintiff had his or her account blocked shortly thereafter, and each account remains blocked. Stip. ¶¶ 46-52. Defendants do “not contest Plaintiffs’ allegation that the Individual Plaintiffs were blocked from the President's Twitter account because the Individual Plaintiffs posted tweets that criticized the President or his policies.” Stip. at 1.

"As a result of the President's blocking of the Individual Plaintiffs from @realDonaldTrump, the Individual Plaintiffs cannot view the President's tweets; directly reply to these tweets; or use the @realDonaldTrump webpage to view the comment threads associated with the President's tweets while they are logged in to their verified accounts." Stip. ¶ 54. However, "[t]he Individual Plaintiffs can view tweets from @realDonaldTrump when using an internet browser or other application that is not logged in to Twitter, or that is logged in to a Twitter account that is not blocked by @realDonaldTrump." Stip. ¶ 55. Additionally, "[s]ome of the Individual Plaintiffs have established second accounts so that they can view the President's tweets." Stip. ¶ 56.

Blocking does not completely eliminate the individual plaintiffs' ability to interact with the President's tweets. "The Individual Plaintiffs can view replies to @realDonaldTrump tweets, and can post replies to those replies, while logged in to the blocked accounts. Replies-to-replies appear in the comment threads that originate with @realDonaldTrump tweets and are visible to users who have not blocked (or been blocked by) the Individual Plaintiffs." Stip. ¶ 57. "Although the Individual Plaintiffs who have been blocked have the ability to view and reply to replies to @realDonaldTrump tweets, they cannot see the original @realDonaldTrump tweets themselves when signed in to their blocked accounts, and in many instances it is difficult to understand the reply tweets without the context of the original @realDonaldTrump tweets." Stip. ¶ 58. While "[i]n the past, Plaintiffs Holly Figueroa, Eugene Gu, and Brandon Neely used a third-party service called Favstar that could be used by blocked users to view and reply to a blocking account's tweets if the blocked user established a Favstar account and followed certain steps[,] [t]he parties' understanding is
that it is no longer possible for blocked users to use the Favstar service to view and reply to a blocking account's tweets." Stip. ¶ 59.

These workarounds "require [the individual plaintiffs] to take more steps than non-blocked, signed-in users to view the President's tweets." Stip. ¶ 55. "All of the Individual Plaintiffs have found these various `workarounds' to be burdensome and to delay their ability to respond to @realDonaldTrump tweets. As a result, four of the Individual Plaintiffs do not use them and the others use them infrequently." Stip. ¶ 60.

D. The Knight Institute

The "Knight First Amendment Institute at Columbia University is a 501(c)(3) organization that works to defend and strengthen the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. Staff at the Knight First Amendment Institute operate a Twitter account under the handle @knightcolumbia, and this account follows @realDonaldTrump." Stip. ¶ 1. In contrast to the individual plaintiffs, "[t]he Knight Institute has not been blocked from the @realDonaldTrump account." Stip. ¶ 61. However, "[t]he Knight Institute desires to read comments that otherwise would have been posted by the blocked Plaintiffs, and by other accounts blocked by @realDonaldTrump, in direct reply to @realDonaldTrump tweets," Stip. ¶ 61, and "[t]he @knightcolumbia account follows Professor Cohen's account, @familyunequal," Stip. ¶ 62. "As of August 22, 2017," however, "the Knight Institute did *555 not follow the other six Individual Plaintiffs on Twitter." Stip. ¶ 62.

E. Procedural History

The Knight Institute and the individual plaintiffs filed suit in July 2017, seeking declaratory and injunctive relief and naming the President, Scavino, and then-White House Press Secretary Sean Spicer as defendants. Compl., July 11, 2017, ECF No. 1. After Spicer's resignation in late July 2017, his successor as White House Press Secretary, Sarah Huckabee Sanders, and White House Communications Director Hope Hicks were substituted in his place pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.[6] See Letter from Jameel Jaffer and Michael H. Baer to the Court, Sept. 25, 2017, ECF No. 28. After entering into the stipulation of facts, defendants moved for summary judgment on October 13, 2017 and plaintiffs cross-moved for summary judgment on November 3, 2017. We heard oral argument on March 8, 2018.

II. Standing

Before turning to the merits of this dispute, "we are required to assure ourselves of jurisdiction." Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J., 760 F.3d 227, 237 n.11 (2d Cir. 2014). At bottom, the "judicial Power of the United States" is constitutionally limited to "Cases" and "Controversies." U.S. Const. art. III, § 2. Because "[s]tanding to sue is a doctrine rooted in the traditional understanding of a case or controversy," Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016), "[w]hether a claimant has standing is the threshold question in every federal case, determining the power of the court to entertain the suit," Fair Hous. in Huntington Comm. Inc. v. Town of Huntington, 316 F.3d 357, 361 (2d Cir. 2003). "If plaintiffs lack Article III standing, a court has no subject matter jurisdiction to hear their claim." Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 433 F.3d 181, 198 (2d Cir. 2005).
The Supreme Court has "established that the `irreducible constitutional minimum' of standing consists of three elements." Spokeo, 136 S.Ct. at 1547 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Id. "The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements." Id. "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Defs. of Wildlife, 504 U.S. at 561, 112 S.Ct. 2130. "In response to a summary judgment motion, however, the plaintiff can no longer rest on such `mere allegations,' but must `set forth' by affidavit or other evidence `specific facts' supporting its standing." Id. (quoting Fed. R. Civ. P. 56(e)). Conversely, in order to grant summary judgment in a plaintiff's favor, there must be no genuine issue of material fact as to that plaintiff's standing.

Because "the standing inquiry requires careful judicial examination of ... whether the particular plaintiff is entitled to an adjudication of the particular claims asserted," Allen v. Wright, 468 U.S. 737, 752, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (emphasis added), standing must be assessed as to each plaintiff and each "plaintiff must demonstrate standing separately for each form of relief sought." Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167, 185, 120 S.Ct. 693, 195 L.Ed.2d 610 (2000). Further, because Article III does not "permit[] suits against non-injurious defendants as long as one of the defendants in the suit injured the plaintiff," standing must also be assessed as against each defendant. Mahon v. Ticor Title Ins. Co., 683 F.3d 59, 62 (2d Cir. 2012).

We consider the three elements of standing as to the individual plaintiffs before turning to the Knight Institute's standing.

A. Injury-in-Fact

"To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." Spokeo, 136 S.Ct. at 1548 (internal quotation marks omitted). However, "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." City of Los Angeles v. Lyons, 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (alteration and omission in original) (quoting O'Shea v. Littleton, 414 U.S. 488, 495-96, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)). Though "past wrongs" serve as "evidence bearing on whether there is a real and immediate threat of repeated injury," id. (internal quotation marks omitted), "[a] plaintiff seeking injunctive or declaratory relief cannot rely on past injury to satisfy the injury requirement," Deshawn E. ex rel. Charlotte E. v. Safir, 156 F.3d 340, 344 (2d Cir. 1998). Rather, that plaintiff "must show a likelihood that he or she will be injured in the future." Id.[2]

"Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes." Clapper v. Amnesty Intl USA, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (quotingDefs. of Wildlife, 504 U.S. at 565 n.2, 112 S.Ct. 2130). Therefore, "threatened injury must be `certainly impending' to constitute injury in fact" that satisfies Article III's requirements. Whitmore v. Arkansas, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (quotingBabbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). A "theory of standing [that] relies on a highly attenuated chain of possibilities[ ] does
Further, the injury must be concrete and particularized. "For an injury to be `particularized,' it `must affect the plaintiff in a personal and individual way.'" Spokeo, 136 S.Ct. at 1548 (quoting Defs. of Wildlife, 504 U.S. at 560 n.1, 112 S.Ct. 2130). The plaintiff "must have a personal stake in the outcome" and must assert "something more than generalized grievances." United States v. Richardson, 418 U.S. 166, 179-80, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974) (internal quotation marks omitted). An "impact on him [that] is plainly undifferentiated and common to all members of the public" is insufficient, id. at 176, 94 S.Ct. 2940 (internal quotation marks omitted), as is a mere "special interest" in a given problem without more, Sierra Club v. Morton, 405 U.S. 727, 739, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). At the same time, "standing is not to be denied simply because many people suffer the same injury." Massachusetts v. EPA, 549 U.S. 497, 526 n.24, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (quoting United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)). "The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance." Spokeo, 136 S.Ct. at 1548 n.7.

Concreteness "is quite different from particularization." Id. at 1548. "A `concrete' injury must be `de facto'; that is, it must actually exist." Id. The term "'[c]oncrete' is not, however, necessarily synonymous with 'tangible,'" and "'intangible injuries' — including infringements on the exercise of First Amendment rights — "can nevertheless be concrete." Id. at 1549 (citing Pleasant Grove City v. Summum, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009), and Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993)).

In this case, the record establishes a number of limitations on the individual plaintiffs' use of Twitter as a result of having been blocked. As long as they remain blocked, "the Individual Plaintiffs cannot view the President's tweets; directly reply to these tweets; or use the @realDonaldTrump webpage to view the comment threads associated with the President's tweets while they are logged in to their verified accounts." Stip. ¶ 54. While alternative means of viewing the President's tweets exist, Stip. ¶¶ 55-56, and the individual plaintiffs "have the ability to view and reply to replies to @realDonaldTrump tweets, they cannot see the original @realDonaldTrump tweets themselves when signed in to their blocked accounts, and in many instances it is difficult to understand the reply tweets without the context of the original @realDonaldTrump tweets," Stip. ¶ 58.

These limitations are cognizable injuries-in-fact. The individual plaintiffs' ability to communicate using Twitter has been encumbered by these limitations (regardless of whether they are harms cognizable under the First Amendment). Further, as long as the individual plaintiffs remain blocked, their ability to communicate using Twitter will continue to be so limited. Stip. ¶¶ 28-31, 54. The individual plaintiffs have experienced past harm in that their ability to use Twitter to interact with the President's tweets has been limited, and — absent some unforeseen change to the blocking functionality — they will continue to experience that harm as long as they are blocked. These future harms are not only certainly impending as required for standing purposes, but they are in fact virtually certain because the individual plaintiffs continue to be blocked.[8]

These injuries are also concrete and particularized. While they are not tangible in nature, these limitations are squarely within the "intangible injuries" previously determined to be concrete. See Spokeo, 136 S.Ct. at 1549. These limitations are also particularized, in that they have affected and will affect the individual
plaintiffs in a "personal and individual way" — each contends that his or her personal First Amendment rights have been and will continue to be encumbered, and the ability to communicate has been and will be limited because of each individual plaintiff's personal ownership of a Twitter account that was blocked. See id. at 1548. We accordingly conclude that the individual plaintiffs have established imminent injury-in-fact that is concrete and particularized, which is sufficient for Article III standing purposes.

B. Causation

The causation requirement demands that the complained-of injury "fairly can be traced to the challenged action of the defendant" as opposed to "injury that results from the independent action of some third party not before the court." Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976). While the Supreme Court has often defined the causation prong of standing with reference to a defendant's challenged action, it has also referred to a defendant's "conduct." See, e.g., Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979)). Accordingly, an omission may provide a basis for standing just as an affirmative action may. See Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.àr.l., 790 F.3d 411, 417 (2d Cir. 2015) (describing causation as requiring "that the injury was in some sense caused by the opponent's action or omission"); see also, e.g., Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity, 878 F.3d 371, 378 (D.C. Cir. 2017) (referring to a "defendant's action or omission").

"The traceability requirement for Article III standing means that the plaintiff must `demonstrate a causal nexus between the defendant's conduct and the injury.'" Rothstein v. UBS AG, 708 F.3d 82, 91 (2d Cir. 2013) (quoting Heldman v. Sobol, 962 F.2d 148, 156 (2d Cir. 1992)). "Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct." Lexmark Int'l, Inc. v. Static Control Components, Inc., ___ U.S. ___, 134 S.Ct. 1377, 1391 n.6, 188 L.Ed.2d 392 (2014).

1. Sarah Huckabee Sanders

Plaintiffs have not established standing against defendant Sanders. "Ms. Sanders does not have access to the @realDonaldTrump account," Stip. ¶ 11, and plaintiffs do not suggest that Sanders "blocked the individual plaintiffs in the first instance or that she could unblock the individual plaintiffs upon a legal finding that such blocking is constitutionally impermissible. Accordingly, plaintiffs do not challenge any action that Sanders has taken (or can take). The individual plaintiffs' injuries-in-fact are not attributable to Sanders, and they accordingly lack Article III standing to sue her. See, e.g., Simon, 426 U.S. at 41-42, 96 S.Ct. 1917. Summary judgment will therefore be granted in favor of defendant Sanders.

2. Daniel Scavino

In contrast to Sanders, "Mr. Scavino has access to the @realDonaldTrump account, including the access necessary to block and unblock individuals from the @realDonaldTrump account." Stip. ¶ 12. Indeed, "Mr. Scavino posts messages on behalf of President Trump to @realDonaldTrump and other social media accounts," Stip. ¶ 12, and "assists President Trump in operating the @realDonaldTrump account, including by drafting and posting tweets to the account," Stip. ¶ 39. While Scavino unquestionably has access to the
@realDonaldTrump account and participates in its operation, such involvement does not, by itself, establish that the plaintiffs' injuries may be fairly traced to an action taken by Scavino as required for standing purposes. The only evidence in the record as to Scavino pertains to this general involvement, and the record is devoid of any suggestion that he blocked the individual plaintiffs.

Nonetheless, the Second Circuit and several other Courts of Appeals have recognized that in cases seeking prospective relief, an official defendant's lack of personal involvement in past constitutional violations does not render that defendant an improper one for purposes of prospective declaratory or injunctive relief from continuing violations — provided that the defendant maintains some connection to, or responsibility for, the continuing violation. See Koehl v. Dalsheim, 85 F.3d 86, 89 (2d Cir. 1996) (holding that "the complaint also sought injunctive relief against [a defendant official], and dismissal of that claim was not warranted" despite the "lack of an allegation of personal involvement" warranting dismissal of a damages claim); Pugh v. Goord, 571 F. Supp.2d 477, 517 (S.D.N.Y. 2008) (Sullivan, J.) (requiring "only that a defendant have a `connection' with the [allegedly unconstitutional] act, and not more") (citing, inter alia, Dairy Mart Convenience Stores, Inc. v. Nickel (In re Dairy Mart Convenience Stores, Inc.), 411 F.3d 367, 372-73 (2d Cir. 2005)); Loren v. Levy, No. 00 Civ. 7687, 2003 WL 1702004, at *11 (S.D.N.Y. Mar. 31, 2003) (Chin, J.) ("[A]ctions involving claims for prospective declaratory or injunctive relief are permissible provided the official against whom the action is brought has a direct connection to, or responsibility for, the alleged illegal action." (quoting Davidson v. Scully, 148 F. Supp.2d 249, 254 (S.D.N.Y. 2001)), aff'd, 120 Fed.Appx. 393 (2d Cir. 2005); see also Parkell v. Danberg, 833 F.3d 313, 332 (3d Cir. 2016) ("Our conclusion that the State Defendants lacked personal involvement in past constitutional violations does not preclude [plaintiff] from obtaining prospective injunctive relief for ongoing violations."); Pouncil v. Tilton, 704 F.3d 568, 576 (9th Cir. 2012) (concluding that a named defendant official was a "proper defendant on a claim for prospective injunctive relief ... because he would be responsible for ensuring that injunctive relief was carried out, even if he was not personally involved in the decision giving rise to [plaintiff's] claims"); Gonzalez v. Feinerman, 663 F.3d 311, 315 (7th Cir. 2011) (per curiam) ("[S]ince [plaintiff] also seeks injunctive relief it is irrelevant whether [the defendant official] participated in the alleged violations.").

While this line of cases developed in the context of suits against state officials and the Ex parte Young exception to state sovereign immunity under the Eleventh Amendment, see In re Dairy Mart, 411 F.3d at 372-73; see also Finstuen v. Crutcher, 496 F.3d 1139, 1151 (10th Cir. 2007); Pennington Seed, Inc. v. Produce Exch. No. 299, 457 F.3d 1334, 1341-42 (Fed. Cir. 2006), it is no less applicable to the present context of suits against federal officials. As the Supreme Court has explained, suits seeking prospective relief against federal officials alleging continuing constitutional violations and those against state officials share common characteristics and a common historical basis: "we have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law. But that has been true not only with respect to violations of federal law by state officials, but also with respect to violations of federal law by federal officials." Armstrong v. Exceptional Child Ctr., Inc., ___ U.S. ___, 135 S.Ct. 1378, 1384, 191 L.Ed.2d 471 (2015) (citations omitted). "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." Id. (emphasis added).

The lack of a prior personal involvement requirement in actions seeking prospective relief does not vitiate standing's traceability requirement, as defendants suggest. The defendant official's connection to the ongoing violation, see, e.g., Parkell, 833 F.3d at 332; Pouncil, 704 F.3d at 576; Gonzalez, 663 F.3d at 315; Pugh, 571 F.Supp.2d at 517, satisfies the traceability requirement. Assuming the existence of an ongoing violation, an official who has some connection to the violation — i.e., one who may prospectively remedy it
— will contribute to the violation and the future injury-in-fact that it may inflict by failing to do so. Here, assuming that the blocking of the individual plaintiffs infringes their First Amendment rights, those rights will continue to be infringed as long as they remain blocked. Cf. Lyons, 461 U.S. at 102, 103 S.Ct. 1660 ("[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." (omission in original) (quoting O'Shea, 414 U.S. at 495-96, 94 S.Ct. 669)). Because Scavino has the ability to unblock the plaintiffs, any future injury will be traceable to him because it will have resulted, at least in part, from his failure to unblock them. Ultimately, as defendants' quoted authority explains, "[s]tanding should be recognized as long as the duty claim survives, but becomes irrelevant when litigation reaches the point of rejecting the duty." 13A Charles A. Wright et al., Federal Practice & Procedure, § 3531.5 (3d ed.) (Westlaw 2018). Because we must consider standing before the merits, we have not at this point in the analysis considered plaintiffs' claim that the First Amendment imposes a duty on Scavino to unblock the individual plaintiffs.[10] We therefore conclude *561 that the traceability requirement of standing is satisfied as to Scavino.

3. The President

The record definitively establishes that the plaintiffs' injuries-in-fact are directly traceable to the President's actions. "The President blocked [each of the individual plaintiffs] from the @realDonaldTrump account." Stip. ¶¶ 46-52; see also Stip. ¶ 54 (referring to "the President's blocking of the Individual Plaintiffs"). The causation requirement is therefore amply satisfied as to the President.

C. Redressability

In order for redressability to be satisfied, "it must be likely that a favorable judicial decision will prevent or redress the injury." Earth Island Inst., 555 U.S. at 493, 129 S.Ct. 1142. That is, redressability must be "likely, as opposed to merely speculative," Laidlaw, 528 U.S. at 181, 120 S.Ct. 693, but it "is not a demand for mathematical certainty," Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 602 (2d Cir. 2016) (quoting Toll Bros., Inc. v. Township of Readington, 555 F.3d 131, 143 (3d Cir. 2009)). "All that is required is a showing that such relief be reasonably designed to improve the opportunities of a plaintiff not otherwise disabled to avoid the specific injury alleged." Huntington Branch, NAACP v. Town of Huntington, 689 F.2d 391, 394 (2d Cir. 1982).

Further, any relief provided need not be complete. "The redressability element of the Article III standing requirement and the `complete relief' referred to by Rule 19 [of the Federal Rules of Civil Procedure] are not identical," Defs. of Wildlife, 504 U.S. at 570 n.4, 112 S.Ct. 2130 (emphasis omitted) (plurality opinion),[11] and a plaintiff "need not show that a favorable decision will relieve his every injury," Larson v. Valente, 456 U.S. 228, 244 n.15, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). As the Tenth Circuit has subsequently explained, "if the law required that the requested relief afford complete redress, the Supreme Court would not have allowed Massachusetts to proceed against the EPA, as there was no guarantee a favorable decision would mitigate future environmental damage, much less redress it completely." Consumer Data Indus. Ass'n v. King, 678 F.3d 898, 905 (10th Cir. 2012) (citing Massachusetts v. EPA, 549 U.S. at 526, 127 S.Ct. 1438); see also WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148, 1156 n.5 (9th Cir. 2015) ("Partial relief ... would qualify as redress for standing purposes." (citing Meese v. Keene, 481 U.S. 465, 476-77, 107 S.Ct. 1862, 95 L.Ed.2d 415 (1987))). "[E]ven if [plaintiffs] would not be out of the woods, a favorable decision would relieve their problem `to some extent,' which is all the law requires." Consumer Data, 678 F.3d at 903.
We therefore conclude that the plaintiffs' injuries may be redressed through declaratory relief or through injunctive relief directed at Scavino: the *562 plaintiffs' future injuries will be prevented if they are unblocked — an action within Scavino's power. Stip. ¶ 12. Nor is this redressability undercut, as defendants suggest, by the President's ability to block individuals. The D.C. Circuit has explained that "the partial relief [the plaintiff] can obtain against subordinate executive officials is sufficient for redressability, even recognizing that the President has the power, if he so chose, to undercut this relief," Swan v. Clinton, 100 F.3d 973, 980-81 (D.C. Cir. 1996), reasoning that has since been adopted by the Eleventh Circuit, see Made in the USA Found. v. United States, 242 F.3d 1300, 1309-11 (11th Cir. 2001). Any declaratory or injunctive relief as to Scavino that results in the unblocking of the individual plaintiffs will redress at least some of their future injury, regardless of whether the President could, theoretically, reblock them subsequently. And of course, "we may assume it is substantially likely that the President and other executive ... officials would abide by an authoritative interpretation of [a] ... constitutional provision by the District Court, even though they would not be directly bound by such a determination." Franklin v. Massachusetts, 505 U.S. 788, 803, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992) (plurality opinion); see also Utah v. Evans, 536 U.S. 452, 463-64, 122 S.Ct. 2191, 153 L.Ed.2d 453 (2002).[12] This substantial likelihood, though not a mathematical certainty, is more than sufficient to establish the redressability of plaintiffs' injuries.[13]

D. The Knight Institute's Organizational Standing

"Under [the] theory of 'organizational' standing, the organization is just another person — albeit a legal person — seeking to vindicate a right." N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286, 294 (2d Cir. 2012).[14] When organizations "sue on their own behalf, they must independently satisfy the requirements *563 of Article III standing." Knife Rights, Inc. v. Vance, 802 F.3d 377, 388 (2d Cir. 2015) (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)). Therefore, the Knight Institute, "as an organization, [bears] the burden of showing: (i) an imminent 'injury in fact' to itself as an organization (rather than to its members) that is 'distinct and palpable'; (ii) that its injury is 'fairly traceable' to [the complained-of act]; and (iii) that a favorable decision would redress its injuries." Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay, 868 F.3d 104, 109 (2d Cir. 2017) (quoting Nnebe v. Daus, 644 F.3d 147, 156 (2d Cir. 2011)).

Here, the Knight Institute has sufficiently established an injury-in-fact: the infringement of its desire "to read comments that otherwise would have been posted by the blocked Plaintiffs ... in direct reply to @realDonaldTrump tweets." Stip. ¶ 61. This infringement is a cognizable interest for standing purposes, cf. Defs. of Wildlife, 504 U.S. at 562-63, 112 S.Ct. 2130 ("[T]he desire to use or observe ... is undeniably a cognizable interest for purpose of standing"), and the Knight Institute's following of one of the individual plaintiffs establishes that the Knight Institute "would thereby be 'directly' affected apart from" its special interest in the First Amendment, id. at 563, 112 S.Ct. 2130. Contrary to defendants' assertion that the Knight Institute's standing rests on an impermissibly attenuated chain of possibilities, the injury in question is straightforward: first, the individual plaintiffs cannot reply directly to the President's tweets because they have been blocked, Stip. ¶ 28, 54, and second, the Knight Foundation possesses a desire to read the direct replies that would have been tweeted, Stip. ¶ 61.

Defendants further contend that the Knight Institute has suffered a noncognizable generalized grievance, but nothing in the record suggests that the citizenry writ large desires to read the individual plaintiffs' tweets engaging with the President's tweets as the Knight Institute does.[15] Even assuming a large number of other individuals share such a desire, that numerosity would not render the Knight Institute's injury a
generalized grievance that cannot support Article III standing. See, e.g., Spokeo, 136 S.Ct. at 1548 n.7; Massachusetts v. EPA, 549 U.S. at 526 n.24, 127 S.Ct. 1438.

And even assuming arguendo that the Knight Institute's assertion of its desire to view the individual plaintiffs' tweets standing alone is insufficient to support standing, see, e.g., Defs. of Wildlife, 504 U.S. at 562-64, 112 S.Ct. 2130; Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 886-89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), any insufficiency is remedied by the fact that the Knight Institute did and does follow one of the individual plaintiffs, Stip. ¶ 62. Defendants correctly note that the Knight Institute did not follow on Twitter six of the seven individual plaintiffs' accounts (as of one month after this lawsuit was filed), Stip. ¶ 62, but the Knight Institute's following of one of the individual plaintiffs is significant and represents "dispositively more than the mere `general averments' and `conclusory allegations' found inadequate in National Wildlife Federation," Laidlaw, 528 U.S. at 184, 120 S.Ct. (citing Nat'l Wildlife Fed'n, 497 U.S. at 888, 110 S.Ct. 3177), and comparable cases. We therefore conclude that the Knight Institute has established an injury-in-fact necessary to support its organizational standing.

III. First Amendment

Concluding that the individual plaintiffs and the Knight Institute both have standing to sue Scavino and the President, we turn to the First Amendment's application to the distinctly twenty-first century medium of Twitter. The primary point of dispute between the parties is whether a public official's blocking of the individual plaintiffs on Twitter implicates a forum for First Amendment purposes. Our analysis of this question proceeds in several steps.

"[W]e must first decide whether" the speech in which the individual plaintiffs seek to engage "is speech protected by the First Amendment." Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); see also Int'l Soc'y for Krishna Consciousness, Inc. v. Lee (ISKCON), 505 U.S. 672, 677, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992). A conclusion that individual plaintiffs' speech is protected speech, however, "merely begins our inquiry." Cornelius, 473 U.S. at 799, 105 S.Ct. 3439. We must then assess whether the putative forum is susceptible to forum analysis at all, see Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998) ("Other government properties are ... not fora at all."); see also Pleasant Grove City, 555 U.S. at 480, 129 S.Ct. 1125 (identifying when "forum analysis is out of place"), identifying with particularity the putative forum at issue, see Cornelius, 473 U.S. at 800, 105 S.Ct. 3439. If so, we must then determine its classification. Id.
Having defined the relevant forum, we must then determine whether it is public or nonpublic in nature.

To the extent we conclude that a First Amendment forum is implicated, we consider whether "the extent to which the Government [has] control[led] access" is consistent with the class of forum identified. Id.

A. Protected Speech

Our inquiry into whether the speech at issue is protected by the First Amendment is straightforward. The individual plaintiffs seek to engage in political speech, Stip. ¶¶ 46-52, and such "speech on matters of public concern" "fall within the core of First Amendment protection," Engquist v. Ore. Dep't of Agric., 553 U.S. 591, 600, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008). Indeed, there is no suggestion that the speech in which the individual plaintiffs engaged and seek to engage fall within the "well-defined and narrowly limited classes of speech," such as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, "the prevention and punishment of which have never been thought to raise any Constitutional problem." Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 791, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)); see also United States v. Stevens, 559 U.S. 460, 468, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010). We readily conclude the speech in which individual plaintiffs seek to engage is protected speech.

B. Applicability of Forum Doctrine

We turn next to the applicability of forum doctrine. As a threshold matter, for a space to be susceptible to forum analysis, it must be owned or controlled by the government. See, e.g., Cornelius, 473 U.S. at 801, 105 S.Ct. 3439 ("[A] speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns."). Further, the application of forum doctrine must be consistent with the purpose, structure, and intended use of the space. See, e.g., Pleasant Grove City, 555 U.S. at 480, 129 S.Ct. 1125 ("[W]here the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.").

The Supreme Court has instructed that in determining whether these requirements are satisfied (i.e., whether forum analysis can be appropriately applied), we should identify the putative forum by "focus[ing] on the access sought by the speaker." Cornelius, 473 U.S. at 801, 105 S.Ct. 3439; see Lebron v. Nat'l R.R. Passenger Corp. (Amtrak), 69 F.3d 650, 655 (2d Cir. 1995). "When speakers seek general access to public property, the forum encompasses that property." Cornelius, 473 U.S. at 801, 105 S.Ct. 3439. By contrast, "[i]n cases in which limited access is sought, [the Supreme Court's] cases have taken a more tailored approach to ascertaining the perimeters of a forum." Id. For example, in Cornelius, where plaintiffs sought access to a fundraising drive conducted in the federal workplace, the fundraising drive specifically, rather than the federal workplace generally, constituted the would-be forum. Id. Similarly, in Perry Education Ass'n v. Perry Local Educators' Ass'n, where the plaintiff sought access to a public school's internal mail system in order to distribute literature, the mail system rather than the school was the space in question. 460 U.S. 37, 46-47, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). And in Lehman v. City of Shaker Heights, where the plaintiff sought access to advertising space on the side of city buses, the advertising space and not the buses constituted the putative forum. 418 U.S. 298, 300-01, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974). Indeed, this exercise in carefully delineating the putative forum based on the access sought is not an academic one. For instance, a public park is susceptible to forum analysis when "used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," Perry Educ. Ass'n, 460 U.S. at

566 We can therefore reject, at the outset, any contention that the @realDonaldTrump account as a whole is the would-be forum to be analyzed. Plaintiffs do not seek access to the account as a whole — they do not desire the ability to send tweets as the President, the ability to receive notifications that the President would receive, or the ability to decide who the President follows on Twitter. Because the access they seek is far narrower, we consider whether forum doctrine can be appropriately applied to several aspects of the @realDonaldTrump account rather than the account as a whole: the content of the tweets sent, the timeline comprised of those tweets, the comment threads initiated by each of those tweets, and the "interactive space" associated with each tweet in which other users may directly interact with the content of the tweets by, for example, replying to, retweeting, or liking the tweet.

1. Government Ownership or Control

First, to potentially qualify as a forum, the space in question must be owned or controlled by the government. While the Supreme Court has frequently referred to "government-owned property," e.g., Pleasant Grove City, 555 U.S. at 478, 129 S.Ct. 1125; see also ISKCON, 505 U.S. at 678, 112 S.Ct. 2701 (referring to property that the government "owns and controls"), its precedents have also made clear that a space may be a forum based on government control even absent legal ownership, see, e.g., Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 679, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010) ("[T]his Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech." (emphasis added)); Cornelius, 473 U.S. at 801, 105 S.Ct. 3439 ("[A] speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns." (emphasis added)); Perry Educ. Ass'n, 460 U.S. at 46, 103 S.Ct. 948 ("[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government."" (emphasis added) (quoting U.S. Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 130, 101 S.Ct. 2676, 69 L.Ed.2d 517 (1981))); see also Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 555, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) (concluding that a "privately owned ... theater under long-term lease to the city," id. at 547, 95 S.Ct. 1239, was a public forum, id. at 555, 95 S.Ct. 1239). This requirement of governmental control, rather than complete governmental ownership, is not only consistent with forum analysis's focus on "the extent to which the Government can control access" to the space and whether that control comports with the First Amendment, Cornelius, 473 U.S. at 800, 105 S.Ct. 3439, but also better reflects that a space can be "a forum more in a metaphysical than in a spatial or geographic sense," Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), and may "lack[] a physical situs," Cornelius, 473 U.S. at 801, 105 S.Ct. 3439, in which case traditional conceptions of "ownership" may fit less well.

Here, the government-control prong of the analysis is met. Though Twitter is a private (though publicly traded) company that is not government-owned, the President and Scavino nonetheless exercise control over various aspects of the @realDonaldTrump account: they control the content of the tweets that are sent from the account and they hold the ability to prevent, through blocking, other Twitter users, including the individual plaintiffs here, from accessing the @realDonaldTrump timeline (while logged into the blocked account) and from participating in the interactive space associated with the tweets sent by the @realDonaldTrump account, Stip. ¶¶ 12, 28-32, 39, 54. Though Twitter also maintains control over the
@realDonaldTrump account (and all other Twitter accounts), we nonetheless conclude that the extent to which the President and Scavino can, and do, exercise control over aspects of the @realDonaldTrump account are sufficient to establish the government-control element as to the content of the tweets sent by the @realDonaldTrump account, the timeline compiling those tweets, and the interactive space associated with each of those tweets. While their control does not extend to the content of a retweet or reply when made — "[n]o other Twitter user can alter the content of any retweet or reply, either before or after it is posted" and a user "cannot prescreen tweets, replies, likes, or mentions that reference their tweets or accounts," Stip. ¶ 26 — it nonetheless extends to controlling who has the power to retweet or reply in the first instance.

The President and Scavino's control over the @realDonaldTrump account is also governmental. The record establishes (1) that the @realDonaldTrump account is presented as being "registered to Donald J. Trump, `45th President of the United States of America, Washington, D.C.," Stip. ¶ 35; (2) "that the President's tweets from @realDonaldTrump ... are official records that must be preserved under the Presidential Records Act," Stip. ¶ 40; see 44 U.S.C. § 2202 (directing the retention of "Presidential records"); id. § 2201(2) (defining "Presidential records" as those created "in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President"); and (3) that the @realDonaldTrump account has been used in the course of the appointment of officers (including cabinet secretaries), the removal of officers, and the conduct of foreign policy, Stip. ¶ 38 — all of which are squarely executive functions, see U.S. Const. art. II, § 2, cl. 2 (appointments); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492-93, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010) (relating the President's removal power to "his responsibility to take care that the laws be faithfully executed" under Article II, section 3, clause 5 of the Constitution (emphasis omitted)); Zivotofsky ex rel. Zivotofsky v. Kerry, ___ U.S. ___, 135 S.Ct. 2076, 2090, 192 L.Ed.2d 83 (2015) ("The President does have a unique role in communicating with foreign governments ...."). That is, the President presents the @realDonaldTrump account as being a presidential account as opposed to a personal account and, more importantly, uses the account to take actions that can be taken only by the President as President. Accordingly, we conclude that the control that the President and Scavino exercise over the account and certain of its features is governmental in nature.

Defendants contend that the governmental control-or-ownership prong is not met because we must also analyze the specific action in question — blocking — under the "under color of state law" precedents developed in the context of actions against state officials under 42 U.S.C. § 1983. In that context, the standards for whether an action was taken "under color of state law" and for whether an action constitutes "state action" are identical, see Lugar v. Edmondson Oil Co., 457 U.S. 922, 935, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), and an official takes action under color of state law when he "exercise[s] power `possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" West v. Atkins, 487 U.S. 42, 49, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (quoting United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941)). Invoking *568 this standard, defendants contend that the act of blocking is not state action triggering First Amendment scrutiny because blocking is a functionality made available to every Twitter user, Stip. ¶ 28, and is therefore not a power possessed by virtue of state law.

While the Constitution applies only to the government and not private individuals, the requirement of state action in the forum context is not usually analyzed separately (either in general or under the West standard specifically) from the government control-or-ownership requirement. As the Second Circuit has recently explained, "[b]ecause facilities or locations deemed to be public forums are usually operated by
governments, determining that a particular facility or location is a public forum usually suffices to render the challenged action taken there to be state action subject to First Amendment limitations." Halleck v. Manhattan Cmty. Access Corp., 882 F.3d 300, 306-07 (2d Cir. 2018) (citing Widmar v. Vincent, 454 U.S. 263, 265-68, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), and City of Madison, Joint Sch. Dist. No. 8 v. Wisc. Emp't Relations Comm'n, 429 U.S. 167, 169-76, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976)). While further analysis may be necessary when the party exercising control over the forum is a non-governmental entity, see, e.g., id. at 307, in which case consideration of the factors set forth by the Supreme Court in Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 295-96, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001), may be appropriate, the Brentwood factors are a poor fit for the facts of this case: the parties exercising control here are a public official, the President, and his subordinate, Scavino, acting in his official capacity.[17]

Further, this argument, which focuses on the act of exclusion divorced from the context of the space from which a person is being excluded, proves too much and is difficult to reconcile with the Supreme Court's public forum precedents. Defendants correctly argue that blocking is a capability held by every Twitter user, Stip. ¶ 28, but the power to exclude is also one afforded generally to every property owner. When a government acts to "legally preserve the property under its control for the use to which it is dedicated," it behaves "like the private owner of property." Rosenberger, 515 U.S. at 829, 115 S.Ct. 2510; Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 390, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); see also, e.g., Greer v. Spock, 424 U.S. 828, 836, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) ("The State, no less than a private owner of property, has the power to preserve the property under its control ...."). Indeed, when the government exercises its "right to exclude others from entering and using *569 [its] property," Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005), it is deploying "one of the most essential sticks in the bundle of rights that are commonly characterized as property," Dolan v. City of Tigard, 512 U.S. 374, 384, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). The right to exclude is "perhaps the most fundamental of all property interests," Lingle, 544 U.S. at 539, 125 S.Ct. 2074, and it is one shared by the government and private property owners alike. The context of the property from which the government is excluding, therefore, must factor into the analysis. No one can seriously contend that a public official's blocking of a constituent from her purely personal Twitter account — one that she does not impress with the trappings of her office and does not use to exercise the authority of her position — would implicate forum analysis, but those are hardly the facts of this case.

For the same reason, defendants' reliance on the President's establishment of the account in 2009, Stip. ¶ 32 — well before his election and inauguration as President — is unpersuasive. To the extent forum analysis applies, "[t]he past history of characterization of a forum may well be relevant; but that does not mean a present characterization about a forum may be disregarded." Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 77 (1st Cir. 2004); see Make the Rd. by Walking, Inc. v. Turner, 378 F.3d 133, 143 (2d Cir. 2004) (recognizing that certain First Amendment restrictions apply "so long as a forum remains public"); cf. Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30, 41 (2d Cir. 2011) (reasoning that "the nature of the site changes" depending on how the site is being used). The Supreme Court has expressly held that "a state is not required to indefinitely retain the open character of the facility," e.g., Perry Educ. Ass'n, 460 U.S. at 46, 103 S.Ct. 948, but changes need not be one-directional. Indeed, the entire concept of a designated public forum rests on the premise that the nature of a (previously closed) space has been changed. See, e.g., Cornelius, 473 U.S. at 802, 105 S.Ct. 3439.

To take two examples, if a facility initially developed by the government as a military base — plainly not a public forum under Greer, 424 U.S. at 838, 96 S.Ct. 1211 — is subsequently decommissioned and
repurposed into a public park.\textsuperscript{[18]} the present use of the facility as a park would bear much more heavily on the forum analysis than its historical origins as a military installation. Similarly, if a privately constructed airport were subsequently taken over by a public agency, forum analysis would focus on its current use as a public airport rather than its prior use as a private one. Cf. \textit{ISKCON}, 505 U.S. at 681, 112 S.Ct. 2701 ("The practices of privately held transportation centers do not bear on the government's regulatory authority over a publicly owned airport.").

Here, the President and Scavino's present use of the @realDonaldTrump account weighs far more heavily in the analysis than the origin of the account as the creation of private citizen Donald Trump. That latter fact cannot be given the dispositive weight that defendants would ascribe to it. Rather, because the President and Scavino use the @realDonaldTrump account for governmental functions, the control they exercise over it is accordingly governmental in nature.

That control, however, does not extend to the comment thread initiated by a tweet sent by the @realDonaldTrump account. The comment thread — consisting of the initial tweet, direct replies to that tweet, and second-order (and higher-order) replies to those replies — therefore cannot be a putative forum. While the President and Scavino can control the interactive space by limiting who may directly reply or retweet a tweet initially sent by the @realDonaldTrump account, they lack comparable control over the subsequent dialogue in the comment thread. As plaintiffs acknowledge, even the individual plaintiffs who have been blocked "can view replies to @realDonaldTrump tweets, and can post replies to those replies, while logged in to the blocked accounts," and that these "replies-to-replies appear in the comment threads that originate with @realDonaldTrump tweets." Stip. ¶ 57. Because a Twitter user lacks control over the comment thread beyond the control exercised over first-order replies through blocking, the comment threads — as distinguished from the content of tweets sent by @realDonaldTrump, the @realDonaldTrump timeline, and the interactive space associated with each tweet — do not meet the threshold criterion for being a forum.

2. Purpose, Structure, and Intended Use

We next assess whether application of forum analysis is consistent with the purpose, structure, and intended use of the three aspects of the @realDonaldTrump account that we have found to satisfy the government control-or-ownership criterion: specifically, the content of tweets, the timeline comprised of the account's tweets, and the interactive space of each tweet.

Generally, "[t]he forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program." \textit{Pleasant Grove City}, 555 U.S. at 478, 129 S.Ct. 1125. By contrast, forum analysis is not appropriately applied when "the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public." \textit{United States v. Am. Library Ass'n}, 539 U.S. 194, 204, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003) (plurality opinion). For example, the Supreme Court has held that "[w]hen a public broadcaster exercises editorial discretion in the selection and presentation of its programming," its decisions are not subject to forum analysis. \textit{Forbes}, 523 U.S. at 674, 118 S.Ct. 1633. Forum analysis was inappropriate, the Court reasoned, because "[c]laims of access under [the Court's] public forum precedents could obstruct the legitimate purposes of television broadcasters." Id. "[B]road rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations." Id. at 673, 118 S.Ct. 1633. Similarly, the Supreme Court has declined to apply forum
analysis to a grant program operated by the National Endowment for the Arts (NEA), reasoning that "[t]he NEA's mandate is to make esthetic judgments" and the application of an "inherently content-based 'excellence' threshold for NEA support." Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 586, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998). And applying Forbes and Finley, a four-Justice plurality of the Supreme Court concluded that the internet access provided by public libraries was not susceptible to forum analysis, as forum analysis was "incompatible with the discretion that public libraries must have to fulfill their traditional missions," which involve the "exercise of judgment in selecting the material [the library] provides to its patrons." Am. Library Ass'n, 539 U.S. at 205, 123 S.Ct. 2297 (plurality opinion).

Ultimately, "where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place." Pleasant Grove City, 555 U.S. at 480, 129 S.Ct. 1125.

Government speech is one category of speech that falls outside the domain of forum analysis: when the government "is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply." Walker v. Tex. Div., Sons of Confederate Veterans, Inc., ___ U.S. ___, 135 S.Ct. 2239, 2240, 192 L.Ed.2d 274 (2015). "The Free Speech Clause restricts [only] government regulation of private speech; it does not regulate government speech." Pleasant Grove City, 555 U.S. at 467, 129 S.Ct. 1125.

However, "[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech." Id. at 470, 129 S.Ct. 1125. Private involvement in the formulation of the speech in question does not preclude the conclusion that it is government speech. For example, Pleasant Grove City concluded that monuments that were privately financed but subsequently accepted by a municipal government and displayed on public park land was government speech, see id. at 470-71, 129 S.Ct. 1125, and Walker held that specialty license plate designs proposed by private groups but approved and issued by a state department of motor vehicles was also government speech, see 135 S.Ct. at 2248-50. Conversely, "speech that is otherwise private does not become speech of the government merely because the government provides a forum for the speech or in some way allows or facilitates it." Wandering Dago, Inc. v. Destito, 879 F.3d 20, 34 (2d Cir. 2018) (citing Cornelius, 473 U.S. at 811-13, 105 S.Ct. 3439).

In assessing whether speech constitutes government speech as opposed to private speech, the Supreme Court has considered at least three factors: whether government has historically used the speech in question "to convey state messages," whether that speech is "often closely identified in the public mind" with the government, and the extent to which government "maintain[s] direct control over the messages conveyed," with Walker's application of these factors "likely mark[ing] the outer bounds of the government-speech doctrine." Matal v. Tam, ___ U.S. ___, 137 S.Ct. 1744, 1760, 198 L.Ed.2d 366 (2017) (quoting Walker, 135 S.Ct. at 2246-49); see also Wandering Dago, 879 F.3d at 34 (distilling the same three factors from Walker).

Based on the government speech doctrine, we reject out of hand any contention that the content of the President's tweets are susceptible to forum analysis. It is not so susceptible because the content is government speech: the record establishes that the President, sometimes "[w]ith the assistance of Mr. Scavino," uses the content of his tweets "to announce, describe, and defend his policies; to promote his Administration's legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; to challenge media organizations whose coverage of his Administration he believes to be unfair; and for other statements, including on occasion statements unrelated to official government business." Stip. ¶ 38. Indeed, the content of the tweets sent by @realDonaldTrump are solely the speech of
the President or of other government officials. Stip. ¶ 39. For the same reason, the account's timeline, which "displays all tweets generated by the [account]" is not susceptible to forum analysis: the timeline merely aggregates the content of all of the account's tweets, Stip. ¶ 15, all of which is government speech.

The same cannot be said, however, of the interactive space for replies and retweets created by each tweet sent by the @realDonaldTrump account. At minimum, as to replies, they are most directly associated with the replying user rather than the sender of the tweet being replied to: a reply tweet appears with the picture, name, and handle of the replying user, Stip. ¶¶ 23, 57, and appears most prominently in the timeline of the replying user, Stip. ¶ 22. Replying tweets are "controlled by the user who generates them," and "[n]o other Twitter user can alter the content of any ... reply, either before or after it is posted." Stip. ¶ 26. Given the prominence with which the account information of the replying user is displayed in the reply tweet, the reply is unlikely to be "closely identified in the public mind" with the sender, even when the sender of the tweet being replied to is a governmental one. Matal, 137 S.Ct. at 1760; Walker, 135 S.Ct. at 2248. And, far from "maintain[ing] direct control over the messages conveyed" in a user's replies to the President's tweets (assuming the user retains the ability to reply, i.e., the user has not been blocked), the government maintains no control over the content of the reply. Matal, 137 S.Ct. at 1760; Walker, 135 S.Ct. at 2249. Taken together, these factors support the conclusion that replies to the President's tweets remain the private speech of the replying user. The association that a reply has with a governmental sender of the tweet being replied to—the indication that the replying tweet is a reply and its appearance in the comment thread accessed from the timeline of the governmental sender — is not sufficient to render the reply government speech.

Nor is the interactive space of each tweet, as distinguished from the content of the tweet, constrained by the notions of inherent selectivity and scarcity that the Supreme Court held to counsel against the application of forum doctrine in Finley and Forbes and in Pleasant Grove City, respectively. Generally, no selection is involved in determining who has the ability to interact directly with the President's tweets: the @realDonaldTrump account is "generally accessible to the public at large without regard to political affiliation or any other limiting criteria," such that any Twitter user who has not been blocked may so engage. Stip. ¶ 36. Indeed, just as "a park can accommodate many speakers and, over time, many parades and demonstrations"; "[t]he Combined Federal Campaign permits hundreds of groups to solicit donations from federal employees" as in Cornelius; "a public university's student activity fund can provide money for many campus activities" as in Rosenberger; "a public university's buildings may offer meeting space for hundreds of student groups" as in Widmar; and "[a] school system's internal mail facilities can support the transmission of many messages to and from teachers and school administrators" as in Perry Education Ass'n, Pleasant Grove City, 555 U.S. at 478, 129 S.Ct. 1125, the interactive space of a tweet can accommodate an unlimited number of replies and retweets. Indeed, the record establishes that tweets sent by the @realDonaldTrump account regularly attract tens of thousands, if not hundreds of thousands, of replies and retweets, Stip. ¶¶ 41-43, and nothing suggests that the "application of forum analysis" to the interactive space associated with a tweet "would lead almost inexorably to closing of the forum," id. at 480, 129 S.Ct. 1125. Rather, the interactive space is "capable of accommodating a large number of public speakers without defeating [its] essential function," id. at 478, 129 S.Ct. 1125; and indeed, the essential function of a given tweet's interactive space is to allow private speakers to engage with the content of the tweet, Stip. ¶ 13, which supports the application of forum analysis.

Ultimately, the delineation of a tweet's interactive space as the putative forum is consistent with the Supreme Court's directive to "focus[] on the access sought by the speaker." Cornelius, 473 U.S. at 801, 105
S.Ct. 3439. When a user is blocked, the most significant impediment is the ability to directly interact with a tweet sent by the blocking user. While a blocked user is also limited in that the user may not view the content of the blocking user's tweets or view the blocking user's timeline, those limitations may be circumvented entirely by "using an internet browser or other application that is not logged in to Twitter, or that is logged in to a Twitter account that is not blocked." Stip. ¶ 55. By contrast, the ability to interact directly cannot be completely reestablished, Stip. ¶¶ 54, 58-59, and that ability — i.e., access to the interactive space — is therefore best described as the access that the individual plaintiffs seek.

In sum, we conclude that the interactive space associated with each of the President's tweets is not government speech and is properly analyzed under the Supreme Court's forum precedents.

C. Classification

Having concluded that forum analysis is appropriately applied to the interactive space associated with a tweet, we turn to the question of classification. "The Supreme Court has recognized three types of fora across a spectrum of constitutional protection for expressive activity." Make the Rd., 378 F.3d at 142. First, traditional public fora are "places which by long tradition or by government fiat have been devoted to assembly and debate." Perry Educ. Ass'n, 460 U.S. at 45, 103 S.Ct. 948. These spaces, like streets and parks, "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Id. (quoting Hague, 307 U.S. at 515, 59 S.Ct. 954 (opinion of Roberts, J.)). Absent a well-established history of dedication to public use, however, a forum cannot be a traditional public forum. The Supreme Court has "rejected the view that traditional public forum status extends beyond its historic confines." Forbes, 523 U.S. at 678, 118 S.Ct. 1633 (citing ISKCON, 505 U.S. at 680-81, 112 S.Ct. 2701).

"A second category consists of public property which the state has opened for use by the public as a place for expressive activity." Perry Educ. Ass'n, 460 U.S. at 574 45, 103 S.Ct. 948. "To create a forum of this type, the government must intend to make the property `generally available,' to a class of speakers." Forbes, 523 U.S. at 678, 118 S.Ct. 1633 (citations omitted) (quoting Widmar, 454 U.S. at 264, 102 S.Ct. 269). "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse," and we "look[] to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." Cornelius, 473 U.S. at 802, 105 S.Ct. 3439. Finally, a space that is susceptible to forum analysis but is "not by tradition or designation a forum for public communication," Perry Educ. Ass'n, 460 U.S. at 46, 103 S.Ct. 948, is termed a "nonpublic forum," Forbes, 523 U.S. at 677, 118 S.Ct. 1633.

Applying this three-part classification framework to the interactive space, we can first conclude that the interactive space of a tweet sent by @realDonaldTrump is not a traditional public forum. There is no historical practice of the interactive space of a tweet being used for public speech and debate since time immemorial, for there is simply no extended historical practice as to the medium of Twitter. While the Supreme Court has referenced the "vast democratic forums of the Internet," Reno v. ACLU, 521 U.S. 844, 868, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), has described the internet (including social media platforms such as Twitter) as one of "the most important places (in a spatial sense) for the exchange of views," Packingham v. North Carolina, ____ U.S. ___, 137 S.Ct. 1730, 1735, 198 L.Ed.2d 273 (2017), and has analogized the internet to the "essential venues for public gatherings" of streets and parks, id., the lack of historical practice is dispositive, see Forbes, 523 U.S. at 678, 118 S.Ct. 1633.
Accordingly, we consider whether the interactive space is a designated public forum, with "governmental intent" serving as "the touchstone for determining whether a public forum has been created." Gen. Media Commc'ns, Inc. v. Cohen, 131 F.3d 273, 279 (2d Cir. 1997). "Intent is not merely a matter of stated purpose. Indeed, it must be inferred from a number of objective factors, including: [the government's] policy and past practice, as well as the nature of the property and its compatibility with expressive activity." Paulsen v. County of Nassau, 925 F.2d 65, 69 (2d Cir. 1991) (citing Cornelius, 473 U.S. at 802­03, 105 S.Ct. 3439).

Here, these factors strongly support the conclusion that the interactive space is a designated public forum. "The @realDonaldTrump account is generally accessible to the public at large without regard to political affiliation or any other limiting criteria," "any member of the public can view his tweets," and "anyone [with a Twitter account] who wants to follow the account [on Twitter] can do so," unless that person has been blocked. Stip. ¶ 36. Similarly, anyone with a Twitter account who has not been blocked may participate in the interactive space by replying or retweeting the President's tweets. Stip. ¶¶ 21, 22, 28, 36. Further, the account — including all of its constituent components — has been held out by Scavino as a means through which the President "communicates directly with you, the American people!" Stip. ¶ 37 (alterations incorporated). And finally, there can be no serious suggestion that the interactive space is incompatible with expressive activity: rather, Twitter as a platform is designed to allow users "to interact with other Twitter users in relation to [their tweets]," Stip. ¶ 13, and users can use Twitter to "petition their elected representatives and otherwise engage with them in a direct manner," *575 Packingham, 137 S.Ct. at 1735.

The interactivity of Twitter is one of its defining characteristics, and indeed, the interactive space of the President's tweets accommodates a substantial body of expressive activity. Stip. ¶¶ 41­43. Taking these factors together, we conclude that the interactive space of a tweet from the @realDonaldTrump account constitutes a designated public forum.

D. Viewpoint Discrimination

"[T]he extent to which the Government can control access depends on the nature of the relevant forum," Cornelius, 473 U.S. at 800, 105 S.Ct. 3439, so we next consider whether the blocking of the individual plaintiffs is permissible in a designated public forum. "Regulation of [a designated public forum] is subject to the same limitations as that governing a traditional public forum" — restriction are permissible "only if they are narrowly drawn to achieve a compelling state interest." ISKCON, 505 U.S. at 678-79, 112 S.Ct. 2701; see also Cornelius, 473 U.S. at 800, 105 S.Ct. 3439. Regardless of the specific nature of the forum, however, "[v]iewpoint discrimination ... is presumed impermissible when directed against speech otherwise within the forum's limitations." Rosenberger, 515 U.S. at 830, 115 S.Ct. 2510; see also Matal, 137 S.Ct. at 1763 ("When government creates such a forum, in either a literal or `metaphysical' sense, some content- and speaker-based restrictions may be allowed. However, even in such cases, what we have termed `viewpoint discrimination' is forbidden." (citations omitted) (quoting Rosenberger, 515 U.S. at 830-31, 115 S.Ct. 2510)).

Here, the individual plaintiffs were indisputably blocked as a result of viewpoint discrimination. The record establishes that "[s]hortly after the Individual Plaintiffs posted the tweets ... in which they criticized the President or his policies, the President blocked each of the Individual Plaintiffs," Stip. ¶ 53, and defendants do "not contest Plaintiffs' allegation that the Individual Plaintiffs were blocked from the President's Twitter account because the Individual Plaintiffs posted tweets that criticized the President or his policies." Stip. at 1. The continued exclusion of the individual plaintiffs based on viewpoint is, therefore, impermissible under the First Amendment.[22]
Defendants contend that the blocking of the individual plaintiffs is permissible because the President retains a personal First Amendment interest in choosing the people with whom he associates and retains the right not to engage with (i.e., the right to ignore) the individual plaintiffs. Further, they argue, the individual plaintiffs have no right to be heard by a government audience and no right to have their views amplified by the government. While those propositions are accurate as statements of law, they nonetheless do not render the blocking of the individual plaintiffs constitutionally permissible.

To be clear, a public official does not lose his First Amendment rights upon taking office. Cf. Garcetti v. Ceballos, 547 U.S. 410, 417, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). "The interest of the public in hearing all sides of a public issue," an interest that the First Amendment seeks to protect, "is hardly advanced by extending more protection to citizen-critics than to [public officials]." Bond v. Floyd, 385 U.S. 116, 136, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966). That is, no set of plaintiffs could credibly argue that they "have a constitutional right to prevent [government officials] from exercising their own rights" under the First Amendment. X-Men Sec., Inc. v. Pataki, 196 F.3d 56, 70 (2d Cir. 1999). Further, "[n]othing in the First Amendment or in [the Supreme] Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 285, 104 S.Ct. 1058, 79 L.Ed.2d 299 (1984). No First Amendment harm arises when a government's "challenged conduct is simply to ignore the [speaker]," as the Supreme Court has affirmed that "[t]hat it is free to do." Smith v. Ark. State Highway Emps., Local 1315, 441 U.S. 463, 466, 99 S.Ct. 1826, 60 L.Ed.2d 360 (1979) (per curiam). Stated otherwise, "[a] person's right to speak is not infringed when government simply ignores that person while listening to others," or when the government "amplifies" the voice of one speaker over those of others. Minn. State Bd., 465 U.S. at 288, 104 S.Ct. 1058. Nonetheless, when the government goes beyond merely amplifying certain speakers' voices and not engaging with others, and actively restricts "the right of an individual to speak freely [and] to advocate ideas," it treads into territory proscribed by the First Amendment. Id. at 286, 104 S.Ct. 1058 (quoting Smith, 441 U.S. at 464, 99 S.Ct. 1826).

Consideration of Twitter's two features for limiting interaction between users — muting and blocking — is useful in addressing the potentially conflicting constitutional prerogatives of the government as listener on the one hand and of speakers on the other, as muting and blocking differ in relevant ways. As Twitter explains, "[m]uting is a feature that allows [a user] to remove an account's Tweets from [the user's] timeline without unfollowing or blocking that account." How to Mute. For muted accounts that the muting account does not follow on Twitter, "[r]eplies and mentions will not appear" in the muting account's notifications, nor will mentions by the muted account. Id. That is, muting allows a user to ignore an account with which the user does not wish to engage. The muted account may still attempt to engage with the muting account — it may still reply to tweets sent by the muting account, among other capabilities — but the muted account generally will not see these replies. Critically, however, the muted account may still reply directly to the muting account, even if that reply is ultimately ignored.

Blocking, by contrast, goes further. The blocking user "will not see any tweets posted by the blocked user" just as a muting user would not see tweets posted by a muted user, but whereas muting preserves the muted account's ability to reply to a tweet sent by the muting account, blocking precludes the blocked user from "see[ing] or reply[ing] to the blocking user's tweets" entirely. Stip. ¶ 28. The elimination of the blocked user's ability to reply directly is more than the blocking user merely ignoring the blocked user; it is "the blocking user limiting the blocked user's right to speak in a discrete, measurable way. Muting equally vindicates the President's right to ignore certain speakers and to selectively amplify the voices of certain others but — unlike blocking — does so without restricting the right of the ignored to speak.
Given these differing consequences of muting and blocking, we find unpersuasive defendants' contention that a public official's muting and blocking are equivalent, and equally constitutional, means of choosing not to engage with his constituents. Implicit in this argument is the assumption that a reply to a tweet is directed only at the user who sent the tweet being replied to. Were that so, defendants would be correct in that there is no difference between the inability to send a direct reply (as with blocking) and the inability to have that direct reply heard by the sender of the initial tweet being responded to (as with muting). But this assumption is not supported in the record: a reply is visible to others, Stip. ¶ 22, and may itself be replied to by other users, Stip. ¶¶ 57-58. The audience for a reply extends more broadly than the sender of the tweet being replied to, and blocking restricts the ability of a blocked user to speak to that audience. While the right to speak and the right to be heard may be functionally identical if the speech is directed at only one listener, they are not when there is more than one.

In sum, we conclude that the blocking of the individual plaintiffs as a result of the political views they have expressed is impermissible under the First Amendment. While we must recognize, and are sensitive to, the President's personal First Amendment rights, he cannot exercise those rights in a way that infringes the corresponding First Amendment rights of those who have criticized him.

To be sure, we do not suggest that the impact on the individual plaintiffs (and, by extension, on the Knight Institute) is of the highest magnitude. It is not. But the law is also clear: the First Amendment recognizes, and protects against, even de minimis harms. See Six Star Holdings, LLC v. City of Milwaukee, 821 F.3d 795, 805 (7th Cir. 2016) (rejecting an argument of "de minimis" First Amendment harm and approving an award of nominal damages); Lippoldt v. Cole, 468 F.3d 1204, 1221 (10th Cir. 2006) (similar); KH Outdoor, LLC v. City of Trussville, 465 F.3d 1256, 1261 (11th Cir. 2006) (similar); Risdal v. Halford, 209 F.3d 1071, 1072 (8th Cir. 2000) (similar); cf. Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); N.Y. Progress & Prot. PAC v. Walsh, 733 F.3d 483, 486 (2d Cir. 2013) (same). Thus, even though defendants are entirely correct in contending that the individual plaintiffs may continue to access the content of the President's tweets, Stip. ¶ 55-56, and that they may tweet replies to earlier replies to the President's tweets, Stip. ¶¶ 57-58, the blocking of the individual plaintiffs has the discrete impact of preventing them from interacting directly with the President's tweets, Stip. ¶ 54, thereby restricting a real, albeit narrow, slice of speech. No more is needed to violate the Constitution.

IV. Relief

As plaintiffs seek both injunctive and declaratory relief, we turn, then, to the question of the proper remedy to be afforded here. Defendants suggest that we categorically lack authority to enjoin the President, a proposition we do not accept. Stated simply, "separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." Nixon v. Fitzgerald, 457 U.S. 731, 753-54, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982). Rather, "it is ... settled that the President is subject to judicial process in appropriate circumstances," Clinton v. Jones, 520 U.S. 681, 703, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997), and the Supreme Court has expressly rejected the notion of "an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances," id. at 704, 117 S.Ct. 1636 (quoting United States v. Nixon, 418 U.S. 683, 706, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)).

However, "a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." Nixon v.
Fitzgerald, 457 U.S. at 754, 102 S.Ct. 2690. A four-Justice plurality of the Supreme Court has explained that while "in general `this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties,,'" Mississippi v. Johnson, 71 U.S. (4 Wall). 475, 499, 18 L.Ed. 437 (1866), "left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely `ministerial' duty." Franklin, 505 U.S. at 802-03, 112 S.Ct. 2767 (plurality opinion) (quoting Mississippi v. Johnson, 71 U.S. (4 Wall) at 499). Franklin's acknowledgment of the door left open by Mississippi v. Johnson is consistent with the balancing approach articulated by the Court in Nixon v. Fitzgerald: an injunction directing the performance of a ministerial duty represents a minimal "danger[] of intrusion on the authority and functions of the Executive Branch" as compared to imposition posed by the injunction considered in Mississippi v. Johnson.

In this case, the intrusion on executive prerogative presented by an injunction directing the unblocking of the individual plaintiffs would be minimal. Any such injunction would not direct the President to execute the laws in a certain way, nor would it mandate that he pursue any substantive policy ends. Even accepting that the President's blocking decisions in the first instance are discretionary, the duty to unblock — following a holding that such blocking was unconstitutional — would not be, as the President must act in compliance with the Constitution and other laws. Cf. Swan, 100 F.3d at 977 ("[The asserted statutory] duty, if it exists, is ministerial and not discretionary, for the President is bound to abide by the requirements of duly enacted and otherwise constitutional statutes."). That is, the correction of an unconstitutional act far more closely resembles the performance of "a mere ministerial duty," where "nothing [is] left to discretion," than the performance of a "purely executive and political" duty requiring the exercise of discretion vested in the President. Mississippi v. Johnson, 71 U.S. (4 Wall) at 499. An injunction directing the unblocking of the individual plaintiffs would therefore impose a duty that far more closely resembles the duties considered in Swan, see 100 F.3d at 977-78, and in National Treasury Employees Union v. Nixon, 492 F.2d 587, 608 (D.C. Cir. 1974) (defining a "ministerial duty" as "a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law"), than the highly discretionary duty considered in Mississippi v. Johnson. The ways to faithfully execute the Reconstruction Acts passed by Congress following the Civil War are uncountable in number, but "[t]he law require[s] the performance of a single specific act" here. Mississippi v. Johnson, 71 U.S. (4 Wall) at 499. No government official, after all, possesses the discretion to act unconstitutionally.

We need not, however, ultimately resolve the question of whether injunctive relief may be awarded against the President, as injunctive relief directed at Scavino and declaratory relief remain available. While we find entirely unpersuasive the Government's parade of horribles regarding the judicial interference in executive affairs presented by an injunction directing the President to comply with constitutional restrictions, we nonetheless recognize that "[a]s a matter of comity, courts should normally direct legal process to a lower Executive official even though the effect of the process is to restrain or compel the President." Nixon v. Sirica, 487 F.2d 700, 709 (D.C. Cir. 1973) (en banc) (per curiam). Subordinate officials may, of course, be enjoined by the courts. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584, 588, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (affirming an injunction directed at the Secretary of Commerce); see also, e.g., Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 605 (4th Cir.) (en banc) (vacating an injunction only to the extent it was directed at the President), vacated and remanded, ___ U.S. ___, 138 S.Ct. 353, 199 L.Ed.2d 203 (2017). Injunctive relief directed against Scavino would certainly implicate fewer separation-of-powers concerns, see Franklin, 505 U.S. at 802-03, 112 S.Ct. 2767, but we also recognize that "the strong remedy of injunction," Rivera-Puig v. Garcia-Rosario, 983 F.2d 311, 316 (1st Cir. 1992), should be sparingly employed even when those constitutional concerns are not present; see, e.g., Salazar v. Buono, 559 U.S. 700, 714-15, 130 S.Ct. 1803, 176 L.Ed.2d 634 (2010) (plurality opinion).
Accordingly, though we conclude that injunctive relief may be awarded in this case — at minimum, against Scavino — we decline to do so at this time because declaratory relief is likely to achieve the same purpose. The Supreme Court has directed that we should "assume it is substantially likely that the President and other executive ... officials would abide by an authoritative interpretation of [a] ... constitutional provision," Franklin, 505 U.S. at 803, 112 S.Ct. 2767 (plurality opinion); see Utah v. Evans, 536 U.S. at 464, 122 S.Ct. 2191 (citing Franklin, 505 U.S. at 803, 112 S.Ct. 2767 (plurality opinion)); see also Alco Fin. Ltd. v. Klee, 861 F.3d 82, 96 (2d Cir. 2017); Made in the USA, 242 F.3d at 1310; Swan, 100 F.3d at 980; L.A. Cty. Bar Ass'n v. Eu, 979 F.2d 697, 701 (9th Cir. 1992) ("Were this court to issue the requested declaration, we must assume that it is substantially likely that [government officials] ... would abide by our authoritative determination."); and there is simply no reason to depart from this assumption at this time. Declaratory judgment is appropriate under the factors that the Second Circuit directs us to consider, see Dow Jones & Co. v. Harrods Ltd., 346 F.3d 357, 359-60 (2d Cir. 2003), and a declaration will therefore issue: the blocking of the individual plaintiffs from the @realDonaldTrump account because of their expressed political views violates the First Amendment.

"It is emphatically the province and duty of the judicial department to say what the law is," Marbury v. Madison, 5 *580 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803), and we have held that the President's blocking of the individual plaintiffs is unconstitutional under the First Amendment. Because no government official is above the law and because all government officials are presumed to follow the law once the judiciary has said what the law is, we must assume that the President and Scavino will remedy the blocking we have held to be unconstitutional.

V. Conclusion

We conclude that we have jurisdiction to entertain this dispute. Plaintiffs have established legal injuries that are traceable to the conduct of the President and Daniel Scavino and, despite defendants' suggestions to the contrary, their injuries are redressable by a favorable judicial declaration. Plaintiffs lack standing, however, to sue Sarah Huckabee Sanders, who is dismissed as a defendant. Hope Hicks is also dismissed as a defendant, in light of her resignation as White House Communications Director.

Turning to the merits of plaintiffs' First Amendment claim, we hold that the speech in which they seek to engage is protected by the First Amendment and that the President and Scavino exert governmental control over certain aspects of the @realDonaldTrump account, including the interactive space of the tweets sent from the account. That interactive space is susceptible to analysis under the Supreme Court's forum doctrines, and is properly characterized as a designated public forum. The viewpoint-based exclusion of the individual plaintiffs from that designated public forum is proscribed by the First Amendment and cannot be justified by the President's personal First Amendment interests.

In sum, defendants' motion for summary judgment is granted in part and denied in part, and plaintiffs' cross-motion for summary judgment is granted in part and denied in part. The Clerk of the Court is directed to terminate the motions pending at docket entries 34 and 42.

SO ORDERED.

[1] We appreciate the parties' professional response to our suggestion that they stipulate to the underlying facts so that the legal issues presented by this dispute could be addressed without the need to undertake a lengthy discovery process.

[2] At the time of the parties' stipulation, most users were limited to 140 characters per tweet. The limit has since been increased to 280 characters. See Aliza Rosen, Tweeting Made Easier, Twitter (Nov. 7, 2017),
The parties agree that we "may take judicial notice of the information published in the 'Using Twitter' and 'Policies and reporting' guides available on Twitter's 'Twitter Support' webpage." Stip. at 3 n.2.


Hicks has since resigned her position as White House Communications Director. See Katie Rogers & Maggie Haberman, Hope Hicks is Gone, and It's Not Clear Who Can Replace Her, N.Y. Times (Mar. 29, 2018), https://www.nytimes.com/2018/03/29/us/politics/hope-hicks-white-house.html. Because plaintiffs seek only prospective relief and Hicks was sued only in her official capacity, Stip. ¶ 10, the fact of Hicks's resignation alone warrants summary judgment in her favor. Further, because the President has not yet appointed Hicks's successor, no substitution by operation of Rule 25(d) can occur. Hicks will therefore be dismissed as a defendant, and no one will be substituted in her stead at this time. The Clerk of the Court is directed to amend the caption of this case accordingly.

The absence of future injury also precludes a finding of redressability, thereby defeating standing to seek injunctive relief on a second basis. See Steel Co. v. Citizens for a Better Envt'., 523 U.S. 83, 109, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("Because [plaintiff] alleges only past infractions of [law], and not a continuing violation or the likelihood of a future violation, injunctive relief will not redress its injury.").

Further, the Court suggested at oral argument that the parties consider a resolution of this dispute under which the individual plaintiffs would be unblocked and subsequently muted, an approach that would restore the individual plaintiffs' ability to interact directly with (including by replying directly to) tweets from the @realDonaldTrump account while preserving the President's ability to ignore tweets sent by users from whom he does not wish to hear. The fact that no such resolution has been reached further suggests that the individual plaintiffs will continue to be blocked and, consequently, will continue to face the harms of which they complain.

Both parties' reliance on other precedents developed in the context of suits against state officials under 42 U.S.C. § 1983 further persuades us that this line of precedent is applicable here.

Indeed, this passage of Federal Practice and Procedure suggests that a plaintiff asserting a duty claim has standing as long as the claim remains viable, and that the issue of standing becomes irrelevant when the duty is rejected — as the claim will have failed on the merits at that point. The government's argument that plaintiffs lack standing as to Scavino because Scavino has no duty therefore inverts the analysis by resolving the merits before standing. Cf. Steel Co., 523 U.S. at 89, 118 S.Ct. 1003 ("[J]urisdiction ... is not defeated... by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." (omissions in original) (quoting Bell v. Hood, 327 U.S. 678, 682, 66 S.Ct. 773, 90 L.Ed. 939 (1946)).

Rule 19(a) mandates the joinder of additional persons as parties if "in that person's absence, the court cannot accord complete relief among existing parties," provided that the joinder of that party does "not deprive the court of subject-matter jurisdiction." Fed. R. Civ. P. 19(a)(1)(A). Justice Blackmun, dissenting in Defenders of Wildlife, had contended that the plurality's analysis of redressability rendered superfluous Rule 19's contemplation that the joinder of additional parties would be needed to afford complete relief, as redressability would be lacking as an initial matter. See Steel Co. at 598 n.4, 112 S.Ct. 2130 (Blackmun, J., dissenting).

This case involves the interpretation of only one law — the First Amendment. The Government's reliance on Delta Construction Co. v. EPA, 783 F.3d 1291 (D.C. Cir. 2015) (per curiam), and Doe v. Cuomo, 755 F.3d 105 (2d Cir. 2014), each of which involved a plaintiff or petitioner subject to the requirements of multiple laws, is accordingly misplaced. In each of those cases, the action that the plaintiff or petitioner sought to undertake would be restricted by the unchallenged law, even if the plaintiff or petitioner were ultimately successful in challenging the first law.

Our conclusion that the individual plaintiffs' injuries are redressable through relief directed at Scavino does not depend on his presence as a defendant. "The power conferred by the [All Writs Act, 28 U.S.C. § 1651.] extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." United States v. N.Y. Tel. Co., 434 U.S. 159, 174, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977) (citations omitted); see also Made in the USA, 242 F.3d at 1310 n.25; Swan, 100 F.3d at 980; cf. Fed. R. Civ. P. 65(d)(2) (providing that injunctions and restraining orders bind not only the parties but also their "officers, agents, servants, employees, and attorneys" and "other persons who are in active concert or participation" with those persons). Accordingly, even if Scavino were not a defendant, relief could nonetheless be properly directed at him.

An organizational plaintiff may also have associational standing, under which "[a]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the
We would in fact be highly skeptical of any such contention.

That is, the question of whether a space is susceptible to forum analysis is analytically distinct from the question, assuming that forum analysis applies, of what type of forum (traditional public, designated public, or non-public) the space is.

In Brentwood, the Supreme Court considered whether "a not-for-profit membership corporation organized to regulate interscholastic sport among the public and private high schools" engaged in state action when it enforced its regulations against a member school. 531 U.S. at 291, 121 S.Ct. 924. The Court held that "state action may be found if, though only if, there is such a `close nexus between the State and the challenged action' that seemingly private behavior `may be fairly treated as that of the State itself,'" but acknowledged that "[w]hat is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity." Id. at 295, 121 S.Ct. 924 (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 351, 95 S.Ct. 1492, 44 L.Ed.2d 378 (1975)), which was sufficient to render the privately originated speech governmental in nature.

Whether the content of retweets initially sent by other users constitutes government speech presents a somewhat closer question. The content of a retweet of a tweet sent by another governmental account, Stip. ¶ 37, is still squarely government speech. The content of the retweet of a tweet sent by a private non-governmental account, Stip. ¶ 39, would still likely be government speech. Despite the private genesis of the content, the act of retweeting by @realDonaldTrump resembles the government's acceptance of the monuments in Pleasant Grove and the government's approval of the license plate designs in Walker, which were sufficient to render the privately originated speech governmental in nature.

Retweets again present a closer question. A retweet appears "in the same form as it did on the original [sender]'s timeline," with the name, picture, and handle of the original sender rather than the retweeter, and with an additional "notation indicating that the post was retweeted" above the tweet in smaller font. Stip. ¶ 21. Nonetheless, in the same way the President's retweeting of a tweet sent by a private individual likely renders the President's retweet government speech, a private individual's retweet of a tweet sent by the President is likely private speech rather than government speech.

Even if the interactive space associated with the content of a tweet constituted a non-public forum, the exclusion of the individual plaintiffs would not withstand First Amendment scrutiny. "Control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Cornelius, 473 U.S. at 806, 105 S.Ct. 3439. The blocking of the individual plaintiffs, which resulted from their "tweets that criticized the President or his policies," Stip. at 1, is not viewpoint-neutral, and is therefore impermissible "regardless of how the property is categorized under forum doctrine," Wandering Dago, 879 F.3d at 39.

These replies will appear in the muting account's notifications if the muting account follows the muted account. Of course, the fact that one account follows a second account strongly indicates some desire by the first user to engage with the second user. Stip. ¶ 19.

We do not analyze separately the argument that the blocking of the individual plaintiffs violates their right "to petition the Government for a redress of grievances" under the First Amendment's Petition Clause. The First Amendment right to speech and petition "are inseparable," and generally "there is no sound basis for granting greater constitutional protection" to one over the other. McDonald v. Smith, 472 U.S. 465, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985). "There may arise cases where the special concerns of the Petition Clause would provide a sound basis for a distinct analysis," Borough of Duryea v. Guarnieri, 554 U.S. 379, 389, 128 S.Ct. 2488, 180 L.Ed.2d 408 (2011), but this case does not present one of them.

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ORDER ON MOTION TO DISMISS

JOHN A. WOODCOCK, JR., District Judge.

Two Maine residents bring this action pursuant to 42 U.S.C. § 1983 seeking injunctive and declaratory relief against the Governor of Maine, alleging that by blocking their access to a social media page they claim has been managed by him and by deleting their comments from the page based on their viewpoints, the Governor violated their rights to free speech and to petition the government for a redress of grievances guaranteed by both the United States and Maine constitutions. The Governor moves to dismiss the Plaintiffs' claims on the grounds that his management of the social media page does not constitute action under color of state law and that his free speech rights protect his ability to delete comments and ban people from his page. In the alternative, the Governor argues that, even if the management of his Facebook page constitutes state action, the claims must still be dismissed because his actions constitute government speech, which cannot give rise to a First Amendment violation. He also argues that channels to petition the government remain open to the Plaintiffs.

The Court denies the Governor's motion because it is premature. The parties to this case do not agree on a basic fact: what exactly is the social media page in question. Is it, as Plaintiffs allege, the Governor's official page that he uses to discuss policy issues? Is it, as the Governor claims, a holdover campaign page that the Governor uses to communicate with his base and his base with him? Is it somewhere in between? On a motion to dismiss a complaint, the Court must assume the truth of all well-pleaded facts and inferences, and therefore, the Court must assume that the social media page is the Governor's official social media page. In doing so, the Court is not able to squarely reach the merits of the issues in the Governor's motion to dismiss.
I. BACKGROUND

A. Procedural History

On August 8, 2017, Karin Leuthy and Kelli Whitlock Burton filed a complaint against Paul R. LePage, in his individual capacity and official capacity as Governor of the state of Maine, alleging that his censorship of his official "Paul LePage, Maine's Governor" page on the social media platform Facebook violates rights guaranteed to them by both the United States and Maine constitutions. Compl. (ECF No. 1). The Complaint contains five counts: (1) Count I alleges that Governor LePage's banning of the Plaintiffs from his Facebook page violates their First Amendment free speech rights by imposing a viewpoint-based restriction on their participation in a limited public forum; (2) Count II alleges that the Governor's action violates the First Amendment because it imposes a viewpoint-based restriction on the Plaintiffs' right to petition the government for redress of grievances; (3) Count III alleges that the Governor's action violates the free speech rights guaranteed to the Plaintiffs by Article I, Section 4 of the Maine Constitution; (4) Count IV alleges that, by imposing a viewpoint-based restriction on the Plaintiffs' participation in a limited public forum, the Governor's action violates the Plaintiffs' right to petition the government embodied in Article I, Section 15 of the Maine Constitution; and (5) in Count V, the Plaintiffs seek a declaratory judgment. Id. at 17-19.

On October 13, 2017, the Governor filed a motion to dismiss the Complaint pursuant to Rule 12(b)(6). Def.'s Mot. to Dismiss (ECF No. 9) (Def.'s Mot.). The Plaintiffs responded on November 3, 2017. Pls.' Mem. of Law in Opp'n to Def.'s Mot. to Dismiss (ECF No. 11) (Pls.' Opp'n). The Governor replied to the Plaintiffs' response on November 17, 2017. Def.'s Reply in Supp. of Mot. to Dismiss (ECF No. 12) (Def.'s Reply).

On April 20, 2018, the Governor filed a supplementary memorandum, Def.'s Suppl. Mem. in Supp. of Mot. to Dismiss (ECF No. 13) (Def.'s Suppl. Mem.), in which he indicated that he "is amenable to oral argument in this matter and available to schedule argument at the Court's convenience." Def.'s Suppl. Mem. at 1 n.1. The Plaintiffs responded to the supplementary memorandum on April 24, 2018. Pls.' Resp. to Suppl. Mem. (ECF No. 14) (Pls.' Suppl. Resp.). On May 23, 2018, the Plaintiffs filed their own supplementary memorandum, Pls.' Notice of Suppl. Authority (ECF No. 15) (Pls.' Suppl. Mem.), and the Governor responded on June 1, 2018. Def.'s Resp. to Notice of Suppl. Authority (ECF No. 16) (Def.'s Suppl. Resp.).[1]

B. The Alleged Facts[2]

1. The Parties

Karin Leuthy is a resident of Camden, Knox County, Maine. Compl. ¶ 10. Ms. Leuthy is a freelance writer and editor. Id. ¶ 49. She is a cofounder of Suit Up Maine, a state-wide progressive grassroots network started in November 2016. Id. The group has more than 5,000 members who work to raise awareness of and advocate for policies, legislation, and initiatives related to civil rights, social justice, healthcare, the environment, education, and other areas that affect the lives of all Mainers. Id. Kelli Whitlock Burton is a resident of Waldoboro, Lincoln County, Maine. Id. ¶ 11. Ms. Whitlock Burton is a science and medical freelance writer. Id. ¶ 56. She is a cofounder of Suit Up Maine. Id. Paul R. LePage is the Governor of the state of Maine. Id. ¶ 12. He is a resident of Augusta, Kennebec County, Maine, with an official office in Augusta, Kennebec County, Maine. Id.
2. Facebook and Public Officials

Social media have recently become a crucial venue for public officials to disseminate news and information, and an equally crucial opportunity for the public to express their thoughts and opinions in response. Id. ¶ 2. Facebook, Twitter, and other social media platforms provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. Id. These platforms are revolutionary in their ability to increase civic engagement with elected officials through instantaneous and direct communication opportunities. Id. The ability of social media platforms such as Facebook to serve as forums for direct communication between constituents and public officials is analogous to speech that, until recently, was only attainable for people physically gathered in the same space, such as in a public park or town hall. Id. As such, cyberspace has become one of the most important places for the exchange of views, one which enables a person to become a town crier with a voice that resonates farther than from any soapbox. Id.

Facebook is a social media platform with approximately 1.94 billion monthly users worldwide, including approximately 234 million users in the United States and Canada. Id. ¶ 20. The website allows users to post messages and photos, to respond to or share others' messages or photos, and to interact with other Facebook users in relation to those posts. Id. A "status update" is a post shared with a Facebook user's friends or the public, depending on the user's privacy settings. Id. ¶ 21. These posts can range from written messages to photos and videos. Id.

Facebook users can subscribe to other users' posts by "following" a user's page. Id. ¶ 22. Users see all messages posted by or shared by the users or pages they have followed. Id. Facebook users can post replies to other users' posts or to comments on their own posts. Id. ¶ 23. Replies appear on the post among other users' replies. Id. Facebook users can "share" another user's post, which publishes the other user's post on the user's own timeline, among their own posts. Id. ¶ 24. Facebook users also are able to react to posts using graphics without replying or posting their own comments. Id. ¶ 25.

Users are able to "ban" other users from their page. Id. ¶ 26. When a user is banned from a page, they lose their ability to publish, react to posts, or comment on the posts on that page. Id. In its Help Center, Facebook explains the process for and consequences of banning. Id. ¶ 27 (citing Help Center, How do I Ban or unban someone from my Page?, FACEBOOK, https://www.facebook.com/help/XXXXXXX026/?ref=u2u). When people have been banned from a page on Facebook, they cannot comment or react to posts but can only see other users' comments and reactions. Id. ¶ 28.

In early 2017, Facebook released a new feature called "Town Hall" as a tool to help users find and contact their government representatives and to increase users' "civic engagement" with public officials on the social media platform. Id. ¶ 29 (quoting Help Center, What is Town Hall?, FACEBOOK, https://www.facebook.com/help/search?ref=1&q=facebook town hall). To participate in "Town Hall," Facebook has requirements for the elected official's Facebook page. Id. ¶ 30 (citing Facebook Town Hall Help Page). One requirement for "Town Hall" is that the elected official's page must be categorized as "Politician" or "Government Official," the official's page must use the "Politician template," and the description in the "Current Office" section of the page must accurately reflect the official's current government position. Id. ¶ 31 (citing Facebook Town Hall Help Page).

The "Town Hall" feature allows Facebook users to connect to verified state and federal government officials. Id. ¶ 32 (citing Facebook Town Hall Help Page). When users' "Town Hall" feature is turned on, a "constituent badge" is posted along with their name when they comment on a verified representative's
Facebook page. Id. ¶ 33 (citing Facebook Town Hall Help Page). A blue badge on a user's Facebook page means that the page has been "verified," or confirmed as a public figure's authentic page. Id. ¶ 34. Through the "Town Hall" feature, Facebook users are able to "opt-in to a tag" which publicly identifies them, through the use of this "constituent badge," as living in the district of an elected official when they are interacting on the elected official's government page. Id. ¶ 35 (citing Kerry Flynn, Facebook is helping politicians better understand who they serve, MASHABLE (Jun. 17, 2017), http://mashable.com/2017/06/07/facebook-constituent-badges-town-hall/#R0TG9CExDkqX). Whenever commenting, liking, or sharing a post by a Town Hall-identified official, the user is given the option to turn on this feature. Id.


Governor LePage owns and operates an official Facebook page entitled "Paul LePage, Maine's Governor." Id. ¶ 36. As Governor LePage's official page, "Paul LePage, Maine's Governor" is used by the Governor and his staff to share information such as news, press releases, announcements, and action items to everyone with access to Facebook, including his followers, supporters, critics, and constituents. Id. ¶ 37. The Facebook page is a significant source of information and news for the people of Maine, as well as a popular forum for speech by, to, and about the Governor. Id. ¶ 3. The page is accessible to the public, including those without a Facebook account; in regard to interactions on the page, it is accessible for all Facebook users, regardless of whether the user "likes" or "follows" the page. Id. ¶ 5.

"Paul LePage, Maine's Governor" is not Governor LePage's personal page. Id. ¶ 38. Governor LePage's personal page is simply entitled "Paul LePage." Id. In the "About" section of "Paul LePage, Maine's Governor," the page is described as "Paul LePage's official page — but not managed by gov't officials." Id. ¶ 39. The Governor's Facebook page is dynamic, with his posts reaching anywhere from tens to thousands of comments, likes, and shares. Id. ¶ 6. The Governor's office labeled this page as his "official page." Id. The page is linked to the Governor's blog on his government site, it is deemed his "official" page in the "About" section of his page, and when asked, his office has classified it as his official Facebook page. Id. The Governor uses the page to share press releases exclusive to the page, promote his policies, and to encourage his supporters to take action. Id.

"Paul LePage, Maine's Governor" is "verified" on Facebook as a public figure's authentic page and currently has 39,773 users who "like" his page. Id. ¶ 40. Governor LePage uses "Paul LePage, Maine's Governor" to perform government business, including relaying video messages directly to his constituents. Id. ¶ 41. As of July 24, 2017, "Paul LePage, Maine's Governor" was linked to Governor LePage's "Blog" on the official state of Maine Office of Governor Paul R. LePage website, as a means of staying connected with the Governor; clicking the Facebook button on this site took users to "Paul LePage, Maine's Governor." Id. ¶ 42. After Plaintiffs sent a letter to Governor LePage about being banned and censored, this link was disabled. Id. ¶ 43.

"Paul LePage, Maine's Governor" is recognized as a "Politician" or "Government Official" page on Facebook's "Town Hall" feature. Id. ¶ 44. "Paul LePage, Maine's Governor" also features many first-person posts from Paul LePage, indicating that Governor LePage controls the page. Id. ¶ 45. Governor LePage stated in a radio interview on July 6, 2017, that he uses the Facebook Live video streaming feature on his Facebook page to bypass the news media and communicate directly with the public. Id. ¶ 46 (citing interview with Governor Paul LePage (Newsradio WGAN broadcast Jul. 6, 2017,
Maine's Office of Information Technology has established a policy regarding the use of social media for state business, which anticipates comments and contributions from constituents critical of governmental officials and their policies.[3] Id. ¶ 48. The Governor's office approved and enforces this policy. Id. Regarding negative commentary, the policy states: "Any scandalous, libelous, defamatory, or pornographic material, if posted, is removed as soon as discovered." Id. The policy further states that "[a]gencies must create and publish a Terms of Comment which describes how the Agency will manage user contributions to the extent allowed by the Social Media site/application. The Terms of Comment shall detail the review criteria for acceptable comments, such as on-topic, non-duplicative, not obscene or offensive etc." Id. (citing Social Media for State Business Policy, MAINE OFFICE OF INFORMATION TECHNOLOGY, available at https://www1.maine.gov/oit/policies/SocialMediaStateBusiness.pdf).

4. Plaintiffs' Interaction with "Paul LePage, Maine's Governor"

a. Karin Leuthy

Ms. Leuthy began interacting with Governor LePage by following and commenting on his Facebook page during the 2014 gubernatorial election. Id. ¶ 50. She increased her interaction with Governor LePage during the weeks leading up to the state government shutdown in July 2017. Id. ¶ 51. On July 6, 2017, Ms. Leuthy made two statements to Governor LePage through "Paul LePage, Maine's Governor." Id. ¶ 52. One comment quoted the Governor about intentionally misleading the press; and the second questioned why the Governor was not responding to reporters, accompanied by a link to a Bangor Daily News article. Id. Approximately one hour after Ms. Leuthy's second comment, a supporter of Governor LePage responded to the comment. Id. ¶ 53. Ms. Leuthy prepared a response to this response, but before she could post it, she was banned from the site. Id. Neither of Ms. Leuthy's comments was scandalous, pornographic, off topic, duplicative, or offensive.[4] Id. ¶ 54. Defendant's banning of Ms. Leuthy from the "Paul LePage, Maine's Governor" Facebook page prevents or impedes her from commenting on the Governor's posts, sharing his posts, and engaging in discussion with Governor LePage and with other constituents. Id. ¶¶ 7, 55.

b. Kelli Whitlock Burton

Ms. Whitlock Burton first commented on "Paul LePage, Maine's Governor" on July 6, 2017. Id. ¶ 56. Ms. Whitlock Burton posted two comments on "Paul LePage, Maine's Governor" on July 6, 2017 and took screenshots of both comments in anticipation of their possible deletion. Id. ¶ 57. Ms. Whitlock Burton's first comment on "Paul LePage, Maine's Governor" was a response to Governor LePage's July 4, 2017 "Happy Independence Day!" post. Id. ¶ 58. Ms. Whitlock Burton's post criticized the Governor's practice of deleting constituents' comments:

Governor LePage, I am hearing from a number of your constituents that they have been blocked from your Facebook page and their comments deleted. I have seen screen shots of the comments and they are not inappropriate, profane or disrespectful. They only disagree with your stance on certain issues and events. Perhaps this is an oversight? Because to remove
constituents from your Facebook account simply because they disagree with you seems to be a poor reflection of the Office of the Governor. The blocking from social media of constituents who disagree with policies or legislation is a disturbing trend among Republican elected officials. I certainly hope that you and your office are not traveling down that road.

Id. Later that same day, July 6, 2017, Ms. Whitlock Burton commented on another post on the Governor’s page. Id. ¶ 59. Governor LePage's post discussed the media falsely reporting that he was taking a vacation: Over this past weekend, during budget negotiations, Governor LePage was attempting to get Senators to return his call during the midst of then negotiations. He wanted to make it clear when speaking with folks that he would not sign a budget which increased taxes on the Maine people and small businesses.

When media contacted the Governor's office regarding a vacation the office was 100% accurate and clear that the Governor was not taking a vacation.

Id. On this post, Ms. Whitlock Burton posted a comment stating: “Gov. LePage, it was members of your own party who told reporters that you had said you were taking a vacation. Perhaps you should direct your anger and frustration at those who talked to the media, not at the media for reporting it.” Id. ¶ 60.

Ms. Whitlock Burton realized within hours of posting the two comments on July 6, 2017, that her comments had been deleted, and that she had been banned from further posting, liking, or replying to any content on the Governor's page. Id. ¶ 61. Neither of Ms. Whitlock Burton's comments was scandalous, pornographic, offtopic, duplicative, or offensive. [5] Id. ¶ 62. The Governor's banning of Ms. Whitlock Burton from the "Paul LePage, Maine's Governor" Facebook page prevents or impedes her from commenting on the Governor's posts, sharing his posts, and engaging in discussion with other constituents. Id. ¶¶ 7, 63.

II. LEGAL STANDARD

Rule 12(b)(6) requires dismissal of a complaint that "fail[s] to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). To state a claim, a complaint must contain, among other things, "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). "[T]he pleading standard Rule 8 announces does not require `detailed factual allegations[.]'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Rather, to survive a motion to dismiss, a complaint must contain "sufficient factual matter, accepted as true, to `state a claim to relief that is plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 570). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). "Plausible . . . means something more than merely possible, and gauging a pleaded situation's plausibility is a `context-specific' job that compels [the Court] `to draw on' [the judge's] `judicial experience and common sense.'" Schatz v. Republican State Leadership Comm., 669 F.3d 50, 55 (1st Cir. 2012) (quoting Iqbal, 556 U.S. at 679).

The First Circuit explained that "[t]he plausibility inquiry necessitates a twostep pavana." García-Catalán v. United States, 734 F.3d 100, 103 (1st Cir. 2013) (citing Rodriguez-Reyes v. Molina-Rodriguez, 711 F.3d 49, 53 (1st Cir. 2013)). "First, the court must distinguish `the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited).'" Id. (quoting Morales-Cruz v. Univ. of P.R., 676 F.3d 220, 224 (1st Cir. 2012)). "Second, the court must determine whether the factual allegations are sufficient to support `the reasonable inference that the defendant is liable for the
misdemeanor alleged." Id. (quoting *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011) (quoting *Iqbal*, 556 U.S. at 678)).

III. DISCUSSION

A. Action Under Color of State Law

"To state a claim for relief in an action brought under [42 U.S.C.] § 1983," plaintiffs must establish that (1) "they were deprived of a right secured by the Constitution or laws of the United States," and (2) "the alleged deprivation was committed under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). "Section 1983's `under color of state law' requirement is the functional equivalent of the Fourteenth Amendment's `state action' requirement. Accordingly, [courts] regard case law dealing with either of these formulations as authoritative with respect to the other, and . . . use the terminologies interchangeably." *Santiago v. Puerto Rico*, 655 F.3d 61, 68 (1st Cir. 2011) (citing, e.g., *United States v. Price*, 383 U.S. 787, 794 n. 7 (1966)).

1. The Governor’s Position

The Governor maintains that the actions alleged in the Plaintiffs' Complaint do not constitute action under color of state law and therefore, both First Amendment claims must fail. *Def.'s Mot.* at 1-2. He states that his Facebook page "has been consistently employed as a platform of expression for [him] as a politician in his private capacity . . .," id. at 7, and that it is not administered by the government. Id. at 1. He states that the page was created nearly a year before he became governor and has always identified its purpose as advancing his messages and those of his supporters. Id. He likens the page to supportive campaign literature or a political rally, emphasizing his status as a politician and former candidate for office over his role as Governor. *Def.'s Reply* at 4. He states that "]it is of no moment that the page no longer clearly states a specific office or term for which [he] is currently seeking elective office." Id. He claims that the page is operated under his name and "not the Office of the Governor." *Def.'s Mot.* at 1. He also maintains that the page discloses that no government officials administer the site and that the page redirects constituents with official inquiries to other channels. Id. at 1-2.

Furthermore, the Governor contends that the page is "distinct in form and substance from official state agency Facebook pages." Id. at 2. He avers that the administration of the Facebook page "is not among any actual or apparent duties of the Office of the Governor of Maine, nor does state law require or otherwise provide for the administration of a governor Facebook account." Id. at 13; see *Def.'s Reply* at 2. He also claims that the page "does not meet any of the requirements of an official social-media account set forth in Social Media for State Business Policy." *Def.'s Reply* at 2. The Governor suggests that for these reasons the Complaint "cannot support an inference that the administration of the page is an act LePage performs `under color of law' pursuant to `an actual or apparent duty of his office.'" *Def.'s Mot.* at 2 (quoting *Davignon v. Hodgson*, 524 F.3d 91, 112 (1st Cir. 2008) (quotation omitted)).

The Governor maintains that his posts regarding official business to the Facebook page do not change this conclusion. Id. at 13 (citing Eugene Volokh, *Is @RealDonaldTrump Violating the First Amendment by Blocking Some Twitter Users?*, THE VOLOKH CONSPIRACY (WASH. POST Jun. 6, 2017), http://goo.gl/G8Qfus). He maintains that "[t]o conflate politicians' statements promoting their political agenda
with the official duties of public office produces irrational results" such as one's discussion of political accomplishments at a cocktail party being deemed action under color of state law. Id. at 14. The Governor observes that much of what elected officials do and say is in some way related to their public office, and he suggests the need for a limiting principle to guide courts in determining "which portions of politicians' lives are and are not fair game for § 1983 suits." Def.'s Reply at 3.

2. The Plaintiffs' Position

The Plaintiffs state that challenged conduct is under color of state law when it is "related in some meaningful way either to the officer's governmental status or to the performance of his duties." Pls.' Opp'n at 10 (quoting Parilla-Burgos v. Hernandez-Rivera, 108 F.3d 445, 449 (1st Cir. 1997) (citing Martinez v. Colon, 54 F.3d 980, 987 (1st Cir. 1995))). They argue that the Governor's Facebook page meets this standard. Id.

The Plaintiffs highlight that the page (1) uses the label "official", (2) invokes the Governor's title: "Paul LePage, Maine's Governor," (3) operates under the verified banner of "Maine's Governor," (4) participates in Facebook's `Town Hall' feature for government representatives, (5) links to the official Maine.gov website, (6) includes his official email address, physical address, and phone number on his Facebook page, and (7) engages citizen responses on matters of public concern. Id. at 11-12. The Plaintiffs analogize this set of factors to those another court considered and relied upon in finding a public official's Facebook page operated under color of state law. Id. at 11 (citing Davison v. Loudoun Cty. Bd. of Supervisors, 267 F. Supp. 3d 702 (E.D. Va. July 25, 2017)).[6] The Plaintiffs disagree with the Governor's contention about the import of the fact that the page was established before his election, by stating that even if such timing is correct, the Governor signaled the official nature of the post-election page by changing its title to "Maine's Governor." Id. at 12. The Plaintiffs also maintain that the fact that the page is categorized as a "Public Figure" rather than "Government Official" likely stems from its creation before his election and is ultimately not determinative. Id. They reiterate the fact-intensive nature of the inquiry and posit that the most persuasive factors here are the "Maine's Governor" label and his participating in Facebook's Town Hall feature for government representatives. Id.

The Plaintiffs aver that one element of discharging the Governor's official duties is using publicity to advance the gubernatorial agenda, including communication and interaction with the constituents of Maine. Id. at 13. They cite the Legislature's creation of the "Governor's Office of Communications," as evidence of this. Id. (citing 2 M.R.S. § 10). The Plaintiffs state that the Governor uses the Facebook page for precisely this purpose, citing his communications about topics such as budget negotiations with the Legislature. Id.

3. Analysis

Courts "examine[] the totality of the circumstances, to determine whether the `state actor's conduct occurs in the course of performing an actual or apparent duty of his office, or . . . is such that the actor could not have behaved in that way but for the authority of his office.'" Davignon, 524 at 112 (quoting Martinez, 54 F.3d at 986). "The key determinant is whether the actor, at the time in question, purposes to act in an official capacity or to exercise official responsibilities pursuant to state law." Martinez, 54 F.3d at 986. Whether the official is acting "under pretense of law" is "[o]ne relevant facet of this inquiry." Parilla-Burgos, 108 F.3d at 448-49.
Plaintiffs pleaded facts alleging that the Governor's operation of his Facebook page relates to "an actual or apparent duty of his office," Davignon, 524 F.3d at 112 (citing Martinez, 54 F.3d at 986), or is "related in some meaningful way either to the officer's governmental status or to the performance of his duties." Parrilla-Burgos, 108 F.3d at 449. The Governor's page is designated his "official page," invokes his official title, and is separate from his personal page. C.f. German v. Eudaly, No. 3:17cv-2028-MO, 2018 WL 3212020, at *6 (D. Or. Jun. 29, 2018) (city commissioner's posting to her undisputed personal, non-official Facebook page, when she also maintained an official Facebook page, did not constitute state action). "Paul LePage, Maine's Governor" is recognized as a politician or government official on Facebook's Town Hall feature, which is designed to help users contact their verified government representatives and enhance civic engagement. These facts lend "Paul LePage, Maine's Governor" an imprimatur of governmental connection and authority.

By contrast, the Governor characterizes the page very differently as campaign-oriented and political in nature. The Court is sensitive to the Governor's valid point that, because much of what he and other elected officials do and say relates in some way to their official duties, in the absence of a limiting principle, little of their activity would be incapable of giving rise to § 1983 suits. Specifically, the Governor maintains that the Facebook page was created nearly a year before he assumed the Office of Governor, that it is expressly labeled a "Public Figure" page, not a "Government Official" page, that the page states it is "fan created" and is "not managed by gov't officials", and that if the user is looking for the Governor's official website, the page redirects the user to his Maine.gov website. At this point in the lawsuit, however, the Court need not demarcate the line between private and public speech because the Court is required to accept the Plaintiffs' allegations as true. The Court may not accept the Governor's alternative version of the facts.

Whether conduct constitutes state action is often fact-intensive, and requires "sifting facts and weighing circumstances." Santiago, 655 F.3d at 68 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)). The Plaintiffs pleaded facts that lead to a reasonable inference the Governor acted under color of state law when he deleted their posts and banned them from his Facebook page. Accepting the Plaintiffs' allegations as true solely for purposes of the Governor's motion to dismiss, the Court rejects his argument for dismissal bottomed on contrary facts.

B. Defining the Speech and Speakers at Issue

1. The Governor's Position

The Governor contends that, even if the Complaint plausibly alleges that his operation of the Facebook page constitutes action under state law, "dismissal is required because the page (and the moderation of comments thereon) would constitute government speech." Def.'s Mot. at 2, 15. His premise is that forum analysis is inapplicable to government speech. Id. (quoting Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny.")). He observes that "[t]he government may constitutionally 'say what it wishes, and to select the views that it wants to express.'" Id. at 2 (quoting Sutliffe v. Epping Sch. Dist., 584 F.3d 314, 329-30 (1st Cir. 2009) (quotations and citation omitted)). He quotes caselaw for the proposition that "[a]s a constitutional matter, the right to speak extends to the right not to be forced to adopt someone else's speech." Id. at 16 (quoting Newton v. LePage, 849 F. Supp. 2d 82, 118 (D. Me. 2012), aff'd, 700 F.3d 595 (1st Cir. 2012) (citing Wooley v. Maynard, 430 U.S. 705, 714 (1977))).
The Governor asserts that he has the discretion to select what speech by others he wants presented on his Facebook page. *Id.* at 16, 18. He characterizes his exercise of this discretion as "[i]ncorporating private speech through third-party comments into his own speech . . . [so as to] accomplish[] his broader effort to express a message that promotes certain policies on the Facebook page." *Id.* at 17. He also claims a "First Amendment right to disavow messages [he] do[es] not wish to be associated with." *Def.’s Reply* at 6.

The Governor analogizes this case to *Sutliffe*, a case involving government speech and the Internet. *Def.’s Mot.* at 17-18. He says that his Facebook page is similar to the *Sutliffe* town website, which the First Circuit deemed government speech—and not a public forum—over which the town retained control and discretion, including the ability to include or exclude hyperlinks to external websites. *Def.’s Mot.* at 18 (citing *Sutliffe*, 584 F.3d at 333-34). The Governor expresses concern that "[a]pplying forum doctrine to cases such as these risks flooding government websites with outside messages that `mak[e] it impossible for the [government] to effectively convey its own message [thus] defeating the very purpose of the website.'" *Id.* at 18 (quoting *Sutliffe*, 584 F.3d at 334).

The Governor cites *Sutliffe* and other caselaw where courts have held that a state’s speech does not lose its governmental nature simply because it derives its content from private sources. *Def.’s Reply* at 5 (citing *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009); *Newton*, 700 F.3d 595; *Sutliffe*, 584 F.3d at 330). He argues that those cases involved "speech contributions that traditionally remain closely affiliated with their creator" and that "nevertheless, such affiliation or attribution alone does not transform government speech into an open forum for private speech." *Id.* at 5-6.

The Governor argues that the First Amendment rights at stake in this case are his, not the Plaintiffs’. *Def.’s Mot.* at 1. He asserts that "Paul LePage, Maine’s Governor" is private speech and that the First Amendment protects his ability to control the content posted on his page. *Id.* at 7. He claims that these rights "include[e] the right to control the messages [he] promote[s]." *Id.* at 1. The Governor argues that the Plaintiffs seek to unconstitutionally restrict his "ability to choose which messages to promote and instead require[e] him to open up that page to all comers, no matter how vociferously their comments may conflict with and detract from [hi]s own messages and priorities." *Id.* He asserts that if the Plaintiffs are successful, he will be forced to "either to broadcast a cacophony of messages with which they disagree, or to change their pages into static sites stripped of the networking features that define social media." *Id.*

The Governor also cites *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), for the proposition that freedom of expression includes the right "to exclude a message [one does] not like from the communication [one chooses] to make." *Def.’s Mot.* at 8 (quoting *Hurley*, 515 U.S. at 574). He argues that his right to post political viewpoints and policy positions on his Facebook page "is therefore inseparable from his right to delete third-party comments from that same page in order to tailor the message he communicates." *Id.*

The Governor observes that elected officials do not lose their rights to free speech when they assume office. *Id.* at 1. He characterizes the Plaintiffs as asserting that the First Amendment protects their political commentary on Facebook to a greater extent than it protects his use of his Facebook page to espouse his own political viewpoints, and he cites *Bond v. Floyd*, 385 U.S. 116, 136 (1966) as rejecting such a distinction. *Def.’s Mot.* at 9. He analogizes the situation here to those cases involving political rallies hosted by incumbent public officials. *Id.* at 9-10 (citing *Sistrunk v. City of Strongsville*, 99 F.3d 194 (6th Cir. 1996); *Weise v. Casper*, No. 05cv-02355-WYD-CBS, 2008 WL 4838682, at *8 (D. Colo. 2008) aff’d on other
2. The Plaintiffs' Position

The Plaintiffs maintain that by opening an online platform for public comment, the Governor created a designated public forum and that, "in any event, viewpoint restriction (as practiced by the Governor) is impermissible even in a non-public forum." Pls.' Opp'n at 2. They cite Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995): "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." Id. at 8 (citing Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972)).

The Plaintiffs point out that the Governor admits he deleted their posts and excluded them from his Facebook page because he disagrees with their viewpoints. Id. at 1, 7. They argue that his deletion of Ms. Whitlock Burton's post criticizing his deletion of the posts of others "doubly violated core First Amendment principles" by "removing evidence of his censorship" in addition to distorting the marketplace of ideas. Id. at 1, 9. They argue that by this action, the Governor projected a false appearance of open public debate. Id. at 1, 9. They observe that this alleged viewpoint discrimination took place in core political speech, which is of special importance in First Amendment doctrine. Id. at 9. The Plaintiffs underscore that the context—social media—is one the Supreme Court recently characterized as "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." Compl. ¶ 2 (quoting Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017)); Pls.' Opp'n at 2, 9 (citing Packingham, 137 S. Ct. at 1735-37).

The Plaintiffs' reject the Governor's framing of this case as about his own expression of opinion. Pls.' Opp'n at 1-2. They underscore that they complain not of the Governor's words, but of his censorship of comments by others. Id. at 1-2. So, while the Governor's own posts may be government speech, the Plaintiffs state, the conduct at issue is censoring private speech, not affirmative government speech. Id. at 16-17. They observe that the posts on the Facebook page are clearly labeled with the name of the person who posted them. Id. at 17. For this reason, the Plaintiffs argue, the Governor's speech—in the form of his posts—is clearly marked as distinct from the posts private citizens make on his page. Id. at 17-18. Thus, a reader of the page would interpret the various posts by various speakers on the Governor's page "as a conversation between different speakers, not as monolithic government speech." Id. at 18. For these reasons, the Plaintiffs dispute the Governor's assertion that an inability to delete posts would force him to adopt the speech of those who comment on his page. Id. at 20.

The Plaintiffs analogize themselves to disfavored voices at a town hall or school board meeting and suggest that the Court should not condone the Governor's actions with respect to them any more than it would censorship of speech at those analogous in-person proceedings. Id. at 20-21 (citations omitted).

3. Deleting Posts as Speech

The Governor is correct that the government's own speech is immune from First Amendment scrutiny, Matal v. Tam, 137 S. Ct. 1744, 1757 (2017); however, he fails to persuade the Court on this motion to dismiss that his speech is at issue in this case. Based solely on the allegations in the Complaint, the Court must disagree with the premise that all of the information on the Governor's Facebook page constitutes his
speech. The posts on the Facebook page are labeled with the name of the person who posted them, and the Governor's speech—his posts—is distinct from the private citizen posts.

For purposes of this motion, the Court is similarly unpersuaded that the Governor incorporates or adopts the comments and posts of others as his own speech simply by not deleting them after the speakers post them to his page. Such posts are readily distinguishable from a city's acceptance of a donated monument for display in a public park or a town's inclusion of private-company hyperlinks on the official town website—both of which have been held to be government speech. *Pleasant Grove City*, 555 U.S. at 468; *Sutcliffe*, 584 F.3d at 330. Citizens posting to the "Paul LePage, Maine's Governor" page control the content and timing of their post without any prior review from the Governor. The page acts a passive conduit for the posts. The Plaintiffs seek to participate in the interactive portion of the page, not to control the static portions over which only the Governor has control nor to generate posts on his behalf. Their past posts were in their names, making clear that the views were theirs—not the Governor's. C.f., *Newton*, 700 F.3d at 602 ("[A] mural's prominence, filling two walls of a small waiting room [in the Maine Department of Labor building (MDOL)], alone would easily lead viewers to understand that the government's location of the art there was an endorsement of the mural's message, even if the expression originated with the artist. That is particularly so, given the plaque identifying the work as being commissioned by the MDOL and paid for by the state."). Indeed a reasonable person would not expect or reasonably interpret comments critical of an elected official to be the speech of that elected official. Such comments are not akin to government-controlled messages that merely "solicit[] assistance from nongovernmental sources." *Sutcliffe*, 584 F.3d at 330 (quoting *Pleasant Grove City*, 555 U.S. at 468).

*Sutcliffe* is factually distinguishable. There, the webpage at issue had a finite number of hyperlinks to external websites. *Id.* at 334. Here, as alleged by the Plaintiffs, the Facebook page is a forum capable of hosting an unlimited number of posts, designed to host ongoing discussion and commentary. The Plaintiffs allege it is more akin to a conversation than a static repository of information. Therefore *Sutcliffe*’s concern about "flooding the Town website with private links, thus making it impossible for the Town to effectively convey its own message and defeating the very purpose of the website and the hyperlinks chosen by the Town" does not appear to apply here. *Id.* As the *Sutcliffe* Court noted,

> Our decision rests on the facts of this case. It is possible there may be cases in which a government entity might open its website to private speech in such a way that its decisions on which links to allow on its website would be more aptly analyzed as government regulation of private speech.

*Id.* at 334-35. Based on the Plaintiffs' allegations, this case plausibly falls into the category the First Circuit described. But, as the First Circuit observed in *Sutcliffe*, the ruling "rests on the facts of this case" and in the context of the motion to dismiss, "the facts" are only those the Plaintiffs allege. *Id.* at 334.

With regard to their First Amendment free speech rights, again based on the Plaintiffs' allegations, the Facebook users who post messages expressing disagreement with the Governor via the "Paul LePage, Maine's Governor" page are akin to citizens who might attend a public meeting hosted by him or who organize rallies at Blaine House in that they seek to engage the Governor on issues pertinent to his official duties and to express their viewpoints in a forum and context associated with him and those duties.

The cases the Governor cites involving political rallies by incumbent elected officials are distinguishable. In those cases, the prospect of interruption and interference is real. A protester yelling and attempting to drown out the speaking elected official can easily interfere with and even halt the elected official's speech.
See Johanns, 544 U.S. at 574 (Souter, J., dissenting) ("To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question."). In contrast, a Facebook post, which is textual and visible alongside posts by the Governor, his supporters, and others, does not prohibit the Governor from posting whatever and whenever he wants. His words are conveyed and received with the precision and clarity he intends.

Based on the allegations in the Complaint, which the Court must accept, the Plaintiffs stated sufficient facts to plausibly allege that the conduct in this case is the Governor's deletion of posts and banning of citizens from the "Paul LePage, Maine's Governor" page, and that this conduct does not constitute government speech. So, while "[t]he Free Speech Clause does not require the government to maintain viewpoint neutrality" when engaging in such government speech," Matal, 137 S. Ct. at 1757, this axiom does not appear to apply to the Plaintiffs' claims.

4. Banning Participants as Speech

Given that the Court is unpersuaded that deletion of the posts constitutes government speech, at least as the Plaintiffs' Complaint frames the factual issues, it follows that banning participants from the page altogether would not be government speech. Because for purposes of the motion to dismiss, the Court sees the relevant speakers as the Plaintiffs—not the Governor—and because, even when considering the Governor's free speech rights, the Court does not consider deletion of the Plaintiffs' posts nor banning them as a form of speech, the Court declines the Governor's suggestion to dismiss the case on this basis.

C. First Amendment: Forum Analysis and Right to Exclude

1. The Governor's Position

While the Governor's primary contention with respect to forum analysis is that it should not apply because management of his Facebook page is government speech, he disputes the Plaintiffs' notion that, even under forum analysis, his actions were unconstitutional. Citing Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972) and Santasucci v. Gallen, 607 F.2d 527, 529 (1st Cir. 1979), the Governor argues that individuals, even those seeking to engage in political speech or protest, have no First Amendment right to disseminate their messages on another's private property, even property generally open for public access. Def.'s Mot. at 11. Because Facebook is a private entity, the Governor concludes that the Plaintiffs have no right to disseminate their messages on his Facebook page. Id. He asserts that he maintains unfettered rights to exclude disfavored speech and to exclude commenters who seek to use his page beyond the scope of any implicit invitation despite allowing some third-party commentary on his Facebook page. Id. at 11-12.

The Governor quotes Student Government Association v. Board of Trustees of University of Massachusetts, 868 F.2d 473 (1st Cir. 1989): "[w]ithout a more specific mandate from the Supreme Court, [courts should be] reluctant to extend the forum doctrine's regulatory tradition of 'absolute neutrality,' to [] instance[s] in which [the state] participates as a player in the marketplace of ideas" rather than "in its role as a regulator in the marketplace." Def.'s Mot. at 20 (quoting Student Gov't Ass'n, 868 F.2d at 477). The Governor contends, "[t]he fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider."
Id. at 21 (quoting Walker, 135 S. Ct. at 2251). He reiterates that "the primary purpose of [his] Facebook page is to express his viewpoints, policies, and concerns to his supporters, not to give constituents a platform to express their views in a marketplace of ideas or a channel to communicate their concerns to the Governor." Id. (emphasis in original). The Governor concedes that under certain circumstances a court might fairly conclude that a government official's website is a public forum, but he maintains that the right circumstances are not present here. Id.

2. The Plaintiffs' Position

With respect to forum analysis, the Plaintiffs aver that "[i]t does not matter which type of forum the Governor's Facebook page created because viewpoint discrimination (as occurred here) is prohibited in all forums." Pls.' Opp'n at 21. Citing Packingham, they state that the Supreme Court has been clear that certain Internet platforms are forums for First Amendment purposes. Id. at 21 (citing Packingham, 137 S. Ct. at 1735-36). The Plaintiffs assert that the Governor's Facebook page is best understood as a public forum, but they maintain that the viewpoint discrimination that the Governor engaged in is prohibited irrespective of the type of forum. Id. at 21-22.

The Plaintiffs distinguish Student Government Association by pointing out that there, the public university-defendant's paying for legal services made the university "a player," rather than a "regulator," in the marketplace of ideas. Id. at 22 (citing Student Gov't Ass'n, 868 F.2d at 477). They posit that here, by contrast, the Governor acted as a regulator when he deleted their speech and banned them from participating on his official Facebook page. Id. at 22.

The Plaintiffs argue that Facebook's status as a privately-owned entity does not matter for forum analysis. They cite Southeastern Promotions v. Conrad, 420 U.S. 546 (1975), which involved a government-leased (not publicly-owned) theater "under [the] control" of public officials. Id. at 22 (quoting Southeastern Promotions, 420 U.S. at 555). They assert that the same conclusion applies here, where the Governor controls his page, though owned by a private corporation. Id.

The Plaintiffs reject the Governor's assertion that the availability of other fora for their speech negates their need to speak on his Facebook page. Id. at 23-24. They state "[t]o the contrary, the Court in Southeastern Promotions expressly rejected a similar argument, holding that the potential availability of `some other, privately owned, theatre . . . is of no consequence.'" Id. at 24 (quoting Southeastern Promotions, 420 U.S. at 556).

3. Analysis

Based on the allegations in the Plaintiffs' Complaint, the Court declines to adopt the Governor's view that all of what appears on his Facebook page constitutes his speech. It follows that the Court does not agree with his argument that the page is government speech inappropriate for forum analysis. The Governor's deletion of posts and banning of participants are actions that speak to a government role as a regulator in a marketplace of ideas, not as a participant. See Pleasant Grove City, 555 U.S. at 467 ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech"); Student Gov't Ass'n, 868 F.2d at 477 (forum analysis "focuses on the government in its role as a regulator in the marketplace of ideas").
In any event, the Supreme Court's jurisprudence of government speech is rooted in a concern that "government would not work" if forum analysis applied to government speech. Walker, 135 S. Ct. at 2246; see also Pleasant Grove City, 555 U.S. at 468 (citation and internal quotations omitted) ("If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed. To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question."). The Court is not convinced that this concern is at play here. The Plaintiffs' posts to the Governor's Facebook page do not appear to hinder governance nor the Governor's ability to speak.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. For First Amendment purposes, there are traditionally three types of fora: "traditional public fora, designated public fora, and non-public fora." Ridley v. Massachusetts Bay Transp. Auth., 390 F.3d 65, 76 (1st Cir. 2004). These may include intangible channels of communication. Student Gov't Ass'n, 868 F.2d at 476. "Whether or not a given place is deemed a 'public forum' is ordinarily less significant than the nature of the speech restriction—despite the Court's rhetoric." Ridley, 390 F.3d at 75-76 (quoting Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 12-24, at 992 (2d ed. 1988)).

"[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs" and "public issues" through the "exposition" of one's political opinions. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995) (citations and internal quotations omitted). The right to disseminate such "core political speech" on one's social media account is "an area highly protected by the First Amendment." In Rideout v. Gardner, 838 F.3d 65 (1st Cir. 2016), the First Circuit struck down a New Hampshire law that prohibited people from photographing their marked ballots and publicizing the photographs on social media. Characterizing such postings as "core political speech," the First Circuit wrote that "there is an increased use of social media and ballot selfies in particular in service of political speech by voters" and as such, laws restricting these postings on social media accounts would affect political speech, "which occupies the core of the protection afforded by the First Amendment." Id. at 75 (internal quotations omitted). In Packingham, the Supreme Court wrote that "[s]ocial media offers `relatively unlimited, low-cost capacity for communication of all kinds.'" 137 S. Ct. at 1735 (quoting Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997)). It therefore provides "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." Id. at 1737 (quoting Reno, 521 U.S. at 870). They can be used for "a wide array of protected First Amendment activity." Id. at 1735-36. Social media platforms such as Facebook are "places" where people "can speak and listen," and are subject to the forum analysis. Id. at 1735.

The Governor's argument about Facebook being a private entity is not dispositive. In Southeast Promotions, the Supreme Court concluded that a privately owned theater under a long-term lease to a city was a public forum. 420 U.S. at 555. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." Rosenberger, 515 U.S. at 828. This is true even in non-public fora. Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) ("Access to a nonpublic forum, however, can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.").) Hence, whether the Facebook page is a public forum, a designated public forum, or a non-public forum, viewpoint discrimination is not permissible. See id. at 806; Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001). "The
essence of a viewpoint discrimination claim is that the government has preferred the message of one speaker over another.”  

McGuire v. Reilly, 386 F.3d 45, 62 (1st Cir. 2004).

The Governor does not dispute the Plaintiffs' claims that his deletion of their posts and banning of them from his page constituted viewpoint discrimination. Given this and the Court's conclusion that forum analysis does apply, the Court finds that the Plaintiffs plausibly stated a claim for violation of their free speech rights under the First Amendment.

D. Morgan v. Bevin

1. The Parties' Positions

The Governor's supplementary memorandum calls the Court's attention to a case he argues is analogous and supports his motion to dismiss: Morgan v. Bevin, 298 F. Supp. 3d 1003 (E.D. Ky. 2018). Def.'s Suppl. Mem. at 1-3.

The Plaintiffs argue that the procedural posture of Morgan—a motion for preliminary injunction—requires a different result than the pending motion to dismiss. Pls.' Suppl. Resp. at 1. They also distinguish Morgan on its facts. Id. at 1-4. The Plaintiffs state that the Morgan Court misapprehended the effect of banning a Facebook user from a page when it characterized that step as refusing "to listen" to the banned person. Id. at 2. The Plaintiffs aver that banning a user "does not merely allow the page owner to refuse 'to listen' to constituents' views; it also prevents blocked constituents from speaking on that platform altogether." Id. at 2 (citing Compl. ¶ 26).

The Plaintiffs also dispute the Morgan Court's finding that disallowing banning of users would flood the Kentucky Governor's pages "with internet spam" sufficient to "effectively, or actually" close the account. Id. at 2 (citing Def.'s Suppl. Mem. at 2-3 (quoting Morgan, 298 F. Supp. 3d at 1012)). They state that Governor LePage's Facebook page already garners "from tens to thousands of comments, likes, and shares," without flooding his Facebook page with spam. Id. at 2 (citing Compl. ¶ 6). They also state that Facebook's automatic display focuses attention on posts (rather than comments) by showing only several comments at a time and at a smaller size than posts. Id. (citing Compl. ¶ 41). They assert Davison is more persuasive than Morgan. Id. at 4.

2. Analysis

In Morgan, the Eastern District of Kentucky denied a request for a preliminary injunction brought by two individuals who argued that the Governor of Kentucky violated their First Amendment rights by banning them from his official Facebook page as well as from his official page on Twitter, another social media platform. 298 F. Supp. 3d at 1014. The Morgan Court found that the plaintiffs did not demonstrate a strong likelihood of success on the merits because it determined the accounts to be government speech not appropriate for forum analysis. Id. at 1010-11, 1013. The Morgan Court wrote that, by banning the plaintiffs, the governor was essentially ignoring them, and that the plaintiffs had no cognizable right to be heard via his official social media accounts. Id. at 1011-12. The district court deemed the accounts "privately owned channels of communication and are not converted to public property by the use of a public official." Id. at 1011. The Morgan Court analogized to Pleasant Grove City and Walker: "Governor Bevin is permitted to cull his desired message through his Facebook and Twitter page, much like Pleasant Grove and Texas
were allowed to engage in viewpoint discrimination when they did not allow certain monuments and did not allow certain specialty license plates." Id. at 1012-13 (citing Walker 135 S. Ct. 2239; Pleasant Grove City, 555 U.S. 460).

For purposes of the motion to dismiss, the facts in Morgan are distinguishable, but more importantly, the Court declines—at this point—to follow key pillars of the Morgan Court's reasoning. Based on the allegations in the Plaintiffs' Complaint, the Court sees the speech as the Plaintiffs' posts that the Governor deleted, as well as the future speech that they wish to engage in, within the forum of the "Paul LePage, Maine's Governor" Facebook page. Based on the allegations in the Complaint, the Court is unconvinced that the Governor adopts as his own speech each undeleted post made by someone else on the page. The Court also disagrees with the related notions that allowing a post to remain on a social media page amounts to "listening" or that the Plaintiffs are asserting "a right to be heard." The Court understands the Plaintiffs to be asserting a right to speak; whether their speech is heard and/or whether the Governor is listening are separate questions.

E. Petition Clause Claim

1. The Governor's Position

The Governor argues that the Petition Clause claim must be dismissed because his operation of the Facebook page does not constitute action under color of state law, thus rendering the Plaintiffs' § 1983 claim deficient. Def.'s Mot. at 22. He argues in the alternative that, even if the Plaintiffs alleged that he is acting under color of state law when he manages "Paul LePage, Maine's Governor," he argues that his First Amendment rights are not trumped by the Plaintiffs' right to petition the government. Id.

The Governor cites caselaw supporting his contention that the Plaintiffs' Petition Clause rights do not include the right to present their petitions by whatever method they choose. Id. at 22-23. He points out that "the operation of the page leaves open official channels to petition the Governor, and specifically directs visitors to those channels instead of the page." Id. at 2; see id. at 23.

2. The Plaintiffs' Position

The Plaintiffs acknowledge that their Petition Clause claim is closely related to their Free Speech Clause claim, and they urge the Court to reject the Governor's arguments for dismissal. Pls.' Opp'n at 24. However, the Plaintiffs distinguish the claims, quoting Borough of Duryea, Pennsylvania v. Guarnieri, 564 U.S. 379 (2011): "Both speech and petition are integral to the democratic process, although not necessarily in the same way. The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas. . . ." Pls.' Opp'n at 24 (quoting Guarnieri, 564 U.S. at 388). The Plaintiffs maintain that the existence of an alternative method to petition the government does not matter. Id. at 25. They contend that once the Governor opened a public channel for petition, he may not exclude petitioners based on their viewpoints. Id.

3. Analysis
The First Amendment guarantees every citizen's right "to petition the Government for a redress of grievances." U.S. CONST. amend. I. "The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression." McDonald v. Smith, 472 U.S. 479, 482 (1985). The right "allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives . . . [and is] generally concerned with expression directed to the government seeking redress of a grievance." Guarineri, 564 U.S. at 388. "Petitions to the government assume an added dimension when they seek to advance political, social, or other ideas of interest to the community as a whole." Id. at 395. "Interpretation of the Petition Clause must be guided by the objectives and aspirations that underlie the right. A petition conveys the special concerns of its author to the government. . . ." Id. at 388-89.

The Plaintiffs allege that the content of their posts to "Paul LePage, Maine's Governor" pertained to the Governor's interactions with the news media and his deletion of the posts of other Facebook users from his page. The Governor does not contend that these posts fail to touch on the objectives and aspirations that underlie the right to petition. Instead, he points out that the Petition Clause does not guarantee the Plaintiffs the right to petition through any channel of their choosing, and he claims that alternative petition channels exist for the Plaintiffs.

The Governor is correct with respect to the scope of the right to petition. It is not absolute. It does not include the right to baseless litigation nor to "petitions to the President that contain intentional and reckless falsehoods. . . ." McDonald, 472 U.S. at 484. The Governor cites Cumin v. Town of Egremont, 510 F.3d 24 (1st Cir. 2007), where the First Circuit determined that a town's policy of not permitting nonvoters who owned property and paid taxes in the town to speak at town meetings did not offend the First Amendment and that the town meeting moderator did not engage in viewpoint discrimination. Id. at 25-26. However, Cumin is inapposite because it does not involve interpretation of the Petition Clause and, in any event, it does not support his suggestion that the existence of alternative channels for petition is determinative.

The Governor cites no authority for the view that alternative channels for petition render a claim for violation of the Petition Clause nonviable, and the Court found none. The Governor does not analogize the Plaintiffs' communications via "Paul LePage, Maine's Governor" to frivolous litigation or to petitions to the President that contain intentional or reckless falsehoods. Thus, based on the allegations in the Complaint, the Court is unpersuaded that Count II fails to state a claim upon which relief can be granted.

F. Maine Constitutional Claims

The Governor argues that the Plaintiffs' claims arising out of the Maine Constitution are parallel to and duplicative of their federal claims and they fail for the same reasons the federal claims fail. Def.'s Mot. at 2, 23-24. He quotes the Maine Supreme Judicial Court: "[w]ith respect to the protection of freedom of speech, the Maine Constitution is no less restrictive than the Federal Constitution." Id. at 23 (quoting City of Bangor v. Diva's, Inc., 2003 ME 51, ¶ 11, 830 A.2d 898) (citation and internal quotations omitted)). With respect to Count IV, the Governor characterizes the Law Court jurisprudence as sparse. Id. at 24.

Because the Court has determined that dismissal of the Plaintiffs' federal claims is unwarranted, and because the Governor's argument for dismissal of the Maine constitutional claims is no different than his arguments for dismissal of the federal claims, the Court denies the motion to dismiss with respect to Counts III and IV.
IV. CONCLUSION

The Court DENIES the Defendant's Motion to Dismiss (ECF No. 9).

SO ORDERED.

[1] Plaintiffs contend that a recent case, Knight First Amendment Inst. at Columbia Univ. v. Donald J. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. May 23, 2018), is analogous and supports their position that dismissal is unwarranted. As will be discussed, the Court has not relied on Knight.

[2] In considering a motion to dismiss, a court “accept[s] all well-pleaded facts in the complaint as true.” Gilk v. Couffie, 655 F.3d 78, 79 (1st Cir. 2011) (quoting Sanchez v. Pereira-Castillo, 590 F.3d 31, 36 (1st Cir. 2009)). A court also “construe[s] all reasonable inferences in favor of the plaintiff.” Sanchez, 590 F.3d at 41.


[4] The Plaintiffs contend that neither of Ms. Leuthy's comments was libelous, obscene, or defamatory. Compl. ¶ 54. The Court excludes this portion of the statement as constituting legal conclusions; in addition, the Governor does not characterize Ms. Leuthy's comments as such.

[5] The Plaintiffs assert that neither of Ms. Whitlock Burton's comments was libelous, obscene, or defamatory. Compl. ¶ 62. The Court excludes this portion of the statement as constituting legal conclusions; in addition, as with Ms. Leuthy, the Governor does not contend that Ms. Whitlock Burton's comments were libelous, obscene, or defamatory.

[6] In Davison, 267 F. Supp. 3d 702, following a bench trial, the Eastern District of Virginia entered judgment in favor of an individual who brought a First Amendment free speech claim against a county official who banned him from her Facebook page for a period of twelve hours. The defendant, Phyllis J. Randall, was Chair of the Loudoun County Board of Supervisors, and the relevant Facebook page was entitled "Chair Phyllis J. Randall." Id. at 706. The Court found that she "acted under color of state law here, both in maintaining her 'Chair Phyllis J. Randall' Facebook page generally, and in taking the specific action of banning Plaintiff from that page." Id. at 711-12. As the resolution of the Governor's motion to dismiss turns on its procedural posture, the Court does not find Davison helpful because the Davison Court resolved contested factual issues at the bench trial.

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DREW MORGAN and MARY HARGIS, Plaintiff,

v.

MATT G. BEVIN, in his official capacity as Governor of Kentucky, Defendant.

Civil No. 3:17-cv-00060-GFVT.

United States District Court, E.D. Kentucky, Central Division, Frankfort.

March 30, 2018.

Drew Morgan & Mary Hargis, Plaintiffs, represented by Heather L. Gatnarek, ACLU of Kentucky, William Ellis Sharp, Blackburn, Domene & Burchett PLLC & Amy Denise Cubbage, Ackerson & Yann, PLLC.

Matt G. Bevin, in his official capacity as Governor of Kentucky, Defendant, represented by M. Stephen Pitt, Office of the Governor KY General Counsel, Matthew F. Kuhn, Office of the Governor KY General Counsel & S. Chad Meredith, Office of the Governor KY General Counsel.

OPINION & ORDER I A

GREGORY F. VAN TATENHOVE, District Judge.

Since 1791, we have given voice to a national value in favor of protecting robust political discourse in the words and promise of the First Amendment to the Constitution. This case requires the Court to test that value in an age in which citizens have never had more platforms to speak. Voice is no longer measured in only parchment or paper or access to the airwaves but also in the exponential potential of the internet.

Here, internet speakers want to use private internet platforms (Twitter and Facebook), used by the Governor to express his views and opinions as Governor, to force him to listen to their views. He might be wise to do so, but since a "person's right to speak is not infringed when government simply ignores that person while listening to others," Minnesota State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271, 286 (1984), the Governor is not required to do so. That is why Plaintiffs are unlikely to succeed on the merits of this case and consequently their Motion [R. 3] is DENIED.

I

A

Governor Bevin maintains official Facebook and Twitter accounts. See Governor Matt Bevin (@GovMattBevin), FACEBOOK (March 15, 2018),

https://www.facebook.com/GovMattBevin; @GovMattBevin, TWITTER (March 15, 2018),
https://twitter.com/govmattbevin?lang=en. Governor Bevin and his staff created these official accounts "in order to communicate [Bevin's] vision, policies, and activities to constituents and receive feedback from them on the specific topics that he chooses to address in his posts." [R 11 at 3.] Governor Bevin asserts
neither his official Facebook nor Twitter accounts were ever meant to be an "open forum for general discussion of all issues by the public." [Id.]

Plaintiffs allege, and Governor Bevin does not deny, that he has "banned" them from Facebook and "blocked" them on Twitter.[1] [R 1 at 1.] Plaintiff Drew Morgan is a citizen of Kentucky and was blocked by Governor Bevin on Twitter after making comments regarding Governor Bevin's then-overdue property taxes. Mary Hargis is a citizen of Kentucky and was blocked by Governor Bevin on Facebook after criticizing his right-to-work policies. Plaintiffs state that their First Amendment rights are being violated because they cannot comment on Facebook or view the posts and comments of others on Twitter. They seek a declaration that this ban is unconstitutional. [Id. at 2.] Plaintiffs further seek preliminary and permanent injunction preventing Governor Bevin from blocking anyone in the future and restoring not only their accounts but also the accounts of other similarly situated individuals. [Id.]

Twitter is a privately owned social networking site where users post messages of up to one hundred forty (140) characters. [See R. 23 at 37.] Individuals can post or tweet their own messages on their own wall or they can "interact with other people's tweets by either commenting on them, re-tweeting them, which is sharing, liking them, or direct messaging users." [Id. at 41.] Twitter is different from Facebook, which is also privately owned, because users post on their own walls and engage "other users by using the at symbol [] in front of their name . . . [which] notifies that person that you're talking to them." [Id. at 45.] Comments are viewed by clicking on the original tweet. [Id. at 42.]

Relevant here, Twitter discourages "violent threats, whether they're direct or indirect, harassment, hateful conduct, multiple account abuse, disclosing private information . . . [and] impersonation of others." [Id. at 39.] More specifically, Twitter discourages multiple accounts that have "overlapping uses" or are created "in order to evade the temporary or permanent suspension of a separate account." [R. 23 at 40.] Twitter's moderation functions allow individual users to "mute" certain words so that those words do not show up when that user is using Twitter, but others can still see those words. [Id. at 43-44.] This might be used when a parent doesn't want their child to see profanity while logged on to Twitter. [Id.] Users can also "report specific tweets," which will alert Twitter to determine if that tweet is appropriate or not. [Id. at 46.] When reporting a tweet, Twitter prompts the user to mute or block the account. [R. 23 at 48.] Twitter then views the tweet and can "temporarily ban the user" or "delete the tweet." [Id.] Users can also block other users from seeing their page altogether. [Id. at 49.] When a user is blocked, they cannot see the page they are blocked from, but instead see a message telling them they are blocked. [Id. at 48.] Users can circumvent this by logging out of Twitter "and viewing that page as an unregistered user." [Id. at 49.] An unregistered user "can see the page and the different posts, along with some of the comments. . . . [T]hey can't actually interact with anything. They can't post, they can't like, they can't share because they're not logged in." [R. 23 at 49.]

"Facebook is an online social media platform that allows users to create their own individual user profiles for the purpose of connecting and interacting with others." [R. 1 at 4.] A user profile "typically consists of a picture of the individual," a banner image, and a wall where individuals can post textual content or share pictures, videos, and other media. [R. 23 at 17.] Individuals can react to others' posts, indicating they "like it, agree with it, love it, hate it," etc. and can comment on that post or share it with their own followers. [Id. at 20.] Individuals also can comment or reply on posts and then react or comment on their own or others' comments or replies. [Id. at 21.]

Facebook's terms of service indicate that users should have only one personal account, but businesses and elected officials may also make Pages. [Id. at 16.] A Page is similar to a user profile, with a few exceptions;
it can have more than one administrator and has some additional rules and functionality. [Id. at 19.] Also, a Page is public, unlike an individual user profile. [R. 23 at 22.] Pages have certain built-in moderation capabilities that can automatically block as spam comments containing user-identified words. [Id. at 23.] Comments that contain words meant to be filtered out are placed in a spam folder and can be manually published by a Page's administrator. [Id.] Additionally, a Page administrator can set up a profanity filter through Facebook at an off, moderate, or strong setting. [Id. at 26.] Page administrators also can manually hide comments that they do not want to be displayed on a Page. [Id.] If a comment is hidden, the original commenter can see their comment, the moderator can see their comment, the original commenter's friends can sometimes see the comment, but no one else on the Page can. [R. 23 at 16; R. 23 at 52.] A Page administrator can delete a comment or post; when a comment or post is deleted, it's gone completely and there is no record of its existence. [Id. at 28.] A Page administrator can also report comments to Facebook, who can delete the comment or post if they find it does not abide by their guidelines. [Id. at 29.] Facebook notifies the individual who has been reported if their post or comment is deleted and may suspend their account if they find the conduct egregious. [Id. at 30.] Individuals can also report entire user accounts. [Id.]

Page administrators can block individuals from their Page, which prevents "them from interacting with the [P]age moving forward. They can still see the [P]age, they can still view it, [ ] they . . . can't comment;" but they can share posts on their own timeline. [R. 23 at 31, 32.] When a user shares a post from a Page, they can add their own comment to the post, which will display on their own account. [Id. at 55.] Page administrators can also disable private messages being sent to the Page. [Id. at 55.] An individual who has been blocked by a user could circumvent that block by accessing it through a Page they administrate. [Id. at 58.] For example, an individual blocked by Governor Bevin could not access his Page through their own personal account, but they could create a Page and then access Governor Bevin's Facebook Page through their own Page. [Id.] Also, nothing prevents blocked individuals from closing down or deleting their accounts and creating new personal accounts, thereby circumventing the block and renewing their access to Governor Bevin's Facebook Page. [R. 23 at 61.]

Governor Bevin has set up his Facebook Page so that members of the public cannot post on their own to his timeline, but can only respond to what he has posted. [R. 11 at 3.] Governor Bevin has further limited the public's ability to interact with his Page by setting up automatic filters on comments that contain "certain words, such as expletives and key words that most commonly appear in off-topic comments and spam." [Id. at 4.] Governor Bevin's Office controls the key words used in this filter. [Id.] Also, "Governor Bevin's Office enforces a policy of disallowing comments that are obscene, abusive, clearly off topic, or spam," and deletes or hides comments that do not abide by the guidelines. [Id.] If members of the public continue to make off-topic or obscene comments, Governor Bevin's Office blocks that person from making future comments. [Id.]

Plaintiff Hargis states that she uses her Facebook for "engaging in protected public speech" and that, "[in] late 2016 or early 2017, [she] posted comments on a post by Governor Bevin criticizing his right-to-work policies." [R. 1 at 10.] She states her "comment was not obscene, abusive, defamatory, or otherwise in violation of Facebook's Terms of Service." [Id.] On another occasion, she claims she "posted comments on a post by Governor Bevin criticizing his skilled labor apprenticeship program" that was similarly not obscene. [Id.] She discovered she was blocked by Governor Bevin in July 2017 and currently wishes to be unblocked. [Id.]

Plaintiff Morgan also uses his Twitter account to engage in political speech. [R. 3 at 3.] In February 2017, Morgan posted several comments on Bevin's Twitter account "inquiring about the status of Governor
Bevin's then-overdue property taxes." [Id.] He states his comments "were not obscene, abusive, defamatory, or otherwise in violation of Twitter's Terms of Service." [Id.] On one post, Morgan wrote, "and paying our property taxes" in response to Governor Bevin's post stating, "[i]f we are to be the best version of ourselves it is going to take us doing simple things like living by the golden rule." [R. 1-2.] Governor Bevin blocked Morgan on Twitter shortly after these comments were posted. [R. 3 at 3.] Governor Bevin claims Morgan was "'spamming' his account with off-topics comments." [R. 11 at 8.]

Governor Bevin states that he wants to hear from the public on Facebook and Twitter and "[o]n-topic comments provide Governor Bevin and his staff with quick, valuable feedback pertaining to the topics at issue, and they also help to further illuminate those topics for other members of the public." [Id. at 5.] However, he claims that off-topic comments "detract from the conversation by obscuring the chosen subject of Governor Bevin's communication and diverting the public's attention to different matters." [Id. at 6.] By allowing off-topic comments, he claims that he is less able to engage with commentators who do want to discuss his chosen topics of conversation, actually inhibiting dialogue between him and his constituents. [Id.] Governor Bevin states that he blocks both positive and negative comments that are off topic. [Id.]

Plaintiffs seek declaratory and prospective injunctive relief. They believe Governor Bevin's actions violate their First Amendment rights pursuant to 42 U.S.C. § 1983.

II

"A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." Overstreet v. Lexington-Fayette Urban Cty. Gov't, 305 F.3d 566, 573 (6th Cir. 2002) (citing Leary v. Daeschner, 228 F.3d 729, 739 (6th Cir. 2000) (finding that issuance of a preliminary injunction "involv[es] the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it."). To issue a preliminary injunction, the Court must consider:

(1) whether the movant has shown a strong likelihood of success on the merits;

(2) whether the movant will suffer irreparable harm if the injunction is not issued;

>(3) whether the issuance of the injunction would cause substantial harm to others; and

(4) whether the public interest would be served by issuing the injunction.

Overstreet, 305 F.3d at 573 (citations omitted).

"In the context of a First Amendment claim, the balancing of these factors is skewed toward an emphasis on the first factor." Liberty Coins, LLC v. Goodman, 748 F.3d 682, 690 (6th Cir. 2014). After deciding whether the movant has shown a strong likelihood of success on the merits, "the other three factors often hinge on this first factor." Id. For example, there can be no irreparable harm absent a substantial likelihood of a First Amendment violation. However, even if the Plaintiff is unable "to show a strong or substantial probability of ultimate success on the merits" an injunction can be issued when the plaintiff "at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." In re Delorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985).
Because Plaintiffs claim Governor Bevin violated their First Amendment rights, the Court will first consider
"whether the movant has shown a strong likelihood of success on the merits," Overstreet, 305 F.3d at 573, as "the likelihood of success on the merits often will be the determinative factor." City of Pontiac Retired Employees Ass'n v. Schimmel, 751 F.3d 427, 430 (6th Cir. 2014).

This Court is mindful that it is one of the first to wrestle with the intersections of the application of free speech to developing technology and First Amendment rights of access to public officials using privately-owned channels of communication. It is a case of first impression in the Sixth Circuit and, if appealed, would be a case of first impression to the Supreme Court of the United States as well. Only a single case on this issue has been decided and it was in the Eastern District of Virginia, which is not binding and this Court declines to follow. See Davison v. Plowman, 247 F. Supp. 3d 767, 771 (E.D. Va. 2017).[2] "The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow." Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (U.S. 2017). Justice Alito is right: "we should proceed circumspectly, taking one step at a time" when applying the Constitution to social media. Id. at 1744 (Auto., J., concurring).[3] For these reasons, the Court treads lightly in assessing the likelihood of success on the merits.

When a state actor restricts speech in a public space, the Court first analyzes what type of space, or forum, exists. Kincaid v. Gibson, 236 F.3d 342, 347 (6th Cir. 2001); see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) ("The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue."). "[T]here are four types of fora: traditional public fora, designated public fora, limited public fora, and nonpublic fora." Miller v. City of Cincinnati, 622 F.3d 524, 534 (6th Cir. 2010). However, the Supreme Court has emphasized that, "[h]aving first arisen in the context of streets and parks, the public forum doctrine should not be extended in a mechanical way" to other contexts. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 672-73 (1998) (holding that forum analysis was inappropriate in assessing public broadcasting program choices); see also United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 205-06 (2003) ("The doctrines surrounding traditional public forums may not be extended to situations where such history is lacking."). Plaintiffs assert that Facebook and Twitter are traditional public fora, necessitating the highest level of scrutiny; Governor Bevin asserts Facebook and Twitter are limited fora, where speech restrictions are permissible when they are viewpoint neutral and reasonable in light of the purpose of the forum. [See R. 3 at 2; R. 11 at 14.] See also Miller, 622 F.3d at 534-35. However, neither party adequately addressed the threshold question of whether forum analysis even applies in this context. This Court finds that it does not.

"[Ms an initial matter a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns." Cornelius v. NAACP Legal Del & Educ. Fund, Inc., 473 U.S. 788, 801 (1985). "[P]ublicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will." Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 686 (1992). (O'Connor J., concurring) (quoting United States v. Grace, 461 U.S. 171, 177 (1983)). And, "where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place." Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 479-80 (2009). In this case, the city of Pleasant Grove was sued for denying Summum a petition to place a monument to their religion in a public park. The Summum petitioners argued that the park was a public forum and the city could not choose some monuments over others, stating it was impermissible viewpoint discrimination. Summum, 555 U.S. at 479. The Supreme Court rejected Summum's argument, stating that the City's decision to place a monument or reject a monument was government speech. The
Supreme Court has explicitly issued caution that "a partial analogy in one context," should not "compel a full range of decisions in . . . a new and changing area," and social media is certainly a new and changing area. Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C., 518 U.S. 727, 749 (1996).

Instead, this Court is convinced that Governor Bevin's use of privately owned Facebook Page and Twitter pages is personal speech, and, because he is speaking on his own behalf, even on his own behalf as a public official, "the First Amendment strictures that attend the various types of government-established forums do not apply." Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2250 (2015). "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000); see also Walker, 135 S. Ct. at 2245 ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. . . . That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech.")

There is "no constitutional right as members of the public to a government audience for their policy views." Minn. State Bd. for Cmty Colleges v. Knight, 465 U.S. 271, 286 (1984). Governor Bevin is under no obligation to listen to Plaintiffs, and Plaintiffs have no Constitutional right to be heard in this precise manner. "Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." Id. at 285. Governor Bevin has chosen to effectively, "ignore" those on Facebook he deems are not following the line of conversations he has decided to start on Facebook. Smith v. Ark. State Highway Emp., Local 1315, 441 U.S. 463, 466 (1979) (holding, in part, "the First Amendment does not impose any affirmative obligation on the government to listen [or] to respond.")

Governor Bevin's Twitter and Facebook accounts are privately owned channels of communication and are not converted to public property by the use of a public official. Simply put, this is unlike any type of property typically protected by First Amendment forum analysis law.[4] See Cornelius, 473 U.S. at 801-02. Governor Bevin's Twitter and Facebook accounts are a means for communicating his own speech, not for the speech of his constituents. Governor Bevin has made a series of decisions in setting up his official Facebook and Twitter accounts that indicate he intended them to be his own speech. First, his intended purpose for the accounts was to "communicate his vision, policies, and activities to constituents and receive feedback from them on the specific topics that he chooses to address in his posts." [R 11 at 3.] He never intended his Facebook or Twitter accounts to be like a public park, where anyone is welcome to enter and say whatever they want; he has a specific agenda of what he wants his pages to look like and what the discussion on those pages will be. Further, individuals cannot directly post on his account. [R. 23 at 4.] Only he posts to his own account and users are permitted to comment on whatever post he has written. [Id.] Governor Bevin has an automatic filter set up so that expletives and spam comments are not posted, and he does not allow comments on his page that are "obscene, abusive, clearly off topic or spam." [R. 11 at 3.] If he wanted a truly open forum where everyone could post or comment, he could have set up his accounts to allow that, but he did not. And the First Amendment does not require him to do so.

The Government argues, and this Court agrees, that the consequence of requiring Governor Bevin to allow anyone to access and post on his Facebook and Twitter accounts could shut down the pages altogether. Hypothetically, if this Court ruled Governor Bevin could not block anyone from his Twitter or Facebook accounts, his accounts could be flooded with internet spam such that the purpose of conveying his
message to his constituents would be impossible and the accounts would effectively, or actually, be closed. This further supports the Court's conclusion that forum analysis is inappropriate in this context. See Summum, 555 U.S. at 479 ("[W]here the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.").

Ultimately, Governor Bevin is not suppressing speech, but is merely culling his Facebook and Twitter accounts to present a public image that he desires. As a general matter, constituents don't have a right to be heard and Governor Bevin has no obligation to listen to everyone who wishes to speak to him. See Ark. State Highway Emp., 441 U.S. at 466. He has set up his Facebook and Twitter accounts to benefit him in ways he has identified, to communicate his policies and visions, and to seek specific feedback. [R 11 at 3.]

Summum is helpful in this analysis, as Pleasant Grove essentially practiced viewpoint discrimination in deciding who could place a monument in a park and who could not. Pleasant Grove chose monuments to go in its city park based on the image the city wanted to display; similarly, Governor Bevin wants to cull his Facebook and Twitter accounts to present an image. However, Summum, 555 U.S. at 479, dealt with the physical impracticalities of requiring a city to display a possibly endless number of monuments in a city park. In contrast, on Facebook and Twitter, there are no such space restrictions and, theoretically, every Facebook user could comment on each of Bevin's posts or tweets.

However, the holding in Summum was expanded and clarified in Walker, where the Supreme Court held that Texas was allowed to decide who could apply for a specialty license plate and who could not. Specifically, they held that Texas could, in accordance with the First Amendment, deny the Sons of Confederate Veterans' application to design a specialty license plate. Walker, 135 S. Ct. at 2251. Analogizing it to Summum, the Court noted that, "[o]f course, Texas allows many more license plate designs than the city in Summum allowed monuments. But our holding in Summum was not dependent on the precise number of monuments found within the park. . . . Texas's desire to communicate numerous messages does not mean that the messages conveyed are not Texas's own." Walker, 135 S. Ct. at 2251. Walker made clear that the holdings in Summum are not contained to the exact parameters of monuments in a public park. Similarly, though there are many posts on Twitter and Facebook, they all appear on the Governor's page or are connected to his page and, thus, convey that they are coming from him. Governor Bevin is permitted to cull his desired message through his Facebook and Twitter page, much like Pleasant Grove and Texas were allowed to engage in viewpoint discrimination when they did not allow certain monuments and did not allow certain specialty license plates. Governor Bevin is not required to allow the public to speak for him.

Further, the term "block" conjures an image much harsher than reality. No one is being blocked from speaking on Twitter or Facebook. They are still free to post on their own walls and on friends' walls whatever they want about Governor Bevin. Governor Bevin only wants to prevent some messages from appearing on his own wall and, relatedly, to not view those messages he deems offensive. Blocking only prevents their direct relationship to Governor Bevin's Facebook and Twitter pages, and a "person's right to speak is not infringed when government simply ignores that person while listening to others." Minn. State Bd, 465 U.S. at 288.

Ultimately, Governor Bevin is accountable to the public. The public may view his Page and account if they wish and they may choose to re-elect him or choose to elect someone else if they are unhappy with how he administers his social media accounts. See Bd. of Regents of Univ. of Wis. Sys., 529 U.S. at 235; Minn. State Bd., 465 U.S. at 285 ("Disagreement with public policy and disapproval of officials' responsiveness . . .
Though Governor Bevin's official Facebook and Twitter accounts are Government speech and Plaintiffs do not have a Constitutional right to be heard by Governor Bevin in this specific format, the Court finds that Plaintiffs do not have a strong likelihood of success on the merits. However, their actual success on the merits remains open. "Our opinion does not guarantee the State a win on the merits." Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Supreme Court, 769 F.3d 447, 455 (6th Cir. 2014). Preliminary injunctions are reserved for situations where the "extraordinary remedy" of an injunction is "clearly" needed. Overstreet, 305 F.3d at 573. Here, in this new and developing area of law, the injunction is not clearly needed.

B

Though this case rests on whether there exists a substantial likelihood of success on the merits, an injunction can be issued when the plaintiff "at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." In re Delorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985). This Court must first find the Plaintiffs will "suffer irreparable harm if the injunction is not issued." Overstreet v. Lexington-Fayette Urban Cty. Gov't, 305 F.3d 566, 573 (6th Cir. 2002) (citations omitted). "A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages." Id. at 578 (quoting Basicomputer Corp. v. Scott, 973 F.2d 507, 511 (6th Cir.1992)).

Since Plaintiffs have failed to demonstrate a likelihood of success on their claim that constitutional rights have been violated, they are not entitled to a presumption of irreparable harm. See id. This Court has found there is no actual harm in Governor Bevin's actions, much less irreparable harm not fully compensable by monetary damages, as a "person's right to speak is not infringed when government simply ignores that person while listening to others." Minn. State Bd., 465 U.S. at 288. Accordingly, this Court does not find irreparable harm will occur if the injunction is not issued.

C

Finally, the Court will determine: "whether the issuance of the injunction would cause substantial harm to others; and [] whether the public interest would be served by issuing the injunction." Overstreet, 305 F.3d at 573 (6th Cir. 2002). There is no legitimate claim that either party would be substantially harmed by the issuing of an injunction, but the Court also does not find that the public interest would be served by its issuance.

By issuing the injunction, though blocked individuals would have access to Governor Bevin's Facebook and Twitter pages, substantial harm to Governor Bevin would be unlikely. If his accounts became inoperable due to spam, he could open another account or simply communicate his vision and ideas to the public in another format. But, this Court is also unable to see a legitimate public interest that would be served by issuing the injunction. As there is not a strong likelihood of success on the merits, this Court cannot make the assumption that the Plaintiffs and similarly situated individuals would be served by being unblocked by Governor Bevin. Accordingly, these factors do not weigh in favor of granting the injunction.
The product of a preliminary look at the merits of this case is a modest holding—public officers can "speak" through a privately owned platform like Twitter and Facebook, and they can choose whom to listen to on those platforms without offending the First Amendment. Accordingly, Plaintiffs' Motion for Preliminary Injunction [R. 3] is DENIED. An Order for Meeting and Report will be entered promptly.

[1] As the expert noted, both block and ban were used correctly interchangeably throughout the evidentiary hearing. For clarity, this Court will use the word "block" for both Twitter and Facebook. [See R. 23 at 32.]

[2] There is also a case pending against the President of the United States in the Southern District of New York, though no opinions on point have been published. See Knight First Amendment Inst. at Columbia Univ., et al. v. Donald Trump, et al., No. 1:17-cv-05205 (S.D.N.Y.).

[3] The Court notes that while some general themes are helpful from Packingham, that case dealt with a law in North Carolina preventing all sex offenders from accessing nearly every type of website, including social media. The question here is much narrower. See Packingham, 137 S. Ct. at 1736.

[4] At least one academic argues that "[t]here's no right to free speech on Twitter. The only rule is that Twitter Inc. gets to decide who speaks and listens—which is its right under the First Amendment." A Twitter account "is a stream of communication that's wholly owned by Twitter, a private company with First Amendment rights of its own." One only has "First Amendment rights against the government, not a private party." Noah Feldman, Constitution Can't Stop Trump from Blocking Tweets, BLOOMBERG VIEW (June 7, 2017, 12:39 PM), https://www.bloomberg.com/view/articles/XXXX-XX-XX/constitution-can-t-stop-trump-fromblocking-tweets.
Use of social media as part of corporate marketing strategy has become commonplace, but as with any time when new technology is adopted, care should be taken to ensure that the company’s suite of insurance products align with the risks presented by that technology.

With respect to social media, the primary insurance forms that corporations turn to for coverage are Commercial General Liability (CGL) and Specialty Media Liability (Media) policies.¹

**Commercial General Liability Policies**

- CGL polices are designed to be a “catchall” form for the general business operations of an insured. The policies typically present as standard forms drafted by the Insurance Services Office, a private organization which provides analytics and filed forms to the insurance industry, among other services.²

- CGL polices are typically divided into two parts, Coverages A and B. Coverage A applies to property and bodily injury, and so is typically not relevant to any content-related torts. See ISO policy CG 00 01 04 13, Coverage A. The policy section that is more likely to give rise to potential coverage for such claims is Coverage B, which governs torts arising from Personal and Advertising Injury. *Id.*, Coverage B.

- Common claims arising from the use of social media include copyright and trademark infringement, defamation, and invasion of privacy torts, all of which would likely fall within the definition of Personal and Advertising Injury per the coverage grant. See *Id.*, ISO policy CG 00 01 04 13, Section V.14.³

- That said, CGL policies carry an exclusion as a matter of course that is relevant to the majority of conference attendees as it expressly limits covered advertising injury claims against “Insureds in Media And Internet Type Businesses” to those arising from false arrest, detention or imprisonment, malicious prosecution, or wrongful eviction and the like. See ISO policy CG 00 01 04 13, Section B.2.j.

- Further impediments to coverage exist.
  - CGL policies only cover advertising, and specifically exclude claims arising from content appearing on any “electronic chatroom or bulletin board the insured hosts, generally speaking, Cyber Liability policies do not offer content-related coverage in their core forms. Enhancements adding content-related coverage are available for websites controlled or operated by insureds, but coverage for social media exposure is questionable under those endorsements.²

  ² For additional information regarding ISO, please see https://www.verisk.com/insurance/brands/iso/.

  ³ Note that the policy defines “Advertisement” as follows:
  1. “Advertisement” means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:
     a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
     b. Regarding web sites, only that part of a web site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

ISO policy CG 00 01 04 13, Section V.1.
owns, or over which the insured exercises control.” See ISO policy CG 00 01 04 13, Exclusion k.

- Further, the CGL policy excludes coverage for the unauthorized use of another’s name or product,⁴ which could arguably serve as a bar to many claims sounding in invasion of privacy, interference with rights of publicity, or trade libel.⁵

**Media Policies**

- Media policies provide coverage more specifically tailored to the needs of media companies. Mainline media insurers will insure both scheduled content and “related advertising.”

- Use of social media by insured employees will oftentimes be for the purpose of marketing the insured and its products and services, and so will typically fall within the definition of “related advertising.” Even so, there are certain points any insured should be aware of in order to avoid potential coverage problems.

- The Policy Schedule.
  - The Policy Schedule sets forth the covered content.
  - A schedule is typically manuscripted, and may be so broad as to insure all published content of the insured, or so limited as to identify specific publications. The result of the latter could be that an insured uses social media to advertise media which is not listed on the policy schedule. Because advertising must be related to scheduled media, marketing activities associated with an unscheduled publication would likely fall outside of coverage.
  - Scope of Employment
    - Another issue can arise with respect to whether a social media post was created within the scope of the employment of an insured. In this respect, the internal corporate social media policy could be relevant in defining that scope of employment.
    - Were an employer to mandate that its employees carry separate social media accounts for work and personal use, posts using the personal account might be considered outside the scope of employment for purposes of insurance coverage.⁶

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⁴ Exclusion I is as follows:

1. **Unauthorized Use of Another’s Name Or Product**
   “Personal and advertising injury” arising out of the unauthorized use of another’s name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another’s potential customers.

   *Id.*, Exclusion I.

⁵ Note that coverage enhancements may be available to CGL policies which could more fully tailor their coverage to the relevant risks.

At the same time, it could be that for relationship or business reasons, the insured may wish to provide a defense to an employee even if a technical violation of the social media guidelines has occurred. While most mainline media liability insurance carriers tend to exercise flexibility, guidelines that are more restrictive than intended could result in coverage complications.
Embedding as Infringement

  - On July 2, 2016, Goldman took a photograph of Tom, Danny Ainge, and others in East Hampton.
  - “The Photo then went ‘viral,’ traveling through several levels of social media platforms — and finally onto Twitter, where it was uploaded by several users.”
  - Defendants are news outlets that published the photo.
  - The news outlets made the Photo visible by “embedding” them:
    - “To embed an image, the coder or web designer would add an ‘embed code’ to the HTML instructions; this code directs the browser to the third party server to retrieve the image. An embedded image will then hyperlink (that is, create a link from one place in a hypertext document to another in a different document) to the third party website. The result: a seamlessly integrated webpage, a mix of text and images, although the underlying images may be hosted in varying locations. Most social media sites — Facebook, Twitter, and YouTube, for example — provide code that coders and web designers can easily copy in order to enable embedding on their own webpages.”
  - Reasoning
    - No Possession Requirement
      - “[T]his Court sees nothing in either the text or purpose of the Copyright Act suggesting that physical possession of an image is a necessary element to its display for purposes of the Act.”
    - No Controlling Authority
      - “In sum, this Court reads [American Broadcasting Cos., Inc. v. Aereo, Inc., 573 U.S. ___ (2014)], while not directly on point, as strongly supporting plaintiff’s argument that liability should not hinge on invisible, technical processes imperceptible to the viewer.”
    - No Persuasive Authority
      - “[T]o the degree that defendants interpret [Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007]) as standing for a broadly construed Server Test, focusing on the physical location of allegedly infringing images, this Court disagrees. Rather, Perfect 10 was heavily informed by two factors — the fact that the defendant operated a search engine, and the fact that the user made an active choice to click on an image before it was displayed —
that suggest that such a broad reading is neither appropriate nor desirable.”

- Other Defenses Available
  - “[T]here are genuine questions about whether plaintiff effectively released his image into the public domain when he posted it to his Snapchat account. Indeed, in many cases there are likely to be factual questions as to licensing and authorization. There is also a very serious and strong fair use defense, a defense under the Digital Millennium Copyright Act, and limitations on damages from innocent infringement.”

- As of November 2018, no other courts have substantively cited Goldman.

The Forgotten Originality Requirement in the Age of Smartphone Cameras

- While many photographs will be sufficiently creative to be considered original, should litigators start making early motions to dismiss if a plaintiff fails adequately to plead originality? And, in an era of “everyone’s a photographer,” should litigators begin making more fulsome originality arguments on motions to dismiss where the photographers are non-professionals who simply just “snapped” what they saw in front of them?

- **Burrow-Giles Lithographic Co. v. Sarony**, 111 U.S. 53 (1884)
  - Burrow-Giles reproduced 85,000 copies of Oscar Wilde No. 18, which was one of 27 photographs of Wilde carefully staged, posed, and captured by Napoleon Sarony. Sarony sued Burrow-Giles for infringement.
  - In the Supreme Court, Burrow-Giles argued that “a photograph being a reproduction . . . of the exact features of some natural object or of some person, is not a writing of which the producer is the author.” The Court rejected that argument.
  - The Court noted that there was “no doubt that the Constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.” It explained that it “may be true in regard to the ordinary production of a photograph” that the photographer is merely creating “mechanical reproduction of the physical features or outlines of some object animate or inanimate, and involves no originality of thought” and that “in such case” there may be “no protection.”
  - Oscar Wilde No. 18, however, was meticulously constructed by Sarony and thus the Court found it sufficiently creative to be subject to copyright.

  - In Pagano, the court considered whether a photograph of the New York Public Library could be copyrighted.
  - The plaintiff alleged that his photograph was “his own original conception” because he “select[ed] the position and place from which to take said picture and the moment when the light, shade, cloud and sky effects upon said New York
Public Library and its surroundings combined to make a new, harmonious, and artistic picture.”

- The court refused to assume that the photograph was necessarily creative, however. In fact, it expressly rejected the allegation that the photograph was “new harmonious, and artistic picture” as conclusory. Thus, it went on to examine the creative elements of photograph itself, many of which were pleaded. After recounting how the author used “light, shade, [and] the position” of the animate and inanimate objects, the court concluded that the “work . . . comes well within what the authorities have held to be the subject matter of copyright.”

  - The issue in **Time Inc.** was whether reproduced frames of the Zapruder film, capturing the J.F.K. assassination were subject to copyright as they had been reproduced (in modified form) by the defendant without permission.
  - Although the court held, relying on **Bleistein v. Donaldson Lithographing Co.**, 188 U.S. 239 (1903), where Justice Holmes used sweeping language to discuss originality, that the photographs were sufficiently creative to merit protection, it nevertheless noted that “Zapruder selected the kind of camera (movies, not snapshots), the kind of film (color), the kind of lens (telephoto), the area in which the pictures were to be taken, the time they were to be taken, and (after testing several sites) the spot on which the camera would be operated.”

  - In a non-photography case, the Supreme Court clarified and limited parts of Justice Holmes’ language in **Bleistein** regarding the inherent originality in creations.
  - Creativity, Justice O’Connor writing for the Court wrote, did not equal novelty. As O’Connor noted, two poets could write the same poem ignorant of the other and neither would be novel but both would be copyrightable. But it did require something. Pulling from **Burrow-Giles**, O’Connor pointed out that the Court had long “stressed the importance of requiring an author who accuses another of infringement to prove ‘the existence of those facts of originality, of intellectual production, of thought, and conception.’” And, relying on **The Trademark Cases**, she added that creativity required evidence of the “fruits of intellectual labor.” Creativity, she said, was a “touchstone” of copyright law.

• **SHL Imaging, Inc. v. Artisan House, Inc.**, 117 F.Supp.2d 201 (S.D.N.Y. 2000)
  - Defendant hired Plaintiff to photograph picture frames sold by defendants. Plaintiff photographed around 130 different frames “with the understanding that the photographs would be used as color slides by defendants’ sales force.” Thereafter, Defendants used the photographs outside of that limitation. Plaintiff sued, and defendant moved for summary judgment on the ground that the photographs were not sufficiently original to be subject to copyright.
  - Based on **Feist**, the court in **SHL Imaging, Inc.** rejected the oft-repeated quotation from Judge Hand in 1921 that “no photograph, however simple, can be
unaffected by the personal influence of the author, and no two will be absolutely alike.” That statement, the court explained, “should not be read as a comment that all photographs are per se copyrightable.”

- Moving to the photographs themselves, the court explained that “[o]riginality analysis in this case begins with [Plaintiff’s] description of his creative process. [Plaintiff] carefully chose to use single light source with a ‘reflector to fill out the shadows’ in order to ‘give a chiaroscuro effect that would wrap around the [the frames] and give [them] depth.’ He used this lighting technique because ‘copy lighting’ would ‘wash out the shadows and impart a flat look.’ [Plaintiff] also employed artistic judgment in determining the amount of shadowing for each individual frame that would emphasize the detail without obscuring it. Reflections in the mirrors also complicated the shoot and led to the creation of a ‘unique light design on a reflector that would appear in the mirror without showing any part of the room or [himself] in the mirror.’”

- Although Defendants submitted expert declarations that there was “noting unusual” in Plaintiff’s technique nor were they “substantial[ly] original[ly],” it held that “neither novelty nor ‘substantial’ originality are required. All that was required was a sufficient spark of creativity, and the spark, based on the Plaintiff’s description of his process, was met.

- Still, the court added that “[w]hile plaintiff’s photographs meet the minimal originality requirements in Feist, they are not entitled to broad copyright protection.” And, practically speaking, “the plaintiff’s works are only protected from verbatim copying.”


- At issue were several photographs of plates of Chinese food that were used on Chinese restaurant menus. According to Plaintiff “in producing a menu for [their] restaurant, defendants copied plaintiffs’ design and photographs, as embodied in a menu for the same restaurant previously produced by plaintiffs.” Defendants, on the other hand, argued that the photographs of plates of Chinese food for not sufficiently original to be copyrightable.

- The court agreed with defendants. Relying on Feist, the court explained: “The Court finds that this is the rare case where the photographs contained in plaintiffs’ work lack the creative or expressive elements that would render them original works subject to protection under the Copyright Act. The photographs lack any artistic quality, and neither the nature and content of such photographs, nor plaintiffs’ description of their preparation, give the Court any reason to believe that any ‘creative spark’ was required to produce them. The photographs, as noted supra, are direct depictions of the most common Chinese food dishes as they appear on the plates served to customers at restaurants.”

- Importantly, the court also rejected the descriptions of the staging and lighting offered by Plaintiffs: Plaintiffs allege they “worked with a photographer on the ‘lighting’ and ‘angles,’” but they provide “no description of either the lighting or
angles employed, or any desired expression.” “From the exhibits submitted,” the court explained, “both the lighting and angle appear to be equivalent in every photograph. Finally, it is clear that the photographs at issue were not designed with creativity or art in mind. Rather, Plaintiffs’ photographs serve a purely utilitarian purpose: to identify for restaurant customers those dishes on a takeout menu.”

This case comes here from the United States Circuit Court of Appeals for the Sixth Circuit by writ of error. Act of March 3, 1891, c. 517, § 6, 26 Stat. 828. It is an action brought by the plaintiffs in error to recover the penalties prescribed for infringements of copyrights. Rev. Stat. §§ 4952, 4956, 4965, amended by act of March 3, 1891, c. 565, 26 Stat. 1109, and act of March 2, 1895, c. 194, 28 Stat. 965. The alleged infringements consisted in the copying in reduced form of three chromolithographs prepared by employes of the plaintiffs for advertisements of a circus owned by one Wallace. Each of the three contained a portrait of Wallace in the corner and lettering bearing some slight relation to the scheme of decoration, indicating the subject of the design and the fact that the reality was to be seen at the circus. One of the designs was of an ordinary ballet, one of a number of men and women, described as the Stirk family, performing on bicycles, and one of groups of men and women whitened to represent statues. The Circuit Court directed a verdict for the defendant on the ground that the chromolithographs were not within the protection of the copyright law, and this ruling was sustained by the Circuit Court of Appeals. Courier Lithographing Co. v. Donaldson Lithographing Co., 104 Fed. Rep. 993.

There was evidence warranting the inference that the designs belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs in their establishment to make those very things. Gill v. United States, 160 U.S. 426, *245; Colliery Engineer Company v. United Correspondence Schools Company, 94 Fed. Rep. 152; Carte v. Evans, 27 Fed. Rep. 861. It fairly might be found also that the copyrights were taken out in the proper names. One of them was taken out in the name of the Courier Company and the other two in the names of the Courier Lithographing Company. The former was the name of an unincorporated joint stock association formed under the laws of New York, Laws of 1894, c. 235, and made up of the plaintiffs, the other a trade variant on that name. Scribner v. Clark, 50 Fed. Rep. 473, 474, 475; S.C., sub nom. Belford v. Scribner, 144 U.S. 488.

Finally, there was evidence that the pictures were copyrighted before publication. There may be a question whether the use by the defendant for Wallace was not lawful within the terms of the contract with Wallace, or a more general one as to what rights the plaintiffs reserved. But we cannot pass upon these questions as matter of law; they will be for the jury when the case is tried again, and therefore we come at once to the
ground of decision in the courts below. That ground was not found in any variance between pleading and proof, such as was put forward in argument, but in the nature and purpose of the designs.

We shall do no more than mention the suggestion that painting and engraving unless for a mechanical end are not among the useful arts, the progress of which Congress is empowered by the Constitution to promote. The Constitution does not limit the useful to that which satisfies immediate bodily needs. **Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53.** It is obvious also that the plaintiffs' case is not affected by the fact, if it be one, that the pictures represent actual groups — visible things. They seem from the testimony to have been composed from hints or description, not from sight of a performance. But even if they had been drawn from the life, that fact would not deprive them of protection. The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy. **Blunt v. Patten, 2 Paine, 397, 400.** See **Kelly v.** *250 Morris, L.R. 1 Eq. 697; Morris v. Wright, L.R. 5 Ch. 279.** The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.

If there is a restriction it is not to be found in the limited pretensions of these particular works. The least pretentious picture has more originality in it than directories and the like, which may be copyrighted. Drone, Copyright, 153. See **Henderson v. Tomkins, 60 Fed. Rep. 758, 765.** The amount of training required for humbler efforts than those before us is well indicated by Ruskin. "If any young person, after being taught what is, in polite circles, called 'drawing,' will try to copy the commonest piece of real work, — suppose a lithograph on the title page of a new opera air, or a woodcut in the cheapest illustrated newspaper of the day — they will find themselves entirely beaten." Elements of Drawing, 1st ed. 3. There is no reason to doubt that these prints in their *ensemble* and in all their details, in their design and particular combinations of figures, lines and colors, are the original work of the plaintiffs' designer. If it be necessary, there is express testimony to that effect. It would be pressing the defendant's right to the verge, if not beyond, to leave the question of originality to the jury upon the evidence in this case, as was done in **Hegeman v. Springer, 110 Fed. Rep. 374.**

We assume that the construction of Rev. Stat. § 4952, allowing a copyright to the "author, inventor, designer, or proprietor . . . of any engraving, cut, print . . . [or] chromo" is affected by the act of 1874, c. 301, § 3, 18 Stat. 78, 79. That section provides that "in the construction of this act the words `engraving,' `cut' and `print' shall be applied only to pictorial illustrations or works connected with the fine arts." We see no reason for taking the words "connected with the fine arts" as qualifying anything except the word "works," but it would not change our decision if we should assume further that they also qualified "pictorial illustrations," as the defendant contends.

*251 These chromolithographs are "pictorial illustrations." The word "illustrations" does not mean that they must illustrate the text of a book, and that the etchings of Rembrandt or Steinla's engraving of the Madonna di San Sisto could not be protected to-day if any man were able to produce them. Again, the act however construed, does not mean that ordinary posters are not good enough to be considered within its scope. The antithesis to "illustrations or works connected with the fine arts" is not works of little merit or of humble degree, or illustrations addressed to the less educated classes; it is "prints or labels designed to be used for any other articles of manufacture." Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use — if use means to increase trade and to help to make money. A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement. And if pictures may be used to advertise soap, or the theatre,
or monthly magazines, as they are, they may be used to advertise a circus. Of course, the ballet is as legitimate a subject for illustration as any other. A rule cannot be laid down that would excommunicate the paintings of Degas.

Finally, the special adaptation of these pictures to the advertisement of the Wallace shows does not prevent a copyright. That may be a circumstance for the jury to consider in determining the extent of Mr. Wallace’s rights, but it is not a bar. Moreover, on the evidence, such prints are used by less pretentious exhibitions when those for whom they were prepared have given them up.

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to *252 pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value — it would be bold to say that they have not an aesthetic and educational value — and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights. See Henderson v. Tomkins, 60 Fed. Rep. 758, 765. We are of opinion that there was evidence that the plaintiffs have rights entitled to the protection of the law.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed and the cause remanded to that court with directions to set aside the verdict and grant a new trial.

MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE McKENNA, dissenting.

Judges Lurton, Day and Severens, of the Circuit Court of Appeals, concurred in affirming the judgment of the District Court. Their views were thus expressed in an opinion delivered by Judge Lurton: "What we hold is this: That if a chromo, lithograph, or other print, engraving, or picture has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the useful arts, within the meaning of the constitutional provision, to protect the `author' in the exclusive use thereof, and the copyright statute should not be construed as including such a publication, if any other construction is admissible. If a mere label simply designating or describing an article to which it is attached, and which has no value separated from the article, does not come within the constitutional clause upon the subject of copyright, it must follow that a pictorial illustration designed and useful only as an advertisement, and having no intrinsic value other than its function as an advertisement, must be equally without the obvious meaning of the Constitution. *253 It must have some connection with the fine arts to give it intrinsic value, and that it shall have is the meaning which we attach to the act of June 18, 1874, amending the provisions of the copyright law. We are unable to discover anything useful or meritorious in the design copyrighted by the plaintiffs in error other than as an advertisement of acts to be done or exhibited to the public in Wallace's show. No evidence, aside from the deductions which are to be drawn from the prints themselves, was offered to show that these designs had any original artistic qualities. The jury could not reasonably have found merit or value aside from the purely business object of advertising a show, and the instruction to find for the defendant was not error. Many other points have been urged as justifying the result reached in the court below. We find it unnecessary to express any opinion upon them, in view of the conclusion already

I entirely concur in these views, and therefore dissent from the opinion and judgment of this court. The clause of the Constitution giving Congress power to promote the progress of science and useful arts, by securing for limited terms to authors and inventors the exclusive right to their respective works and discoveries, does not, as I think, embrace a mere advertisement of a circus.

MR. JUSTICE McKENNA authorizes me to say that he also dissents.

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This is a writ of error to the Circuit Court for the Southern District of New York.

Plaintiff is a lithographer and defendant a photographer, with large business in those lines in the city of New York.

The suit was commenced by an action at law in which Sarony was plaintiff and the lithographic company was defendant, the plaintiff charging the defendant with violating his copyright in regard to a photograph, the title of which is "Oscar Wilde No. 18." A jury being waived, the court made a finding of facts on which a judgment in favor of the plaintiff was rendered for the sum of $600 for the plates and 85,000 copies sold and exposed to sale, and $10 for copies found in his possession, as penalties under section 4965 of the Revised Statutes.

Among the findings of fact made by the court the following presents the principal question raised by the assignment of errors in the case:

"3. That the plaintiff about the month of January, 1882, under an agreement with Oscar Wilde, became and was the author, inventor, designer, and proprietor of the photograph in suit, the title of which is "Oscar Wilde No. 18," being the number used to designate this particular photograph and of the negative thereof; that the same is a useful, new, harmonious, characteristic, and graceful picture, and that said plaintiff made the same at his place of business in said city of New York, and within the United States, entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by the plaintiff, he produced the picture in suit, Exhibit A, April 14th, 1882, and that the terms 'author,' 'inventor,' and 'designer,' as used in the art of photography and in the complaint, mean the person who so produced the photograph."

Other findings leave no doubt that plaintiff had taken all the steps required by the act of Congress to obtain copyright of this photograph, and section 4952 names photographs among other things for which the
author, inventor, or designer may obtain copyright, which is to secure him the sole privilege of reprinting, publishing, copying and vending the same. That defendant is liable under that section and section 4965 there can be no question, if those sections are valid as they relate to photographs.

Accordingly, the two assignments of error in this court by plaintiff in error, are:

1. That the court below decided that Congress had and has the constitutional right to protect photographs and negatives thereof by copyright.

The second assignment related to the sufficiency of the words "Copyright, 1882, by N. Sarony," in the photographs, as a notice of the copyright of Napoleon Sarony under the act of Congress on that subject.

With regard to this latter question, it is enough to say, that the object of the statute is to give notice of the copyright to the public, by placing upon each copy, in some visible shape, the name of the author, the existence of the claim of exclusive right, and the date at which this right was obtained.

This notice is sufficiently given by the words "Copyright, 1882, by N. Sarony," found on each copy of the photograph. It clearly shows that a copyright is asserted, the date of which is 1882, and if the name Sarony alone was used, it would be a sufficient designation of the author until it is shown that there is some other Sarony.

When, in addition to this, the initial letter of the christian name Napoleon is also given, the notice is complete.

The constitutional question is not free from difficulty.

The eighth section of the first article of the Constitution is the great repository of the powers of Congress, and by the eighth clause of that section Congress is authorized:

"To promote the progress of science and useful arts, by securing, for limited times to authors and inventors, the exclusive right to their respective writings and discoveries."

The argument here is, that a photograph is not a writing nor the production of an author. Under the acts of Congress designed to give effect to this section, the persons who are to be benefited are divided into two classes, authors and inventors. The monopoly which is granted to the former is called a copyright, that given to the latter, letters patent, or, in the familiar language of the present day, patent right.

We have, then, copyright and patent right, and it is the first of these under which plaintiff asserts a claim for relief.

It is insisted in argument, that a photograph being a reproduction on paper of the exact features of some natural object or of some person, is not a writing of which the producer is the author.

Section 4952 of the Revised Statutes places photographs in the same class as things which may be copyrighted with "books, maps, charts, dramatic or musical compositions, engravings, cuts, prints, paintings, drawings, statues, statuary, and models or designs intended to be perfected as works of the fine arts." "According to the practice of legislation in England and America," says Judge Bouvier, 2 Law Dictionary, 363, "the copyright is confined to the exclusive right secured to the author or proprietor of a writing or drawing which may be multiplied by the arts of printing in any of its branches."
The first Congress of the United States, sitting immediately after the formation of the Constitution, enacted that the "author or authors of any map, chart, book or books, being a *57 citizen or resident of the United States, shall have the sole right and liberty of printing, reprinting, publishing and vending the same for the period of fourteen years from the recording of the title thereof in the clerk's office, as afterwards directed." 1 Stat. 124, 1.

This statute not only makes maps and charts subjects of copyright, but mentions them before books in the order of designation. The second section of an act to amend this act, approved April 29, 1802, 2 Stat. 171, enacts that from the first day of January thereafter, he who shall invent and design, engrave, etch or work, or from his own works shall cause to be designed and engraved, etched or worked, any historical or other print or prints shall have the same exclusive right for the term of fourteen years from recording the title thereof as prescribed by law.

By the first section of the act of February 3d, 1831, 4 Stat. 436, entitled an act to amend the several acts respecting copyright, musical compositions and cuts, in connection with prints and engravings, are added, and the period of protection is extended to twenty-eight years. The caption or title of this act uses the word copyright for the first time in the legislation of Congress.

The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.

Unless, therefore, photographs can be distinguished in the classification on this point from the maps, charts, designs, engravings, etchings, cuts, and other prints, it is difficult to see why Congress cannot make them the subject of copyright as well as the others.

These statutes certainly answer the objection that books only, or writing in the limited sense of a book and its author, are within the constitutional provision. Both these words are susceptible of a more enlarged definition than this. An author in *58 that sense is "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature." Worcester. So, also, no one would now claim that the word writing in this clause of the Constitution, though the only word used as to subjects in regard to which authors are to be secured, is limited to the actual script of the author, and excludes books and all other printed matter. By writings in that clause is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, &c., by which the ideas in the mind of the author are given visible expression. The only reason why photographs were not included in the extended list in the act of 1802 is probably that they did not exist, as photography as an art was then unknown, and the scientific principle on which it rests, and the chemicals and machinery by which it is operated, have all been discovered long since that statute was enacted.

Nor is it to be supposed that the framers of the Constitution did not understand the nature of copyright and the objects to which it was commonly applied, for copyright, as the exclusive right of a man to the production of his own genius or intellect, existed in England at that time, and the contest in the English courts, finally decided by a very close vote in the House of Lords, whether the statute of 8 Anne, chap. 19, which authorized copyright for a limited time, was a restraint to that extent on the common law or not, was then recent. It had attracted much attention, as the judgment of the King's Bench, delivered by Lord Mansfield, holding it was not such a restraint, in Miller v. Taylor, 4 Burrows, 2303, decided in 1769, was
overruled on appeal in the House of Lords in 1774. Ibid. 2408. In this and other cases the whole question of
the exclusive right to literary and intellectual productions had been freely discussed.

We entertain no doubt that the Constitution is broad enough to cover an act authorizing copyright of
photographs, so far as they are representatives of original intellectual conceptions of the author.

But it is said that an engraving, a painting, a print, does embody *59 the intellectual conception of its author,
in which there is novelty, invention, originality, and therefore comes within the purpose of the Constitution in
securing its exclusive use or sale to its author, while the photograph is the mere mechanical reproduction of
the physical features or outlines of some object animate or inanimate, and involves no originality of thought
or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture. That
while the effect of light on the prepared plate may have been a discovery in the production of these pictures,
and patents could properly be obtained for the combination of the chemicals, for their application to the
paper or other surface, for all the machinery by which the light reflected from the object was thrown on the
prepared plate, and for all the improvements in this machinery, and in the materials, the remainder of the
process is merely mechanical, with no place for novelty, invention or originality. It is simply the manual
operation, by the use of these instruments and preparations, of transferring to the plate the visible
representation of some existing object, the accuracy of this representation being its highest merit.

This may be true in regard to the ordinary production of a photograph, and, further, that in such case a
copyright is no protection. On the question as thus stated we decide nothing.

In regard, however, to the kindred subject of patents for invention, they cannot by law be issued to the
inventor until the novelty, the utility, and the actual discovery or invention by the claimant have been
established by proof before the Commissioner of Patents; and when he has secured such a patent, and
undertakes to obtain redress for a violation of his right in a court of law, the question of invention, of novelty,
of originality, is always open to examination. Our copyright system has no such provision for previous
examination by a proper tribunal as to the originality of the book, map, or other matter offered for copyright.
A deposit of two copies of the article or work with the Librarian of Congress, with the name of the author
and its title page, is all that is necessary to secure a copyright. It is, therefore, much more important that
when the supposed author sues for a violation of his copyright, the *60 existence of those facts of originality,
of intellectual production, of thought, and conception on the part of the author should be proved, than in the
case of a patent right.

In the case before us we think this has been done.

The third finding of facts says, in regard to the photograph in question, that it is a "useful, new, harmonious,
characteristic, and graceful picture, and that plaintiff made the same ... entirely from his own original mental
conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting
and arranging the costume, draperies, and other various accessories in said photograph, arranging the
subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and
evoking the desired expression, and from such disposition, arrangement, or representation, made entirely
by plaintiff, he produced the picture in suit."

These findings, we think, show this photograph to be an original work of art, the product of plaintiff's
intellectual invention, of which plaintiff is the author, and of a class of inventions for which the Constitution
intended that Congress should secure to him the exclusive right to use, publish and sell, as it has done by
section 4952 of the Revised Statutes.
The question here presented is one of first impression under our Constitution, but an instructive case of the same class is that of Nottage v. Jackson, 11 Q.B.D. 627, decided in that court on appeal, August, 1883.

The first section of the act of 25 and 26 Victoria, chap. 68, authorizes the author of a photograph, upon making registry of it under the copyright act of 1882, to have a monopoly of its reproduction and multiplication during the life of the author.

The plaintiffs in that case described themselves as the authors of the photograph which was pirated, in the registration of it. It appeared that they had arranged with the captain of the Australian cricketers to take a photograph of the whole team in a group; and they sent one of the artists in their employ from London to some country town to do it.

The question in the case was whether the plaintiffs, who owned the establishment in London, where the photographs were made from the negative and were sold, and who had the negative taken by one of their men, were the authors, or the man who, for their benefit, took the negative. It was held that the latter was the author, and the action failed, because plaintiffs had described themselves as authors.

Brett, M.R., said, in regard to who was the author: "The nearest I can come to, is that it is the person who effectively is as near as he can be, the cause of the picture which is produced, that is, the person who has superintended the arrangement, who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be — the man who is the effective cause of that."

Lord Justice Cotton said: "In my opinion, `author' involves originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph;" and Lord Justice Bowen says that photography is to be treated for the purposes of the act as an art, and the author is the man who really represents, creates, or gives effect to the idea, fancy, or imagination.

The appeal of plaintiffs from the original judgment against them was accordingly dismissed.

These views of the nature of authorship and of originality, intellectual creation, and right to protection confirm what we have already said.

**The judgment of the Circuit Court is accordingly affirmed.**

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This case requires us to clarify the extent of copyright protection available to telephone directory white pages.

Rural Telephone Service Company, Inc., is a certified public utility that provides telephone service to several communities in northwest Kansas. It is subject to a state regulation that requires all telephone companies operating in Kansas to issue annually an updated telephone directory. Accordingly, as a condition of its monopoly franchise, Rural publishes a typical telephone directory, consisting of white pages and yellow pages. The white pages list in alphabetical order the names of Rural's subscribers, together with their towns and telephone numbers. The yellow pages list Rural's business subscribers alphabetically by category and feature classified advertisements of various sizes. Rural distributes its directory free of charge to its subscribers, but earns revenue by selling yellow pages advertisements.

Feist Publications, Inc., is a publishing company that specializes in area-wide telephone directories. Unlike a typical directory, which covers only a particular calling area, Feist's area-wide directories cover a much larger geographical range, reducing the need to call directory assistance or consult multiple directories. The Feist directory that is the subject of this litigation covers 11 different telephone service areas in 15 counties and contains 46,878 white pages listings—compared to Rural's approximately 7,700 listings. Like Rural's directory, Feist's is distributed free of charge and includes both white pages and yellow pages. Feist and Rural compete vigorously for yellow pages advertising.

As the sole provider of telephone service in its service area, Rural obtains subscriber information quite easily. Persons desiring telephone service must apply to Rural and provide their names and addresses; Rural then assigns them a telephone number. Feist is not a telephone company, let alone one with monopoly status, and therefore lacks independent access to any subscriber information. To obtain white pages listings for its area-wide directory, Feist approached each of the 11 telephone companies operating in northwest Kansas and offered to pay for the right to use its white pages listings.
Of the 11 telephone companies, only Rural refused to license its listings to Feist. Rural's refusal created a problem for Feist, as omitting these listings would have left a gaping hole in its area-wide directory, rendering it less attractive to potential yellow pages advertisers. In a decision subsequent to that which we review here, the District Court determined that this was precisely the reason Rural refused to license its listings. The refusal was motivated by an unlawful purpose "to extend its monopoly in telephone service to a monopoly in yellow pages advertising." Rural Telephone Service Co. v. Feist Publications, Inc., 737 F. Supp. 610, 622 (Kan. 1990).

Unable to license Rural's white pages listings, Feist used them without Rural's consent. Feist began by removing several thousand listings that fell outside the geographic range of its area-wide directory, then hired personnel to investigate the 4,935 that remained. These employees verified the data reported by Rural and sought to obtain additional information. As a result, a typical Feist listing includes the individual's street address; most of Rural's listings do not. Notwithstanding these additions, however, 1,309 of the 46,878 listings in Feist's 1983 directory were identical to listings in Rural's 1982-1983 white pages. App. 54 (¶ 15-16), 57. Four of these were fictitious listings that Rural had inserted into its directory to detect copying.

Rural sued for copyright infringement in the District Court for the District of Kansas taking the position that Feist, in compiling its own directory, could not use the information contained in Rural's white pages. Rural asserted that Feist's employees were obliged to travel door-to-door or conduct a telephone survey to discover the same information for themselves. Feist responded that such efforts were economically impractical and, in any event, unnecessary because the information copied was beyond the scope of copyright protection. The District Court granted summary judgment to Rural, explaining that "[c]ourts have consistently held that telephone directories are copyrightable" and citing a string of lower court decisions. 663 F. Supp. 214, 218 (1987). In an unpublished opinion, the Court of Appeals for the Tenth Circuit affirmed "for substantially the reasons given by the district court." App. to Pet. for Cert. 4a, judgt. order reported at 916 F. 2d 718 (1990). We granted certiorari, 498 U. S. 808 (1990), to determine whether the copyright in Rural's directory protects the names, towns, and telephone numbers copied by Feist.

II

A

This case concerns the interaction of two well-established propositions. The first is that facts are not copyrightable; the other, that compilations of facts generally are. Each of these propositions possesses an impeccable pedigree. That there can be no valid copyright in facts is universally understood. The most fundamental axiom of copyright law is that "[n]o author may copyright his ideas or the facts he narrates." Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U. S. 539, 556 (1985). Rural wisely concedes this point, noting in its brief that "[f]acts and discoveries, of course, are not themselves subject to copyright protection." Brief for Respondent 24. At the same time, however, it is beyond dispute that compilations of facts are within the subject matter of copyright. Compilations were expressly mentioned in the Copyright Act of 1909, and again in the Copyright Act of 1976.

There is an undeniable tension between these two propositions. Many compilations consist of nothing but raw data—i. e., wholly factual information not accompanied by any original written expression. On what basis may one claim a copyright in such a work? Common sense tells us that 100 uncopyrightable facts do
not magically change their status when gathered together in one place. Yet copyright law seems to contemplate that compilations that consist exclusively of facts are potentially within its scope.

The key to resolving the tension lies in understanding why facts are not copyrightable. The sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author. See Harper & Row, supra, at 547-549. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990) (hereinafter Nimmer). To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be. Id., § 1.08[C][1]. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, "assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable. See Sheldon v. Metro-Goldwyn Pictures Corp., 81 F. 2d 49, 54 (CA2 1936).

Originality is a constitutional requirement. The source of Congress' power to enact copyright laws is Article I, § 8, cl. 8, of the Constitution, which authorizes Congress to "secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings." In two decisions from the late 19th century—The Trade-Mark Cases, 100 U. S. 82 (1879); and Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53 (1884)—this Court defined the crucial terms "authors" and "writings." In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality.

In The Trade-Mark Cases, the Court addressed the constitutional scope of "writings." For a particular work to be classified "under the head of writings of authors," the Court determined, "originality is required." 100 U. S., at 94. The Court explained that originality requires independent creation plus a modicum of creativity: "[W]hile the word writings may be liberally construed, as it has been, to include original designs for engraving, prints, &c., it is only such as are original, and are founded in the creative powers of the mind. The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like." Ibid. (emphasis in original).

In Burrow-Giles, the Court distilled the same requirement from the Constitution's use of the word "authors." The Court defined "author," in a constitutional sense, to mean "he to whom anything owes its origin; originator; maker." 111 U. S., at 58 (internal quotation marks omitted). As in The Trade-Mark Cases, the Court emphasized the creative component of originality. It described copyright as being limited to "original intellectual conceptions of the author," 111 U. S., at 58, and stressed the importance of requiring an author who accuses another of infringement to prove "the existence of those facts of originality, of intellectual production, of thought, and conception." Id., at 59-60.

It is this bedrock principle of copyright that mandates the law's seemingly disparate treatment of facts and factual compilations. "No one may claim originality as to facts." \textit{Id.}, § 2.11[A], p. 2-157. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. To borrow from \textit{Burrow-Giles}, one who discovers a fact is not its "maker" or "originator." 111 \textit{U. S.}, at 58. "The discoverer merely finds and records." Nimmer § 2.03[E]. Census takers, for example, do not "create" the population figures that emerge from their efforts; in a sense, they copy these figures from the world around them. Denicola, Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works, 81 Colum. L. Rev. 516, 525 (1981) (hereinafter Denicola). Census data therefore do not trigger copyright because these data are not "original" in the constitutional sense. Nimmer *348 § 2.03[E]. The same is true of all facts—scientific, historical, biographical, and news of the day. "[T]hey may not be copyrighted and are part of the public domain available to every person." \textit{Miller, supra}, at 1369.

Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. Nimmer §§ 2.11[D], 3.03; Denicola 523, n. 38. Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement. See \textit{Harper & Row}, 471 \textit{U. S.}, at 547. Accord, Nimmer § 3.03.

This protection is subject to an important limitation. The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the \textit{sine qua non} of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author. Patterson & Joyce 800-802; Ginsburg, Creation and Commercial Value: Copyright Protection of Works of Information, 90 Colum. L. Rev. 1865, 1868, and n. 12 (1990) (hereinafter Ginsburg). Thus, if the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression. Others may copy the underlying facts from the publication, but not the precise words used to present them. In \textit{Harper & Row}, for example, we explained that President Ford could not prevent others from copying bare historical facts from his autobiography, see \textit{Id.}, at 566-557, but that he could prevent others from copying his "subjective descriptions and portraits of public figures." \textit{Id.}, at 563. Where the compilation author adds no written expression but rather lets the facts speak for themselves, the expressive element is more elusive. The only conceivable expression is the manner in which the compiler has selected and arranged the facts. Thus, if the selection and arrangement are original, these elements of the work are eligible for copyright protection. See Patry, Copyright in Compilations of Facts (or Why the "White Pages" Are Not Copyrightable), 12 Com. & Law 37, 64 (Dec. 1990) (hereinafter Patry). No matter how original the format, however, the facts themselves do not become original through association. See Patterson & Joyce 776.

This inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement. As one commentator explains it: "[N]o matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking . . . . [T]he very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas." Ginsburg 1868.
It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not "some unforeseen byproduct of a statutory scheme." Harper & Row, 471 U. S., at 589 (dissenting opinion). It is, rather, "the essence of copyright," ibid., and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." Art. I, § 8, cl. 8. Accord, Twentieth Century Music Corp. v. Aiken, 422 U. S. 151, 156 (1975). To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. Harper & Row, supra, at 556-557. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.

This Court has long recognized that the fact/expression dichotomy limits severely the scope of protection in fact-based works. More than a century ago, the Court observed: "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book." Baker v. Selden, 101 U. S. 99, 103 (1880). We reiterated this point in Harper & Row:

"[N]o author may copyright facts or ideas. The copyright is limited to those aspects of the work—termed `expression'—that display the stamp of the author's originality.

"[C]opyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original—for example . . . facts, or materials in the public domain—as long as such use does not unfairly appropriate the author's original contributions." 471 U. S., at 547-548 (citation omitted).

This, then, resolves the doctrinal tension: Copyright treats facts and factual compilations in a wholly consistent manner. Facts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted. A factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement. In no event may copyright extend to the facts themselves.

B

As we have explained, originality is a constitutionally mandated prerequisite for copyright protection. The Court's decisions announcing this rule predate the Copyright Act of 1909, but ambiguous language in the 1909 Act caused some lower courts temporarily to lose sight of this requirement.

The 1909 Act embodied the originality requirement, but not as clearly as it might have. See Nimmer § 2.01. The subject matter of copyright was set out in §§ 3 and 4 of the Act. Section 4 stated that copyright was available to "all the writings of an author." 35 Stat. 1076. By using the words "writings" and "author"—the same words used in Article I, § 8, of the Constitution and defined by the Court in The Trade-Mark Cases and Burrow-Giles—the statute necessarily incorporated the originality requirement articulated in the Court's decisions. It did so implicitly, however, thereby leaving room for error.

Section 3 was similarly ambiguous. It stated that the copyright in a work protected only "the copyrightable component parts of the work." It thus stated an important copyright principle, but failed to identify the
specific characteristic—originality—that determined which component parts of a work were copyrightable and which were not.

Most courts construed the 1909 Act correctly, notwithstanding the less-than-perfect statutory language. They understood from this Court's decisions that there could be no copyright without originality. See Patterson & Joyce 760-761. As explained in the Nimmer treatise: "The 1909 Act neither defined originality, nor even expressly required that a work be 'original' in order to command protection. However, the courts uniformly inferred the requirement from the fact that copyright protection may only be claimed by 'authors'. . . . It was reasoned that since an author is 'the . . . 'creator, originator' it follows that a work is not the product of an author unless the work is original." Nimmer § 2.01 (footnotes omitted) (citing cases).

But some courts misunderstood the statute. See, e. g., Leon v. Pacific Telephone & Telegraph Co., 91 F. 2d 484 (CA9 1937); Jeweler's Circular Publishing Co. v. Keystone Publishing Co., 281 F. 83 (CA2 1922). These courts ignored §§ 3 and 4, focusing their attention instead on § 5 of the Act. Section 5, however, was purely technical in nature: It provided that a person seeking to register a work should indicate on the application the type of work, and it listed 14 categories under which the work might fall. One of these categories was "[b]ooks, including composite and cyclopædic works, directories, gazetteers, and other compilations." § 5(a). Section 5 did not purport to say that all compilations were automatically copyrightable. Indeed, it expressly disclaimed any such function, pointing out that "the subject-matter of copyright [i]s defined in section four." Nevertheless, the fact that factual compilations were mentioned specifically in § 5 led some courts to infer erroneously that directories and the like were copyrightable per se, "without any further or precise showing of original—personal—authorship." Ginsburg 1895.

Making matters worse, these courts developed a new theory to justify the protection of factual compilations. Known alternatively as "sweat of the brow" or "industrious collection," the underlying notion was that copyright was a reward for the hard work that went into compiling facts. The classic formulation of the doctrine appeared in Jeweler's Circular Publishing Co., 281 F., at 88:

"The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are publici juris, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious *353 collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author" (emphasis added).

The "sweat of the brow" doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement—the compiler's original contributions—to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler was "not entitled to take one word of information previously published," but rather had to "independently wor[k] out the matter for himself, so as to arrive at the same result from the same common sources of information." Id., at 88-89 (internal quotation marks omitted). "Sweat of the brow" courts thereby eschewed the most fundamental axiom of copyright law—that no one may copyright facts or ideas. See Miller v. Universal City Studios, Inc., 650 F. 2d, at 1372 (criticizing "sweat of the brow" courts because "ensur[ing] that later writers obtain the facts independently . . . is precisely the scope of protection given . . . copyrighted matter, and the law is clear that facts are not entitled to such protection").

Decisions of this Court applying the 1909 Act make clear that the statute did not permit the "sweat of the brow" approach. The best example is International News Service v. Associated Press, 248 U. S. 215
(1918). In that decision, the Court stated unambiguously that the 1909 Act conferred copyright protection only on those elements of a work that were original to the author. International News Service had conceded taking news reported by Associated Press and publishing it in its own newspapers. Recognizing that § 5 of the Act specifically mentioned "periodicals, including newspapers," § 5(b), the Court acknowledged that news articles were copyrightable. Id., at 234. It flatly rejected, however, the notion that the copyright in an article extended to the factual information it contained: "[T]he news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are publici juris; it is the history of the day." Ibid.[2]

Without a doubt, the "sweat of the brow" doctrine flouted basic copyright principles. Throughout history, copyright law has "recognize[d] a greater need to disseminate factual works than works of fiction or fantasy." Harper & Row, 471 U. S., at 563. Accord, Gorman, Fact or Fancy: The Implications for Copyright, 29 J. Copyright Soc. 560, 563 (1982). But "sweat of the brow" courts took a contrary view; they handed out proprietary interests in facts and declared that authors are absolutely precluded from saving time and effort by relying upon the facts contained in prior works. In truth, "[i]t is just such wasted effort that the proscription against the copyright of ideas and facts . . . [is] designed to prevent." Rosemont Enterprises, Inc. v. Random House, Inc., 366 F. 2d 303, 310 (CA2 1966), cert. denied, 385 U. S. 1009 (1967). "Protection for the fruits of such research . . . may in certain circumstances be available under a theory of unfair competition. But to accord copyright protection on this basis alone distorts basic copyright principles in that it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of `writings' by `authors.'" Nimmer § 3.04, p. 3-23 (footnote omitted).

C

"Sweat of the brow" decisions did not escape the attention of the Copyright Office. When Congress decided to over-haul the copyright statute and asked the Copyright Office to study existing problems, see Mills Music, Inc. v. Snyder, 469 U. S. 153, 159 (1985), the Copyright Office promptly recommended that Congress clear up the confusion in the lower courts as to the basic standards of copyrightability. The Register of Copyrights explained in his first report to Congress that "originality" was a "basic requisit[e]" of copyright under the 1909 Act, but that "the absence of any reference to [originality] in the statute seems to have led to misconceptions as to what is copyrightable matter." Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law, 87th Cong., 1st Sess., p. 9 (H. Judiciary Comm. Print 1961). The Register suggested making the originality requirement explicit. Ibid.

Congress took the Register's advice. In enacting the Copyright Act of 1976, Congress dropped the reference to "all the writings of an author" and replaced it with the phrase "original works of authorship." 17 U. S. C. § 102(a). In making explicit the originality requirement, Congress announced that it was merely clarifying existing law: "The two fundamental criteria of copyright protection [are] originality and fixation in tangible form . . . . The phrase `original works of authorship,' which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present [1909] copyright statute." H. R. Rep. No. 94-1476, p. 51 (1976) (emphasis added) (hereinafter H. R. Rep.); S. Rep. No. 94-473, p. 50 (1975) (emphasis added) (hereinafter S. Rep.). This sentiment was echoed by the Copyright Office: "Our intention here is to maintain the established standards of originality. . . ." Supplementary Report of the Register of Copyrights on the General Revision of U. S. Copyright Law, 89th Cong., 1st Sess., pt. 6, p. 3 (H. Judiciary Comm. Print 1965) (emphasis added).
To ensure that the mistakes of the "sweat of the brow" courts would not be repeated, Congress took additional measures. For example, § 3 of the 1909 Act had stated that copyright protected only the "copyrightable component parts" of a work, but had not identified originality as the basis for distinguishing those component parts that were copyrightable from those that were not. The 1976 Act deleted this section and replaced it with § 102(b), which identifies specifically those elements of a work for which copyright is not available: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." Section 102(b) is universally understood to prohibit any copyright in facts. Harper & Row, supra, at 547, 556. Accord, Nimmer § 2.03[E] (equating facts with "discoveries"). As with § 102(a), Congress emphasized that § 102(b) did not change the law, but merely clarified it: "Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law. Its purpose is to restate . . . that the basic dichotomy between expression and idea remains unchanged." H. R. Rep., at 57; S. Rep., at 54.

Congress took another step to minimize confusion by deleting the specific mention of "directories . . . and other compilations" in § 5 of the 1909 Act. As mentioned, this section had led some courts to conclude that directories were copyrightable per se and that every element of a directory was protected. In its place, Congress enacted two new provisions. First, to make clear that compilations were not copyrightable per se, Congress provided a definition of the term "compilation." Second, to make clear that the copyright in a compilation did not extend to the facts themselves, Congress enacted § 103.

The definition of "compilation" is found in § 101 of the 1976 Act. It defines a "compilation" in the copyright sense as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship" (emphasis added).

The purpose of the statutory definition is to emphasize that collections of facts are not copyrightable per se. It conveys this message through its tripartite structure, as emphasized above by the italics. The statute identifies three distinct elements and requires each to be met for a work to qualify as a copyrightable compilation: (1) the collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an "original" work of authorship. "[T]his tripartite conjunctive structure is self-evident, and should be assumed to `accurately express the legislative purpose.'" Patry 51, quoting Mills Music, 469 U. S., at 164.

At first glance, the first requirement does not seem to tell us much. It merely describes what one normally thinks of as a compilation—a collection of pre-existing material, facts, or data. What makes it significant is that it is not the sole requirement. It is not enough for copyright purposes that an author collects and assembles facts. To satisfy the statutory definition, the work must get over two additional hurdles. In this way, the plain language indicates that not every collection of facts receives copyright protection. Otherwise, there would be a period after "data."

The third requirement is also illuminating. It emphasizes that a compilation, like any other work, is copyrightable only if it satisfies the originality requirement ("an original work of authorship"). Although § 102 states plainly that the originality requirement applies to all works, the point was emphasized with regard to compilations to ensure that courts would not repeat the mistake of the "sweat of the brow" courts by concluding that fact-based works are treated differently and measured by some other standard. As Congress explained it, the goal was to "make plain that the criteria of copyrightable subject matter stated in
section 102 apply with full force to works . . . containing preexisting material." H. R. Rep., at 57; S. Rep., at 55.

The key to the statutory definition is the second requirement. It instructs courts that, in determining whether a fact-based work is an original work of authorship, they should focus on the manner in which the collected facts have been selected, coordinated, and arranged. This is a straightforward application of the originality requirement. Facts are never original, so the compilation author can claim originality, if at all, only in the way the facts are presented. To that end, the statute dictates that the principal focus should be on whether the selection, coordination, and arrangement are sufficiently original to merit protection.

Not every selection, coordination, or arrangement will pass muster. This is plain from the statute. It states that, to merit protection, the facts must be selected, coordinated, or arranged "in such a way" as to render the work as a whole original. This implies that some "ways" will trigger copyright, but that others will not. See Patry 57, and n. 76. Otherwise, the phrase "in such a way" is meaningless and Congress should have defined "compilation" simply as "a work formed by the collection and assembly of preexisting materials or data that are selected, coordinated, or arranged." That Congress did not do so is dispositive. In accordance with "the established principle that a court should give effect, if possible, to every clause and word of a statute," Moskal v. United States, 498 U. S. 103, 109-110 (1990) (internal quotation marks omitted), we conclude that the statute envisions that there will be some fact-based works in which the selection, coordination, and arrangement are not sufficiently original to trigger copyright protection.

As discussed earlier, however, the originality requirement is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (i. e., without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Presumably, the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent. See generally Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 251 (1903) (referring to "the narrowest and most obvious limits"). Such works are incapable of sustaining a valid copyright. Nimmer § 2.01[B].

Even if a work qualifies as a copyrightable compilation, it receives only limited protection. This is the point of § 103 of the Act. Section 103 explains that "[t]he subject matter of copyright . . . includes compilations," § 103(a), but that copyright protects only the author's original contributions—not the facts or information conveyed:

"The copyright in a compilation . . . extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material." § 103(b).

As § 103 makes clear, copyright is not a tool by which a compilation author may keep others from using the facts or data he or she has collected. "The most important point here is one that is commonly misunderstood today: copyright. . . has no effect one way or the other on the copyright or public domain status of the preexisting material." H. R. Rep., at 57; S. Rep., at 55. The 1909 Act did not require, as "sweat of the brow" courts mistakenly assumed, that each subsequent compiler must start from scratch and is precluded from relying on research undertaken by another. See, e. g., Jeweler's Circular Publishing Co., 281 F., at 88-89. Rather, the facts contained in existing works may be freely copied because copyright protects only the elements that owe their origin to the compiler—the selection, coordination, and arrangement of facts.
In summary, the 1976 revisions to the Copyright Act leave no doubt that originality, not "sweat of the brow," is the *360 touchstone of copyright protection in directories and other fact-based works. Nor is there any doubt that the same was true under the 1909 Act. The 1976 revisions were a direct response to the Copyright Office's concern that many lower courts had misconstrued this basic principle, and Congress emphasized repeatedly that the purpose of the revisions was to clarify, not change, existing law. The revisions explain with painstaking clarity that copyright requires originality, § 102(a); that facts are never original, § 102(b); that the copyright in a compilation does not extend to the facts it contains, § 103(b); and that a compilation is copyrightable only to the extent that it features an original selection, coordination, or arrangement, § 101.

The 1976 revisions have proven largely successful in steering courts in the right direction. A good example is *Miller v. Universal City Studios, Inc.*, 650 F. 2d, at 1369-1370: "A copyright in a directory . . . is properly viewed as resting on the originality of the selection and arrangement of the factual material, rather than on the industriousness of the efforts to develop the information. Copyright protection does not extend to the facts themselves, and the mere use of information contained in a directory without a substantial copying of the format does not constitute infringement" (citation omitted). Additionally, the Second Circuit, which almost 70 years ago issued the classic formulation of the "sweat of the brow" doctrine in *Jeweler's Circular Publishing Co.*, has now fully repudiated the reasoning of that decision. See, e. g., *Financial Information, Inc. v. Moody's Investors Service, Inc.*, 808 F. 2d 204, 207 (CA2 1986), cert. denied, 484 U. S. 820 (1987); *Financial Information, Inc. v. Moody's Investors Service, Inc.*, 751 F. 2d 501, 510 (CA2 1984) (Newman, J., concurring); *Hoehling v. Universal City Studios, Inc.*, 618 F. 2d 972, 979 (CA2 1980). Even those scholars who believe that "industrious collection" should be rewarded seem to recognize that this is beyond the scope of existing copyright law. See *Denicola* 516 ("[T]he very vocabulary of copyright is ill *361 suited to analyzing property rights in works of nonfiction"); id., at 520-521, 525; Ginsburg 1867, 1870.

III

There is no doubt that Feist took from the white pages of Rural's directory a substantial amount of factual information. At a minimum, Feist copied the names, towns, and telephone numbers of 1,309 of Rural's subscribers. Not all copying, however, is copyright infringement. To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. See *Harper & Row*, 471 U. S., at 548. The first element is not at issue here; Feist appears to concede that Rural's directory, considered as a whole, is subject to a valid copyright because it contains some foreword text, as well as original material in its yellow pages advertisements. See Brief for Petitioner 18; Pet. for Cert. 9.

The question is whether Rural has proved the second element. In other words, did Feist, by taking 1,309 names, towns, and telephone numbers from Rural's white pages, copy anything that was "original" to Rural? Certainly, the raw data does not satisfy the originality requirement. Rural may have been the first to discover and report the names, towns, and telephone numbers of its subscribers, but this data does not "ow[e] its origin" to Rural. *Burrow-Giles*, 111 U. S., at 58. Rather, these bits of information are uncopyrightable facts; they existed before Rural reported them and would have continued to exist if Rural had never published a telephone directory. The originality requirement "rule[s] out protecting . . . names, addresses, and telephone numbers of which the plaintiff by no stretch of the imagination could be called the author." Patterson & Joyce 776.
Rural essentially concedes the point by referring to the names, towns, and telephone numbers as "preexisting material." Brief for Respondent 17. Section 103(b) states explicitly *362 that the copyright in a compilation does not extend to "the preexisting material employed in the work."

The question that remains is whether Rural selected, coordinated, or arranged these uncopyrightable facts in an original way. As mentioned, originality is not a stringent standard; it does not require that facts be presented in an innovative or surprising way. It is equally true, however, that the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. The standard of originality is low, but it does exist. See Patterson & Joyce 760, n. 144 ("While this requirement is sometimes characterized as modest, or a low threshold, it is not without effect") (internal quotation marks omitted; citations omitted). As this Court has explained, the Constitution mandates some minimal degree of creativity, see The Trade-Mark Cases, 100 U. S., at 94; and an author who claims infringement must prove "the existence of . . . intellectual production, of thought, and conception." Burrow-Giles, supra, at 59-60.

The selection, coordination, and arrangement of Rural's white pages do not satisfy the minimum constitutional standards for copyright protection. As mentioned at the outset, Rural's white pages are entirely typical. Persons desiring telephone service in Rural's service area fill out an application and Rural issues them a telephone number. In preparing its white pages, Rural simply takes the data provided by its subscribers and lists it alphabetically by surname. The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity.

Rural's selection of listings could not be more obvious: It publishes the most basic information—name, town, and telephone number—about each person who applies to it for telephone service. This is "selection" of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient effort *363 to make the white pages directory useful, but insufficient creativity to make it original.

We note in passing that the selection featured in Rural's white pages may also fail the originality requirement for another reason. Feist points out that Rural did not truly "select" to publish the names and telephone numbers of its subscribers; rather, it was required to do so by the Kansas Corporation Commission as part of its monopoly franchise. See 737 F. Supp., at 612. Accordingly, one could plausibly conclude that this selection was dictated by state law, not by Rural.

Nor can Rural claim originality in its coordination and arrangement of facts. The white pages do nothing more than list Rural's subscribers in alphabetical order. This arrangement may, technically speaking, owe its origin to Rural; no one disputes that Rural undertook the task of alphabetizing the names itself. But there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. See Brief for Information Industry Association et al. as Amici Curiae 10 (alphabetical arrangement "is universally observed in directories published by local exchange telephone companies"). It is not only unoriginal, it is practically inevitable. This time-honored tradition does not possess the minimal creative spark required by the Copyright Act and the Constitution.

We conclude that the names, towns, and telephone numbers copied by Feist were not original to Rural and therefore were not protected by the copyright in Rural's combined white and yellow pages directory. As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity. Rural's white pages, limited to basic subscriber information and arranged alphabetically, fall short of the mark. As a statutory matter, 17 U. S. C. § 101 does not afford protection *364
from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality. Given that some works must fail, we cannot imagine a more likely candidate. Indeed, were we to hold that Rural's white pages pass muster, it is hard to believe that any collection of facts could fail.

Because Rural's white pages lack the requisite originality, Feist's use of the listings cannot constitute infringement. This decision should not be construed as demeaning Rural's efforts in compiling its directory, but rather as making clear that copyright rewards originality, not effort. As this Court noted more than a century ago, "'great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way.'" *Baker v. Selden*, 101 U. S., at 105.

The judgment of the Court of Appeals is

**Reversed.**

JUSTICE BLACKMUN concurs in the judgment.

[*] Briefs of amici curiae urging reversal were filed for the Association of North American Directory Publishers et al. by Theodore Case Whitehouse; for the International Association of Cross Reference Directory Publishers by Richard D. Grauer and Kathleen McCree Lewis; and for the Third-Class Mail Association by Ian D. Volner.


Briefs of amici curiae were filed for Bellsouth Corp. by Anthony B. Askew, Robert E. Richards, Walter H. Alford, and Vincent L. Sgroso; for the Direct Marketing Association, Inc., by Robert L. Sherman; for Haines and Co., Inc., by Jeremiah D. McAuliffe, Bernard A. Barken, and Eugene Gressman; and for the Information Industry Association et al. by Steven J. Metaltiz and Angela Burnett.

[*] The Court ultimately rendered judgment for Associated Press on non-copyright grounds that are not relevant here. See *248 U. S.*, at 235, 241-242.

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MEMORANDUM ORDER

SCHWARTZ, District Judge.

In this action, plaintiffs seek injunctive relief and damages for defendants' alleged infringement of plaintiffs' copyright in a menu design for Chinese restaurants, and for unfair competition arising out of defendants' actions. Currently before the Court are (i) plaintiffs' motion for a preliminary injunction pursuant to Fed.R.Civ.P. 65(a), and (ii) defendants' cross-motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). For the reasons set forth below, plaintiffs' motion is denied and defendants' motion is granted in part and denied in part.

I. Factual Background and Instant Motions

Plaintiff Oriental Art ("Oriental Art") is a printing company which specializes in printing Chinese restaurant menus. Plaintiff Ngan & Sons ("Ngan & Sons") is a company which holds the copyrights in certain designs used in Oriental Art's products. Plaintiff companies are jointly owned. Defendants are also printing companies with a common place of business.

According to the Complaint, in 1995 Ngan & Sons created and copyrighted a graphic design work entitled "Chinese dishes photo menu." (Compl. ¶ 6.) According to the materials submitted on the motion, plaintiffs' copyrighted work[1] consists of photographs of several common, but unlabeled, Chinese food dishes, arranged in various patterns on a white background. The dishes are arranged in full circles, semi-circles, and open circles, ovals, zigzags, and parallel rows, among other patterns. Some of the arrangements also contain certain geometric artwork, such as floating hearts, stars, or diamonds. The food items themselves appear on plates of various sizes, which each contain the same traditional decorative pattern. (Compl., Ex. A; Defendants' Memorandum of Law In Opposition to Preliminary Injunction Motion and in Support of Motion to Dismiss ("Def.Mem.") at 5; Affidavit of Danny Lam dated Dec. 28, 2000 ("First Lam Aff.") ¶ 28.)

On November 1, 2000, plaintiffs filed this action, by order to show cause, to enjoin defendants' alleged use of plaintiffs' design. Plaintiffs allege that defendants "have been, and are continuing to infringe the
copyrights in the Design by, among other things, printing and selling restaurant take-out menus containing reproductions of the Design." (Compl. ¶ 10.) While plaintiffs' "are presently unable to ascertain the full nature and extent" of defendants' activity or the monetary damages which they have suffered, plaintiffs introduced one example with their moving papers that they claim is infringing: restaurant menu for a New Jersey restaurant called "No. 1. Chinese Kitchen" (the "No. 1 Chinese Kitchen menus"). (Affidavit of Feng S. Zheng dated Sept. 29, 2000.) Plaintiffs claim that, in producing a menu for this restaurant, defendants copied plaintiffs' design and photographs, as embodied in a menu for the same restaurant previously produced by plaintiffs. While the Complaint also asserts claims for trademark infringement and unfair competition, plaintiffs' preliminary injunction motion is directed to their allegations of copyright infringement. (Memorandum of Law in Support of Motion for a Temporary Restraining Order and Seizure and Preliminary Injunction.)

Defendants cross-move to dismiss the Complaint in its entirety on the ground that the photographs contained in the copyrighted design and the No. 1 Chinese Kitchen menus are not copyrightable. (Def. Mem. at 3-10.) They also request joinder of two additional parties as plaintiffs, pursuant to Fed.R.Civ.P. 19(a) ("Rule 19(a)"), along with certain other relief addressed in Parts II.C and D, infra.

II. Discussion

A. Plaintiffs' Motion for Preliminary Injunction

1. Legal Standard

Under the traditional test for the award of equitable relief, the Court may grant a motion for a preliminary injunction only upon a demonstration of (i) irreparable injury, and (ii) either (a) a likelihood of success on the merits of the case or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in favor of the moving party. Waldman Pub'g Corp. v. Landoll, 43 F.3d 775, 779-80 (2d Cir.1994). The Court finds that plaintiffs' submissions do not demonstrate a likelihood of success on the merits, and because copying has not been established, has failed to prove irreparable harm. Nor does the record reflect that the balance of hardships tips decidedly in plaintiffs' favor.

2. Likelihood of Success

In order to establish copyright infringement, a plaintiff must prove (i) ownership of a valid copyright, and (ii) copying of constituent elements of the work in question which are original. Feist Publications, Inc. v. Rural Telephone Serv. Co., Inc., 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991). "The Copyright Act makes a certificate of registration from the U.S. Register of Copyrights prima facie evidence of the valid ownership of a copyright, see 17 U.S.C. § 410(c), though that presumption of ownership may be rebutted." Rogers v. Koons, 960 F.2d 301, 306 (2d Cir.1992) (citing Hasbro Bradley, Inc. v. Sparkle Toys, Inc., 780 F.2d 189, 192 (2d Cir.1985)). Protection under the Act extends to pictorial and graphic works, such as the photographs and design at issue here, pursuant to 17 U.S.C. § 102(a)(5). See Rogers, 960 F.2d at 306 (citing Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349 (1884)) ("For more than a century, photographs have been held to be copyrightable 'writings' under Article I, Section 8 of the Constitution."). Copyright in such works, as in any protectable work under the Copyright Act, protects
against unauthorized copying not only in the work’s original medium but also in any other medium. 1 Nimmer on Copyright § 2.08[E] at 2-128 to 129 (1999).

a. Ownership

In support of their position on the instant motions, defendants challenge plaintiffs' *546 copyright claim on the ground that plaintiffs' photographs are not copyrightable. The scope of plaintiffs' copyright is integral to their allegations of infringement and their likelihood of success on their copyright claim, and is considered in the context of the preliminary injunction motion. The Court agrees with defendants that the photographs are not copyrightable — and therefore grants their motion to dismiss to the extent it so argues — but disagrees with their view that the uncopyrightability of the photographs alone disposes of plaintiffs' copyright infringement claim. The issue of the photographs' copyrightability centers on the concept of originality. "Since the law protects authors' exclusive rights to their works, the cornerstone of that law is that the work protected must be original." Rogers, 960 F.2d at 307 (citing Feist, 499 U.S. at 345-46, 111 S.Ct. 1282) (stating that the originality requirement is constitutionally mandated for all works). That a particular work is copyrighted does not mean that every element of it is copyrightable; copyright protection extends only to those components of the work that are original to the creator. Id. A work is original if it was independently created by the author and possesses at least some minimal degree of creativity. Feist, 499 U.S. at 345, 111 S.Ct. 1282. The required creativity is small; "even a slight amount will suffice." Id. Moreover, "[o]riginality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying." Id. Elements of originality in a photograph may include posing the subjects, lighting, angle, and evoking certain desired expression, as well as other variants. Rogers, 960 F.2d at 307; Kaplan v. The Stock Market Photo Agency, 133 F.Supp.2d 317 (S.D.N.Y 2001).

The Court finds that the requisite originality is lacking in this case. The photographs contained in plaintiffs' work, as the president of both plaintiff companies, Chi Lung Ngan ("Ngan"), concedes, depict the "most common Chinese dishes used in take-out menu [sic]." [2] (Declaration of Chi Lung Ngan dated Oct. 22, 2000 ("First Ngan Decl.") ¶ 4; see also Declaration of Chi Lung Ngan in Opposition to Defendants' Motion to Dismiss ("Second Ngan Decl.") ¶ 4.) While there are no labels for the dishes depicted, the Court assumes that such dishes include some or all of the dishes depicted by photograph in the No. 1 Chinese Kitchen menu, which defendants allegedly copied. Such dishes include: (i) sweet and sour chicken; (ii) General Tso's chicken; (iii) roast pork egg foo young; (iv) Singapore mei fun; (v) seafood delight; (vi) barbeque spare ribs combo; (vii) pepper steak with onion; (viii) pu pu platter; (ix) Peking duck; and (x) bean curd home style. (First Ngan Decl., Exs. A, B.)

The Court finds that this is the rare case where the photographs contained in plaintiffs' work lack the creative or expressive elements that would render original works subject to protection under the Copyright Act. The photographs lack any artistic quality, and neither the nature and content of such photographs, nor plaintiffs' description of their preparation, give the Court any reason to believe that any "creative spark" was required to produce them. The photographs, as noted supra, are direct depictions of the most common Chinese food dishes as they appear on the plates served to customers at restaurants. According to defendants, the *547 pattern on the plates is also extremely common, reflecting a traditional Chinese "cloisonné porcelain" pattern with lotus flowers and leaves. (Def. Mem. at 5; First Lam Aff. ¶ 28.) Each of the menus, and all of the sample photographs submitted in connection with the instant motions, depict food on plates with this decorative pattern. (Compl., Ex. A; First Ngan Decl., Exs. A, B; First Lam Aff., Exs. B-D, F-H; Reply Aff. of Danny Lam dated Jan. 23, 2001 ("Second Lam Aff."). Exs. J-L, O.) Moreover,
as presented by plaintiffs in their Complaint and their exhibits on the pending motions, each photograph is a rather obscure, black-and-white, depiction of a particular Chinese dish. While plaintiffs allege the photographs were taken in 1993, two years before the menu design was created, plaintiffs fail to describe how the photographs were taken, or how they were incorporated into the copyrighted design as a whole. (Second Ngan Decl. ¶ 4.) While Ngan states that he worked with a photographer on the "lighting" and "angles," he provides no description of either the lighting or angles employed, or any desired expression. (Id.) From the exhibits submitted, both the lighting and angle appear to be equivalent in every photograph. Finally, it is clear that the photographs at issue were not designed with creativity or art in mind. Rather, plaintiffs' photographs serve a purely utilitarian purpose: to identify for restaurant customers those dishes on a take-out menu, such that the customers may achieve a better understanding of what a particular dish contains. Thus, the Court concludes that plaintiffs' photographs lack the originality to be copyrightable.[3] Cf. Burrow-Giles, 111 U.S. at 55, 4 S.Ct. 279 (finding that photograph of Oscar Wilde demonstrated sufficient originality "by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression ..."); Kitchens of Sara Lee, Inc. v. Nifty Foods Corp., 266 F.2d 541, 544-545 (2d Cir.1959) (finding requisite originality where plaintiff "ha[d] put in time, creative thought and money" into its realistic pictorial representations, made by artists and lithographers, of certain cakes); Pagano v. Charles Beseler Co., 234 F. 963, 964 (S.D.N.Y.1916) (finding that a photograph of the New York Public Library exhibited the necessary originality where the photograph in question contained an "artistic" quality).

The Court should note that finding the photographs in question to be copyrightable would secure plaintiffs the exclusive right of use in such photographs, which effectively would permit them to monopolize the market for printing menus that depict certain commonly served Chinese dishes. Such a result was not Congress' intent in enacting the Copyright Act to "promote the Progress of Science and useful Arts." Const. Art. 1 § 8; cf. Sara Lee, 266 F.2d at 543 (emphasizing that, in judging the issue of copyrightability for realistic depictions of merchandise, the Court must strike a balance between "protect[ing] plaintiff here against the onslaught of predatory competitors and equally to protect defendants from an unwarranted monopoly").

However, while plaintiffs' photographs are not original, the overall design in which they are contained does contain the requisite originality to render it a copyrightable work. See Feist, 499 U.S. at 348, 111 S.Ct. 1282 ("The mere fact that a work is copyrighted does not mean that every element of the work may be protected."); cf. id. at 348-51, 111 S.Ct. 1282 (finding that while facts are not protectable under the Copyright Act, factual compilations may possess the requisite originality to be copyrightable). Plaintiffs did not copyright the photographs themselves, but a "graphic design" for menus in which they appear, which contains arrangements of dishes, and in some cases, associated artwork. (Compl., Ex. B; First Ngan Decl. ¶ 4.) Their copyright registration certificate constitutes prima facie evidence of a valid copyright in such design. Rogers, 960 F.2d at 306. The burden is on defendants to rebut the presumption that plaintiffs are the valid copyright holders. See Gaste v. Kaiserman, 863 F.2d 1061, 1064 (2d Cir.1988). Defendants have not done so here, as they have based their arguments solely on the copyrightability of the photographs. Accordingly, plaintiffs have satisfied the Court that they own a valid copyright in their menu design.

b. Copying
Although plaintiffs have established, for the purposes of their preliminary injunction motion, that they own a valid copyright in their menu design, the Court finds that they are unable to establish the second element of the prima facie test: evidence of copying of the design's original constituent elements. The only evidence that plaintiffs have submitted in support of infringement are the No. 1 Chinese Kitchen menus. Because the photographs on such menus are not copyrightable, plaintiffs must be able to establish that the arrangement of dishes and associated artwork was copied. However, the No. 1 Chinese Kitchen menus do not reflect any of the arrangements in plaintiffs' registered work. 

In the allegedly infringing menu, there are two sets of dishes. In the first set, which appears in the menu's upper left hand corner, the dishes are grouped together in a filled oval, with seven dishes on the outside and one, the "pu pu platter," on the inside. The second set, which appears in the middle bottom of the menu, depicts two items placed on three adjacent plates at an angle. While some of the photographs appearing in the registered design are grouped together in circular or oval patterns, none of them contains either the same number of dishes or the manner of spacing present in the No. 1 Chinese Kitchen menus. Moreover, because the individual photographs in plaintiffs' design are not labeled and the images lack clarity, it is not possible to determine whether any of the same photographs are depicted in the menu as are present in the registered work. Further, the borders present in the allegedly infringing menu are not present in the registered work. Accordingly, plaintiffs have failed to establish a likelihood of success with regard to copying on its preliminary injunction motion.

Even if the Court were to consider the No. 1 Chinese Kitchen menu allegedly produced by plaintiffs, rather than the registered work, as the genesis of plaintiffs' copyright rights in the particular arrangement of dishes featured in the menu, the preliminary injunction motion would still be denied, because plaintiffs have failed to establish that such design is sufficiently original so as to be copyrightable. First, nothing in the record indicates that this design, i.e. the arrangement of the plates and associated artwork, was independently created by plaintiffs. Second, even if it were independently created, it is far from clear whether such design has the requisite "creative spark" necessary for originality. The oval arrangement of plates merely reflects the close clustering of dishes in order to fit the space allocated for them on the menu. Moreover, the rectangular borders surrounding the plates do not appear to be independently created, and are not particularly creative.

3. Irreparable Harm

The Court notes that the possibility of irreparable harm is eliminated because plaintiffs have not established the likelihood of success on the merits with regard to infringement. There is thus no reason to infer that plaintiffs could not be compensated by money damages.

4. Balance of Hardships

While there may be sufficiently series questions on the merits of plaintiffs' copyright claim to constitute a fair ground for litigation, the balance of hardships from the award of a preliminary injunction does not decidedly tip in plaintiffs' favor. In fact, because plaintiffs have not set forth facts showing that they have been, and continue to be harmed by defendants' alleged actions, the relative hardships suffered by either side as a result of the grant or denial of the requested injunction here appear to be evenly balanced. Both parties own successful printing businesses. While plaintiffs contend that they would lose "a significant portion of the
market share" if an injunction is not granted, (Pl. Mem. at 9), defendants' printing business would be substantially curtailed by the grant of an injunction.

5. Conclusion

For the foregoing reasons, the Court denies plaintiffs’ motion for preliminary injunction.

B. Defendants' Motion to Dismiss

Defendants' motion to dismiss alleges that plaintiffs' copyright claim is invalid because the photographs are not copyrightable. It also alleges that plaintiffs' trademark and unfair competition claims should be dismissed because they are predicated on defendants' alleged misappropriation of plaintiffs' copyrighted works. (Def. Mem. at 1-11.)

First, the Court declines defendants' suggestion to convert the motion into one for summary judgment. (Defendants' Memorandum of Law in Reply to Plaintiffs' Opposition and in Further Support of *550 Defendants' Cross-Motion ("Def.Mem.") at 1-2.) In rendering the decision on the motion to dismiss, the Court declines to consider the affidavits and exhibits submitted by the parties on the pending motions. See Allen v. New World Coffee, Inc., No. 00 Civ. 2610, 2001 WL 293683, at *2 (S.D.N.Y. Mar. 27, 2001).

Second, for the reasons set forth supra, the Court grants the motion to the extent that it contends that plaintiffs' photographs are not copyrightable works, but denies the request to dismiss plaintiffs' Complaint in full, because defendants have failed to rebut the presumption that plaintiffs have a valid copyright in the menu design. Moreover, despite their suggestion to the contrary in their reply papers, (Def. Rep. at 7), defendants have not demonstrated that they have not copied plaintiffs' arrangements, either on the No. 1 Chinese Kitchen menu or elsewhere. Rather, defendants miss the point in asserting that copying of such arrangements by others in the absence of a suit by plaintiffs suggests there is no copyright:

"[T]here are other menus printed by other printers other than defendant herein which used substantially similar photographs and the arrangements thereof. However, plaintiffs did not commence any legal action to enforce their copyright protection against these printers."

(Def. Rep. at 7.)

C. Defendants' Request for Joinder

Defendants did not include a request for joinder in their notice of cross-motion. (Notice of Cross-Motion dated Dec. 28, 2000.) Nevertheless, defendants state in their moving papers that two third parties, Double G Graphic, Inc. ("Double G") and Chi Lung Ngan ("Ngan") should be joined as parties to the instant litigation pursuant to Rule 19(a).[5] (Def. Mem. at 12.) Specifically, defendants claim that Double G must be joined because (i) it has done business with defendants; (ii) a recent press announcement in a Chinese language newspaper stated that Double G was the owner of the copyrights claimed by plaintiffs, which renders the plaintiffs unable to sue, and (iii) Double G is "subject to defendant[s'] defamation claims" because it published the press announcement, which included defamatory statements concerning defendants. (Id.) Defendants state that Ngan must be joined because he (i) is the sole owner of both plaintiff companies, and (ii) has "personally tortiously interfered with Goldstar's business," which will subject him to personal liability. (Id.)
The Court denies the request for joinder. With regard to Double G, defendant has failed to establish that Double G is a party to the transactions at issue in the instant action, that relief can be accorded to those which are parties, or that its interests will be harmed by the outcome of this litigation; moreover, the Court does not perceive a substantial risk of inconsistent results or obligations were Double G not joined. Rule 19(a). Further, the current record reflects that Ngan & Sons is the owner of the copyrights at issue in this litigation, and that Oriental Art is a licensee; defendants' reference to a statement in the press announcement regarding Double G's ownership is inapposite here. (Compl., Ex. B; First Lam Aff., Ex. I.) Finally, defendants have asserted no defamation claims in this action, either by way of counterclaim, or third party complaint.

With regard to Ngan, the mere fact that he is president, or even owner, of both plaintiff corporations, or that he allegedly tortiously interfered with defendants' business, does not mandate joinder.

D. Defendants' Additional Request for Relief

Defendants also request that the Court (i) enjoin plaintiffs from "continuing publishing [sic] any defamatory announcements against the defendant[s]," (ii) order plaintiffs to issue a public apology to defendants, and (iii) award defendants compensatory and punitive damages against plaintiffs. (Def. Mem. at 13.) Defendants' first concern has been adequately addressed by the restraining order issued by the Court on January 3, 2001. (Restraining Order dated Jan. 3, 2001). The Court declines to order plaintiffs to issue a public apology, and finds that there is no basis to award defendants damages against plaintiffs. The claims in this action have not been fully disposed of and defendants have filed no claims against plaintiffs.

III. Conclusion

For the foregoing reasons, (i) plaintiffs' motion for preliminary injunction is denied, and (ii) defendants' cross-motion to dismiss is granted to the extent that it contends that plaintiffs' photographs are not copyrightable works, but is denied in all other respects.

SO ORDERED.

[1] In this order, the copyright rights at issue are referred to as "plaintiffs'" rights, although Ngan & Sons is the registered owner of such rights, and Oriental Art is the licensee of such rights. (Compl. ¶¶ 6-8.)

[2] Defendants also state that the photographs reflect the most common ways to serve the relevant food in Chinese restaurants in the United States. (First Lam Aff. ¶ 28.)

[3] Even if the photographs were original works capable of being copyrighted, such photographs would be unprotectible under the doctrine of *scenes a faire*. This doctrine identifies and excludes from protection against infringement expression whose creation "flow[ed] naturally from considerations external to the author's creativity." 4 Nimmer § 13.03[B][4] at 13-73, [F][3] at 13-129 to 130; *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir.1980) (finding that the doctrine holds that "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic," are not protectable under the copyright laws). Here, each of the potentially protectable elements, i.e. the photographs' lighting, angle, and the choice of plates, flow necessarily from the subject matter of the photographs, i.e. the realistic depiction of most common Chinese food dishes. See *Kaplan*, 133 F.Supp.2d 317 (finding that businessperson's typical garb, and angle and viewpoint of photograph depicting businessperson, were unprotectible); *Great Importations, Inc. v. Caffco Ind'l, Inc.*, No. 95 Civ. 0514, 1997 WL 414111, at *4 (S.D.N.Y. July 24, 1997) (finding plaintiff could not claim protection for the "depiction of baby angels as round-cheeked, smiling or bemused, and wearing loose robes or drapery" because "these are stereotypical attributes of baby angels ... indispensable to the generalized idea of baby angels, analogous to unprotectable *scenes a faire*"); *Kerr v. New Yorker Magazine, Inc.*, 63 F.Supp.2d 320, 324 (S.D.N.Y.1999) (finding that the idea of a New York skyline as a "Mohawk" haircut might reasonably be expected to include other unprotectible elements, such as eyes, nose, mouth, a figure in profile, and New York buildings).
Because such design is not registered, there is no presumption of copyrightability.

Rule 19(a) provides that a person shall be joined "if feasible" if: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

It should be noted that the announcement, as reflected in its translation, does not affirmatively state that Double G owns any copyright. (First Lam Aff., Ex. I.) It is also notable in this regard that defendants have not moved to dismiss the complaint on the ground that plaintiffs are not owners of the relevant copyrights.

The record does not reflect that Nagn is owner of the plaintiffs, only the president.

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This copyright action raises issues concerning the copyrightability of photographs, the work-for-hire doctrine, joint authorship, and the nature of derivative works. Plaintiff SHL Imaging, Inc. ("SHL") is owned by professional photographer Steven H. Lindner ("Lindner"). Lindner's work has been published in The New York Times and Sports Illustrated. (Lindner Aff. ¶ 6.) The defendant Max Munn ("Munn") is chairman and CEO of defendants Artisan House, Inc. ("Artisan") and Interiors, Inc. ("Interiors"). The defendants design, manufacture and sell frames for pictures and mirrors. [1] (Munn Aff. ¶ 3.)

In 1996, Munn hired Lindner to photograph mirrored picture frames manufactured and offered for sale by defendants. Lindner photographed approximately 130 different frames with the understanding that the photographs would be used as color slides by defendants' sales force. Thereafter, Munn used the photographs in a catalogue, reproduced them in 5,000 brochures, and offered them as magazine "comps" or publicity releases. Defendants also provided Lindner's photographs to Photo-2-Art, Ltd. so they could be scanned into a computer for manipulation and displayed to customers.

Defendants move for summary judgment on plaintiff's copyright claims [2] on the grounds that the photographs are not original, or alternatively, if they are, that defendants were either joint authors or the sole work-for-hire author. On July 20, 2000, this Court notified the parties that it was considering a grant of summary judgment to plaintiff and afforded defendants the opportunity to make additional arguments or submit additional evidence. Thereafter, defendants submitted a supplemental memorandum.

For the reasons that follow, defendants' motion for summary judgment is denied, and this Court grants summary judgment to plaintiff on the issue of liability under the Copyright Act, 17 U.S.C. § 101, et seq. At the outset, this Court observes that its sua sponte grant of summary judgment rests on an analysis of issues raised by the defendants in their motion and supplemental submission. Thus, the defendants have not been prejudiced by a lack of notice or any inability to offer evidence. See Bridgeway Corp. v. Citibank, 201 F.3d 134, 140 (2d Cir.2000).
BACKGROUND

Prior to photographing the frames, Lindner made a number of creative decisions including selection of a camera (a handcrafted Hasselblad 500 EL), lenses (Zeiss 50mm and 80 mm), film type (C-Print negative Fuji ASA 160), paper type (seamless), as well as diffusers, reflectors, and lighting equipment. (Lindner Aff. ¶ 13.) Lindner supplied all of the photographic equipment for the project. (Lindner Aff. ¶ 12.)

The photo shoot spanned four days at Interior's factory. (Lindner Aff. ¶ 4.) Assisted by his employee Ersellia Ferron ("Ferron"), Lindner arranged both the lighting and staging of the frames. Instead of using "copy lighting" (two lights set up at 45 degree angles in front of the object being photographed), Lindner selected a single light source with a reflector in order to "fill out the shadows (but not eliminate them) to give a chiaroscuro effect that would wrap around the [frame] and give it depth." (Lindner Aff. ¶ 17.) While Munn asserts that he "instructed Lindner precisely how [he] wanted the photographs taken, including the positioning and angle and appropriate lighting," he provides no specifics. (Munn Aff. ¶ 12.) Lindner and Ferron alone set up the lighting, hung the frames and took the photographs, while Munn remained in his office. (Lindner Aff. ¶ 13; Ferron Dep. at 16.)

Photographing the frames was complicated by the reflection in the mirrors of several frames. (Lindner Aff. ¶ 17.) Lindner overcame this obstacle by creating a unique lighting design so that the mirrors would not reflect any part of the factory or the photographer. (Lindner Aff. ¶ 17.) The lighting design also enhanced the luster of each frame's gilt. (Lindner Aff. ¶ 17.) As the shoot proceeded, Lindner also took Polaroid instant photographs "to check [the] lighting, angles and composition." (Lindner Aff. ¶ 12.) Munn claims that he ordered the Polaroids to ensure Lindner was following his instructions. (Munn Reply Aff. ¶ 12.)

After the shoot concluded, plaintiff submitted a preliminary invoice to Munn, who rejected it. Thereafter, plaintiff submitted a second bill in the amount of $3,700, which was paid. (Lindner Aff. Ex. 2: 11/19/96 Invoice.) That bill bears Munn's initials and the remark "OK" on its first page. (Lindner Aff. ¶ 20 & Ex. 2: 11/19/96 Invoice.) The invoice specifies: "Re: Photography of frames. Usage: For C-Prints to be used by sales people." "C-Prints" is shorthand for negative color prints. (Lindner Aff. ¶ 7.)

Five months later, Lindner discovered that Artisan had used sixty-four of the photographs in a catalogue without securing his permission. After registering the photographs with the Copyright Office, plaintiff filed this infringement action. (Lindner Aff. ¶ 9.) During discovery, defendants revealed that they had made an additional 3,000 copies of the photographs for undisclosed purposes, reproduced them in 5,000 brochures, scanned eighty-three of them into a computer, and used the photographs as magazine "comps" or publicity releases, all without plaintiff's permission. (Lindner Aff. ¶ 10.)

DISCUSSION

I. Summary Judgment Standards

Summary judgment may be granted only when there is no genuine issue of material fact remaining for trial, and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c). The burden of demonstrating the absence of any genuine dispute as to a material fact rests with the moving party. See Grady v. Affiliated Cent., Inc., 130 F.3d 553, 559 (2d Cir. 1997). In determining whether the movant has met
this burden, the Court must resolve all ambiguities and draw all permissible factual inferences in favor of the party opposing the motion. See Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1187 (2d Cir.1987).

If the moving party meets its initial burden, the non-moving party must then come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The non-moving party must "do more than simply show there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986). Where it is apparent that no rational finder of fact "could find in favor of the non-moving party because the evidence to support its case is so slight," summary judgment should be granted. Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1223 (2d Cir.1994).

It is well established that courts may grant summary judgment sua sponte when no material issue of fact is in dispute and the losing party had to come forward with all of its evidence. See Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986) ("district courts are widely acknowledged to possess the power to enter summary judgments sua sponte"); Bridgeway Corp., 201 F.3d at 139 ("District courts are well advised to give clear and express notice before granting summary judgement sua sponte, even against parties who have themselves moved for summary judgment."). This Court notified defendants that it was considering a grant of summary judgment for plaintiff on liability and afforded defendants additional time to submit further arguments or evidence. Accordingly, the absence of a motion by plaintiff is inconsequential. See Bridgeway, 201 F.3d at 139.

II. Prima Facie Case of Infringement

Plaintiff claims that defendants infringed its copyrights in the photographs. The Copyright Act does not define "infringement," but rather states in conclusory fashion that "anyone who violates one of the exclusive rights of the copyright owner ... is an infringer of copyright." 17 U.S.C. § 501(a)(1996). Congress left the courts free to flesh out the outlines of a cause of action. Fundamentally, the elements required to establish a prima facie case of copyright infringement are: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Feist Publications, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, 361, 111 S.Ct. 1282, 1296, 113 L.Ed.2d 358 (1991).

Plaintiff obtained a certificate of registration from the Copyright Office within five years from the date of the photographs' publication. (Lindner Aff. Ex. 2: Registration No. VA 855-059.) Under 17 U.S.C. § 410(c), the certificate constitutes prima facie evidence of the facts stated therein and of the originality of the work. Here the certificate states that plaintiff is the sole author of the photographs, and therefore, the owner of the copyrights. Defendants bear the burden of overcoming this statutory presumption. See Langman Fabrics v. Graff Californiawear, Inc., 160 F.3d 106, 111 (2d Cir. 1998) (noting that "[t]he statutory presumption is by no means irrebuttable, but it does order the burden of proof").

III. Derivative Works

In evaluating whether plaintiff has established ownership of a valid copyright, defendants argue that plaintiff's photographs are derivative works that must satisfy a higher standard of "substantial originality." (SeeDefs.' Reply Br. at 5-11.) The nub of defendants' argument is that the photographs are derivative works because they depict the defendants' frames. (See, e.g.,Defs.' Br. at 4-13;Defs.' Reply at 1-9.)

The Copyright Act defines a derivative work as
a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

17 U.S.C. § 101. Thus, a derivative work must incorporate a substantial element of a preexisting work of authorship and recast, transform, or adapt those elements.

Recently, the Ninth Circuit addressed the question of whether a photograph is a derivative work of the object it depicts. See Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1077-1082 (9th Cir. 2000). Although the Ninth Circuit concluded that a photograph of a vodka bottle was not a derivative work of the bottle, it reached that holding only after determining that the bottle was not independently copyrightable. Thus, the Ninth Circuit reasoned that the bottle was not a preexisting work. Ets-Hokin, at 1077-1082. This Court respectfully believes that the Ets-Hokin court misconstrued the nature of derivative works. While the Ets-Hokin court correctly noted that a derivative work must be based on a "preexisting work," and that the term "work" refers to a "work of authorship" as set forth in 17 U.S.C. § 102(a), it failed to appreciate that any derivative work must recast, transform or adopt the authorship contained in the preexisting work. A photograph of Jeff Koons' "Puppy" sculpture in Manhattan's Rockefeller Center, merely depicts that sculpture; it does not recast, transform, or adopt Koons' sculptural authorship. In short, the authorship of the photographic work is entirely different and separate from the authorship of the sculpture.

This is not to suggest that photographs are incapable of derivative authorship. A cropped photograph of an earlier photograph is a derivative work. Re-shooting an earlier photographic work with some alteration of the expressive elements is another example. However, in both cases the nature of photographic authorship would have been recast, adapted, or transformed. Since plaintiff's photographs merely depict defendants' frames and do not recast, adapt or transform any authorship that may exist in the frames, they are not derivative works.

IV. Originality

Since the photographs are not derivative works, the next issue is whether they satisfy the general constitutional requirement of originality. Defendants assert they do not. Before addressing defendants' arguments, it is useful to review the nature of copyright in photographs so that those general principles can be applied to this claim.

Photographs did not receive federal copyright protection until the Act of March 3, 1865, 38th Cong., 2d Sess., 16 Stat. 198. See also Cong. Globe 981 (Feb. 22, 1865); William Patry, 1 Copyright Law & Practice 248-253 (1994) [hereinafter "Patry"]. However, photography had become an established commercial endeavor as early as 1839, when the French government made the daguerreotype process available and William Talbot produced negative images on paper through a process called, eponymously, "Talbottype." See Naomi Rosenblum, A History of Women Photographers 42 (1994) [hereinafter "A History of Women Photographers"]; Naomi Rosenblum, A World History of Photography 47 (3d ed.1997) [hereinafter "A World History of Photography"]. The following year, Alexander Wolcott and John Johnson established the first commercial photography studio in the United States here in New York City. Four years later, Mathew Brady, whose subsequent photographs of the Civil War would gain world wide recognition, established his studio in
lower Manhattan. See *A World History of Photography* at 47. By the 1850s, small carte-de-viste photographs were exchanged with all the passion baseball cards would be traded a century later. Even Queen Victoria is reported to have collected more than one hundred albums of photographs of European royalty. See *A World History of Photography* at 64.

The reason for the delay in extending federal copyright protection for photographs will likely never be known, but the increased post-Civil War commercial popularity of portraiture photography by leading figures such as Mathew Brady, Napoleon Sarony, and Julia Margaret Cameron may have led to widespread piracy, and, therefore, calls for protection.

Even though photography had been poetically referred to as "drawing with the aid of the sun,"

> [i]t was not yet clear whether photography could produce art or merely a record, whether it would be just a pastime or could fulfill more serious purposes, whether it was limited by its current "307" technology or could be expanded in unforeseen ways. But from the start photography was perceived to be a different kind of picture making — an easier version of an activity [painting] that had required a degree of talent and training not available to many.

*A World History of Photography* at 39.

Painters, like many faced with the introduction of a new technology, feared the end of public interest in their art. Critics derided photography, declaring that the new medium "copies everything and explains nothing, it is blind to the realm of the spirit." *A World History of Photography* at 210. Yet, some photographers' skill inspired high praise. Critic Phillipe Burty, reviewing an 1859 exhibition of photography by Gaspard Felix Tournachon (a/k/a Nadar), wrote, "his portraits are works of art in every accepted sense of the word.... [I]f photography is by no means a complete art, the photographer always has the right to be an artist." *A World History of Photography* at 72.

In the United States, some photographers quickly seized on the new medium as a means to express artistic as well as political and social sentiments. See Margaret Loke, *In a John Brown Portrait, The Essence of a Militant*, N.Y. Times, July 7, 2000, at E30 (describing a striking 1846 photograph of abolitionist John Brown by African-American photographer Augustus Washington, who touted his artistic skill and his intention of using that skill to contribute to the advancement of "the oppressed and unfortunate people with whom I am identified").

The ambivalence and occasional antagonism toward photography expressed by painters and art critics spilled into the debate over whether to extend copyright protection to photographs. It was not until 1948 that the Berne Convention for the Protection of Literary and Artistic Works enumerated photographs as a mandatory subject matter. Prior to that revision, protection was either on a reciprocal basis or extended only to "artistic," as opposed to "ordinary" photographs. See Patry at 254. Even for "artistic" photographs, a minimum term of protection of twenty-five years from the making of the photographic work was not required until the 1971 Paris Text of the Berne Convention. See Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, art. 7(4) (Paris text 1971); Patry 253-254. The Universal Copyright Convention still does not require protection for photographs. See Universal Copyright Convention, July 24, 1971, art. IV(3) (Paris text 1971). Article 12 of the Trade-Related Aspects of Intellectual Property Rights Agreement (part of the 1994 Uruguay Round of the General Agreement on Tariffs and Trade), allows member countries to exclude photographs from the general requirement of a term of protection of life of the author plus 50 years. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, MTN/FA 11-A1C (1994). Only recently has international protection for

The dual standard applied by the Berne Convention — "artistic" photographs could be protected, but "ordinary" photographs could not — stemmed from doubts over whether photographs were the result of the photographer's creativity or were instead the result of the technical process of photography. Those doubts took on constitutional dimensions in a challenge to the Act of March 3, 1865 in Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349 (1884). In Burrow-Giles, plaintiff Napoleon Sarony was a successful celebrity photographer who produced inexpensive cartes-de-visite and larger cabinet cards favored by actors as publicity shots. See In The Waking Dream: Photography's First Century 339-40 (M. Hambourg, et al. eds., Metropolitan Museum of Art 1993). In 1882, twenty-seven-year-old Oscar Wilde came to the United States at the invitation of theater producer Richard D'Oyle Carte as part of the production of Gilbert & Sullivan's operetta "Patience," satirizing Wilde's "aesthetics" movement. Eager to be in the limelight, Wilde sought out Sarony for a series of publicity photographs to use on his tour of the United States:

Wilde appeared in Sarony's studio dressed in the attire he would wear at his lectures: a jacket and vest of velvet, silk knee breeches and stockings, and slippers adorned with grosgrain bows — the costume he wore as a member of the Apollo Lodge, a Freemason society at Oxford. Sarony took many photographs of Wilde, in a variety of poses. Here, his features not yet bloated by self-indulgence and high living, Wilde leans forward toward the viewer as though engaging him in dialogue, the appearance and calculated pose of the dandy secondary to the intelligence and spontaneous charm of conversation.


In all, Sarony took more than twenty photographs of Wilde and registered them with the Copyright Office. Defendant Burrow-Giles, a lithographer, sold a staggering 85,000 copies of one of Sarony's photographs, "Oscar Wilde No. 18," without Sarony's permission. See Burrow-Giles, 111 U.S. at 54, 4 S.Ct. at 279. Because substantial similarity was not an issue, Burrow-Giles mounted a direct constitutional attack on Congress's authority to protect any photograph. Burrow-Giles asserted that "writings" under the Constitution were limited to literary productions and that photographs did not involve authorship since they were the result of a mechanical process. See Burrow-Giles, 111 U.S. at 55, 4 S.Ct. at 280. Only the latter argument is relevant to this case.

Burrow-Giles argued that photographs were "the mere mechanical reproduction of the physical features or outlines of some object, animate or inanimate, and involve[] no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in [the] shape of a picture." Burrow-Giles, 111 U.S. at 59, 4 S.Ct. at 281. Once the image was captured on the photographic plate, the resulting photograph followed mechanically and inevitably. The Supreme Court did not reject Burrow-Giles' attack entirely, observing that a lack of originality may be "true in regard to the ordinary production of a photograph .... [I]n such a case a copyright is no protection." Burrow-Giles, 111 U.S. at 59, 4 S.Ct. at 282. However, the Court found that Sarony's "Oscar Wilde No. 18" was no "ordinary" photograph and that Sarony was an author based on the trial court's findings that the photograph was a
new, harmonious ... and graceful picture, ... that plaintiff made ... entirely from his own mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.

**Burrow-Giles, 111 U.S. at 60, 4 S.Ct. at 282.**

Two general principles emerge from Burrow-Giles. First, an author is some-one who creates the work himself, i.e., does not copy it from someone else. Second, an author must imbue the work with a visible form that results from creative choices. In the case of Oscar Wilde No. 18, these creative choices included the particular pose (the unique features of which are recounted above in the quotation from Hambourg book), selecting and arranging the costume, draperies, and other "accessories," as well as the lighting and shading. The combination of these choices was a "new, harmonious, and graceful picture," subject to protection. **Burrow-Giles, 111 U.S. at 60, 4 S.Ct. at 282.**

Nineteen years later, the Supreme Court renounced the distinction between the artistic and the ordinary in **Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 23 S.Ct. 298, 47 L.Ed. 460 (1903).** In describing the circumstances when the requisite creativity may be satisfied, Justice Holmes wrote:

> The [work] is always the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.

**Bleistein, 188 U.S. at 250, 23 S.Ct. at 300.**

Despite the broad sweep of this paragraph, Justice Holmes was not suggesting that a mere signature, even one as distinctive as John Hancock's, is by itself copyrightable, nor that all pictorial works are *per se* protectible. Rather, he noted that courts may reject protection for works within "the narrowest and most obvious limits" and that works are protectible when there is a "very modest grade of art." **Bleistein, 188 U.S. at 250, 251, 23 S.Ct. at 300.**

The Supreme Court's most recent and authoritative pronouncement on originality in **Feist** augmented the **Bleistein** analysis. In **Feist**, the Court rejected the proposition that works are protectible so long as they were born from "sweat of the brow," reaffirming that "[o]riginality is a constitutional requirement." **499 U.S. at 346-47, 351-52, 358, 111 S.Ct. at 1288, 1290-91, 1294.** The Court also cautioned that it is not difficult to satisfy the originality requirement; an author need only independently create the work and imbue it with "some minimum level of creativity," a "creative spark." **Feist, 499 U.S. at 345, 358, 111 S.Ct. at 1290, 1294.** The "spark need not provide a shock, but it must at least be perceptible to the touch." Patry at 149.

The standards to be applied in determining whether the creative spark is present can be elusive. Although photography is a species of pictorial work, see **17 U.S.C. §§ 102(a)(5), 101** (definition of "pictorial, graphic and sculptural works"), it is not defined in the Copyright Act. Thus, unlike computer programs and audiovisual works, which are defined in the Act, courts are left without congressional guidance as to what attributes of photographic works are necessary to satisfy the originality requirement.
Judge Learned Hand observed that "no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike." *Jewelers' Circular Pub'g Co. v. Key-Stone Pub'g Co.*, 274 F. 932, 934 (S.D.N.Y.1921), aff'd, 281 F. 83 (2d Cir. 1922). Although often quoted, this statement should not be read as a comment that all photographs are *per se* copyrightable. The Supreme Court in *Feist* made clear that the originality requirement is constitutional, and that no work is *per se* protectible.


The difficulty in identifying a common set of protectible elements may be attributable to the 19th century prejudice against the creation of works by mechanical means. This prejudice is rooted in unfounded suspicion that photographic equipment restricts creativity. See Patry at 252 ("As with other works created by technological means, protection for photographs has been hampered by superficial examination of the wide range of creative options available to the photographers.")

The technical aspects of photography imbue the medium with almost limitless creative potential. For instance, the selection of a camera format governs the film size and ultimately the clarity of the negative. Lenses affect the perspective. Film can produce an array of visual effects. Selection of a fast shutter speed freezes motion while a slow speed blurs it. Filters alter color, brightness, focus and reflection. Even the strength of the developing solution can alter the grain of the negative.

The elements that combine to satisfy *Feist's* minimal "spark of creativity" standard will necessarily vary depending on the photographer's creative choices. The cumulative impact of these technical and artistic choices becomes manifest in renowned portraits, such as "Oscar Wilde 18." The measure of originality becomes more difficult to gauge as one moves from sublime expression to simple reproduction.[3]

Originality analysis in this case begins with Lindner's description of his creative process. Lindner carefully chose to use single light source with a "reflector to fill out the shadows" in order to "give a chiaroscuro effect that would wrap around the [the frames] and give [them] depth." (Lindner Aff. ¶ 15.) He used this lighting technique because "copy lighting" would "wash out the shadows and impart a flat look." (Lindner Aff. ¶ 15.) Lindner also employed artistic judgment in determining the amount of shadowing for each individual frame that would emphasize the detail without obscuring it. (Lindner ¶ 15.) Reflections in the mirrors also complicated the shoot and led to the creation of a "unique light design on a reflector that would appear in the mirror without showing any part of the room or [himself] in the mirror." (Lindner Aff. ¶ 16.)

The digital reprints in defendants' catalogue support Lindner's assertion that he exercised significant aesthetic judgment. They show the detail in the carvings, the saturation of color and gilt, and the appearance of attractive and well-defined picture frames.
The affidavits by defendants' photography experts do not rebut plaintiff's substantial evidence concerning originality. Those affidavits declare that "there is nothing unusual in the camera Mr. Lindner used or in the film or exposure ..." and that "the photographs reflect effort by Mr. Lindner, but certainly ... no substantial originality in the manner in which they *311 were taken or in the result." (Weiss Aff. ¶ 3; Mackiewicz Aff. ¶¶ 3-4.) However, neither novelty nor "substantial" originality are the tests for copyrightability. See Feist, 499 U.S. at 345, 111 S.Ct. at 1287 ("[o]riginality does not signify novelty"). The works need only possesses some minimal degree of creativity. See Feist, 499 U.S. at 345, 111 S.Ct. at 1287. While Lindner's works may not be as creative as a portrait by Dianne Arbus, they show artistic judgment and therefore meet the Feist standard. That the photographs were intended solely for commercial use has no bearing on their protectibility. See Bleistein, 188 U.S. at 251-52, 23 S.Ct. at 300.

Defendants also seek to minimize plaintiff's creativity by describing the photographs as "accurate and precise copies of framed mirrors." Thus, they assert that the frames were "merely photographed one after another, all in the same straightforward manner faithfully to copy them to the medium of film." (Munn Aff. ¶¶ 7, 9.) The "master" photographs of the frames offered as an exhibit to defendants' expert's affidavit, present a compelling visual case that undermines defendants' arguments. (Oudit Harbhajan Aff. Ex. A.) The "master" photographs have none of the aesthetic elements that make plaintiff's photographs attractive. The gilded frames are dull and the details are obscured by shadows or overexposed.

There is no legal significance to defendants' argument that Lindner merely photographed one frame after another. Without contradiction, Lindner states that "[e]ach frame required a different treatment." (Lindner Aff. ¶ 4.) Contrary to defendants' assertion, there is no requisite amount of time necessary to create a copyrighted work; originality is the only requirement. As Circuit Judge Easterbrook observed:

> The copyright laws protect the work, not the amount of effort expended. A person who produces a short new work or makes a small improvement in a few hours gets a copyright for that contribution fully as effective as that on a novel written as a life’s work. Perhaps the smaller the effort the smaller the contribution; if so, the copyright simply bestows fewer rights. Others can expend the same effort to the same end. Copyright covers, after all, only the incremental contribution and not the underlying information.

> The input is irrelevant. A photograph may be copyrighted, although it is the work of an instant and its significance may be accidental. In 14 hours Mozart could write a piano concerto, J.S. Bach a cantata, or Dickens a week's installment of Bleak House. The Laffer Curve, an economic graph prominent in political debates, appeared on the back of a napkin after dinner, the work of a minute. All of these are copyrightable.


While plaintiff's photographs meet the minimal originality requirements in Feist, they are not entitled to broad copyright protection. Plaintiff cannot prevent others from photographing the same frames, or using the same lighting techniques and blue sky reflection in the mirrors. What makes plaintiff's photographs original is the totality of the precise lighting selection, angle of the camera, lens and filter selection. In sum, plaintiff is granted copyright protection only for its "incremental contribution." Rockford Map Publishers, 768 F.2d at 148. Practically, the plaintiff's works are only protected from verbatim copying. However, that is precisely what defendants did.

**V. Work-for-Hire**
Defendants claim that even if the photographs are protectible, they were created for Interiors as works-for-hire. If this defense is proven, plaintiff's infringement claim fails because as authors, defendants would own all copyrights in the photographs. See 17 U.S.C. §§ 101 (definition *312 of "work made for hire") and 201(b) ("[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author").

There are two categories of work-for-hire: (1) works created by employees; and (2) works created by independent contractors under special order or commission. See 17 U.S.C. § 101. Although defendants have not specified which categories they claim, only the first is relevant in this case. The second category is inapplicable because photographs are not included in the § 101 list of subject matters permitting a work-for-hire agreement with independent contractors. Even if these photographs could be shoehorned into a § 101 subject matter category, they will still not qualify as a work-for-hire because there was no written agreement between the parties.

Thus, the only relevant question is whether defendants were plaintiff's "employers" under the Copyright Act. Faced with congressional silence concerning the term "employer," the Supreme Court created a federal common law agency test to evaluate work-for-hire claims. See Community for Creative Non-Violence v. Reid, 490 U.S. 730, 750-751, 109 S.Ct. 2166, 2178, 104 L.Ed.2d 811 (1989); see also Patry at 377 ("[W]hile the Court referred to the Restatement of Agency for factors lower courts should apply in determining whether an individual is an independent contractor or an employee, [Reid] adopted a federal rule of agency patterned on the common law.").

The Reid Court identified thirteen factors to consider in determining whether a party is an employer under agency principles:

- the hiring party's right to control the manner and means by which the product is accomplished ...
- the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

490 U.S. at 751-752, 109 S.Ct. at 2178-79 (footnotes omitted). None of these is dispositive; in fact they are not even the universe of factors that can be considered. Reid, 490 U.S. at 752, 109 S.Ct. at 2179. Rather, it is the totality of the parties' relationship that is the focus of the inquiry.

The Second Circuit has construed Reid several times. See Langman Fabrics, 160 F.3d at 110-113; Graham v. James, 144 F.3d 229, 234-35 (2d Cir.1998); Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 85-88 (2d Cir.1995); Playboy Enters., Inc. v. Dumas, 53 F.3d 549 (2d Cir.1995); Aymes v. Bonelli, 980 F.2d 857, 860-64 (2d Cir. 1992). The Aymes court's analysis of work-for-hire is the most extensive. There, the Second Circuit declined to treat all thirteen of the Reid factors as equally important or even relevant in every case. See 980 F.2d at 861. Instead of woodenly tallying the factors, the Aymes court emphasized that each factor is to be weighed according to the significance it played in the work's creation. See 980 F.2d at 861. Nonetheless, the Aymes court identified five of the Reid factors that are significant "in virtually every situation." These five are:
(1) the hiring party's right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party.

Aymes, 980 F.2d at 861. Accord, e.g., Langman Fabrics, 160 F.3d at 111; Carter, 71 F.3d at 86; cf. Graham, 144 F.3d at 235 ([w]e give greater weight to certain of the Reid factors). The Aymes court indicated that these five factors should be given more weight "because they will usually be highly probative of the true nature of the employment relationship." 980 F.2d at 861.

A. The Hiring Party's Right to Control the Manner and Means of Creation

The first factor identified by the Reid Court — a general right of control — can be indicative of both a work-for-hire employee and an independent contractor. See, e.g., Patry 1998 Supp. at 59. Thus, in order to determine whether the hired party is an employee rather than an independent contractor, there must be evidence that the hiring party actually contributed to the aesthetic choices.

Defendants do not claim that they instructed plaintiff to use any particular camera, film or equipment. Munn only reviewed Polaroid photographs of the works in progress to ensure plaintiff was achieving the ultimate result that Munn desired. (See Munn Reply Aff. ¶ 12.) Munn's passive review is a far cry from the assertions in Langman Fabrics that the hiring party literally stood over the hired party giving her instructions in "laborious detail" concerning exactly how to create the work. Langman Fabrics, 160 F.3d at 111-112. Indeed, it is uncontradicted that Munn remained closeted in his office throughout the shoot. (Lindner Aff. ¶ 13.) As in Graham, Munn's involvement in the creation of the photographs "was minimal and ... his instructions ... were very general." Graham, 144 F.3d at 235; accord Marco v. Accent Pub'l'g Co., 969 F.2d 1547, 1551-52 (3d Cir.1992) (photographer is not work-for-hire employee where hiring party "controlled only the subject matter and composition of the images" but not "most aspects of the work, including the choice of light sources, filters, lenses, camera, film, perspective, aperture setting, shutter speed, and processing techniques").

B. The Skill Required

Lindner had twenty-five years experience as a professional photographer when defendants hired him and defendants "do not question [plaintiff's] application of technical skill, which was the reason he was hired." (Defs.' Br. at 3; Munn Reply Aff. ¶ 8.) The record is bereft of any evidence that defendants possessed any technical photographic skills. See Marco, 969 F.2d at 1551 (noting that defendant although himself an art director had hired a professional photographer because the photographer is "the person who makes the shot work," and describing the photographer as "certainly skilled in the sense that Reid, the sculptor in the Reid case, was skilled"); cf. Morita v. Omni Publications, Int'l, Ltd., 741 F. Supp. 1107 (S.D.N.Y.1990) (photographer is not merely a "mechanical" extension of hiring party).

C. The Provision of Employee Benefits

There is no claim in this case that defendants provided plaintiff with any employment benefits. Cf. Carter, 71 F.3d at 86 (artists given paid vacations and other benefits such as unemployment, life, health, and liability
insurance, as well as worker’s compensation).

D. The Tax Treatment of the Hired Party

Defendants do not claim that they withheld any taxes or made any tax payments on behalf of plaintiff. Cf. Carter, 71 F.3d at 86 (artists had income and social security taxes deducted from their weekly salary).

E. The Hiring Party's Right to Assign Additional Projects to the Hired Party

There is no claim in this case that the defendants had the right to assign, or in fact assigned additional projects to plaintiff after all the mirrors were photographed. Cf. Carter, 71 F.3d at 86 (hiring party had and exercised the right to assign artists to other projects without further compensation).

F. The Other Eight Reid Factors

Although the Aymes court did not require that every work-for-hire factor be analyzed, that holding should not be construed as precluding district courts from continuing the inquiry under the remaining eight Reid factors. Similarly, it need not necessarily follow that the five factors identified in Aymes will invariably be the most significant. Indeed, some of the other eight Reid factors are helpful in analyzing this case.

The source of the instrumentalities and tools factor is significant because the choice of equipment played a vital role that affected the aesthetic appearance of the photographs. (See Lindner ¶ 17.) The duration of the relationship between the parties also informs the analysis. In contrast to a typical employee, plaintiff was hired by defendants for the specific photo shoot in question. Defendants did not exercise any control over when and how long plaintiff would work. So too, defendants neither hired nor paid any of Lindner's assistants. It is noteworthy that defendants are in the business of creating and selling frames, while plaintiff's sole business is creating photographic works. Defendants have never suggested that they regularly photographed their own catalogues.

G. Work-For-Hire Conclusions

In sum, the Reid factors weigh heavily in plaintiff's favor. Defendants' argument that plaintiff was a work-for-hire employee because "SHL Imaging was given explicit instructions and worked under the supervision of the defendants, at their premises, photographing their property [and] ... paid SHL Imaging's expenses" is unavailing. (Defs.' Br. at 17.) Resolving all ambiguities and drawing all permissible factual inferences in favor of defendants, it is clear that defendants' instructions were so general as to fall within the realm of unprotectible ideas. Thus, they cannot substantiate a work-for-hire authorship defense. If inevitable, routine participation sufficed to transform the hiring party into a work-for-hire author, Reid would be eviscerated and the law would retrogress to the "actual supervision and control" rule established in Aldon Accessories, Ltd. v. Spiegel, Inc., 738 F.2d 548 (2d Cir.1984).

VI. Joint Authorship
Defendants also move for summary judgment on the grounds that the photographs are joint works. Since one joint author may not sue another joint author for copyright infringement, if the works are joint works, plaintiff's infringement claim must fail. See, e.g., Weissman v. Freeman, 868 F.2d 1313, 1318 (2d Cir. 1989) ("[A]n action for infringement between joint owners will not lie because an individual cannot infringe his own copyright. The only duty joint owners have with respect to their joint work is to account for profits from its use."). Like work-for-hire, joint authorship is an affirmative defense. Plaintiff's certificate of registration indicating SHL is the author is prima facie evidence of sole authorship. See 17 U.S.C. § 410(c) (1978). Defendants bear the burden of overcoming this statutory presumption. See, e.g., Langman Fabrics, 160 F.3d at 111.

The starting point for any claim of joint authorship is the definition of "joint work" in the copyright statute. See, e.g., Childress v. Taylor, 945 F.2d 500, 505 (2d Cir.1991). 17 U.S.C. § 101 states: "A `joint work' is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." The leading case construing this definition is Childress v. Taylor, 945 F.2d 500 (2d Cir.1991). In Childress, defendant asserted joint authorship of a play, despite the fact that she had not contributed copyrightable expression. The defendant claimed that one could be a joint author in the absence of such a contribution so long as the work as a whole was original. The Second Circuit rejected that argument and held that joint authors must contribute expression. See Childress, 945 F.2d at 507. The Childress court required that all joint authors contribute expression to "prevent some spurious claims by those who might otherwise try to share the fruits of the efforts of a sole author of a work ...." 945 F.2d at 507.

Defendants assert that they are joint authors by reason of their creation of the frames. Their argument continues that the framed mirrors "constitute ... `inseparable or interdependent parts ...' of the photographs." (Defs.' Br. at 15.) However, the copyrighted works at issue are the photographs, not the frames. If defendants' theory were credited, then any photograph of any copyrighted sculptural work would automatically be a joint work between the photographer and the sculptor. Such a result would be plainly absurd.

In their supplemental submissions, defendants assert that their selection of the frames and their "right to control" the photographs after they were developed[8] creates an issue of fact about the parties' intent to be joint authors.[2] (Defs.' Supp. Br. at 8.) It is no surprise that defendants selected the frames to be photographed since that is why they hired SHL in the first place. Mere selection of the subject matter to be photographed does not create joint authorship. Similarly, ownership of the physical embodiment of a work does not bear on ownership of the intellectual property in that work. The Copyright Act differentiates between ownership of the physical embodiment of a work and ownership of the intellectual property in a work:

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object does not of itself convey any rights in the copyrighted work embodied in the object....


To be a "joint work" under the Copyright Act, the authors must have "the intention that their contributions be merged." 17 U.S.C. § 101 (1978). The requisite intent is "especially important in circumstances, [such as this case], where one person ... is undisputably the dominant author of the work and the only issue is
whether that person is the sole author or she and another ... are joint authors." *Childress*, 945 F.2d at 508; see also *Thomson* v. *Larson*, 147 F.3d 195, 201-02 (2d Cir.1998).

The relevant inquiry in determining the parties' intent to be joint authors is whether they "entertain[ed] in their minds the concept of joint authorship, whether or not they understood precisely the legal consequences of their relationship." *Childress*, 945 F.2d at 508. Although "joint authorship does not require an understanding by the co-authors of the legal consequences of their relationship, ... some distinguishing characteristic of the relationship must be understood for it to be the subject of their intent." *Childress*, 945 F.2d at 508. In *Childress*, the Second Circuit observed that where there is no contractual agreement concerning authorship, it is useful to look for an understanding about authorship credit. See *Childress*, 945 F.2d at 508; see also *Thomson*, 147 F.3d at 202-204 (discussing contributor's decision-making authority over what changes are made in the work and whether parties believed they could enter into agreements with "outsiders" concerning use of the work).

Here, defendants have not offered any evidence that they intended to share credit for the photographs. Indeed, they possess none of the indicia of copyright ownership such as registering the photographs at the time they were created, or affixing a copyright notice on the work.

Accordingly, defendants are not joint authors.

**VII. Transfer of Rights**

Finally, defendants assert that Lindner agreed that Artisan would have the right to use the photographs without limitation. Defendants bear the burden of proving the existence of a license covering the activity in question. See, e.g., *Graham*, 144 F.3d at 236 (citing *Bourne v. Walt Disney Co.*, 68 F.3d 621, 631 (2d Cir.1995)).

The Copyright Act prescribes a comprehensive scheme for the licensing of copyrighted works. See, e.g., 17 U.S.C. §§ 101, 201(d), 204, 205 (defining "copyright owner" and "transfer of copyright ownership"). There are three possible types of licenses: (1) written; (2) oral; (3) implied. See Patry at 390. A written license may be either exclusive or non-exclusive. An oral license and an implied license can only be non-exclusive. See 17 U.S.C. § 204(a) ("A transfer of copyright ownership, otherwise than by operation of law, is not valid unless an instrument of conveyance ... is in writing and signed by the owner of the rights conveyed.").

**A. Express License**

Defendants assert that the "intrinsic evidence before the Court on the terms and scope of the parties['] license is contradictory" and therefore summary judgment should be denied. (Defs.' Supp. Br. at 4.) Defendants observe that the initial estimate Lindner provided to Munn simply provides prices for "3 days," "film & processing" and "no seam paper." (Munn Aff. ¶ 6 & Ex. B.) Thus, they maintain it does not limit the use of the photographs. A subsequent estimate limited the use of the prints to "(C-Prints) for retail point of purchase."[8] (Defs.' Supp. Br. Appendix 3.) The final invoice, which was initialed by Munn, states: "Usage: For C-Prints to be used by sales people." (Lindner Aff. Ex. 1.) Therefore, defendants contend that the parties' license is unclear.

Defendants' argument is without merit. Irrespective of any ambiguity in the estimate or invoices, those documents do not purport to transfer ownership or non-exclusive use of the copyrights in the photographs.
None of them even allude to the transfer of exclusive or non-exclusive copyrights. Rather, they simply memorialize the parties' bargain with respect to the transfer of the physical prints and the "price for plaintiff's services. The documents therefore fail to comply with the § 204(a) requirements.

B. Implied License

Alternatively, defendants argue that they had an implied license to use the photographs in a catalogue. (Defs.' Br. at 8;Defs' Reply Br. at 14-15;Defs' Supp. Br. at 4.) However, given the extensive reproduction of the photographs in various media, the implied license would have to be broader than limited use in a catalogue.

Recently, the Second Circuit cautioned that implied licenses will be found "only in `narrow' circumstances where one party `created a work at the [other's] request and handed it over, intending that [the other] copy and distribute it." Smith-Kline Beecham Consumer Healthcare, L.P. v. Watson Pharms., Inc., 211 F.3d 21, 25 (2d Cir.2000). An implied license can only exist where an author creates a copyrighted work with knowledge and intent that the work would be used by another for a specific purpose. Thus, in Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 558 (9th Cir.1990), the copyright owner created special effects for a horror movie. Following a monetary disagreement and distribution of the movie, the copyright owner sued for infringement. Relying on the parties' course of dealing and the copyright owner's registration which stated that the special effects footage was to be used in the movie, the Ninth Circuit found an implied license. Thus, defendants had the right to use the special effects in the manner intended by plaintiff, i.e., in the movie. See 908 F.2d at 559 & n. 6.

Courts have also found implied licenses where jingles or songs were created for use by a specific radio station or a sports team and were used in exactly the manner intended by the copyright owner over a lengthy period. In those cases, the passage of time afforded the copyright owner ample opportunity to terminate the implied license. See Korman v. HBC Florida, 182 F.3d 1291, 1293 (11th Cir.1999); Jacob Maxwell, Inc. v. Veeck, 110 F.3d 749, 751-752 (11th Cir.1997).[9]

However, no court has found an implied license where the nature of the use is contested. The absence of an implied license to reproduce the photographs for catalogues and computer generated images does not render the C-prints useless; they are useful as sales tools without implying a license.

Further, there is no evidence of a meeting of the minds between plaintiff and defendants. Defendants do not maintain that Lindner created the C-Prints with the intention that defendants use them in any manner they wished. Nor do defendants suggest that plaintiff knew or intended that the prints be scanned in a computer or used for "magazine comps." Rather, defendants merely allege that Lindner suspected defendants might use the photographs for a catalogue. (See Ferron Dep. at 55-56.) This is not sufficient evidence to establish an implied license. As Judge Sweet observed, "an implied license to use a copyrighted work `cannot arise out of the unilateral expectations of one party.' There must be objective conduct that would permit a reasonable person to conclude that `an agreement had been reached.'" Design Options, Inc. v. BellePointe, Inc., 940 F.Supp. 86, 92 (S.D.N.Y.1996) (quoting Allen-Myland v. International Bus. Mach. Corp., 746 F.Supp. 520, 549 (E.D.Pa.1990)). See also N.A.D.A. Servs. Corp. v. Business Data of Virginia, Inc., 651 F.Supp. 44, 49 (E.D.Va. 1986) ("The creation of an implied license, as in the creation of any implied contract, requires a meeting of the minds"). Here, the record shows only that plaintiff created the photographs, sold them to defendants *318 for a price, and never conveyed any rights to reproduce the photographs directly or by implication. Accordingly, a license will not be implied. See, e.g., Design Options,
940 F. Supp. at 92 (no implied license where plaintiff sold sweater to defendant for resale and there was no evidence that there was anything more to the transaction than the purchase of goods for an agreed-upon price).

In summary, the undisputed evidence shows that the photographs are entitled to copyright protection; that plaintiff is the sole owner of the copyrights in those photographs; and defendants copied the photographs verbatim without the authority of the copyright owner. Accordingly, defendants are liable for infringing plaintiff's copyrights.

**CONCLUSION**

Defendants' motion for summary judgment is denied in its entirety. Partial summary judgment is hereby granted to plaintiff on the issue of copyright liability. A pretrial conference will be held on October 18, 2000 at 5:00 p.m.

SO ORDERED:

[1] Photo-2-Art, Ltd. has not been served with a summons and has not appeared, therefore all claims against it are dismissed.

[2] The motion is really one for partial summary judgment since defendants did not address plaintiff's state law contract claims.

[3] Courts often cite *Time, Inc. v. Bernard Geis Assocs.*, 293 F Supp. 130 (S D N Y 1968), involving the Zapruder film of President Kennedy's assassination, for the proposition that even newsworthy photographs taken by sheer happenstance are copyrightable. However, the Zapruder case was decided before *Feist*. More importantly, the Zapruder case involved the infringement of an audiovisual work by a photograph. The issue before the court was whether the film of Kennedy's assassination was copyrightable. The copyrightability of an audiovisual work is analyzed in accord with the definition of audiovisual works in the Copyright Act. See *Atari Games Corp. v. Oman*, 979 F 2d 242, 244-45 (D C Cir 1992) (Ruth Bader Ginsburg, J.). This analysis is not altered by the fact that the audiovisual work is alleged to have been infringed by copying individual frames. Thus, the Zapruder case is not a proper point of reference in determining the copyrightability of a photograph.

[4] Although the statutory term is "work made for hire," it is common to shorten it to "work-for-hire," a practice adopted here.

[5] This assertion is the totality of defendants' work-for-hire argument. The only case cited in support of their argument is a 1988 district court case which was effectively overruled by *Reid*.

[6] Defendants also state in their supplemental August 11, 2000 brief that plaintiff gave them the negatives. (Defs.' Supp. Br. at 8.) Defendants do not cite to any sworn statement in support of this allegation. See Fed R Civ P 56(e); *Skyline Corp. v. NLRB*, 813 F 2d 1328, 1337 (9th Cir 1980) ("Statements by counsel in briefs are not evidence."); *Markowitz Jewelry Co. v. Chapal/Zenray, Inc.*, 988 F Supp. 404, 407 & n. 18 (S D N Y 1997) (same). In any event, transfer of the physical embodiment of a work is not evidence of joint authorship.

[7] The Court notes that defendants advance only three arguments regarding joint ownership: authorship of the frames, selection of the frames and "right to control" the photographs. Since defendants have had what is tantamount to three separate opportunities to move for summary judgment, these are the only arguments that this Court will consider.

[8] This estimate was submitted as an appendix to defendants' supplemental brief. Since it is not attached to any sworn document, the Court does not rely on it. However, even if it was properly submitted, it would not effect this Court's analysis.

[9] In the cited cases, the Eleventh Circuit appears to regard implied licenses as an equitable device, akin to equitable estoppel. This view has been rejected by the Ninth Circuit, see *Effects Assocs.*, 908 F 2d at 559 n. 7, which regards them as a variety of a legal, implied-in-fact contract.

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Social Media and Discovery

- Courts apply the same analysis to social media posts as to other evidence. In short, social media posts – whether “public” or “private” – are fair game if they are relevant or reasonably calculated to lead to the discovery of admissible evidence.
  - “Private” Facebook posts are subject to discovery if the posts are relevant. Discovery is not conditioned on whether the party seeking disclosure can demonstrate that there is material in the “public” Facebook posts that justify discovery into the “private” posts. See Forman v. Henkin, 93 N.E.3d 882, 30 N.Y.3d 656 (N.Y. 2018). The Court of Appeals rejected a heightened standard for discovery of private social media posts that would have depended on what the Facebook account holder chooses to share on the public portion of the Facebook account. 93 N.E.3d at 888-89. “Under such an approach, disclosure turns on the extent to which some of the information sought is already accessible—and not, as it should, on whether it is “material and necessary in the prosecution or defense of an action.”’ Id. at 889.

  Plaintiff in a personal injury case claimed she was injured when she fell from a horse owned by defendant. Id. at 885. At her deposition, she testified that she posted “a lot” of photographs to her Facebook account before the accident but that she deactivated the account six months after the accident. Id. She testified that she had become reclusive and had difficulty using a computer and composing coherent messages. Id.

  Defendant moved to compel access to Plaintiff’s entire private Facebook account, arguing that the Facebook posts were relevant to the scope of Plaintiff’s injuries and her credibility. Id. Defendant argued that because Plaintiff had testified that she was quite active on Facebook before the injury, there was a basis to conclude that Plaintiff’s Facebook account would contain evidence relating to whether she could no longer cook, travel, participate in sports, or ride horses, and whether the accident had impacted her ability to read, write and use a computer. Id. at 886.

  The trial court ordered Plaintiff to produce all photos of herself privately posted on Facebook before the accident that she intended to introduce at trial, all photos of herself privately posted on FB after the accident that did not depict nudity or romantic encounters, and an authorization for FB records showing each time Plaintiff posted a private message after the accident and the number of characters or words in the messages. Id.

  The Appellate Division modified the order and limited disclosure to pre-accident and post-accident photographs posted on FB that Plaintiff intended to introduce at trial. Appellate Division eliminated the authorization allowing Defendant to obtain data relating to post-accident messages. Id. In essence, the Appellate Division applied a heightened standard for production of social media records that
depended on whether the “public” Facebook posts tended to contradict Plaintiff’s allegations.

Court of Appeals reversed the Appellate Division and reinstated the trial court’s ruling. The Court of Appeals held that the “heightened standard” followed by the Appellate Division would allow the Facebook account holder “to unilaterally obstruct disclosure merely by manipulating ‘privacy’ settings or curating the materials on the public portion of the account. . . . Thus, we reject the notion that the account holder’s so-called ‘privacy’ settings govern the scope of disclosure of social media materials.” *Id.* at 889.

The Court of Appeals rejected a rule that would require disclosure of Plaintiff’s entire Facebook account. Rather, courts should follow a two-step test:

1. “consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account”;

2. Balance “the potential utility of the information sought against any specific ‘privacy’ or other concerns raised by the account holder” and “issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials.” *Id.* at 890.

- Requests for “all social media posts” will likely be viewed as overbroad. See *Renaissance Equity Holdings LLC v. Webber*, 61 Misc.3d 298, 82 N.Y.S.3d 810 (N.Y. Civ. Ct. 2018). The case concerned whether the alleged daughter of a deceased tenant had tenancy rights to a rent-controlled apartment. To establish rights, the respondent had to show that she lived with the alleged mother in the apartment as a primary residence for two years. Petitioner landlord sought all of respondent’s social media posts.

Applying *Forman*, the court held that the discovery request was overbroad “because it fails to state the specific information sought within these posts on the narrow issue of primary residence.” 61 Misc.3d at 307. Under *Forman*, the discovery request was “insufficiently tailored to avoid disclosure of non-relevant materials.” *Id.*

- Subpoenas to social media providers: The Stored Communications Act, 18 U.S.C § 2701 *et seq.*, prohibits a social media provider from providing the contents of a stored communication unless it has the “lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service.” 18 U.S.C. 2702(b)(3). The Stored Communications Act does not block the provider from disclosing certain non-content information, such as IP addresses and date and time of Facebook messages. See, e.g., *In re Request for International Judicial Assistance from the Turkish Ministry of Justice*, No. 16-mc-80108-JSC, 2016 WL 2957032, at *2
(N.D. Cal. May 23, 2016); see also Thompson v. Doel, No. 5:13-cv-80088, 2013 WL 5544607, at *1, 3 (N.D. Cal. Oct. 7, 2013) (subpoena approved so long as the application sought only the names, addresses, telephone numbers, email addresses, and Media Access Control addresses of the owner of the email address, but not the content of any email).

In Rainsy v. Facebook, Inc., 311 F.Supp.3d 1101, 1114-15 (N.D. Cal. 2018), the court held that the Stored Communications Act prohibited disclosure by Facebook of the people who “liked” a Cambodian prime minister’s Facebook page:

[Given that a “like” or “liking” a Facebook page is speech that communicates approval, a “like” or “liking” constitutes “content” as information concerning the meaning of a communication. The communication conveyed by “liking” a Facebook page is approval. The “identity of a speaker is an important component” of the message. City of Ladue v. Gilleo, 512 U.S. 43, 56, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994). Thus, to the extent that Applicant seeks the identities of people who “liked” Hun Sen’s Facebook page, Applicant seeks “contents of a communication” because Applicant seeks to know who approved Hun Sen. The Stored Communications Act precludes that disclosure.

Id. at 1114-15.

Admissibility

- Defendant’s social media posts held not to be hearsay. Ripstra v. Texas, 514 S.W.3d 305 (Tex. App. 2016). Defendant was convicted of felony injury to a child. On appeal, she argued in part that her Facebook posts were inadmissible hearsay. Stating that the issue was one of first impression, the Court held that the trial court properly admitted Defendant’s Facebook posts as admissions of a party opponent. Id. at 315. Defendant’s Facebook posts were the Defendant’s own statements and were offered against her, and therefore were admissions, not hearsay.

Preservation

- Litigants have a duty to preserve relevant evidence, including social media evidence.

- Consider using a third-party vendor to preserve/archive your client’s social media accounts and posts and the other party’s public social media posts. The vendor – rather than you or your client - will be the testifying witness as to the chain-of-custody of the archived posts.

- Be cautious about changing privacy settings during the course of litigation. In Thurmond v. Bowman, No. 14-CV-6465W, 2016 WL 1295957, at *13 (W.D.N.Y. Mar. 31, 2016), the magistrate judge expressed concern that Plaintiff violated the court’s verbal preservation order by hiding posts from her Facebook page. After the order,
Plaintiff adjusted the privacy settings on her Facebook account, which made formerly public postings available only to Facebook “friends.” *Id.* The magistrate judge admonished Plaintiff and threatened sanctions for any instances of future similar conduct. *Id.* at *14. Regardless, the magistrate judge denied spoliation sanctions against Plaintiff because Plaintiff inadvertently deleted three posts that were not relevant to the litigation, and most of the posts that Defendants claimed were deleted were simply hidden from view once Plaintiff changed her privacy settings, but still existed. *Id.* at *8-12. The District Court judge adopted the magistrate’s findings. *Thurmond v. Bowman*, 199 F. Supp.3d 686 (W.D.N.Y. 2016).

- **How to access and download your Facebook information.** See [https://www.facebook.com/help/1701730696756992](https://www.facebook.com/help/1701730696756992): If you want to download a copy of your information from Facebook, you can use the Download Your Information tool.

  **To download a copy of your Facebook data:**

  1. Go to the top right of Facebook and click 📄.
  2. Click **Settings**.
  3. Click **Your Facebook Information**.
  4. Go to **Download Your Information** and click **View**.
  5. To add or remove categories of data from your request, click the boxes on the right side of Facebook.
  6. Select other options, including:
     - The format of your download request.
     - The quality of photos, videos and other media.
     - A specific date range of information. If you don't select a date range, you'll request all the information for the categories you've selected.
  7. Click **Create File** to confirm the download request.

After you've made a download request, it will appear as Pending in the Available Files section of the Download Your Information Tool. It may take several days for us to finish preparing your download request.

Once we’ve finished preparing your download request, we'll send a notification letting you know it's ready.

  **To download a copy of data you requested:**

  1. Go to the **Available Files** section of the Download Your Information tool.
  2. Click **Download** and enter your password.

You can also click **Show more** to view information about your download request, such as the format and when it will expire.

**Note:** You can always view your Privacy Shortcuts, [https://twitter.com/settings/account](https://twitter.com/settings/account), to learn about the ways you can control your data and privacy on Facebook. If you want to review recent activity on your Facebook account or want to review your Facebook

- **How to access and download your Twitter archive.** See https://help.twitter.com/en/managing-your-account/how-to-download-your-twitter-archive:
  1. Go to your Account settings, https://twitter.com/settings/account, by clicking on the profile icon at the top right of the page and selecting Settings and privacy from the drop-down menu.
  2. Next to Your Twitter archive, click the Request your archive button.
  3. When your download is ready, we'll send a notice via push notification (if you have Twitter for iOS or Android installed on your mobile device). From your settings, you can click the Download archive button under the Download your data section.
  4. We’ll also send you an email with a download link to the confirmed email address associated with your Twitter account.
  5. Once you receive the email, click the Download button while logged in to your Twitter account and download a .zip file of your Twitter archive.

Note: Please make sure your email address is confirmed prior to requesting your Twitter archive and that you are logged into your Twitter account on the same browser you are using to download your Twitter archive. Instructions and troubleshooting tips for confirming your email address may be found here. It may take a few days for us to prepare the download of your Twitter archive.

- **Authentication.**

  - **Social media posts are not admissible without evidence of authorship.** *Pennsylvania v. Mangel,* 181 A.3d 1154 (Pa. Super. Ct. 2018). The Superior Court affirmed the trial court’s denial of the prosecution’s motion to admit Facebook posts into evidence. The Superior Court held that the proponent of social media evidence must present direct or circumstantial evidence that tends to corroborate the identity of the author of the post, and the prosecution had failed to do so:

    Social media evidence presents additional challenges because of the great ease with which a social media account may be falsified, or a legitimate account may be accessed by an imposter. Nevertheless, social media records and communications can be properly authenticated . . . similar to the manner in which text messages and instant messages can be authenticated. Initially, authentication social media evidence is to be evaluated on a case-by-case basis to determine whether or not there has been an adequate foundational showing of its relevance and authenticity. Additionally, the proponent of social media evidence must present direct or circumstantial evidence that tends to corroborate the identity of the author of the communication in question, such as testimony from the
person who sent or received the communication, or contextual clues in the communication tending to reveal the identity of the sender. Other courts examining the authentication of social media records have ruled that the mere fact that an electronic communication, on its face, purports to originate from a certain person's social networking account is generally insufficient, standing alone, to authenticate that person as the author of the communication. See United States v. Vayner, 769 F.3d 125, 131 (2d Cir. 2014) (holding that the government failed to authenticate what it alleged was a printout of the defendant's profile page from a Russian social networking site where it offered no evidence to show that the defendant had created the page); United States v. Jackson, 208 F.3d 633, 636–37 (7th Cir. 2000) (holding that in order to authenticate a website posting, the proponent had to show that the group in question had actually authored the post, rather than merely someone improperly accessing the group’s website); Griffin v. State, 419 Md. 343, 19 A.3d 415, 423–24 (2011) (holding that MySpace account profile bearing a photograph of an individual, coupled with her location and birthdate, were insufficient to authenticate a posting from the account, as having been made by the individual); Commonwealth v. Purdy, 459 Mass. 442, 945 N.E.2d 372, 381 (2011) (explaining that an e-mail sent from a Facebook account bearing the defendant's name was not sufficiently authenticated without additional confirming circumstances); Smith v. State, 136 So.3d 424, 434 (Miss. 2014) (holding that the name and photo on a Facebook printout were not sufficient to link the communication to the alleged author, where the state failed to make a prima facie case that the messages were actually sent by the defendant); Dering v. State, 465 S.W.3d 668, 672 (Tex. 2015) (holding that Facebook posts on a third party's account by other third parties were not authenticated, where the sponsoring witness was neither the owner of the account onto which the posts were made, nor the owner of any of the accounts of the alleged posters).

Id. at 1162-63 (some citations omitted).

- New Jersey v. Hannah, 151 A.3d 99 (N.J. App. Div. 2016) (finding that a tweet was authenticated by its use of the defendant’s Twitter handle, her profile photo, the content of the tweet, its nature as a reply, and trial testimony).

- FRE 902 updated in 2017 to allow self-authentication of certain types of electronic documents and data. The amended rules allow certification, rather than live testimony, to authenticate “records generated by an electronic process or system” and “data copied from an electronic device, storage medium, or file,” but you still have to jump through the hoops of admissibility.

Amended FRE 902(13):

**Certified Records Generated by an Electronic Process or System.** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a
qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

Amended FRE 902(14):

**Certified DataCopied from an Electronic Device, Storage Medium, or File.** Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

Advisory committee notes:

**[Paragraph (13)]** The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. . . . The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

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A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. . . . The Rule specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

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A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds--including hearsay, relevance, or in criminal cases the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information
produced is unreliable--the authentication establishes only that the output came from the computer. . . .

[Paragraph (14)] The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. . . .

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by “hash value.” A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

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A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. . . . Rule 902(14) is solely limited to authentication, and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds--including hearsay, relevance, or in criminal cases the right to confrontation....
18 U.S. Code § 2702 - Voluntary disclosure of customer communications or records

(a) Prohibitions. — Except as provided in subsection (b) or (c)—

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing; and

(3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

(b) Exceptions for disclosure of communications. — A provider described in subsection (a) may divulge the contents of a communication—

(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient;

(2) as otherwise authorized in section 2517, 2511(2)(a), or 2703 of this title;

(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service;

(4) to a person employed or authorized or whose facilities are used to forward such communication to its destination;

(5) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;
(6) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 2258A;

(7) to a law enforcement agency—

(A) if the contents—

(i) were inadvertently obtained by the service provider; and

(ii) appear to pertain to the commission of a crime; or


(8) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency.

(c) Exceptions for Disclosure of Customer Records.—A provider described in subsection (a) may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2))—

(1) as otherwise authorized in section 2703;

(2) with the lawful consent of the customer or subscriber;

(3) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

(4) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency;

(5) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 2258A; or

(6) to any person other than a governmental entity.

(d) Reporting of Emergency Disclosures.—On an annual basis, the Attorney General shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report containing—

(1) the number of accounts from which the Department of Justice has received voluntary disclosures under subsection (b)(8);

(2) a summary of the basis for disclosure in those instances where—

(A) voluntary disclosures under subsection (b)(8) were made to the Department of Justice; and

(B) the investigation pertaining to those disclosures was closed without the filing of criminal charges; and
(3) the number of accounts from which the Department of Justice has received voluntary disclosures under subsection (c)(4).

The Commonwealth of Pennsylvania appeals from the Order denying its Motion in Limine to introduce Facebook posts and messages allegedly authored by defendant Tyler Kristian Mangel ("Mangel"). We affirm.

On June 26, 2016, Nathan Cornell ("Cornell") was assaulted at a graduation party. On July 15, 2016, a Criminal Complaint was filed against Mangel, at CR 2939 of 2016, charging him with aggravated assault, simple assault and harassment of Cornell. See 18 Pa.C.S.A. §§ 2702(a)(1), 2701(a)(1), 2709(a)(1). At CR 2940 of 2016, the Commonwealth filed a separate Criminal Complaint against Matthew Robert Craft ("Craft"), charging him with the same offenses. The criminal cases against Mangel and Craft were consolidated for trial. Attached to the Criminal Complaints was an Affidavit of Probable Cause,[1] which indicated that Cornell had told police that "several fights ensued as a result of an undetermined amount of people arriving" at the party. Affidavit of Probable Cause, 7/15/16, at 1. Cornell had further stated that "he was walking away from where these altercations were taking place when he was struck in the back of the head[,] knocked to the ground[,]" and "was repeatedly kicked and punched by [ ] Mangel [ ] and [ ] Craft [ ]." Id. Cornell also stated that he did not know Mangel or Craft, "nor had he been in contact with them during
the course of the night, but he was able to identify them as a result of being shown Facebook pictures by his family." Id. As a result of the assault, Cornell suffered facial lacerations, a broken maxilla bone, a broken nasal bone, and seven of his teeth were knocked out. Id.

On March 15, 2017, the Commonwealth filed a Motion for Provider to Provide Subscriber Information, pursuant to 18 U.S.C. § 2307(c) and 18 Pa.C.S.A. § 5743(c) and (d), seeking to obtain Mangel's Facebook records. The trial court granted the Motion on that same date. At the time of jury selection on May 8, 2017, the Commonwealth filed a Motion in Limine to introduce screenshots of certain pages of a Facebook account for "Tyler Mangel," consisting of undated online and mobile device "chat" messages. See Motion in Limine, 5/8/17, at Appendices A-C. The Commonwealth also sought to introduce a Facebook screenshot wherein a photograph of purportedly bloody hands had been posted by "Justin Jay Sprejum Hunt." See id.

On May 8, 2017, the trial court conducted a hearing on the Motion, at which the Commonwealth presented the testimony of Erie County Detective Anne Styn ("Detective Styn"), whom the trial court qualified as an expert in computer forensics. N.T., 5/8/17, at 7. Detective Styn testified that she had received a request from the Commonwealth to determine the owner of a particular Facebook account, bearing the name "Tyler Mangel," and was provided with "Facebook screenshots captured from online, as well as mobile device chats" of that account taken by Trooper Schaeffer[2] of the Pennsylvania State Police. Id. at 7-8, 12-14.

Detective Styn then "conducted a search on Facebook for the individual's name, Tyler Mangel, in which only one name had populated at that time [as] being ['']Tyler Mangel,['']" N.T., 5/8/17, at 9. Detective Styn then compared the Facebook account that she had located to the screenshots that she had received from the Commonwealth, and noticed that both the screenshots and the Facebook account bore name "Tyler Mangel;" both listed the account holder as living in Meadville, Pennsylvania; and some of the photographs on the screenshots were the same as those on the Facebook account. Id. at 9. In the "about" section of the Facebook account located by Detective Styn, the page indicated that the individual had attended Meadville High School. Id. Detective Styn further testified that the username associated with the Facebook account was "Mangel17." Id. at 11. Upon receiving the requested subscriber records from Facebook, Detective Styn determined that the account was created by using the first name "Tyler" and the last name "Mangel," and the registered e-mail addresses of mangel17@facebook and tylertkm@hotmail.com. Id. The Facebook subscriber records also indicated that the Facebook account had been verified by the cell phone number (814) 573-4409. Id. at 11-12. Detective Styn then obtained a court order for the Verizon subscriber records associated with this phone number, which identified the owner of the number as "Stacy Mangel," residing at 10866 Pettis Road, Meadville, Pennsylvania. Id. at 12. The trial court took judicial notice of the fact that this particular address is the same as the address listed in the Criminal Complaint filed against Mangel. Id.

Detective Styn then compared the Facebook account that she had located to the screenshots provided to her by the Commonwealth, and came to the conclusion that the Facebook account that she had located "should be the same" as the account in the screenshots provided by the Commonwealth because both accounts (1) bore the name "Tyler Mangel;" (2) listed the account holder as living in Meadville, Pennsylvania; (3) listed the account holder as having attended Meadville High School; and (4) displayed several photographs which seemed to be of the same individual. Id. at 14. With regard to the screenshots of the mobile device chats that the Commonwealth initially provided to Detective Styn, she testified that "[t]he Facebook name itself . . . and even the images on his Facebook page" added to her opinion that the chats came from Mangel. Id. at 15. Detective Styn referred to a post by "Tyler Mangel," in the screenshots provided by the Commonwealth, stating "[i]f all that you leave is a scratch you know you're a bitch[,]" and opined that "it looks like he's posting it in regard to an altercation that may or may not have happened." Id.
at 16. When Detective Styn was asked what contextual clues she had found in the chats to indicate that they were from the same Facebook account, the defense objected. Id. After hearing argument from counsel, the trial court questioned Detective Styn, as follows:

The Court: Well, I'm the gatekeeper of admissibility. So[,] I want to know, first of all, can you even testify to a reasonable degree of computer and scientific certainty the answer to that question? I mean, can you do that? And[,] this is a criminal case. This is not probability. This is certainty and you know what that is.

[Detective] Styn: Correct.

The Court: So, can you do that, first of all?

[Detective] Styn: Based on my training and experience, in this particular instance I would solely base my testimony off the records that I received from Facebook and Verizon.

The Court: And could you do that with a reasonable degree of certainty that it was what? [ ] Mangel that did all of this?

[Detective] Styn: That this account was registered under Tyler Mangel's account and —

The Court: No. That [ ] Mangel actually did this. You can do that with a reasonable degree of certainty? You can say that he did this? That no one else intervened or someone else grabbed the account? You can do that?

[Detective] Styn: I cannot, Judge.

The Court: So, objection sustained.

Id. at 20. On cross-examination, Detective Styn testified that she did not obtain an IP address for the Facebook account she had located.[3] Id. at 23. Defense counsel then showed Detective Styn his own cell phone, on which he had conducted a Facebook search for "Tyler Mangel," resulting in five accounts bearing that name, one of which listed Meadville, Pennsylvania, as the hometown. Id. at 24. Defense counsel took a screenshot of his Facebook search, which was admitted as an exhibit into evidence for the hearing. Additionally, the trial court admitted into evidence the screenshots taken by Detective Styn of the homepage and "about" page of the Facebook account she had located for "Tyler Mangel;" the Facebook and Verizon subscriber records; and the screenshots provided by the Commonwealth to Detective Styn of the online and mobile device chats on the Facebook account for "Tyler Mangel" located by Trooper Schaeffer. Id. at 21. At the conclusion of the hearing, the trial court denied the Commonwealth's Motion in Limine.

On May 9, 2017, the Commonwealth timely filed a joint Notice of Appeal, pursuant to Pa.R.A.P. 311(d), claiming that the trial court's Order denying its Motion in Limine terminated or substantially handicapped the prosecution of its criminal cases against Mangel and Craft. The Commonwealth thereafter filed a joint court-ordered Pa.R.A.P. 1925(b) Concise Statement of matters complained of on appeal.[4]

On appeal, the Commonwealth raises the following issues for our review:

1. Did the trial court commit legal error when it applied a "reasonable degree of scientific certainty" standard in determining whether [the Commonwealth] provided adequate extrinsic evidence to support the authenticity of Facebook records?
2. Did the trial court commit legal error when it failed to apply "whether the jury could reasonably find the authenticity of the Facebook records by a preponderance of the evidence" standard in determining whether [the Commonwealth] provided adequate extrinsic evidence to support the authenticity of the Facebook records?

Brief for the Commonwealth at 3 (capitalization omitted).

The Commonwealth claims that the trial court erred by applying "a reasonable degree of certainty, reliability, scientific, technological certainty" standard in determining whether the Commonwealth had satisfied the requirements for authentication of the proffered Facebook records. Id. at 11. The Commonwealth argues that "this ruling was made by the trial court solely based upon the direct testimony of Detective Styn." Id. The Commonwealth contends that "[w]hat evidence the [Commonwealth] may or may not have connecting [Mangel and Craft] to the crimes charged here has no bearing upon the standard to be applied in determining whether the Facebook documents were authenticated." Id. The Commonwealth asserts that the trial court "applied a considerably higher burden than [is] required by either the rules of evidence or controlling case law." Id. The Commonwealth claims that this case is analogous to United States v. Browne, 834 F.3d 403 (3d Cir. 2016), wherein the United States Court of Appeals for the Third Circuit examined the issue of the authentication of social media evidence, and applied a "preponderance of the evidence" standard for authentication of Facebook records. Commonwealth's Brief at 10.

Our standard of review of a denial of a motion in limine is as follows:

When ruling on a trial court's decision to grant or deny a motion in limine, we apply an evidentiary abuse of discretion standard of review. The admission of evidence is committed to the sound discretion of the trial court, and a trial court's ruling regarding the admission of evidence will not be disturbed on appeal unless that ruling reflects manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support to be clearly erroneous.


Pursuant to Pennsylvania Rule of Evidence 901, authentication is required prior to admission of evidence. The proponent of the evidence must introduce sufficient evidence that the matter is what it purports to be. See Pa.R.E. 901(a). Testimony of a witness with personal knowledge that a matter is what it is claimed to be can be sufficient. See Pa.R.E. 901(b)(1). Evidence that cannot be authenticated by a knowledgeable person, pursuant to subsection (b)(1), may be authenticated by other parts of subsection (b), including circumstantial evidence pursuant to subsection (b)(4).[6] See Pa.R.E. 901(b)(4).

The question of what proof is necessary to authenticate social media evidence, such as Facebook postings and communications, appears to be an issue of first impression in Pennsylvania. Facebook is a social networking site where "[u]sers of that Web site may post items on their Facebook page that are accessible to other users, including Facebook 'friends' who are notified when new content is posted." Nicolaou v. Martin, 153 A.3d 383, 387 n.2 (Pa. Super. 2016) (en banc) (citing Elonis v. United States, 135 S. Ct. 2001, 2004, 192 L. Ed. 2d 1 (2015)). Additionally, Facebook "requires users to provide a name and e[-]mail address to establish an account. Account holders can, among other things, add other users to their "friends" list and communicate with them through Facebook chats, or messages." Browne, 834 F.3d at 405. In determining what is required to authenticate social media evidence, such as Facebook postings and communications, we look first to the treatment accorded other types of electronic communications.
Pennsylvania appellate courts have considered the authentication of computerized instant messages and cell phone text messages. See In the Interest of F.P., a Minor, 878 A.2d 91, 96 (Pa. Super. 2005) (computerized instant messages); Commonwealth v. Koch, 39 A.3d 996, 1005 (Pa. Super. 2011), affirmed by an equally divided court, 106 A.3d 705 (Pa. 2014) (cell phone text messages).[7] In In re. F.P., this Court examined the issue of whether computerized instant message transcripts had been appropriately authenticated. The Commonwealth sought to introduce instant messages from screen name "lcp4Life30" to "WHITEBOY Z." In re. F.P., 878 A.2d at 94. The victim identified himself as "WHITEBOY Z" and testified (1) that he thought "lcp4Life30" was the defendant; and (2) about the events that had occurred involving defendant. Id. The defendant had threatened the victim via instant messages, and when this was reported to the school counselor, there was a meeting between defendant and school officials. Id. A mediation between both students was conducted by a school guidance counselor. Id. The contents of the instant messages referred to these ongoing events and, in one instance, the defendant referred to himself by his first name. Id. The defendant never denied sending the instant messages. Id. The In re. F.P. Court concluded that this circumstantial evidence sufficiently identified defendant as "lcp4Life30," and authenticated the instant message transcripts, such that the trial court did not abuse its discretion in admitting them. Id. at 95.

Notably, the In re. F.P. Court rejected the argument that electronic communications, such as text messages or e-mails, are inherently unreliable due to their relative anonymity and the difficulty connecting them to their author, noting that the same uncertainties exist with written documents: "[a] signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationary can be copied or stolen." In re. F.P., 878 A.2d at 95. The In re. F.P. Court also rejected the notion that unique rules for admissibility of electronic communications should be created, stating "[w]e believe that e-mail messages and similar forms of electronic communication can be properly authenticated within the existing framework of Pa.R.E. 901 and Pennsylvania case law[..]" Id. Additionally, the In re. F.P. Court concluded that the admissibility of an electronic communication is to be evaluated on a case-by-case basis, as any other document, to determine whether or not there has been an adequate foundational showing of its relevance and authenticity. See id. at 96.

In Koch, this Court examined whether cell phone text messages had been appropriately authenticated prior to their admission into evidence. In that case, the Commonwealth sought the admission of text messages retrieved from a cell phone taken during the execution of a search warrant on the defendant's residence. Koch, 39 A.3d at 1000. During the raid, police found two cell phones, marijuana, scales, a bong, pipes for smoking marijuana, and other drug paraphernalia. Id. The defendant admitted to owning one of the cell phones. Id. Thirteen text messages were retrieved from the defendant's cell phone, the content of which indicated drug sale activity. Id. At trial, a detective testified that he had transcribed the text messages and identifying information from the cellular phone belonging to the defendant. Id. However, the detective conceded that he could not confirm that the defendant was the author of the text messages, and that it was apparent that the defendant did not write some of the messages. Id. at 1003.

The Koch Court looked to this Court's prior holding in In re. F.P., as well as cases from other jurisdictions wherein courts had examined the authentication of text messages, and concluded that "[i]mplicit in these decisions is the realization that e-mails and text messages are documents and subject to the same requirements for authenticity as non-electronic documents generally. Koch, 39 A.3d at 1004 (citations omitted). The Koch Court additionally observed that "electronic writings typically show their source, so they can be authenticated by contents in the same way that a communication by postal mail can be authenticated." Id. at 1003.
However, the **Koch** Court was mindful of the various challenges presented in authenticating electronic communications:

> [T]he difficulty that frequently arises in e-mail and text message cases is establishing authorship. Often more than one person uses an e-mail address and accounts can be accessed without permission. In the majority of courts to have considered the question, the mere fact that an e-mail bears a particular e-mail address is inadequate to authenticate the identity of the author; typically, courts demand additional evidence.

**Id.** at 1004.[⁸] Accordingly, the **Koch** Court ruled, "authentication of electronic communications, like documents, requires more than mere confirmation that the number or address belonged to a particular person. Circumstantial evidence, which tends to corroborate the identity of the sender, is required." **Id.** at 1005.

Applying these considerations to the evidence in the record, the **Koch** Court concluded that the testimony of the detective was insufficient to authenticate the text messages in question, noting that there was no testimony from any person who had sent or received the text messages, nor any contextual clues in the drug-related text messages that tended to reveal the identity of the sender. **Id.** at 1005. On this basis, the **Koch** Court concluded that the admission of the text messages constituted an abuse of discretion. **Id.**[⁹]

Recently, in **Browne**, the United States Court of Appeals for the Third Circuit addressed the authentication of Facebook chat logs, and concluded that "it is no less proper to consider a wide range of evidence for the authentication of social media records than it is for more traditional documentary evidence[,]" and that "the Rules of Evidence provide the courts with the appropriate framework within which to conduct that analysis." **Browne**, 834 F.3d at 412. In **Browne**, under the Facebook account name "Billy Button," Browne began exchanging messages with one of his female victims, with whom he eventually met in person and exchanged sexually explicit photographs through Facebook chats. **Id.** at 405. Browne then threatened to publish her photos online unless she engaged in oral sex, and promised to delete the photos only if she provided him with the password to her Facebook account. **Id.** Using the first victim's Facebook account, Browne made contact with four of her Facebook "friends," all minors, and solicited explicit photographs from them. **Id.** Once he had the minor's photos, Browne repeated the pattern he had established with his first victim. **Id.** Browne threatened the minors with public exposure of their images unless they agreed to engage in various sexual acts, and sent additional explicit photos of themselves to his "Billy Button" Facebook account or to his "998" cell phone number. **Id.** at 405-06. At trial, the district court permitted the government to introduce five Facebook chat logs and a certificate of authenticity into evidence at trial. **Id.** at 406. Four of the chat logs involved communications between the "Billy Button" Facebook account and four of the five victims. **Id.** The fifth chat log involved Facebook communications between two of the victims, in which one victim discussed her sexual assault by Browne. **Id.**

In concluding that the Facebook records were properly authenticated under F.R.E. 901,[¹⁰] the **Browne** Court looked to the following factors: (1) the victims provided detailed testimony about the Facebook communications they had with "Button," which were consistent with the content of the chat logs that the government had introduced into evidence; (2) three of the victims testified that after conversing with the defendant's "Billy Button" Facebook account, they met in person with "Button," whom they were able to identify in open court as Browne; (3) Browne testified that he owned the "Billy Button" Facebook account on which the search warrant had been executed, and that he had conversed on that account with three of the victims; (4) Browne testified that he owned the phone with the "998" number that was seized from his
residence and from which certain images were recovered—which the victims identified as those they sent in response to commands from the "Billy Button" Facebook account or the "998" number; (5) in his post-arrest statement, Browne provided the passwords to the "Billy Button" Facebook account; (6) the personal information that Browne confirmed on the stand was consistent with the personal details that "Button" interspersed throughout his Facebook conversations with certain of the victims (i.e., that his first name was "Tony," he resided at Lovenlund, was a plumber and had a fiancé); and (7) the government supported the accuracy of the chat logs by obtaining them directly from Facebook and introducing a certificate attesting to their maintenance by the company's automated systems. Browne, 834 F.3d at 413-14. Based on this evidence, the Browne Court ruled that the government had provided sufficient evidence from which the jury could reasonably find the authenticity of the records by a preponderance of the evidence. Id. at 413.

In our view, the same authorship concerns, as expressed by the Koch Court in relation to e-mails and instant messages, exist in reference to Facebook and other social media platforms, that can be accessed from any computer or smart phone with the appropriate user identification and password. See Koch, 39 A.3d at 1004; see also In re. F.P., 878 A.2d at 95 (stating that "anybody with the right password can gain access to another's email account and send a message ostensibly from that person."). Social media evidence presents additional challenges because of the great ease with which a social media account may be falsified, or a legitimate account may be accessed by an imposter. See Browne, 834 F.3d at 412. Nevertheless, social media records and communications can be properly authenticated within the existing framework of Pa.R.E. 901 and Pennsylvania case law, similar to the manner in which text messages and instant messages can be authenticated. Initially, authentication social media evidence is to be evaluated on a case-by-case basis to determine whether or not there has been an adequate foundational showing of its relevance and authenticity. See In re. F.P., 878 A.2d at 96. Additionally, the proponent of social media evidence must present direct or circumstantial evidence that tends to corroborate the identity of the author of the communication in question, such as testimony from the person who sent or received the communication, or contextual clues in the communication tending to reveal the identity of the sender. See Koch, 39 A.3d at 1005. Other courts examining the authentication of social media records have ruled that the mere fact that an electronic communication, on its face, purports to originate from a certain person's social networking account is generally insufficient, standing alone, to authenticate that person as the author of the communication. See United States v. Vayner, 769 F.3d 125, 131 (2d Cir. 2014) (holding that the government failed to authenticate what it alleged was a printout of the defendant's profile page from a Russian social networking site where it offered no evidence to show that the defendant had created the page); United States v. Jackson, 208 F.3d. 633, 636-37 (7th Cir. 2000) (holding that in order to authenticate a website posting, the proponent had to show that the group in question had actually authored the post, rather than merely someone improperly accessing the group's website); Griffin v. State, 19 A.3d 415, 423-24 (Md. 2011) (holding that MySpace account profile bearing a photograph of an individual, coupled with her location and birthdate, were insufficient to authenticate a posting from the account, as having been made by the individual); Commonwealth v. Purdy, 945 N.E.2d 372, 381 (Mass. 2011) (explaining that an e-mail sent from a Facebook account bearing the defendant's name was not sufficiently authenticated without additional confirming circumstances); Smith v. State, 136 So. 3d 424, 434 (Miss. 2014) (holding that the name and photo on a Facebook printout were not sufficient to link the communication to the alleged author, where the state failed to make a prima facie case that the messages were actually sent by the defendant); Deering v. State, 465 S.W.3d 668, 672 (Tex. 2015) (holding that Facebook posts on a third party's account by other third parties were not authenticated, where the sponsoring witness was neither the owner of the account onto which the posts were made, nor the owner of any of the accounts of the alleged posters).
Turning to the record before us, the trial court, in reliance upon *Koch*, explained that it had denied the Commonwealth’s Motion in Limine on the basis that it had failed to present sufficient evidence that tended to corroborate that Mangel was the sender of the Facebook communications in question. See Trial Court Opinion, 7/10/17, at 9. As explained by the trial court,

... Mangel did not himself state at any time that the Facebook account in question was his own personal Facebook account and/or that he authored the posts and messages on the Facebook account, and the Commonwealth did not introduce subsequent testimony from any other knowledgeable party to substantiate that the Facebook page (and, by association, the posts and messages contained therein) belonged to [ ] Mangel. Moreover, the Commonwealth did not obtain the username or password for the Facebook account to confirm its authenticity. Although the Commonwealth did produce evidence allegedly linking [ ] Mangel to the Facebook page in question, including a name, hometown, school district and certain pictures, this information has generally been held to be insufficient to connect a defendant to posts and messages authored on a Facebook page. In fact, following a search on Facebook for the name of "Tyler Mangel" by [defense counsel], five (5) "Tyler Mangel" Facebook accounts appeared in response to the search, one of which has the same hometown of "Meadeville, Pennsylvania," which contradicts Detective Styn’s testimony that only one (1) "Tyler Mangel" Facebook account appeared during her search.

A thorough review of the Facebook posts and messages themselves raises specific issues. First, the evidence presented by the Commonwealth does not indicate the exact time the posts and messages were made. The incident which brought about the instant criminal charges occurred allegedly on June 26th, 2016, according to the Criminal Information. The lack of a date and timestamps raises a significant question regarding the connection of the posts and messages to the alleged incident on June 26th, 2016. Furthermore, the "Tyler Mangel" who allegedly authored the Facebook posts and messages does not specifically reference himself in the incident on June 26th, 2016; rather, other individuals, many of them who are not directly involved in the instant criminal case, reference a "Tyler Mangel" in response to a post made and in subsequent conversations about an alleged assault. Moreover, the Facebook posts and messages are very ambiguous, containing slang and other nonsensical words with "Like" replies, and do not specifically and directly relate to the alleged incident on June 26th, 2016. Finally, the Commonwealth did not produce evidence as to the distinct characteristics of the posts and messages which would indicate [that] Mangel was the author.

Also, as part of the Commonwealth’s Exhibit 2, the Commonwealth introduced a black and white copy of a Facebook picture of a hand, which is allegedly bloody and bruised. However, this picture was posted by a Facebook user named "Justin Jay Sprejum Hunt," who makes no reference to [ ] Mangel or Craft. Therefore, this Facebook exhibit offered by the Commonwealth is not relevant regarding the authentication of the Facebook posts and messages.

Trial Court Opinion, 7/10/17, at 9-10 (internal citations and footnote omitted).[11]

Based on its explanation, it is clear that the trial court, in recognizing *Koch* as the controlling legal precedent in Pennsylvania for the authentication of electronic communications, applied the proper standard in determining whether the Commonwealth had presented sufficient direct or circumstantial evidencethat Mangel had authored the Facebook messages in question.[12] Here, the Commonwealth presented no
evidence, direct or circumstantial, tending to substantiate that Mangel created the Facebook account in question, authored the chat messages, or posted the photograph of bloody hands. The mere fact that the Facebook account in question bore Mangel's name, hometown and high school was insufficient to authenticate the online and mobile device chat messages as having been authored by Mangel. Moreover, there were no contextual clues in the chat messages that identified Mangel as the sender of the messages. Accordingly, the trial court did not abuse its discretion in denying the Commonwealth's Motion in Limine to admit such items into evidence at trial.

Order affirmed.

Judgment Entered.

[1] The Affidavit of Probable Cause attached to each Criminal Complaint was the same, except for the docket number, OTN number and the defendant's name.

[2] Trooper Schaeffer's first name is not contained within the record.

[3] Notably, Detective Styn had testified that an investigation of social media includes retrieving IP addresses to determine the specific location from which an item has been posted, including the specific computer or network where a particular post originated from. See N.T., 5/8/17, at 5-6, 23.

[4] This Court, sua sponte, consolidated the appeals.

[5] Although the Commonwealth purports to raise two issues on appeal, the Argument section of its brief contains only one section. See Pa.R.A.P. 219(a) (providing that "the argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part—in distinctive type or in type distinctively displayed—the particular point treated therein."). Nevertheless, as the Commonwealth's issues are related, we will address them together.

[6] Pursuant to Rule 901(b)(4), evidence may be authenticated by "Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Pa.R.E. 901(b)(4).

[7] Because an equally divided Supreme Court affirmed this Court's grant of a new trial in Koch, our Supreme Court's decision is not binding in this case. See Commonwealth v. Mosley, 114 A.3d 1072, 1082 n.11 (Pa. Super. 2015) (holding that "[w]hen a judgment of sentence is affirmed by an equally divided court, as in the Koch case, no precedent is established and the holding is not binding on other cases.").

[8] In In re. F.P, the Court noted that "[t]here is a paucity of cases involving authentication of e-mails or instant messages, none in the Commonwealth of Pennsylvania." Based on our review, it appears that there have been no further intermediate court developments in the specific area of authentication of social media evidence since the In re. F.P. Opinion was published.

[9] Also at issue in Koch was whether the text messages constituted inadmissible hearsay under Pa.R.E. 802. See Koch, 39 A.3d at 1005-06 (holding that there was no exception to the hearsay rule that would render the text messages admissible, and their admission constituted an abuse of discretion). However, the issue of whether the Facebook communications in question constitute hearsay is not before us in this case.


[11] We further observe that the Commonwealth did not produce any evidence that Mangel had created, or had access to, the email accounts associated with the Facebook account (mangel17@facebook and tylertkm@hotmail.com), per the Facebook subscriber records. Nor did the Commonwealth produce any evidence that Mangel had access the cellular phone with the number (814) 573-4409, associated with the Facebook account, or any relationship with the individual who owned that number ("Stacy Mangel").

[12] The Commonwealth appears to conflate the authentication of evidence standard applied by the trial court, with the expert testimonial standard employed during the trial court's questioning of Detective Styn. As Detective Styn had been qualified as an expert, the trial court properly inquired whether she could state her opinions with a reasonable degree of certainty. See Commonwealth v. Gonzalez, 109 A.3d 711, 727 (Pa. Super. 2015) (holding that an expert must base her opinion on a reasonable degree of certainty instead of mere speculation).
In this personal injury action, we are asked to resolve a dispute concerning disclosure of materials from plaintiff's Facebook account.

Plaintiff alleges that she was injured when she fell from a horse owned by defendant, suffering spinal and traumatic brain injuries resulting in cognitive deficits, memory loss, difficulties with written and oral communication, and social isolation. At her deposition, plaintiff stated that she previously had a Facebook account on which she posted "a lot" of photographs showing her pre-accident active lifestyle but that she deactivated the account about six months after the accident and could not recall whether any post-accident photographs were posted. She maintained that she had become reclusive as a result of her injuries and also had difficulty using a computer and composing coherent messages. In that regard, plaintiff produced a document she wrote that contained misspelled words and faulty grammar in which she represented that she could no longer express herself the way she did before the accident. She contended, in particular, that a simple email could take hours to write because she had to go over written material several times to make sure it made sense.

Defendant sought an unlimited authorization to obtain plaintiff's entire "private" Facebook account, contending the photographs and written postings would be material and necessary to his defense of the
action under CPLR 3101 (a). When plaintiff failed to provide the authorization (among other outstanding
discovery), defendant moved to compel, asserting that the Facebook material sought was relevant to the
scope of plaintiff's injuries and her credibility. In support of the motion, defendant noted that plaintiff alleged
that she was quite active before the accident and had posted photographs on Facebook reflective of that
fact, thus affording a basis to conclude her Facebook account would contain evidence relating to her
activities. Specifically, defendant cited the claims that plaintiff can no longer cook, travel, participate in
sports, horseback ride, go to the movies, attend the theater, or go boating, contending that photographs and
messages she posted on Facebook would likely be material to these allegations and her claim that the
accident negatively impacted her ability to read, write, word-find, reason and use a computer.

Plaintiff opposed the motion arguing, as relevant here, that defendant failed to establish a basis for access
to the "private" portion of her Facebook account because, among other things, the "public" portion contained only a single photograph that did not contradict plaintiff's claims or deposition testimony. Plaintiff's counsel did not affirm that she had reviewed plaintiff's Facebook account, nor allege that any specific material located therein, although potentially relevant, was privileged or should be shielded from disclosure on privacy grounds. At oral argument on the motion, defendant reiterated that the Facebook material was reasonably likely to provide evidence relevant to plaintiff's credibility, noting for example that the timestamps on Facebook messages would reveal the amount of time it takes plaintiff to write a post or respond to a message. Supreme Court inquired whether there is a way to produce data showing the timing and frequency of messages without revealing their contents and defendant acknowledged that it would be possible for plaintiff to turn over data of that type, although he continued to seek the content of messages she posted on Facebook.

Supreme Court granted the motion to compel to the limited extent of directing plaintiff to produce all
photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at
trial, all photographs of herself privately posted on Facebook after the accident that do not depict nudity or
romantic encounters, and an authorization for Facebook records showing each time plaintiff posted a
private message after the accident and the number of characters or words in the messages (2014 NY Slip Op 30679[U] [2014]). Supreme Court did not order disclosure of the content of any of plaintiff's written Facebook posts, whether authored before or after the accident.

Although defendant was denied much of the disclosure sought in the motion to compel, only plaintiff
appealed to the Appellate Division.[1] On that appeal, the Court modified by limiting disclosure to
photographs posted on Facebook that plaintiff intended to introduce at trial (whether pre- or post-
accident) and eliminating the authorization permitting defendant to obtain data relating to post-accident
messages, and otherwise affirmed (134 AD3d 529 [2015]). Two Justices dissented, concluding defendant
was entitled to broader access to plaintiff's Facebook account and calling for reconsideration of that Court's
recent precedent addressing disclosure of social media information as unduly restrictive and inconsistent
with New York's policy of open discovery. The Appellate Division granted defendant leave to appeal to this
Court, asking whether its order was properly made. We reverse, reinstate Supreme Court's order and
answer that question in the negative.

Disclosure in civil actions is generally governed by CPLR 3101 (a), which directs: "[t]here shall be full
disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the
burden of proof." We have emphasized that "[t]he words, 'material and necessary', are ... to be interpreted
liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist
preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness
and reason” (Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 [1968]; see also Andon v 302-304 Mott St. Assoc., 94 NY2d 740, 746 [2000]). A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is “material and necessary” — i.e., relevant — regardless of whether discovery is sought from another party (see CPLR 3101 [a] [1]) or a nonparty (CPLR 3101 [a] [4]; see e.g. Matter of Kapon v Koch, 23 NY3d 32 [2014]). The “statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise” (Spectrum Sys. Intl. Corp. v Chemical Bank, 78 NY2d 371, 376 [1991]).

The right to disclosure, although broad, is not unlimited. CPLR 3101 itself “establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101 [b]); attorney’s *662 work product, also absolutely immune (CPLR 3101 [c]); and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship” (Spectrum at 376-377). The burden of establishing a right to protection under these provisions is with the party asserting it — "the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity" (id. at 377).

In addition to these restrictions, this Court has recognized that "litigants are not without protection against unnecessarily onerous application of the discovery statutes. Under our discovery statutes and case law, competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party" (Kavanagh v Ogden Allied Maintenance Corp., 92 NY2d 952, 954 [1998] [citations and internal quotation marks omitted]; see CPLR 3103 [a]). Thus, when courts are called upon to resolve a dispute,[2] discovery requests "must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure ... Absent an [error of law or an] abuse of discretion," this Court will not disturb such a determination (Andon, 94 NY2d at 747; see Kavanagh, 92 NY2d at 954).[3]

Here, we apply these general principles in the context of a dispute over disclosure of social media materials. Facebook is a *663 social networking website "where people can share information about their personal lives, including posting photographs and sharing information about what they are doing or thinking" (Romano v Steelcase Inc., 30 Misc 3d 426, 429 [Sup Ct, Suffolk County 2010]). Users create unique personal profiles, make connections with new and old "friends" and may "set privacy levels to control with whom they share their information" (id. at 429-430). Portions of an account that are "public" can be accessed by anyone, regardless of whether the viewer has been accepted as a "friend" by the account holder — in fact, the viewer need not even be a fellow Facebook account holder (see Facebook, Help Center, What audiences can I choose from when I share?, https://www.facebook.com/help/XXXXXXXXXXXXXXX?helpref=faq_content [last accessed Jan. 15, 2018]). However, if portions of an account are "private," this typically means that items are shared only with "friends" or a subset of "friends" identified by the account holder (id.). While Facebook — and sites like it — offer relatively new means of sharing information with others, there is nothing so novel about Facebook materials that precludes application of New York's long-standing disclosure rules to resolve this dispute.

On appeal in this Court, invoking New York's history of liberal discovery, defendant argues that the Appellate Division erred in employing a heightened threshold for production of social media records that depends on what the account holder has chosen to share on the public portion of the account. We agree. Although it is unclear precisely what standard the Appellate Division applied, it cited its prior decision in Tapp v New York State Urban Dev. Corp. (102 AD3d 620 [1st Dept 2013]), which stated: "To warrant
discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account — that is, information that "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims" (id. at 620 [emphasis added]). Several courts applying this rule appear to have conditioned discovery of material on the "private" portion of a Facebook account on whether the party seeking disclosure demonstrated there was material in the "public" portion that tended to contradict the injured party's allegations in some respect (see e.g. Spearin v Linmar, L.P., 129 AD3d 528 [1st Dept 2015]; Nieves v 30 Ellwood Realty LLC, 39 Misc 3d 63 [App Term, 1st Dept 2013]; Pereira v City of New York, 40 Misc 3d 1210[A], 2013 NY Slip Op 51091[U] [Sup Ct, Queens *664 County 2013]; Romano, 30 Misc 3d 426). Plaintiff invoked this precedent when arguing, in opposition to the motion to compel, that defendant failed to meet the minimum threshold permitting discovery of any Facebook materials.

Before discovery has occurred — and unless the parties are already Facebook "friends" — the party seeking disclosure may view only the materials the account holder happens to have posted on the public portion of the account. Thus, a threshold rule requiring that party to "identify[] relevant information in [the] Facebook account" effectively permits disclosure only in limited circumstances, allowing the account holder to unilaterally obstruct disclosure merely by manipulating "privacy" settings or curating the materials on the public portion of the account.[d] Under such an approach, disclosure turns on the extent to which some of the information sought is already accessible — and not, as it should, on whether it is "material and necessary in the prosecution or defense of an action" (see CPLR 3101 [a]).

New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. Indeed, as the name suggests, the purpose of discovery is to determine if material relevant to a claim or defense exists. In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence. Thus, we reject the notion that the account holder's so-called "privacy" settings govern the scope of disclosure of social media materials.

That being said, we agree with other courts that have rejected the notion that commencement of a personal injury action renders a party's entire Facebook account automatically discoverable (see e.g. Kregg v Maldonado, 98 AD3d 1289, 1290 [4th Dept 2012] [rejecting motion to compel disclosure of all social media accounts involving injured party without prejudice to narrowly-tailored request seeking only relevant information]; Giacchetto, 293 FRD at 115; Kennedy v Contract Pharmacal Corp., 2013 WL 1966219, *2, 2013 US Dist LEXIS 67839, *3-4 [ED NY, May 13, 2013, No. CV 12-2664 (JFB) (ETB)]). Directing disclosure of a party's entire Facebook account is comparable to ordering discovery of every photograph or communication that party shared with any person on any topic prior to or since the incident giving rise to litigation — such an order would be likely to yield far more nonrelevant than relevant information. Even under our broad disclosure paradigm, litigants are protected from "unnecessarily onerous application of the discovery statutes" (Kavanagh, 92 NY2d at 954).

Rather than applying a one-size-fits-all rule at either of these extremes, courts addressing disputes over the scope of social media discovery should employ our well-established rules — there is no need for a specialized or heightened factual predicate to avoid improper "fishing expeditions." In the event that judicial intervention becomes necessary, courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second, balancing the potential utility of the
information sought against any specific “privacy” or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials. In a personal injury case such as this it is appropriate to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each. Temporal limitations may also be appropriate — for example, the court should consider whether photographs or messages posted years before an accident are likely to be germane to the litigation. Moreover, to the extent the account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court (see CPLR 3103[a]). Here, for example, Supreme Court exempted from disclosure any photographs of plaintiff depicting nudity or romantic encounters.

Plaintiff suggests that disclosure of social media materials necessarily constitutes an unjustified invasion of privacy. We *666 assume for purposes of resolving the narrow issue before us that some materials on a Facebook account may fairly be characterized as private.[5] But even private materials may be subject to discovery if they are relevant. For example, medical records enjoy protection in many contexts under the physician-patient privilege (see CPLR 4504). But when a party commences an action, affirmatively placing a mental or physical condition in issue, certain privacy interests relating to relevant medical records — including the physician-patient privilege — are waived (see Arons v Jutkowitz, 9 NY3d 393, 409 [2007]; Dillenbeck v Hess, 73 NY2d 278, 287 [1989]). For purposes of disclosure, the threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information.

Applying these principles here, the Appellate Division erred in modifying Supreme Court’s order to further restrict disclosure of plaintiff’s Facebook account, limiting discovery to only those photographs plaintiff intended to introduce at trial.[6] With respect to the items Supreme Court ordered to be disclosed (the only portion of the discovery request we may consider), defendant more than met his threshold burden of showing that plaintiff’s Facebook account was reasonably likely to yield relevant evidence. At her deposition, plaintiff indicated that, during the period prior to the accident, she posted “a lot” of photographs showing her active lifestyle. Likewise, given plaintiff’s acknowledged tendency to post photographs representative of her activities on Facebook, there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities and/or limitations. The *667 request for these photographs was reasonably calculated to yield evidence relevant to plaintiff’s assertion that she could no longer engage in the activities she enjoyed before the accident and that she had become reclusive. It happens in this case that the order was naturally limited in temporal scope because plaintiff deactivated her Facebook account six months after the accident and Supreme Court further exercised its discretion to exclude photographs showing nudity or romantic encounters, if any, presumably to avoid undue embarrassment or invasion of privacy.

In addition, it was reasonably likely that the data revealing the timing and number of characters in posted messages would be relevant to plaintiff’s claim that she suffered cognitive injuries that caused her to have difficulty writing and using the computer, particularly her claim that she is painstakingly slow in crafting messages. Because Supreme Court provided defendant no access to the content of any messages on the Facebook account (an aspect of the order we cannot review given defendant’s failure to appeal to the Appellate Division), we have no occasion to further address whether defendant made a showing sufficient to obtain disclosure of such content and, if so, how the order could have been tailored, in light of the facts and circumstances of this case, to avoid discovery of nonrelevant materials.[7]
In sum, the Appellate Division erred in concluding that defendant had not met his threshold burden of showing that the materials from plaintiff's Facebook account that were ordered to be disclosed pursuant to Supreme Court's order were reasonably calculated to contain evidence "material and necessary" to the litigation. A remittal is not necessary here because, in opposition to the motion, plaintiff neither made a claim of statutory privilege, nor offered any other specific reason — beyond the general assertion that defendant did not meet his threshold burden — why any of those materials should be shielded from disclosure.

Accordingly, the Appellate Division order insofar as appealed from should be reversed, with costs, the Supreme Court order reinstated and the certified question answered in the negative.

Order insofar as appealed from reversed, with costs, order of Supreme Court, New York County, reinstated and certified question answered in the negative.

[1] Defendant's failure to appeal Supreme Court's order impacts the scope of his appeal in this Court. "Our review of [an] Appellate Division order is "limited to those parts of the [order] that have been appealed and that aggrieve the appealing party" (Hain v Jamison, 28 NY3d 524, 534 n 3 [2016], quoting Hecht v City of New York, 60 NY2d 57, 61 [1983]). Because defendant did not cross-appeal and, thus, sought no affirmative relief from the Appellate Division, he is aggrieved by the Appellate Division order only to the extent it further limited Supreme Court's disclosure order.

[2] While courts have the authority to oversee disclosure, by design the process often can be managed by the parties without judicial intervention. If the party seeking disclosure makes a targeted demand for relevant, non-privileged materials (see CPLR 3120 [1] [2] [permitting a demand for items within the other party's "possession, custody or control," which "shall describe each item and category with reasonable particularity"], counsel for the responding party — after examining any potentially responsive materials — should be able to identify and turn over items complying with the demand. Attorneys, while functioning as advocates for their clients' interests, are also officers of the court who are expected to make a bona fide effort to properly meet their obligations in the disclosure process. When the process is functioning as it should, there is little need for a court in the first instance to winnow the demand or exercise its in camera review power to cull through the universe of potentially responsive materials to determine which are subject to discovery.

[3] Further, the Appellate Division has the power to exercise independent discretion — to substitute its discretion for that of Supreme Court, even when it concludes Supreme Court's order was merely improvident and not an abuse of discretion — and when it does so applying the proper legal principles, this Court will review the resulting Appellate Division order under the deferential "abuse of discretion" standard (see e.g., Andon; Kavanaugh; see generally Kapon).

[4] This rule has been appropriately criticized by other courts. As one federal court explained,

"[t]his approach can lead to results that are both too broad and too narrow. On the one hand, a plaintiff should not be required to turn over the private section of his or her Facebook profile (which may or may not contain relevant information) merely because the public section undermines the plaintiff's claims. On the other hand, a plaintiff should be required to review the private section and produce any relevant information, regardless of what is reflected in the public section ... Furthermore, this approach improperly shields from discovery the information of Facebook users who do not share any information publicly" (Giacchetto v Patchogue-Medford Union Free Sch. Dist., 293 FRD 112, 114 n 1 [ED NY 2013]).

[5] There is significant controversy on that question. Views range from the position taken by plaintiff that anything shielded by privacy settings is private, to the position taken by one commentator that "anything contained in a social media website is not 'private' ... [S]ocial media exists to facilitate social behavior and is not intended to be served as a personal journal shielded from others or a database for storing thoughts and photos" (McPeak, The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data, 48 Wake Forest L Rev 887, 929 [2013]).

[6] Because plaintiff would be unlikely to offer at trial any photographs tending to contradict her claimed injuries or her version of the facts surrounding the accident, by limiting disclosure in this fashion the Appellate Division effectively denied disclosure of any evidence potentially relevant to the defense. To the extent the order may also contravene CPLR 3101 (i), we note that neither party cited that provision in Supreme Court and we therefore have no occasion to further address its applicability, if any, to this dispute.

[7] At oral argument, Supreme Court indicated that, depending on what the data ordered to be disclosed revealed concerning the frequency of plaintiff's post-accident messages, defendant could possibly pursue a follow-up request for disclosure of the content. We express no views with respect to any such future application.
Save trees - read court opinions online on Google Scholar.
ORDER DENYING APPLICATION FOR ORDER PURSUANT TO 28 U.S.C. § 1782 FOR LEAVE TO OBTAIN DISCOVERY

Regarding Docket No. 1

SALLIE KIM, United States Magistrate Judge.

Sam Rainsy ("Applicant") has filed an Ex Parte Application for leave to obtain third party discovery from Facebook for use in proceedings in Cambodia, pursuant to 28 U.S.C. § 1782. Facebook, Inc. ("Facebook") opposes the motion. Applicant seeks both documents from and a deposition of Facebook pursuant to Fed.R.Civ.P. 30(b)(6) on several topics. Having reviewed the parties' papers, relevant legal authority and having heard oral argument, the Court DENIES the motion for the reasons set forth below.

BACKGROUND

Applicant is the founder of the Cambodian National Rescue Party ("CNRP") and is living in exile in France. (Dkt. 2, ¶¶ 3, 13.) Applicant is a vocal opponent of the current Cambodian government, under the leadership of Prime Minister Hun Sen, an ex-commander of the Khmer Rouge. (Id., ¶ 1.) Applicant has already been the subject of one assassination attempt, and Hun Sen has threatened his life. (Dkt. 2, ¶ 2; Dkt. 13, ¶ 26). [1]

Applicant seeks information from Facebook to respond to criminal and civil proceedings that Hun Sen and his proxies have initiated against him in Cambodia. These include the following:

(1) First Defamation Case — Son Soeun, the manager of Hun Sen's Facebook account and a government minister, filed a defamation claim against Applicant on March 10, 2016. That claim alleges that Applicant made a false statement on Facebook that millions of Hun Sen's Facebook "likes" were generated by "click farms." (Id., ¶ 6 and Ex. 2.) Applicant was found guilty on November 6, 2016, and the judgment was upheld...
in January 2017. (Dkt. 2, ¶ 6.) The matter is already on appeal with Cambodia's Supreme Court. (Dkt. 2, ¶ 6; Dkt. 13, ¶ 6.)

(2) Second Defamation Case — In August 2016, Hun Sen commenced criminal defamation and "incitement" charges against Applicant for posting on Applicant's Facebook page that the murder of respected human rights activist and journalist Dr. Kem Ley was a government-ordered assassination. After failing to appear in that proceeding, Applicant was barred from entering Cambodia, convicted of defamation and incitement, and sentenced to twenty months in jail. (Dkt. 2, ¶ 7; Dkt. 13, ¶ 7 and Ex. A.) Applicant provided a copy of the complaint against him, the summons for him to appear, and a translation of the verdict. (Dkt. 13, ¶ 7 and Ex. A, B, C.) A copy of the appellate court's decision rejecting appeal without argument (which has since been appealed), is attached to Applicant's second declaration. (Id., ¶ 16 and Ex. F, G.)

(3) Third Defamation Case — On January 17, 2017, the Cambodian government initiated criminal defamation charges at the behest of Thy Sovantha, a Cambodian celebrity with ties to Hun Sen, after Applicant posted information on his Facebook page showing that Hun Sen's associates and family bribed Thy Sovantha to voice support for the government. On December 29, 2017, Applicant was found guilty and fined the equivalent of $1 million USD. (Dkt. 2, ¶¶ 9, 11, 12.) Applicant plans to appeal the decision. (Dkt. 13, ¶ 18.)

1109 (4) Criminal Incitement Charge — On December 7, 2017, the current Cambodian government charged Applicant with criminal incitement based on statements Applicant posted to his Facebook page urging Cambodia's military to cease use of deadly force against peaceful protestors. (Dkt. 2, ¶ 11; Dkt. 13, ¶ 8.) The Cambodian government filed those incitement charges approximately four months ago. (Dkt. 13, ¶¶ 14, 17.)

ANALYSIS

A. Application Pursuant to 18 U.S.C. § 1782

Applicant seeks discovery pursuant to 18 U.S.C. § 1782. "A district court may grant an application pursuant to 28 U.S.C. § 1782 where (1) the person from whom the discovery is sought resides or is found in the district of the district court to which the application is made, (2) the discovery is for use in a proceeding before a foreign tribunal, and (3) the application is made by a foreign or internal tribunal or any interested person." In re Republic of Ecuador, 2010 WL 3702427, at *2 (N.D. Cal., Sept. 15, 2010). See also 28 U.S.C. § 1782 (a). There is no dispute that the Application meets the first requirement, as Facebook, with its headquarter in Menlo Park, California, is found in this District. (Dkt. 3-8, Ex. 25.) In analyzing the factors, the Court will review the factors out of order, first reviewing the third factor and then the second factor of § 1782.

1. Third Factor: Use of Information in Foreign Proceeding by an Interested Person

Facebook argues that the Application does not satisfy the third factor to show that Applicant is an "interested person" who can invoke § 1782. A litigant in a foreign proceeding is an "interested person" who
can seek discovery pursuant to § 1782. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 256, 124 S.Ct. 2466, 159 L.Ed.2d 355 (2004) ("No doubt litigants are included among, and may be the most common example of, the interested person[s] who may invoke § 1782") (internal quotations and citations omitted). An applicant need only establish that a "dispositive ruling" is "within reasonable contemplation" or that "the evidence is eventually to be used" in a proceeding. Id. at 259, 124 S.Ct. 2466 (citations omitted). Facebook argues that Applicant has not shown the existence of a proceeding in a foreign tribunal, so he cannot show that he is an "interested party" to a non-existent litigation. Facebook argues that Applicant provided only a "skeletal account of the purported proceedings" and that Applicant's declaration and newspaper articles are insufficient to show that he is a litigant in a foreign tribunal. There is no reason to doubt the veracity of newspaper articles and Applicant's own sworn declarations supporting the fact that there are four actions against him in Cambodia. (Dkt. 2, ¶¶ 16-12 and Ex. 1; Dkt. 13, ¶¶ 6-9; Dkts. 13-1; 13-2; 13-3; 13-6; 13-7; 19-1; 19-2; 19-3; 19-4.) As both parties note, in Cambodia, there is no public docket from which to determine the existence of a formal proceeding, as there is in the U.S. (Dkt. 11, ¶ 5; Dkt. 13, ¶ 11.) Further, Applicant lives in exile because he fears for his life in Cambodia, and he often relies on other sources for his information about the cases against him. (Dkt. 13, ¶¶ 11-12.) Moreover, Facebook does not provide any evidence to refute the existence of those proceedings against Applicant in Cambodia. Facebook merely provides an expert's opinion that the expert cannot determine whether the four actions in Cambodia are pending. (Dkt. 11, ¶ 7.) That opinion is not enough to overcome Plaintiff's testimony and other documents supporting the existence of the claims against him in Cambodia.

Although the Court is troubled that Applicant cannot provide the source documents for the first defamation case, the Court finds that Applicant has submitted sufficient evidence to show that he is an "interested party" in Cambodian litigation and satisfies the third prong of § 1782.

2. Second Factor: Discovery for Use in a Foreign Tribunal

Facebook argues that, even if Applicant can obtain the information, he cannot use the information sought in Cambodian litigation. However, Facebook cites no law that § 1782 requires a party seeking to show that he can use that information in the foreign tribunal. Facebook's expert witness only opines that it is not clear whether Applicant can use the information he seeks from Facebook in Cambodia. (Dkt. 11, ¶ 4.) Even if there were such a requirement to show that Applicant can use the information sought in Cambodia, Applicant states that he can introduce new evidence on appeal. (Dkt. 2, ¶ 14.) Applicant, though not a lawyer, helped draft the Cambodian Constitution and thus has some familiarity with the law. (Dkt. 13, ¶ 1.) Facebook does not dispute this evidence. Intel does not place a requirement on American courts to adjudicate the admissibility of evidence in foreign tribunals.

Facebook also argues that Applicant will not use the discovery he seeks in a foreign tribunal because the information he seeks is not related to the four pending actions. Applicant alleges that the information he seeks is relevant to the defamation claims and thus that he plans to use the information from Facebook to defend against the defamation claims. (Dkt. 2, ¶ 17 and Ex. 7) In addition, Applicant asserts the information from Facebook will show that Hun Sen and his allies have conspired against Applicant in bringing false charges to undermine Applicant's political work. (Dkt. 13, ¶ 23.) Applicant plans to use the requested discovery to defend himself in the four pending actions listed above and for "other contemplated proceedings related thereto" which he has not identified. (Dkt. 2, ¶ 18 and Ex. 7.) In his reply, Applicant clarified that he intends to sue Hun Sen in Cambodia or urge the United Nations to sue Hun Sen. (Dkt. 13, ¶ 13.)
A party seeking discovery pursuant to § 1782 must show that the discovery sought is relevant to the claims and defenses in the foreign tribunal, and the court should be "permissive" in interpreting that standard. In re Veiga, 746 F. Supp. 2d 8, 18 (D.D.C. 2010) (internal citation and quotation omitted); see also Digital Shape Techs., Inc. v. Glassdoor, Inc., 2016 WL 5930275, at *3 (N.D. Cal. Oct. 12, 2016) ("The party issuing the subpoena has the burden of demonstrating the relevance of the information sought.")

To determine whether the discovery Applicant seeks is relevant to the Cambodian legal actions, the Court must analyze those matters in relation to the categories of information.

a. Information about "Likes" on Hun Sen's Facebook Page

Applicant seeks information to show that his statement about the false "likes" for Hun Sen's Facebook page was true. To that end, Applicant seeks documents, in categories 1 and 2 specifically related to the issue of "likes" on Hun Sen's Facebook page and any investigation by Facebook into the "likes" on Hun Sen's Facebook page. (Dkt. 3-1, Ex. 1). Applicant also seeks, in categories 4, 5, 6 and 7, general information about Facebook's investigations of and communications with Hun Sen on any topic, which might include the false use of "likes." (Id.) In addition, Applicant seeks to depose a Facebook representative (in categories 5 and 8(a)) about Hun Sen's use of Facebook to disseminate false information regarding "likes" and policies and procedures regarding false use of "likes." (Id.) The requests directed to general violations of Facebook policies are not targeted to the potential generation of false "likes" and thus are not relevant to the first defamation case, but the information about "likes" on Hun Sen's Facebook page are related to the first defamation case.[3]

b. Other Categories of Information

The other categories of information both in the request for documents and in the deposition notice are not related to the issues in any of the four Cambodian cases. For example, in category 10, Applicant seeks information about communications — allegedly without seeking the contents of the communications — between and among eight people (Hun Sen and his affiliates) "regarding" several subjects: Applicant, the four cases against him in Cambodia, the Cambodian National Rescue Party, Kem Sokha, Kem Ley, and payments to Thy Sovantha. (Dkt. 3-1, Ex. 1). Applicant seeks the "header and meta-data information (i.e., non-content information) regarding the dates, times, senders, recipients, date read, and forwarding and deleting actions for those communications. (Id.) Applicant claims that this information, the fact that these eight individuals were discussing these six subjects at some unspecified time, will show that they are involved in a conspiracy against Applicant. (Dkt. 13, ¶ 23.) Applicant concedes that he does not seek the content of the communications. (Dkt. 3-1, Ex. 1). However, the mere fact that people are communicating about a subject or person does not show that those people are conspiring to make false claims against him. This information has marginal relevance at best and is also subject to the Stored Communications Act, discussed below.

Additionally, Applicant seeks documents about the following: communications between and among the same eight individuals about this Application, payments by the same eight individuals for advertising with Facebook, and Facebook's historical processes for preventing false or deceptive news and threatening or harassing statements. (Id.) Applicant also seeks to depose Facebook on the following subjects in all categories other than 5 and 8(a): response or enforcement of policies against Hun Sen's Facebook page, complaints and investigations regarding "findings regarding" Hun Sen's Facebook page, communications
with Hun Sen, policies and procedures regarding threats or harassment on Facebook, Hun Sen's attempts
to disseminate false news or make threats, any communications between Facebook and Hun Sen, funds
spent by Hun Sen on Facebook advertising, any negotiations or agreements between Facebook and Hun
Sen and the government of Cambodia, Facebook's review of documents, and authentication of any
document produced in response to the Application. (Id.) There is no time limitation on these subjects. None
of these categories of information in the request for documents or deposition topics has any bearing on the
four actions in Cambodia.

Facebook also argues that Applicant is attempting to use the information for another, more sinister purpose
— other litigation either in Cambodia or in the International Criminal Court. Facebook argues that a court
cannot provide support for the International Criminal Court. 22 U.S.C. § 7423(e). The only statement that
might support Facebook's argument is Applicant's statement that he plans to use the requested
discovery for "other contemplated proceedings related thereto" or to sue Hun Sen in Cambodia or urge the
United Nations to sue Hun Sen in Cambodia. (Dkt. 2, ¶ 18 and Ex. 7; Dkt. 13, 3.) However, even with that
statement, Facebook's argument about Applicant's intentions is speculative, and the Court will not deny the
Application based on Facebook's unsubstantiated concerns that Applicant seeks to use information in
another court.

Thus, with regard to the requirements of § 1782, the Court finds that Applicant's requests for documents in
1 and 2 and the deposition topics in 5 and 8(a) satisfy the requirements of § 1782. The documents in
categories 4, 5, 6 and 7 might satisfy § 1782, to the extent that they are limited to "likes," but as written,
they do not satisfy § 1782 because they encompass far more than issues regarding "likes" and thus have
no relevance to the Cambodian cases. The analysis does not end at this stage, though.

3. Intel Factors

Even if the seeking party satisfies the core requirements of § 1782, the Court retains wide discretion to
grant or deny discovery under § 1782. Intel, 542 U.S. at 260-61, 124 S.Ct. 2466. In exercising discretion,
the Supreme Court identified several factors for consideration by the court:

(1) whether "the person from whom discovery is sought is a participant in the litigation" and thus can obtain
the discovery in the foreign tribunal;

(2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity
of the foreign government or court or agency abroad to U.S. federal-court jurisdictional assistance";

(3) "whether the § 1782 request conceal an attempt to circumvent foreign proof-gathering restrictions or
other policies of a foreign country or the United States"; and

(4) whether the subpoena contains "unduly intrusive or burdensome requests." Intel, 542 U.S. at 264-65,
124 S.Ct. 2466.

a. Ability to Obtain Litigation against Facebook in Cambodia

The first Intel factor for consideration is whether the material sought is within the foreign tribunal's
jurisdictional reach.
A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence .... In contrast, nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence available in the United States, may be unobtainable absent § 1782(a) aid.

Intel, 542 U.S. at 264, 124 S.Ct. 2466. Here, Facebook is not a party to the Cambodian proceeding and therefore Applicant needs the assistance of § 1782 to obtain the information he seeks.

b. Nature of Foreign Tribunal/Comity

Although there is no direct discussion about the nature of the foreign tribunal, Facebook argues that granting the Application implicates comity. Specifically, Facebook claims that Applicant seeks information that includes "private communications of a head of state" and that the Court should deny the Application in deference to foreign policy interests. Facebook offers no evidence or commentary that Hun Sen used Facebook for official, governmental purposes. Given the nature of Facebook as a private company, the claim that the discovery sought involves "private communications of a head of state" is not convincing.

Applicant seeks information about communications between individuals. One of them happens to be the Prime Minister of Cambodia, who apparently has chosen to utilize Facebook, a private company. Discovery into communications of a private company located in the U.S., even if a head of state of a foreign country uses those services, does not implicate comity.

c. Foreign Proof Gathering

As to the third Intel factor, Facebook argues that Applicant is attempting to circumvent foreign proof-gathering restrictions and policies. However, nothing in Applicant's request or Facebook's argument suggests that Applicant is attempting to circumvent the discovery restrictions that may be in place in Cambodia, and Facebook provides no evidence that Applicant is doing so. The proceedings against Applicant occurred in Applicant's absence because Applicant was concerned about his personal safety. There is no evidence that Applicant sought this information in Cambodia but failed to obtain it because of restrictions on discovery in Cambodia.

d. Breadth and Burden

As to the fourth Intel factor, whether the request is "unduly intrusive or burdensome," Facebook argues that the Application is overly broad because it does not specify a time limit and because it asks for a deposition on topics that are common to many types of litigation. In general, the fact that there is no time period limiting the documents or deposition topics makes the entire Application overbroad. Applicant seeks a wide scope of documents regarding Facebook's policies and procedures and investigations on numerous topics, without any focus on a time period.

With regard to category 10, the Court agrees that asking for information — even without the content of the messages themselves — between and among eight people with an unlimited time period, is unduly broad and burdensome on Facebook. Moreover, the request in category 10 requires Facebook to review and analyze all of those communications between and among eight individuals to determine whether those individuals were communicating about the Applicant, the four cases against him in Cambodia, the
Cambodian National Rescue Party, Kem Sokha, Kem Ley, and payments to Thy Sovantha. In other words, in order for Facebook to respond to provide information about the header and meta-data of the communications on those specified subjects, Facebook's attorneys will be required to read all of the communications and determine whether the communications discuss those six subjects. This is very burdensome, given that there are eight individuals, six subjects, and an unlimited time period.

And as noted above, the documents sought in categories 4, 5, 6, and 7, to the extent that they do not address the false "likes," are overbroad because they encompass many subjects that are not related to the litigation. In this regard, the analysis of breadth is related to relevance, because the requests in categories 4, 5, 6, and 7 are overbroad to the extent that they seek irrelevant information.

The scope of the topics in the deposition topics is also broad and burdensome. For example, as noted above, Applicant seeks information about any communication between Facebook and Hun Sen, in category 9, with no time limitation and no limitation as to subject. Facebook would have to prepare and provide a representative to talk about every communication on any subject at any time between Facebook and Hun Sen. Presumably this includes any notice sent by Facebook to Hun Sen, including news articles, suggestions about new "friends," and other topics completely unrelated to the four cases in Cambodia. That Applicant has not limited the topic of communications is emblematic of the burden of the subpoena. All of the other deposition topics suffer from the same type of problem.

Thus, the Court concludes that only the documents sought in categories 1 and 2, and the deposition topics in 5 and 8(a) satisfy the Intel test, but only if they were narrowly tailored in terms of time period. For example, if Facebook has documentation of an investigation that shows that there were one million false "likes" on Hun Sen's Facebook page, generated after Applicant's allegedly defamatory statement, that documentation might not be relevant. The limitation for time period matters both for relevance and burden.

B. The Stored Communications Act

Even if Applicant satisfies the requirements of § 1782 and the Intel test for documents sought in categories 1 and 2, and the deposition topics in 5 and 8(a), Facebook argues that the Stored Communications Act prevents disclosure of the information regarding the identities of people who "liked" Hun Sen's Facebook page. The Stored Communications Act states that "a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service." 18 U.S.C. § 2702(a)(1). Facebook argues, and Applicant does not contest, that it is a provider of electronic communication services and that it cannot divulge the "contents" of its users' communications. There is no exception for civil subpoenas. In re Facebook, Inc., 923 F.Supp.2d 1204, 1206 (N.D. Cal. 2012); Theofel v. Farey-Jones, 359 F.3d 1066, 1071-72, 1077 (9th Cir. 2004).

Applicant maintains that he does not seek any information protected by the Stored Communications Act, i.e., "the contents of a communication" in 18 U.S.C. §§ 2510 and 2702. The statute defines "contents" as "any information concerning the substance, purport, or meaning of that communication." 18 U.S.C. 2510(8). At least one court has found that metadata and other bibliographical information without "the messages themselves" do not constitute "contents of a communication" under § 1782. In re Request for Int'l Judicial Assistance from the Turkish Ministry of Justice, 2016 WL 2957032, at *2 (N.D. Cal. May 23, 2016). See also Thompson v. Doel, 2013 WL 5544607, at *1, 3 (N.D. Cal. Oct. 7, 2013) (subpoena approved so long as the application sought "documents sufficient to identify: the names, addresses, telephone numbers, email
Applicant seeks, in category 1(a), documents "showing the geographic source, date, user and account that sent the 'likes' to Hun Sen's Facebook page. (Dkt. 3-1, Ex. 1.) Facebook argues that the identities of the people who posted "likes" on Hun Sen's Facebook page equals "contents of a communication" under § 1782. The only court that has addressed the issue of the nature of "likes" held that "liking" a Facebook page is a form of speech that "communicates the user's approval" of the person who made the Facebook page. Bland, 730 F.3d at 386. The context of Bland was different, but the Ninth Circuit has explained in the context of the Stored Communications Act that the meaning of the words "contents of a communication" in 18 U.S.C. § 2511(3)(a) and § 2702(2) to be "any information concerning the substance, purport or meaning of [a] communication." In re Zynga Privacy Litig., 750 F.3d 1098, XXXX-XXXX (9th Cir. 2014).[4] Here, given that a "like" or "liking" a Facebook page is speech that communicates approval, a "like" or "liking" constitutes "content" as information concerning the meaning of a communication. The communication conveyed by "liking" a Facebook page is approval. The "identity of a speaker is an important component" of the message. City of Ladue v. Gilleo, 512 U.S. 43, 56, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994). Thus, to the extent that Applicant seeks the identities of people who "liked" Hun Sen's Facebook page, Applicant seeks "contents of a communication" because Applicant seeks to know who approved Hun Sen. The Stored Communications Act precludes that disclosure.

Finally, Applicant seeks information, in category 1(d), "[c]ommunications with the Hun FB Account or its representatives regarding the 'likes.'" (Dkt. 3-1, Ex.1.) Although this may be a drafting error, the request seems to ask for communications between and among the eight individuals. The Stored Communications Act clearly bars that disclosure. It is possible that Applicant intends to seek communications only between Facebook and Hun Sen, but that interpretation seems unlikely because category 1(c) specifically seeks information about communications between Facebook and Hun Sen about the "likes" on Hun Sen's Facebook page. Applicant was able to limit one category to communications between Hun Sen and Facebook in crafting category 1(c), so the absence of similar language for category 1(d) indicates that Applicant seeks something broader.

1. Exception under § 2511(g)(i)

Applicant argues that there is an exception under the Stored Communications Act that allows a provider to produce "publicly-available" content. However, this exception exists for purposes of intercepting or accessing communications — not disclosing communications. The Stored Communications Act has two components: (1) a part that addresses actions in intercepting and accessing communications under § 2511(1) and (2) a part that addresses the disclosure of information under § 2511(3). Section 2511(2)(g) specifically applies only to prohibitions on the provider's interception or access to electronic communications. The statute specifically states: "It shall not be unlawful under this chapter or chapter 121 of this title for any person — (i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public." 28 U.S.C. § 2511(2)(g). By its own language, this exception only applies to intercepting or accessing and not to disclosing communications. In contrast, the second portion of the Stored Communications Act prohibits disclosure: *Except as provided in paragraph (b) of this subsection, a person or entity providing electronic communication service to the public may not divulge the contents of any such communication[.]" 28 U.S.C. § 2511(3)(a)(emphasis added). Subsection (b) of 28 U.S.C. §
2511(3) does not contain the exception of subsection (g) of § 2511(2) and thus does not provide an exception for disclosure of "publicly-available" content. By the plain terms of the statute, Applicant's proposed exception does not apply to this situation.

2. Exception under § 2702(b)(5)

Applicant also seeks to apply an exception under the Stored Communications Act that allows disclosure "necessarily incidental to the rendition of the service or to the protection of the rights or property of the provider of that service." Applicant provides no explanation why this exception applies, and on its face, it does not apply to this situation.

Therefore, the Stored Communications Act prohibits disclosure of the documents sought in category 1(a). With regard to documents sought in categories 1(b), 1(c), 1(d), and with regard to information sought in the deposition topics 5 and 8(a), those documents and information might disclose the identities of users who "liked" Hun Sen's Facebook page, but the categories are written so vaguely that it is impossible to determine whether the information and documents sought contain the "contents of a communication."

C. Notice to Hun Sen

Facebook argues that the Court should not grant the Application without first giving notice to Hun Sen. However, notice under § 1782 occurs after approval by the Court of the Application, not before. The discovery conducted occurs by default in accordance with the Federal Rules of Civil Procedure. **Kraggs v. Yahoo, Inc.,** 15-MC-80281-MEJ, 2016 WL 3916350, at *7 (N.D. Cal. July 20, 2016). Here, the time for notice has yet to arise. Section 1782 "provide[s] the Court with authority to approve the practice and procedure of the discovery" and the manner of notice, if any. **In re Merck & Co., Inc.,** 197 F.R.D. 267, 269-70 (M.D.N.C. 2000). "Courts typically handle Section 1782 discovery requests in the context of an ex parte application for an order appointing a commissioner to collect the information." **Turkish Ministry of Justice,** 2016 WL 2957032, at *1 (citing **In re Letters Rogatory from Tokyo Dist., Tokyo, Japan,** 539 F.2d 1216, 1219 (9th Cir. 1976) (holding that the subpoenaed parties may object and exercise due process rights by bringing motions to quash the subpoena after the court issues a § 1782 order).

CONCLUSION

The entire Application suffers from the problem of being overly broad and burdensome, given the failure to provide a time period for the documents and information Applicant seeks. And to the extent that Applicant seeks information about investigation of Hun Sen's Facebook page, those should be limited to investigations regarding "likes" without revealing the identities of users who "liked" Hun Sen's Facebook page. Investigations into other abuses of Facebook's policies are simply not relevant to the four Cambodian cases. If Applicant were to focus on Facebook's investigations of false "likes" on Hun Sen's page, during the relevant time period, without revealing the identity of the users who posted the "likes," the Application might satisfy § 1782 and evade any problems under the Stored Communications Act. Although the Court initially noted that some parts of the Application would pass muster, the job of the Court is not to re-write the Application to narrow its breadth and scope. The Court DENIES the Application, but Applicant may request another Application within the scope discussed above.
IT IS SO ORDERED.

[1] Applicant focuses much of his argument both in writing and at the hearing on the evils of the current Cambodian government and of Facebook and provides numerous exhibits to prove his point. (Dkts. 3; 3-1, 3-2, 3-3; 3-4; 3-5; 3-6; 3-7.) Allegations that some parties are reprehensible do not alter the Court's analysis here, because the rule of law — which Applicant supports — requires that the Court treat all parties fairly.

[2] “Facebook is an online social network where members develop personalized web profiles to interact and share information with other members.” Lane v. Facebook, Inc., 696 F.3d 811, 816 (9th Cir. 2012). As the Court in Bland v. Roberts explained, “[l]iking on Facebook is a way for Facebook users to share information with each other.” 730 F.3d 368, 385 (4th Cir. 2013). “The ‘like’ button, which is represented by a thumbs-up icon, and the word ‘like’ appear next to different types of Facebook content.” Id. To “like” something is “an easy way to let someone know that you enjoy it.” Id. (internal citation and quotation omitted). When a Facebook user “likes” a Facebook Page, the user is then identified as a person who “likes” that Page and can receive content directly from that Page. Id.

[3] At oral argument, Facebook stated that the first case for defamation against Plaintiff is closed, as the Cambodian Supreme Court has finally ruled on the motion. However, Facebook does not present any evidence for that statement and does not explain whether Cambodian law forecloses any chance by Plaintiff to challenge that decision.

[4] In Zynga, the Court held that revealing “header information” that included the “user's Facebook ID and the address of the webpage from which the User's HTTP request to view another webpage was sent” did not violate the Stored Communications Act. 750 F.3d at 1107. There was no issue about disclosing the identity of people who posted “likes” and no discussion of “likes” in that case.

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In this licensee holdover proceeding, respondent Mercedes Webber moves by order to show cause for a protective order, pursuant to CPLR § 3103, “limiting discovery” demands contained in petitioner Renaissance Equity Holdings, LLC’s supplemental notice to produce, dated May 15, 2018. Petitioner cross-moves for an order, pursuant to CPLR R. 3124 and § 3126, compelling respondent to provide documents in response to the supplemental notice. Alternatively, petitioner seeks an order precluding her from introducing any documents at trial that are not produced prior to her deposition.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent Mercedes Webber alleges that she is the adopted daughter of the former tenant of record, Joan Webber (Joan). Joan passed away on October 25, 2015. Respondent also assumes the name, "Benze Lohan," and she was a cast member on the reality television show, "Bad Girls Club," during its eleventh season. The eleventh season aired sometime in the Fall of 2013. Respondent asserts that she has gained a social media following since her appearance on the show. She also occasionally partners with businesses to promote their products.

After the court granted leave for discovery pursuant to the parties’ so-ordered stipulation, dated December 20, 2017, petitioner served respondent with a notice to produce, pursuant to CPLR R. 3120 (initial notice). The items sought included, among other things, proof of respondent's relationship to Joan, respondent's federal and state tax returns, insurance information, bank statements, and phone bills. Petitioner limited its notice to the relevant two-year period prior to Joan's death (October 25, 2013-October 25, 2015). In another so-ordered stipulation, dated January 29, 2018, respondent agreed to produce documents in response to the initial notice and to be deposed. Petitioner reserved its right to further seek additional documentation after receiving her responses.

Respondent provided answers to the initial notice in a series of undated and unsworn statements, which is annexed to petitioner's cross-motion. Notably, she wrote that she "did not file" either federal or state tax
returns for the relevant period. Petitioner asserts that, despite these statements, respondent still failed to produce any documents to numerous items sought such as bank statements and phone bills.

On May 15, 2018, however, petitioner served respondent with the instant, supplemental notice to produce (supplemental notice). The supplemental notice demands an additional 15 items not contained in the initial notice including any contracts between respondent and the "Bad Girls Club" (item 28), "all [of] Respondent's posts whether in her legal name, Benze Lohan or any other aliases (whether posted by or for Respondent) to social media including but not limited to Instagram, Twitter, YouTube, and Facebook" (item 29), and "all documents" in connection with a host of third-party entities (items 31-40). Additionally, the supplemental notice seeks documents related to respondent's "travel" (item 26) and "hotel and motel" stays (item 27) during the relevant period. Specifically, petitioner requests "all documents in connection with respondent's trips" to at least 13 localities (item 41).[1] Lastly, the supplemental notice demands authorizations for respondent's federal and state taxes, albeit from 2013 through the present rather than just the relevant period (item 3).

One month after receiving the supplemental notice and on the eve of her deposition, respondent brought the instant order to show cause for an order "limiting discovery." Petitioner cross-moved to compel disclosure. This Court construed respondent's order to show cause as a motion for a protective order pursuant to CPLR § 3103, and petitioner's cross-motion as one to compel and/or preclude pursuant to CPLR R. 3124 and § 3126. At oral argument on July 16, 2018, the parties stipulated to resolve their respective motions in part. Importantly, the parties agreed that respondent would produce documents in response to items 26, 27, and 41 of the supplemental notice, that is, all documents relating to her travel, lodging, and "trips" to the abovementioned 13 localities.

ARGUMENTS

On her motion, respondent contends that the disputed items in petitioner's supplemental notice fail to be narrowly tailored and, as such, constitute a "fishing expedition." In support, respondent annexes her affidavit claiming that the items relating to social media have no bearing on her succession defense. Moreover, respondent asserts that the Bad Girls Club was a controversial reality television show that critics have described as "horrible" and "tasteless without merit" and that the petitioner's demand for information on this issue is meant to "smear her in the eyes of the Court." Lastly, respondent argues that compelling authorizations for tax returns, if any, during the relevant period is unnecessary since her unsworn statement that she "did not file" them is sufficient.

In opposition and in support of its cross-motion, petitioner argues that the contract with the Bad Girls Club, social media posts by herself or as Benze Lohan, and documents in connection with the abovementioned third-party entities are relevant because they will show respondent's "travel and endeavors." In support, petitioner annexes copies of online posts containing photographs and flyers ostensibly of and comments made by "Benze Lohan" on the public portion of her social media accounts, both within and outside of the relevant period. Many of these posts, however, do not include a location. Lastly, petitioner argues that respondent's self-serving denial that she did not file taxes during the relevant period is insufficient.

DISCUSSION

In a summary proceeding, discovery is not obtainable by right; rather, leave must be granted by the court (see CPLR § 408). However, "[n]otwithstanding the general sentiment that discovery is antithetical to the
purposes of special proceedings, the courts have repeatedly approved discovery in cases arising from disputed claims to tenancy where the facts concerning a tenant's residence and the use made of leased premises are peculiarly within the tenant's knowledge" (see Quality and Ruskin Assoc. v London, 8 Misc 3d 102, 103 [App Term 2005]). Moreover, "although discovery may delay resolution of this summary proceeding, there is no prejudice as the landlords have decided that clarification of the facts is preferable to a quick resolution" (see Malafis v Garcia, 2002 NY Slip Op 40180(U), 3 [App Term, 2d Dept 2002]). Here, it is undisputed that petitioner obtained leave for discovery under the prior, so-ordered stipulations.

Once leave for discovery has been granted, general principles governing disclosure apply (see e.g. Pavel, 21 Misc 3d 143(A) [App Term, 2d Dept 2008]; Quality and Ruskin Assoc. v London, 8 Misc 3d 102, 104-05 [App Term, 2d Dept 2005]). That is, "[a] party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is "material and necessary" — i.e. relevant . . ." (Forman v Henkin, 30 NY3d 656 [2018]; see generally CPLR § 3101). However, "[u]nder our discovery statutes and caselaw, competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party" (id). These special burdens include whether the discovery sought is overbroad, burdensome, or palpably improper (see Quality and Ruskin Assoc., 8 Misc 3d at 104-05). Thus, CPLR § 3103 allows the court on its own initiative or upon motion to make a protective order denying or otherwise regulating the use of any discovery device to prevent "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

The caselaw on social media discovery had, until recently, required that the party seeking disclosure establish a "factual predicate," that is, information which "contradicts or conflicts with claims [by the party against whom discovery is sought]" (see Richards v Hertz Corp., 100 AD3d 728 [2d Dept 2012]; Tapp v New York State Urban Dev. Corp, 102 AD3d 620 [1st Dept 2013]; Kregg v Maldonado, 98 AD3d 1289, 1290 [4th Dept 2012]). Moreover, parties were restricted to viewing the public portions of the accountholder's social media page to ferret out a basis warranting disclosure of the accountholder's private profile (see Richards v Hertz Corp., 100 AD3d 728, 729-730; Spearin v Linmar, 129 AD3d 528, 528 [1st Dept 2015]; Romano v Steelcase Inc., 30 Misc 3d 426, 430 [Sup Ct 2010]).

But in a recent opinion, the Court of Appeals in Forman v Henkin rejected the factual predicate standard and enunciated a two-part test for discovery of a party's social media (see 30 NY3d 656 [February 13, 2018]). In Forman, plaintiff commenced a personal injury action after falling from defendant's horse. Plaintiff alleged that she suffered traumatic brain injury, memory loss, and other cognitive deficits as a result of the accident. At her deposition, plaintiff stated that she posted "a lot" of pre-accident photographs showing her active lifestyle, but that after the accident she had become a recluse, and she had difficulty using a computer and composing coherent messages. Plaintiff also claimed that she could no longer cook, travel, participate in sports, horseback ride, or engage in other social activities.

The Forman defendant demanded authorizations for the entirety of plaintiff's Facebook account from both her public and private accounts. After plaintiff objected, defendant moved to compel disclosure. Supreme Court granted the motion to the limited extent of directing that plaintiff produce all photographs of herself posted on Facebook prior to the accident that she intends to introduce at trial, all photographs of herself posted to her Facebook account after the accident that do not depict nudity or romantic encounters, and an authorization for Facebook records showing each time plaintiff posted a private message after the accident and the number of characters or words in the message. Supreme Court denied disclosure of the content of plaintiff's written Facebook posts, whether authored before or after the accident.
On appeal, the Appellate Division modified Supreme Court's order by limiting disclosure to photographs posted on Facebook that plaintiff intended to introduce at trial and eliminating the authorization for data related to post-accident messages. In a unanimous decision, the Court of Appeals reversed the Appellate Division's order and reinstated Supreme Court's order.

The Court of Appeals in Forman reaffirmed the principle that discovery under CPLR § 3101 "embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise." The Court cautioned, however, that the right to disclosure — although broad — is "not unlimited." Thus, "when courts are called upon to resolve a dispute, discovery requests must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure." (see Forman, supra, 30 NY3d at 662 citing Andon ex rel. Andon v 302-304 Mott St. Assoc., 94 NY2d 740, 747 [2000]).

After examining the rules governing discovery, the Forman court rejected the notion that the account holder's so-called "privacy" settings govern the scope of disclosure in these types of cases. Rather, the request need only be "appropriately tailored" and "reasonably calculated to yield relevant information." Nevertheless, the Court cautioned that, even in personal injury actions, discovery is not unlimited since "directing disclosure of a party's entire Facebook account is comparable to ordering discovery of every photograph or communication that party shared with any person on any topic prior to or since the incident giving rise to litigation." Because "such an order would be likely to yield far more non-relevant than relevant information," the court can regulate the breadth of the disclosure request to protect litigants from "unnecessarily onerous application of the discovery statutes" (see Forman, supra at 664; see generally CPLR § 3103).

Thus, so as to avoid sanctioning the oft-referenced "fishing expedition," the Forman court gave the following test: "first, the court should consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account;" and "second, balancing the potential utility of the information sought against any specific `privacy' or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of non-relevant materials" (Forman, supra at 665).

Turning to the nature of the personal injury litigation at issue, the Forman court held that because plaintiff testified at her deposition that she posted "a lot" of photographs documenting her active lifestyle prior to the accident, defendant met its burden of showing that disclosure of pre- and post-accident photographs was reasonably likely to yield relevant evidence. Moreover, the Forman court found that Supreme Court's order was sufficiently tailored to avoid embarrassment or invasion of privacy by excluding disclosure of photographs depicting nudity or romantic encounters. Lastly, given plaintiff's claim that she suffered cognitive injuries, disclosure of data revealing the timing and number of characters in her posted messages met the threshold of relevance.

Because the defendant in Forman did not appeal to the Appellate Division, the Court of Appeals did not reach the question of whether he had met his burden of disclosing the content of plaintiff's messages (see Forman, supra). However, given the Court's elimination of the heightened, "factual predicate" standard for social media discovery, this Court interprets Forman to permit disclosure of the content of a party's online messages upon a showing of relevance tailored to the particular controversy.
Applying Forman to the case at bar, this Court must first address the nature of the litigation and claims, or in this instance, defenses, as well as any other specific information to the case. That is, "if an offer is made to a tenant [of a rent stabilized housing accommodation pursuant to a renewal lease within the applicable time frame] . . . and such tenant has permanently vacated the housing accommodation, any member of such tenant's family . . . who has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years . . . immediately prior to the permanent vacating of the housing accommodation by the tenant, or from the inception of the tenancy or commencement of the relationship, if for less than such periods, shall be entitled to be named as a tenant on the renewal lease" (see 9 NYCRR § 2523.5[b][1]). In other words, succession rights are afforded to a family member of the tenant of record if that individual can prove that she primarily resided in the subject premises for at least two years immediately prior to the tenant's permanent vacatur based on, as here, the tenant's death (see e.g. Pavel v Fischer, 21 Misc 3d 143(A) [App Term, 2d Dept 2008]). "Succession is in the spirit of the statutory scheme, whose goal is to facilitate the availability of affordable housing for low-income residents and to temper the harsh consequences of the death or departure of a tenant for their 'traditional' and 'non-traditional' family members" (see Murphy v New York State Div. of Hous. and Community Renewal, 21 NY3d 649, 653 [2013] [discussing succession generally]). "The regulation should be liberally construed to carry out the reform intended and spread its beneficial effects as widely as possible" (Jourdain v New York State Div. of Hous. and Community Renewal, 159 AD3d 41, 45 [2d Dept 2018]).

The main inquiry here is whether the discovery sought is relevant to proving or disproving respondent's defense that she primarily resided with Joan at the premises for at least two years prior to her death on October 25, 2015. Thus, the traditional indicia of primary residence, including respondent's driver's license, voter registration, tax returns, telephone and bank records, are clearly obtainable (see e.g. Quality and Ruskin Assocs., supra at 104-05 ["insomuch as a number of the items sought, such as utility, banking, and other records are relevant to proof of residency . . . [they are] "reasonably calculated to elicit information that might lead to admissible evidence . . ."]; see also Pavel, supra at 2; see generally 9 NYCRR 2520.6[u]).

That respondent possesses the pseudonym, "Benze Lohan," constitutes "specific information to the case" under Forman because this information may show the duration of any stays, if any, outside of the subject premises. Contrary to respondent's argument, to permit discovery of relevant material from a litigant's social media account under her true name but bar any disclosure under her assumed name would subvert Forman's ruling that social media is obtainable so long as the request is "appropriately tailored and reasonably calculated to yield relevant information."

But it is under the second prong of the Forman test where petitioner's supplemental notice fails. That is, this Court must balance the "utility of the information sought against the specific privacy concerns of the account holder" and "issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of non-relevant materials" (see Forman, supra at 665).

Specifically, item 29 of the supplemental notice seeks, without limitation, "all [of] Respondent's posts whether in her legal name, Benze Lohan or any other aliases (whether posted by or for respondent) to social media." Even if "all" posts are limited to the relevant period, the demand is nevertheless overbroad because it fails to state the specific information sought within these posts on the narrow issue of primary residence. Indeed, and within the context of online social media, seeking discovery of posts "for respondent" may include publications by a third-party in an online forum respondent has no access to and, as such, are not in respondent's possession, custody, or control (see CPLR 3120; see generally Rosado v Mercedes-Benz of N. Am., Inc., 103 AD2d 395, 398 [2d Dept 1984]). Like the personal injury plaintiff in Forman who was asked to disclose the "entirety" of her Facebook profile, directing that respondent on her
succession defense produce "all" social media posts is tantamount to revealing "every transaction, communication, and photograph that respondent shared with any person on any topic" during a two-year period (see Forman, supra at 665).[3] As such, item 29 is insufficiently tailored to avoid disclosure of non-relevant materials.

Likewise, item 30 impermissibly seeks "all documents which utilize the name Benze Lohan." This demand fails as it contains no specificity with respect to the information sought. Moreover, respondent's assertions support her argument that broad discovery requests as to Benze Lohan fall outside the realm of "material and necessary" information relating to her succession claim. Namely, respondent asserts that the notoriety she has gained since the Bad Girls Club has led to "partnerships" with third-party organizations to promote their products. In this regard, the photographs contained in petitioner's own exhibits reveal that "Benze Lohan" may travel entirely for her job rather than for housing. Although, for the reasons already stated, discovery requests as to respondent's alias may not be entirely shielded from a narrowly tailored demand with respect to primary residence, the demand here is so overbroad as to be palpably improper (see Titleserv, Inc. v Zenobio, 210 AD2d 314, 315-16 [2d Dept 1994]).

Petitioner also seeks in items 31 through 40 to compel production of "all documents" in connection with a number of third-party entities. Petitioner argues in its cross-motion that it demanded these items because respondent was traveling across the United States with the Bad Girls Club. Yet petitioner asserts the same reason for requesting travel and lodging information — items that respondent has agreed to produce. Moreover, petitioner’s moving papers are bereft of any explanation as to the nature of the relationship between respondent and these entities. Under the circumstance, there is an insufficient offer of proof demonstrating that the documents sought are relevant.

In any event, the Court looks to the parties' most recent stipulation as further justification for denying the breadth of online discovery sought by petitioner. Namely, respondent agreed to produce information relating to items 26, 27 and 41, to wit, all documents relating to her travel, lodging, and "trips" to over 13 different locations during the relevant period. In essence, respondent agreed to provide documentation by way of bills, receipts, and itineraries on the very same issues that petitioner seeks in the form of online posts, comments, and snapshots. In contrast to a photograph on one's Facebook and other social media — which may or may not state the real location of the individual or thing depicted in the image — the documents that respondent has consented to provide are far more likely to yield relevant information that is germane to her succession claim. Thus, given what she has already agreed to turn over, production of respondent's social media without limitation enhances the probability of disclosing material that is embarrassing and prejudicial to or unnecessarily invades the privacy of respondent.

Although palpably improper demands may be struck as a whole (see Posh Pillows, Ltd. v Hawes, 138 AD2d 472, 474 [2d Dept 1988]), the better course in this instance is to craft an order narrowly tailored to the issue of respondent's primary residence during the relevant period. This Court therefore adopts an approach like the one taken by Supreme Court in Forman, in accordance with the directives below.[4]

With respect to that part of the cross-motion seeking to compel disclosure of her contract with the Bad Girls Club, petitioner has met its burden of entitlement to this material. Specifically, and unlike petitioner's request for all documents relating to Benze Lohan that fails to indicate any temporal limitation, the Bad Girls Club contract is relevant as respondent admits that she was a cast member on the show during the relevant period (i.e. 2013). Thus, the address that respondent listed, if any, on the contract may yield information tending to prove or disprove her succession defense.
Petitioner has also demonstrated its entitlement to authorizations of respondent's federal and state tax returns. Respondent's unsworn assertion that she did not file any taxes during the relevant period is self-serving and insufficient. Moreover, tax records are within the scope of disclosure in succession claims because the address listed on these documents is relevant to the question of primary residence (see e.g. Pavel v Fischer, 21 Misc 3d 143(A) [App Term, 2d Dept 2008]; see also Lesser v Park 65 Realty Corp., 140 AD2d 169, 173 [1st Dept 1988]). As such, respondent is directed to execute authorizations to release her federal and state tax returns, if any, subject to redaction (see Kovacs v Bloom, 267 AD2d 357, 358 [2d Dept 1999]). Accordingly, it is 

Ordered that respondent Mercedes Webber's motion for a protective order and petitioner Renaissance Equity Holdings LLC E's cross-motion are granted in accordance with the parties' July 16, 2018 stipulation; and it is further

Ordered that petitioner Renaissance Equity Holdings LLC E's cross-motion is also granted in part to the following extent:

(1) directing that respondent within 10 days from the date of this order execute written authorizations of all federal and state tax returns, if any, for the period of 2013 through 2015, redacted therefrom all content except for the address listed on the returns;

(2) directing that respondent within 15 days from the date of this order produce all contracts executed between the Bad Girls Club within the relevant period (October 25, 2013 through October 25, 2015), redacted therefrom all content except for the address, if any, listed by respondent and the date of the contract; and

(3) directing that respondent within 20 days from the date of this order produce all online posts whether in her legal name, Benze Lohan, or any other aliases to social media including but not limited to Instagram, Twitter, YouTube, and Facebook under the following conditions:

(a) if the post contains a location and date, then respondent shall redact all content, including photographs and third-party statements, except for the location and date stated on the post;

(b) if the post contains any comment or statement made by respondent in which she states a location, then respondent shall redact only the photograph contained within the post; and

(c) if the post contains a comment or statement made by respondent which contains the word "home," "house," "apartment" or any other synonym of the word "residence," then the entire content of the post shall be produced with no redaction.

And it is further

Ordered that the cross-motion is otherwise denied with leave to serve a revised set of proposed discovery demands following respondent's deposition; and it is further

Ordered that respondent Mercedes Webber's motion for a protective order is granted solely to the extent that a protective order is made as to any content disclosed that is not in accordance with the above; and it is further

Ordered that the trial date of July 30, 2018 is hereby adjourned to September 5, 2018 at 9:30 a.m. for the parties and attorneys to appear for trial in Room 502, Part J at 141 Livingston Street.

Specifically, petitioner seeks travel and lodging information for the following: "Atlanta, Georgia; Cambridge, Massachusetts; Revere, Massachusetts; Los Angeles, California; Houston, Texas; Miami, Florida; West Palm Beach, Florida; Brooklyn, New York; Syracuse, New York; New York, New York; Philadelphia, Pennsylvania; Columbus, Pennsylvania; Charlotte, North Carolina; and any other places."

Unlike Forman, petitioner seeks "all" posts from respondent's social media pages from respondent herself, rather than an authorization to access these accounts from the companies that have custody of those pages. To the extent this may be burdensome to respondent, she did not raise this argument in her moving papers or at oral argument. Thus, respondent's failure to object to the form of petitioner's demand constitutes a waiver particularly since any responses are temporally limited to the relevant, two-year period and substantively limited in accordance with the directives below.

The Forman court makes clear the important role of counsel during the discovery process: "attorneys, while functioning as advocates for their clients' interest, are also officers of the court who are expected to make a bona fide effort to properly meet their obligations in the disclosure process" (see Forman, supra at 662, *2). In the context of the instant, year-long summary proceeding, this Court expects counsel to exchange outstanding discovery in good faith and in accordance with the timeframes set forth in this order.
In four issues, Katie Alice Ripstra appeals her two convictions for felony injury to a child. She challenges (1) the legal sufficiency of the evidence in support of the jury's guilty verdicts; (2) the trial court's denial of her motion to exclude statements made during voir dire and motion to suppress statements she made to her child's guardian ad litem; (3) the trial court's admission of her Facebook posts; and (4) the trial court's exclusion of certain expert testimony. We affirm.

Background

Appellant was employed as a pediatric nurse for Texas Children's Hospital. Her daughter, Rachel, was born in August 2009.[1] By October, appellant began reporting to Rachel's pediatrician that Rachel was having acid reflux and spitting up her milk. As these problems purportedly continued, in February 2010, Rachel's pediatrician referred Rachel to a pediatric gastroenterologist, Bruno Chumpitazi. Chumpitazi increased Rachel's reflux medication and put her on a milk-protein allergy diet. Appellant reported that Rachel continued to vomit and often had diarrhea. Thus, Chumpitazi put Rachel on more medications, instituted additional dietary measures, and began performing diagnostic procedures on Rachel, including endoscopies, colonoscopies, and biopsies. These tests did not reveal a medical explanation consistent with the extent of Rachel's symptoms, so Chumpitazi ordered more tests, including blood, stool, and allergy tests.
In April 2011, Chumpitazi was concerned about Rachel's poor weight gain and placed a nasogastric feeding tube in her nose, which ran down her esophagus into her stomach, through which she received medicine and formula to improve her nutritional intake. Appellant continued to report that Rachel was vomiting and having diarrhea and able to tolerate very little nutritional intake except through the nasogastric tube. In November 2011, Rachel underwent surgery to have a gastronomy button and feeding tube inserted directly into her stomach to deliver nutrition. Within approximately 48 hours of the surgery, appellant reported that Rachel's vomiting had increased. Finding these symptoms unusual and troubling, Chumpitazi ordered another surgery for Rachel to receive a central line catheter through a large vein in her chest that would provide an access point for the delivery of medication and “total parenteral nutrition” intravenously.

In January 2012, in response to appellant's report that the vomiting was continuing, Chumpitazi ordered Rachel to be fitted with a feeding tube placed directly into the stomach that extended into the small intestine to bypass the stomach. The goal with was to deliver nutrition into the small intestine, so that the vomiting would stop. Despite these interventions, appellant still reported that Rachel was vomiting, having diarrhea, and developing fevers at home.

Over the course of Rachel's treatment, Chumpitazi conducted extensive testing to determine a medical explanation for Rachel's continuing symptoms, but Chumpitazi was unable to ascertain the cause. In February 2013, Chumpitazi met with appellant and recommended that Rachel resume regular feedings in lieu of receiving nutrition intravenously and through feeding tubes because Rachel was not receiving any benefit from her treatments and the treatments put her at risk. Appellant disagreed, and Chumpitazi referred Rachel to another gastroenterologist at Texas Children's, Eric Chiou.

Rachel was admitted to the hospital numerous times while she was seeing both Chumpitazi and Chiou. During her hospital stays, she developed infections from multiple types of bacteria introduced into her central line catheter, which Chumpitazi described as "extremely rare."

Like Chumpitazi, Chiou could not find a medical explanation for Rachel's symptoms. Not only were Rachel's symptoms worsening, but Rachel was experiencing (1) sudden and inexplicable drops in her hemoglobin levels from rapidly losing large amounts of blood for which she received transfusions; (2) numerous complications with her feeding tube; (3) the aforementioned central line catheter infections; and (4) episodes of severe hypernatremia, which is a dangerously high level of sodium in the bloodstream. Rachel was hospitalized repeatedly because of these issues and underwent numerous medical treatments.

By June 2013, Chiou began to suspect medical child abuse. He met with Marcella Donaruma, a pediatrician and specialist in medical child abuse at Texas Children's. She agreed to consult on the case. During this time, Rachel was repeatedly hospitalized. In August 2013, one day after Rachel was discharged from the hospital in a healthy condition, appellant brought Rachel to Texas Children's emergency room with an extremely elevated sodium level. Rachel was admitted and transferred to the intensive care unit. During this hospitalization, hospital staff, working with Child Protective Services, placed Rachel in a "therapeutic separation," whereby appellant was kept away from Rachel. Rachel quickly recovered — her sodium and blood levels stabilized, and she was able to eat solid foods and no longer needed the central line catheter or feeding tubes. Based on the results of the therapeutic separation and Donaruma's review of the medical records, Donaruma concluded that Rachel had suffered from medical child abuse.

Appellant was charged with two felony offenses of intentionally or knowingly causing serious bodily injury to a child. After the jury found her guilty, it assessed punishment at 20 years' confinement for each offense, to run concurrently.
Discussion

Appellant brings four issues. She challenges the legal sufficiency of the evidence in support of the jury's guilty verdicts and complains that the trial court abused its discretion in (1) not excluding the State's discussion in voir dire of Munchausen by proxy also known as factitious disorder by proxy, appellant's Facebook posts offered by the State, and statements made by appellant to Rachel's guardian ad litem; and (2) in excluding testimony from the State's expert witness regarding an alleged prior misdiagnosis in a different case.\[^{[3]}\]

I. Jury's Verdicts Supported by Legally Sufficient Evidence

We address first appellant's fourth issue in which she challenges the legal sufficiency of the evidence in support of the jury's guilty findings against her for felony injury to a child. Appellant argues there is no evidence that she administered sodium to Rachel and that, instead, Rachel (1) suffered from dehydration and not salt poisoning; (2) was misdiagnosed as having suffered medical child abuse; and (3) was "over-medicalized," which is why she got better after she was separated from appellant and her medical treatments stopped.

When reviewing sufficiency of the evidence, we view all of the evidence in the light most favorable to the verdict and determine, based on that evidence and any reasonable inferences therefrom, whether any rational factfinder could have found the elements of the offense beyond a reasonable doubt. \[^{[1]}\] \[^{[4]}\] We do not sit as a thirteenth juror and may not substitute our judgment for that of the factfinder by reevaluating the weight and credibility of the evidence. \[^{[2]}\] Rather, we defer to the factfinder to fairly resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. \[^{[3]}\] This standard applies equally to both circumstantial and direct evidence. \[^{[4]}\] Each fact need not point directly and independently to the appellant's guilt, as long as the cumulative effect of all incriminating facts is sufficient to support the conviction. \[^{[5]}\]\[^{[6]}\] As to each charged offense, the State was required to prove that appellant "intentionally, knowingly, recklessly, or with criminal negligence" caused serious bodily injury to Rachel. \[^{[7]}\]\[^{[8]}\] See Tex. Penal Code § 22.04. Appellant was charged with committing these offenses by "introducing sodium into [Rachel's] body" and "placing a catheter in [Rachel's] vein" as the primary actor or a criminally responsible party to the offense.\[^{[4]}\]

A. Challenges Related to Salt Poisoning

Appellant argues that no evidence supports the jury's finding that she administered sodium to Rachel. Appellant further contends that she established through expert testimony that Rachel suffered from dehydration and not salt poisoning.

The State presented evidence that Rachel had been released from the hospital on August 5, 2013 in a healthy condition. Her sodium level was within the normal range at that time. She left the hospital with appellant. By 6 a.m. the next morning, Rachel's sodium level became "extremely high," and appellant took her back to the emergency room. Rachel was *critically ill* and was admitted into the intensive care unit.
Donaruma testified that Rachel "could have died." Donaruma concluded that the medical explanation for the "incredibly rapid" rise in Rachel's sodium level was "salt poisoning." Appellant was the only person who had been with Rachel from the time she was discharged from the hospital until the time appellant took Rachel to the hospital.

Appellant presented expert testimony that, based upon a review of her medical records, Rachel suffered from dehydration and not salt poisoning. The State's experts testified that Rachel's symptoms were not consistent with dehydration, given Rachel's excessive urination, unusual emission of fluids from her feeding tube, and the "[e]xtremely significant discrepancy" between what Rachel should have weighed upon admission to the hospital and her actual weight.[5] The State's experts concluded that the only possible explanation for Rachel's condition was the administration of an excessive amount of sodium to Rachel. Moreover, upon the therapeutic separation from appellant, Rachel's sodium level returned to normal, and Rachel did not again experience a rapid increase in her sodium level. Even though appellant's expert testified that Rachel suffered from dehydration as opposed to salt poisoning, the jury was free to resolve the conflict in the expert testimony in favor of the State.[6] See Stanley v. State, 470 S.W.3d 664, 672 (Tex. App.-Dallas 2015, no pet.).

B. Evidence Related to Misdiagnosis and "Over-Medicalization"

Appellant argues that she established at trial that Rachel was misdiagnosed with medical child abuse and had been "over-medicalized" by her doctors. In other words, the doctors had over-prescribed remedies that "either hurt [Rachel] or ... made [her] more sick," and she either got better when the doctors stopped treatment or got better on her own. Appellant presented expert testimony to support these defenses. Her experts testified, among other things, that many, if not all, of Rachel's symptoms were consistent with mitochondrial disease and Rachel's condition improved because the "over-medicalization" was stopped.

The jury was entitled to take the following evidence into account in reaching its verdicts. Appellant's expert did not make a definitive diagnosis of mitochondrial disease. He did not indicate that any invasive treatment Rachel received would have been contraindicated by such a diagnosis, for which he testified there is "not really a cure." The jury also reasonably could have concluded that appellant's expert testimony indicating that Rachel possibly had mitochondrial disease and was over-medicalized was contradictory — either Rachel needed treatment for mitochondrial disease, which her doctors were administering, or her symptoms were attributable to over-treatment.

The State's experts, on the other hand, presented evidence that Rachel's symptoms were not caused by mitochondrial disease or over-medicalization but instead were caused by medical child abuse:

- Rachel suffered many complications with her central line catheter, including unusual damage to the line, which caused the line to leak, and several *313 infections that were suspicious based on their timing, frequently occurring shortly after hospital staff informed appellant that Rachel would be discharged from the hospital. The types and quantities of bacteria discovered to be causing the infections were extremely rare.
- Rachel's feeding tube inexplicably had moved out of place many times.
- Rachel's hemoglobin levels suddenly and inexplicably dropped several times, which could be explained only by someone withdrawing blood from Rachel's central line.
• Rachel experienced several episodes of hypernatremia, a dangerously high level of sodium in the bloodstream, which could only be explained by salt poisoning.

• After a therapeutic separation from her mother, Rachel recovered completely.

• After reviewing Rachel's medical history over several years, Donaruma concluded that Rachel had suffered medical child abuse at the hands of appellant.

The jury, as factfinder, was free to believe or disbelieve, in whole or in part, any or all of the expert testimony. See Jones v. State, 235 S.W.3d 783, 786 (Tex. Crim. App. 2007). Viewing the evidence in the light most favorable to the jury's verdict, we conclude that the jury's finding that appellant caused serious bodily injury to Rachel by introducing sodium into her body and the jury's rejection of appellant's misdiagnosis and over-medicalization theories were supported by legally sufficient evidence. We overrule appellant's fourth issue.

II. No Abuse of Discretion in Allowing References to Munchausen by Proxy

A. During Voir Dire

In her first issue, appellant complains that the trial court allowed the State to question the jury panel on the disorder "Munchausen by proxy" during voir dire. Appellant asserts that such questions were irrelevant because appellant had not been diagnosed with the disorder. Before voir dire began, defense counsel made an oral motion to prohibit the State from using the terms "Munchausen by proxy" or "factitious disorder by proxy." The trial court overruled the oral motion. Defense counsel renewed the objection to the State's reference to the disorder during voir dire.

As an initial matter, we note that a motion in limine normally preserves nothing for appellate review because it merely requests that the opposing party not be permitted to raise certain issues before a hearing has been held outside the presence of the jury to determine admissibility of those issues. Geuder v. State, 115 S.W.3d 11, 14-15 (Tex. Crim. App. 2003). Presuming without deciding that appellant's oral motion preserved this issue for our review, we nevertheless conclude that the trial court did not abuse its discretion in allowing the State to question the jury panel regarding Munchausen by proxy.

The trial court has broad discretion over the process of selecting a jury. Barajas v. State, 93 S.W.3d 36, 38 (Tex. Crim. App. 2002). We leave to the trial court's discretion the propriety of a particular question that we will not disturb absent an abuse of that discretion. Id. A trial court abuses its discretion only when a proper question about a proper area of inquiry is prohibited. Id. A question is proper if it seeks to discover a panel member's views on an issue applicable to the case. Id. An otherwise proper question is impermissible, however, if it attempts to commit the panel member to a particular verdict based on particular facts. Id.

Defense counsel objected on the basis that the State's references to the disorder were not relevant because appellant had not been diagnosed with "medical child abuse, previously factitious disorder, previously [M]unchausen." State's counsel argued:

[W]e're just going to be asking the jurors for what they've heard in the community. And it is relevant. It is what this case is about. It is the crux of the case. And that is a common term that
I think most society is going to know it by. They're not going to know it by medical child abuse.

State's counsel also noted, "[I]t is voir dire. The purpose is to get [the panel members'] thoughts and feelings, what they know, do they have any preconceived notions about the issues that are going to come up in trial." The trial court overruled the objection, concluding "I think they're entitled to ask people if they know what [Munchausen by proxy] is."

During voir dire, State's counsel generally asked the panel if they had heard of Munchausen by proxy and whether the panel members thought it was a form of child abuse. These questions were proper because they sought to discover the panel member's views on an issue applicable to the case — whether appellant abused her child by fabricating an illness or intentionally making her sick. The questions were general and did not attempt to commit the panel members to a particular verdict based on particular facts. State's counsel did not represent to the panel that appellant had been diagnosed with Munchausen by proxy or otherwise reveal facts about appellant's medical condition. We conclude that the trial court did not abuse its discretion in allowing the State to ask these questions.

B. Through Facebook Posts

Appellant also argues in her first issue that the State's voir dire questions about Munchausen by proxy "opened the door to allowing ... [Facebook posts admitted at trial to] sway the jury." The State introduced Facebook posts made by appellant and her Facebook friends about Rachel's condition to support the State's theory that appellant was abusing Rachel to get attention — in other words, the State contended that appellant sought the affirmation of her friends on Facebook whenever Rachel had health problems. Defense counsel objected to all of the Facebook posts as hearsay. The trial court admitted only the statements made by appellant on Facebook, not statements made by appellant's friends.

On appeal, appellant argues that the admission of her Facebook posts "allowed prejudicial and unsupported testimony and evidence in front of the jury" to advance the State's theory that appellant had Munchausen by proxy. Appellant contends that the State failed to present evidence of a "medical or scientific foundation" to support a diagnosis of Munchausen by proxy and thus the trial court abused its discretion in admitting the appellant's Facebook posts, which advanced the State's theory. Appellant did not object to the admission of the Facebook posts on these grounds at trial. To preserve error, a party must object and state the grounds for the objection with enough specificity to make the trial judge aware of the complaint, unless the specific grounds were apparent from the context. Tex. R. App. P. 33.1. The objection must be sufficiently clear to give the judge and opposing counsel an opportunity to address and, if necessary, correct the purported error. Thomas v. State, 505 S.W.3d 916, 924 (Tex. Crim. App. 2016). If a trial objection does not comport with arguments on appeal, error has not been preserved. Id. We conclude that appellant has not preserved error on her complaint that the Facebook posts were prejudicial or improperly advanced the State's theory.

Appellant also argues that appellant's Facebook posts are hearsay. Texas Rule of Evidence 801(e)(2) provides that a statement is not hearsay if it is offered against a party and is a party's own statement. Williams v. State, 402 S.W.3d 425, 438 (Tex. App.-Houston [14th Dist.] 2013, pet. ref'd). The only requirements for admissibility of an admission of a party opponent under Rule 801(e)(2) is that the admission is the opponent's own statement and that it is offered against her. Id. The State offered appellant's own statements that she made on Facebook against her. Although we have not previously addressed this issue, we conclude that the trial court did not err in admitting appellant's Facebook posts as
admissions of a party opponent. Cf. Jackson v. State, No. 05-14-00274-CR, 2015 WL 3797806, at *4 n.4 (Tex. App.-Dallas 2015, no pet.) (mem. op., not designated for publication) (concluding that the appellant's text messages were not hearsay because they were admissions of a party opponent); see also Steven Goode, The Admissibility of Electronic Evidence, 29 Rev. Litig. 1, 7 (Fall 2009). Accordingly, the statements are not hearsay.

We overrule appellant's first issue.

III. Denial of Motion to Suppress Not Erroneous Due to Lack of Custodial Interrogation

In her second issue, appellant contends that the trial court erred in denying her motion to suppress statements made to Rachel's court-appointed guardian ad litem. According to appellant, her statements are inadmissible because she did not receive warnings under Texas Code of Criminal Procedure article 38.22 and Miranda v. Arizona. See Tex. Code Crim. Proc. art. 38.22 (establishing that no statement of an accused made as a result of custodial interrogation shall be admissible against her at trial unless a recording is made of the statement and statutory warnings are given); Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (establishing that subjecting an individual to custodial questioning without first warning her of Fifth Amendment rights against self-incrimination and obtaining a voluntary waiver of those rights renders any evidence obtained as part of that questioning inadmissible at trial). Appellant also complains that her statements are inadmissible under Texas Code of Criminal Procedure article 38.23. Tex. Code Crim. Proc. art. 38.23 (establishing that evidence obtained in violation of Texas or United States Constitutions or statutes is inadmissible at trial).

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard. State v. Kerwick, 393 S.W.3d 270, 273 (Tex. Crim. App. 2013). The trial court's determinations of historical facts and mixed questions of law and fact that rely on credibility are granted almost total deference when supported by the record. Id. But when mixed questions of law and fact do not depend on the evaluation of credibility and demeanor, we review the trial court's ruling de novo. Id. When, as in this case, the trial judge does not make formal findings of fact, we uphold the trial court's ruling on any theory of law applicable to the case and presume the court made implicit findings in support of its ruling if those findings are supported by the record. State v. Ross, 32 S.W.3d 853, 855-56 (Tex. Crim. App. 2000).

Duane King represented Rachel as her guardian ad litem in a separate proceeding filed in juvenile district court involving the Texas Department of Family and Protective Services (C.P.S.). As Rachel's guardian ad litem, King investigated Rachel's case and made recommendations to the juvenile court judge regarding custody of Rachel. As part of his investigation, King interviewed appellant approximately four months before she was arrested for the offenses in this case.¹⁰ The interview occurred in defense counsel's office in the presence of two of appellant's attorneys and a private investigator whom the juvenile court had authorized King to hire. The interview was not recorded.

At trial, defense counsel objected to King's testimony regarding statements made by appellant during the interview on the basis that

based on [King's] capacity as a child advocate and as a guardian ad litem, ... I think he would fit under the umbrella of a State agent.... [W]e think that... he shouldn't be allowed to testify as to anything that was said to him in my office without her having been properly warned....
Without citing any authority, appellant argues that King was a State agent and that the trial court erred in failing to exclude the statements appellant made when King interviewed her. "Miranda ... generally applies only to questioning by law enforcement officers or their agents." Wilkerson v. State, 173 S.W.3d 521, 527 (Tex. Crim. App. 2005). The "label [State agent] does not, by itself, make the person an `agent of the State' for the purpose of defining `custodial interrogation.'" Id. Appellant had the burden to prove that her statements were the product of custodial interrogation by an agent for law enforcement. See Id. at 532. To be an agent for law enforcement for the purposes of custodial interrogation, King had to interview appellant "for the primary purpose of gathering evidence or statements to be used in a later criminal proceeding against" appellant. See Id. at 531. Appellant has not demonstrated that King did so.[11]

Presuming for purposes of our analysis, however, that appellant had demonstrated King was an agent for law enforcement, appellant voluntarily met with King and participated in the interview with her attorneys present. If statements do not derive from custodial interrogation, the requirements of Miranda and article 38.22 do not apply. Gregory v. State, 56 S.W.3d 164, 174 (Tex. App.-Houston [14th Dist.] 2001, pet. dism'd). A non-custodial, voluntary, oral statement is admissible at trial. Id. (citing Tex. Code Crim. Proc. art. 38.22, § 5). In that connection, article 38.33, which applies only to evidence obtained in violation of Texas or federal constitutional or statutory law, likewise would not apply to statements obtained lawfully when an accused is not in custody. See Tex. Code Crim. Proc. art. 38.23.

A person is in custody if, under the totality of the circumstances, a reasonable person would believe her freedom of movement was restrained to the degree associated with a formal arrest. Dowthitt v. State, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996); Turner v. State, 252 S.W.3d 571, 576 (Tex. App.-Houston [14th Dist.] 2008, pet. ref'd). The Court of Criminal Appeals has established four general situations that may constitute custody: (1) if the suspect is physically deprived of her freedom in any significant way; (2) if a law enforcement officer tells the suspect not to leave; (3) if a law enforcement officer creates a situation that would lead a reasonable person to believe that her freedom of movement has been significantly restricted; and (4) there is probable cause to arrest the suspect and the law enforcement officer did not tell the suspect she is free to leave. Gardner v. State, 306 S.W.3d 274, 294 (Tex. Crim. App. 2009); Matthews v. State, 513 S.W.3d 45, 63 (Tex. App.-Houston [14th Dist.] Nov. 6, 2016, pet. denied).

Appellant does not assert that she was in custody at the time of the interview, and the circumstances do not support a conclusion that a reasonable person would believe her movement was restrained to the degree associated with a formal arrest when she voluntarily met with an investigator in her attorney's office. Accordingly, we conclude that the trial court did not err in denying her motion to suppress. We overrule appellant's second issue.

IV. No Abuse of Discretion in Excluding Evidence Regarding Alleged Misdiagnosis in Different Case

In her third issue, appellant argues that the trial court abused its discretion in excluding proffered evidence regarding an alleged prior misdiagnosis of medical child abuse by the State's expert, Marcella Donaruma. Defense counsel asked Donaruma whether she had "ever recommended C.P.S. intervention in a case that later turned out to be mitochondrial disease." State's counsel objected on the basis of relevance, and the trial court sustained the objection.

Evidence is relevant if it has any tendency to make a fact that is of consequence in determining the action more or less probable than it would be without the evidence. Tex. R. Evid. 401. Relevant evidence is generally admissible. See Tex. R. Evid. 402; Erazo v. State, 144 S.W.3d 487, 499 (Tex. Crim. App. 2004). Irrelevant evidence is inadmissible. Tex. R. Evid. 402. Under Rule 403, a "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Tex. R. Evid. 403. In conducting a rule 403 analysis, courts must balance: (1) the inherent probative force of the proffered evidence and (2) the proponent's need for that evidence, against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency to confuse or distract the jury from the main issues, (5) any tendency to be given undue weight by the jury, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or be cumulative of other evidence. Gigliobianco v. State, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006); Buzby v. State, 480 S.W.3d 113, 116 (Tex. App.-Houston [14th Dist.] 2015, no pet.). Appellant provides no analysis of the Rule 403 balancing test, other than to list the factors and make the bare assertion that the proffered evidence "would have [been] more probative than prejudicial in Appellant's case."

Defense counsel made the following offer of proof in relevant part:

- Donaruma previously had been sued in a medical malpractice case. The underlying allegation was that Donaruma had referred a child to C.P.S. based on an erroneous lab result.

- Appellant's counsel asked Donaruma, "[T]he child was later diagnosed as having mitochondrial disease; isn't that right?" Donaruma responded, "I have no idea what happened to her."

- Donaruma testified that she referred the child to C.P.S. for possible abuse "because there were positive substances found in [the] child's blood that shouldn't be there." She denied that the lab made a mistake.

Appellant's defense at trial was that Rachel had been misdiagnosed with medical child abuse when she actually had mitochondrial disease. Defense counsel argued that the proffered evidence revealed that Donaruma was biased because she could be subjected to "potential malpractice liability for a misdiagnosis of medical child abuse" as to Rachel if appellant was not convicted. Defense counsel, however, did not establish an exception to the immunity provided for C.P.S. referrals that would expose Donaruma to "potential malpractice liability." Moreover, appellant has not demonstrated how the excluded testimony would advance her theory that Donaruma misdiagnosed Rachel with medical child abuse. Appellant did not offer any evidence that Donaruma had misdiagnosed the child in the other case.

The proffered testimony was, at best, marginally relevant. The trial court did not prevent appellant from advancing her theory that Rachel was misdiagnosed with medical child abuse. Under these facts, the trial court reasonably could have concluded that the probative value of the proffered evidence was substantially outweighed by a danger that the jury would have been confused or distracted from the main issue in this case — whether, under these facts, appellant medically abused Rachel. We overrule appellant's third issue.
Conclusion

We affirm the judgment of the trial court.

[1] We identify the complainant by a pseudonym to protect her identity.

[2] With total parenteral nutrition, the patient receives nutrition through her veins as opposed to through her gastrointestinal tract.

[3] Munchausen by proxy, or factitious disorder by proxy, is referred to in the medical community as medical child abuse and involves subjecting another person, often a child, to unnecessary medical treatments by either fabricating an illness or intentionally making the person sick.

[4] Appellant does not provide any analysis to support an argument that no evidence supports the jury's finding that she "place[d] a catheter in [Rachel's] vein." To the extent that appellant asserts such an argument, we conclude that it is inadequately briefed. See Tex. R. App. P. 38.1 (requiring an appellant's brief to contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record).

[5] The State's expert testified the hospital weighed Rachel 24 hours earlier, at discharge, when her sodium levels were normal. When she was readmitted to the hospital and began receiving fluids, her weight was about the same. According to the expert, had Rachel been dehydrated, her weight would have been significantly less.

[6] Appellant has not challenged the reliability of the State's expert testimony.

[7] Defense counsel stated: "I wanted to make a motion — an oral Motion in Limine with regard to any reference to the term 'Munchausen by proxy' or 'factitious disorder by proxy,' that those things not be stated in the presence of the jury panel without that being ruled upon as being proper."

[8] Defense counsel also had filed a "Motion to Exclude All Evidence and All Testimony Regarding Attention Seeking a/k/a Factitious Disorder, alternatively Motion in Limine." After the trial court denied the oral motion, defense counsel mentioned the written motion but did not ask for a ruling on it. Defense counsel stated, "You've ruled on the oral Motion in Limine. We have it in written form as well. It's going to come up again and again." The trial judge responded, "I know," but did not rule on the written motion.

[9] The trial judge sustained appellant's objection to statements made by others on the Facebook posts. Those statements were redacted.

[10] Appellant had been charged with the offenses approximately two months before the interview.

[11] King testified at trial that his role was to help the juvenile district court decide what was in Rachel's best interest with regard to custody in the juvenile court proceeding. See Wilkerson, 173 S.W.3d at 531-32 (concluding that a C.P.S. caseworker was not acting as State agent for purposes of custodial interrogation when the caseworker interviewed the defendant in jail to assess whether to remove a child from the defendant's home).

[12] Although the trial court did not expressly conduct a Rule 403 balancing test in excluding the evidence, we will affirm a trial court's ruling on any theory of law applicable to the case, even if the trial court did not purport to rely on that theory. Buzby v. State, 480 S.W.3d 113, 116 n.3 (Tex. App.-Houston [14th Dist.] 2015, no pet.).

[13] Defense counsel asserted that Donaruma was biased because she would be "exonerated from any potential medical malpractice" by "having [appellant] convicted of a crime related to [Donaruma's] diagnosis."

[14] Under Family Code section 261.106:

A person acting in good faith who reports or assists in the investigation of a report of alleged child abuse or neglect or who testifies or otherwise participates in a judicial proceeding arising from a report, petition, or investigation of alleged child abuse or neglect is immune from civil or criminal liability that might otherwise be incurred or imposed.

Tex. Fam. Code § 261.106(a). Defense counsel argued that Donaruma would not be immune from liability under section 261.106 if she had misdiagnosed Rachel. Appellant cites no authority establishing such an exception, and we have found none.

[15] Defense counsel stated that the father of the child in the other case was prepared to testify that Donaruma had misdiagnosed his daughter. However, defense counsel did not call the father as a witness.
Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

1. Domestic Public Documents That Are Sealed and Signed. A document that bears:
   A. a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and
   B. a signature purporting to be an execution or attestation.

2. Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if:
   A. it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and
   B. another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.

3. Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country’s law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document’s authenticity and accuracy, the court may, for good cause, either:
   A. order that it be treated as presumptively authentic without final certification; or
   B. allow it to be evidenced by an attested summary with or without final certification.

4. Certified Copies of Public Records. A copy of an official record — or a copy of a document that was recorded or filed in a public office as authorized by law — if the copy is certified as correct by:
(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

5 Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.

6 Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

7 Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

8 Acknowledged Documents. A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

9 Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

10 Presumptions Under a Federal Statute. A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

11 Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

12 Certified Foreign Records of a Regularly Conducted Activity. In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

13 Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

14 Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule (902(11) or (12). The proponent also must meet the notice requirements of Rule 902 (11).

Notes
NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension. The present rule collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify. In no instance is the opposite party foreclosed from disputing authenticity.

Paragraph (1). The acceptance of documents bearing a public seal and signature, most often encountered in practice in the form of acknowledgments or certificates authenticating copies of public records, is actually of broad application. Whether theoretically based in whole or in part upon judicial notice, the practical underlying considerations are that forgery is a crime and detection is fairly easy and certain. 7 Wigmore §2161, p. 638; California Evidence Code §1452. More than 50 provisions for judicial notice of official seals are contained in the United States Code.

Paragraph (2). While statutes are found which raise a presumption of genuineness of purported official signatures in the absence of an official seal, 7 Wigmore §2167; California Evidence Code §1453, the greater ease of effecting a forgery under these circumstances is apparent. Hence this paragraph of the rule calls for authentication by an officer who has a seal. Notarial acts by members of the armed forces and other special situations are covered in paragraph (10).

Paragraph (3) provides a method for extending the presumption of authenticity to foreign official documents by a procedure of certification. It is derived from Rule 44(a)(2) of the Rules of Civil Procedure but is broader in applying to public documents rather than being limited to public records.

Paragraph (4). The common law and innumerable statutes have recognized the procedure of authenticating copies of public records by certificate. The certificate qualifies as a public document, receivable as authentic when in conformity with paragraph (1), (2), or (3). Rule 44(a) of the Rules of Civil Procedure and Rule 27 of the Rules of Criminal Procedure have provided authentication procedures of this nature for both domestic and foreign public records. It will be observed that the certification procedure here provided extends only to public records, reports, and recorded documents, all including data compilations, and does not apply to public documents generally. Hence documents provable when presented in original form under paragraphs (1), (2), or (3) may not be provable by certified copy under paragraph (4).

Paragraph (5). Dispensing with preliminary proof of the genuineness of purportedly official publications, most commonly encountered in connection with statutes, court reports, rules, and regulations, has been greatly enlarged by statutes and decisions. 5 Wigmore §1684. Paragraph
Paragraph (6). The likelihood of forgery of newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them. Establishing the authenticity of the publication may, of course, leave still open questions of authority and responsibility for items therein contained. See 7 Wigmore §2150. Cf. 39 U.S.C. §4005(b), public advertisement prima facie evidence of agency of person named, in postal fraud order proceeding; Canadian Uniform Evidence Act, Draft of 1936, printed copy of newspaper prima facie evidence that notices or advertisements were authorized.


Paragraph (8). In virtually every state, acknowledged title documents are receivable in evidence without further proof. Statutes are collected in 5 Wigmore §1676. If this authentication suffices for documents of the importance of those affecting titles, logic scarcely permits denying this method when other kinds of documents are involved. Instances of broadly inclusive statutes are California Evidence Code §1451 and N.Y.CPLR 4538, McKinney’s Consol. Laws 1963.

Paragraph (9). Issues of the authenticity of commercial paper in federal courts will usually arise in diversity cases, will involve an element of a cause of action or defense, and with respect to presumptions and burden of proof will be controlled by Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Rule 302, supra. There may, however, be questions of authenticity involving lesser segments of a case or the case may be one governed by federal common law. Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943). Cf. United States v. Yazell, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966). In these situations, resort to the useful authentication provisions of the Uniform Commercial Code is provided for. While the phrasing is in terms of “general commercial law,” in order to avoid the potential complication inherent in borrowing local


NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 902(8) as submitted by the Court referred to certificates of acknowledgment “under the hand and seal of” a notary public or other officer authorized by law to take acknowledgments. The Committee amended the Rule to eliminate the requirement, believed to be inconsistent with the law in some States, that a notary public must affix a seal to a document acknowledged before him. As amended the Rule merely requires that the document be executed in the manner prescribed by State law.

The Committee approved Rule 902(9) as submitted by the Court. With respect to the meaning of the phrase “general commercial law”, the Committee intends that the Uniform Commercial Code, which has been adopted in virtually every State, will be followed generally, but that federal commercial law will apply where federal commercial paper is involved. See Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). Further, in those instances in which the issues are governed by Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), State law will apply irrespective of whether it is the Uniform Commercial Code.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1988 AMENDMENT

These two sentences were inadvertently eliminated from the 1987 amendments. The amendment is technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2000 AMENDMENT

The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Rule 803(6). 18 U.S.C. §3505 currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure for domestic records, and for foreign records offered in civil cases.

A declaration that satisfies 28 U.S.C. §1746 would satisfy the declaration requirement of Rule 902(11), as would any comparable certification under oath.
The notice requirement in Rules 902(11) and (12) is intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.

GAP Report—Proposed Amendment to Rule 902. The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 902:

1. Minor stylistic changes were made in the text, in accordance with suggestions of the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.

2. The phrase “in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority” was added to proposed Rule 902(11), to provide consistency with Evidence Rule 902(4). The Committee Note was amended to accord with this textual change.

3. Minor stylistic changes were made in the text to provide a uniform construction of the terms “declaration” and “certifying.”

4. The notice provisions in the text were revised to clarify that the proponent must make both the declaration and the underlying record available for inspection.

**TERMINATION OF TRUST TERRITORY OF THE PACIFIC ISLANDS**

For termination of Trust Territory of the Pacific Islands, see note set out preceding section 1681 of Title 48, Territories and Insular Possessions.

**COMMITTEE NOTES ON RULES—2011 AMENDMENT**

The language of Rule 902 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Committee Notes on Rules—2017 Amendment

Paragraph (13). The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including though judicial notice where appropriate.
A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The Rule specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this Rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication, and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the web page was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable—the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will affect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

Committee Notes on Rules—2017 Amendment

Paragraph (14). The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.
Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value". A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record of the certifying person testified, then authenticity is not established under this Rule.

The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this Rule to prove the requirements of Rule 803(6). Rule 902(14) is solely limited to authentication, and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will affect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

**Taxonomy upgrade extras**

 evidence
Defendant Terri Hannah appeals her July 10, 2015 conviction for simple assault after a trial de novo in the Law Division, following her conviction in municipal court. She argues that a Twitter posting was improperly admitted into evidence, citing a Maryland case requiring that social media postings must be subjected to a greater level of authentication. We reject that contention, holding that New Jersey's current standards for authentication are adequate to evaluate the admission of social media postings. Under those standards, we find it was not an abuse of discretion to admit the tweet. Finding defendant's remaining claims lack merit, we affirm.

I.

The Law Division found the following facts based on the testimony in the Vineland Municipal Court. On September 22, 2012, Arnett Blake and his girlfriend, Cindy Edwards, attended a party at a community center. Defendant, Blake's ex-girlfriend, also attended the party.

While in the bathroom, Edwards encountered defendant "making rude comments about her." While Edwards was still in the bathroom, defendant exited the bathroom, approached Blake, and said "I should F your girlfriend up." Later that night, defendant purposefully bumped into Blake.

As Edwards and Blake were in the lobby trying to leave the party, defendant quickly approached Blake with her closed fist in the air. Blake reacted by pushing defendant away, prompting security to grab him. When
Edwards turned to say something, she saw defendant holding a high-heeled shoe, with which defendant struck Edwards in the face. Blake also saw defendant hit Edwards with a shoe as he was being escorted outside. When defendant was brought outside, Edwards saw defendant did not have her shoes on.

Edwards and Blake went to the police station to report the incident and then went to the hospital, where Edwards received nine stitches. After the assault, defendant and Edwards had communications "back and forth" on Twitter. On December 28, 2012, Edwards saw defendant posted a tweet saying "shoe to ya face bitch."

In municipal court, defendant offered a different version of events. Defendant testified she approached Blake and told him that she heard "hearsay ... saying that [she] was going to ... beat his girlfriend up." Defendant told Blake she "wanted to clear the air and let him know that [she was] not going to do anything to [his girlfriend]." Later during the party he "push[ed] defendant to the side." Defendant later saw Blake in the lobby and decided to ask him why he pushed her. She became aggressive and started yelling, and a security guard took her "straight out... of the party." Defendant testified she never saw Edwards that night and never punched anyone or hit anyone with a shoe.

Defendant called as a witness a security guard at the party, who testified he saw defendant approaching a man "in an aggressive manner" and heard her make hostile remarks. "[B]efore she could do anything," the guard "snatched her up and... took her out of the building." He told her she was not permitted to reenter the party. He did not see Blake or Edwards or see defendant hit anyone with a shoe.

Defendant was charged with aggravated assault, but the charge was downgraded to simple assault, a disorderly persons offense. N.J.S.A. 2C:12-1(a)(1). On January 12, 2015, the municipal court found defendant guilty and imposed a $307 fine plus costs and assessments. Defendant appealed. On June 5, 2015, the Law Division conducted a trial de novo, hearing oral argument. After reserving decision, the Law Division found defendant guilty of simple assault and imposed the same monetary penalties. The Law Division credited Edwards and Blake, found defendant not credible, and found the passage of two years compromised the security guard's recollection of the event.

On appeal to this court, defendant argues:

POINT I — THE COURT'S ADMISSION OF THE TWEET (S-4), CLAIMED BY THE STATE TO HAVE BEEN POSTED BY THE DEFENDANT TO HER TWITTER ACCOUNT, WAS ERROR AS:


(2) THIS JUDGE IMPROPERLY AUTHENTICATED THE TWEET BY RELYING ON THE ACCUSER'S TESTIMONY AS WELL AS THAT OF THE DEFENDANT, WHO ONLY TESTIFIED AFTER THE STATE HAD RESTED;
(3) With this Judge finding [sic] that the defendant’s January 12, 2015
municipal court testimony was not credible because he contrasted her
testimony with exhibit D-4 attached to defense counsel’s May 8, 2015
appeal brief; and,

(4) this Judge admitted the tweet, without analysis as to the Tweet’s
relevance or probative value.

Point II — the sequestration order was imposed at the start of the
January 12, 2015 municipal court trial. The sequestration order was not
enforced as the alleged victim was allowed to remain in the
courtroom by the judge after her testimony; allowing her to be
present while her boyfriend testified. The boyfriend’s equivocal and
seemingly contradictory or "forgetful" responses strongly suggest
visual cues from the alleged victim. The law division judge’s written
opinion is devoid of any consideration or discussion of that issue. That
violation, by itself, should have resulted in reversal and remand to the
municipal court with strict adherence thereafter to the
sequestration order.

This defendant’s constitutional rights to due process and a fair trial
were violated; no showing of prejudice is required in these
circumstances. Defendant’s constitutional rights override any
constitutional rights of a victim of crime. This trial involved not a
crime but a disorderly person’s offense. [Constitutional aspect not
raised below].

Point III — the relief requested on the appeal sought reversal and
remand for trial in the municipal court, R. 3:23-8(a)(2); relief mandated
for supplementation of the municipal court record: (1) to allow
defendant the opportunity to respond to the adverse inference
determination made against her by the municipal court judge, (2) to
allow the state to attempt to establish authentication of the twitter
posting, and, (3) to allow the municipal court to deal with the, as yet,
unresolved issue of sequestration violation set forth in point II above.
R. 3:23-8 was amended to permit *104 such supplementation by remand to
the municipal court, a remedial device not acknowledged by this judge.

II.

Defendant argues a message sent on twitter should not have been admitted as it was not properly
authenticated.[1] "[C]onsiderable latitude is afforded a trial court in determining whether to admit evidence,
and that determination will be reversed only if it constitutes an abuse of discretion." State v. Kuropchak, 221
not substitute its own judgment for that of the trial court, unless `the trial court's ruling "was so wide of the
mark that a manifest denial of justice resulted.'"" Ibid. (citation omitted). We must hew to our standard of
review.
The municipal court and the Law Division each admitted as Exhibit S-4 the following tweet allegedly posted by defendant on December 28, 2012: "No need for me to keep responding to ya stupid unhappy fake mole having ass .. how u cring in a corner with a shoe to ya face bitch." The tweet displayed defendant's profile photo and defendant's Twitter handle, "@cirocgirl25."

Edwards testified she recognized the tweet as being written by defendant because it displayed defendant's picture. She also was familiar with defendant's Twitter handle, "@cirocgirl25." Moreover, Edwards testified the tweet was posted "in response to things that [Edwards] was saying" and they were communicating "back and forth." On December 28, 2012, Edwards went onto defendant's Twitter page, saw the posted tweet, and captured it as a screenshot.

Defendant testified the Twitter page displayed a picture of her and her Twitter handle. However, she testified she did not author the tweet.

When the State sought to admit the tweet, defense counsel objected, arguing "[t]here's no way anybody besides Twitter can say that this came from [defendant]." In admitting the tweet, the municipal court ruled nothing "requires somebody to be here from Twitter. I think somebody can testify as to it as Ms. Edwards [did] and we go from there."

At the trial de novo, the Law Division classified the methods of authenticating a social media post into two camps: the Maryland approach and the Texas approach, respectively citing Griffin v. State, 419 Md. 343, 19 A.3d 415 (2011), and Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App. 2012).

In Griffin, the Maryland Court of Appeals considered what the test should be for the authentication of printed pages of a MySpace profile. Griffin, supra, 19 A.3d at 416-17. Citing "[t]he potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user," Griffin ruled that images from such a site require "greater scrutiny" than "letters and other paper records." Id. at 423-24 (concluding that "a printout of an image from such a site requires a greater degree of authentication"). The court suggested three possible methods of authentication. Id. at 427.

The first method was "to ask the purported creator if she indeed created the profile and also if she added the posting in question, i.e. '[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be.'" Ibid. (citation omitted). The second method was "to search the computer of the person who allegedly created the profile and posting and examine the computer's internet history and hard drive to determine whether that computer was used to originate the social networking profile and posting in question." Ibid. The third method was "to obtain information directly from the social networking website that links the establishment of the profile to the person who allegedly created it and also links the posting sought to be introduced to the person who initiated it." Id. at 428.

In Tienda, the Texas Court of Criminal Appeals did not employ any of the three Griffin methods but concluded "there are far more circumstantial indicia of authenticity in this case than in Griffin — enough, we think, to support a prima facie case that would justify admitting the evidence and submitting the ultimate question of authenticity to the jury." Tienda, supra, 358 S.W.3d at 647. The Texas court found "the internal content of ... [the] MySpace postings — photographs, comments, and music — was sufficient circumstantial evidence to establish a prima facie case such that a reasonable juror could have found that they were created and maintained by" a particular individual. Id. at 642.
Here, the Law Division found "[t]he Maryland approach is too strict in its authentication requirements," stating that its three methods "are unrealistic for a party to fulfill" and "create a higher bar than originally intended by the Rules." Accordingly, the Law Division "chose[ ] to adopt a rule of admissibility more similar to the Texas approach."

Defendant argues that Texas follows the Maryland approach and that we should adopt the Maryland approach with its "three non-exclusive methods" of authentication. Id. at 647. We reject any suggestion that the three methods of authentication suggested in Griffin are the only methods of authenticating social media posts. We also reject Griffin's suggestion that courts should apply greater scrutiny when authenticating information from social networks. See Parker v. State, 85 A.3d 682, 686-87 (Del. 2014) (rejecting the Griffin "greater scrutiny" approach and "conclud[ing] that social media evidence should be subject to the same authentication requirements under the Delaware Rules of Evidence Rule 901(b) as any other evidence"); see also United States v. Vayner, 769 F.3d 125, 131 n.5 (2d Cir. 2014) (noting that Griffin requires "greater scrutiny" and stating "we are skeptical that such scrutiny is required").

Rather, we agree with Tienda's observation that

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"[c]ourts and legal commentators have reached a virtual consensus that, although rapidly developing electronic communications technology often presents new and protean issues with respect to the admissibility of electronically generated, transmitted and/or stored information, including information found on social networking web sites, the rules of evidence already in place for determining authenticity are at least generally "adequate to the task."

[Tienda, supra, 358 S.W.3d at 638-39 (citation omitted).]

Indeed, "jurisdictions across the country have recognized that electronic evidence may be authenticated in a number of different ways consistent with Federal Rule 901 and its various state analogs." Id. at 639.


We need not create a new test for social media postings. Defendant argues a tweet can be easily forged, but so can a letter or any other kind of writing. The simple fact that a tweet is created on the Internet does not set it apart from other writings. Accordingly, we apply our traditional rules of authentication under N.J.R.E. 901.

Though in "electronic" form, a tweet is a "writing." See N.J.R.E. 801(e). "The requirement of authentication of writings ... and the recognized modes of proving genuineness have been developed by case law over two centuries." Biunno, supra, comment 1 on N.J.R.E. 901 (2016). "Over the years authentication requirements have become more flexible, perhaps because the technology has become more commonplace." Suarez v. Egeland, 330 N.J.Super. 190, 195, 749 A.2d 372 (App. Div. 2000).

N.J.R.E. 901 provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims." Authentication "does not require absolute certainty or conclusive proof" — only `a prima facie

"Courts are inclined to assess their role in authentication as that of a screening process[,] and `will admit as genuine writings which have been proved prima facie genuine ... leaving to the jury more intense review of the documents.'" Konop v. Rosen, 425 N.J.Super. 391, 411, 41 A.3d 773 (App. Div. 2012) (quoting Biunno, supra, comment 1 on N.J.R.E. 901 (2011)). In a bench trial, as here, "considering the judge's dual role with regard to its admission and weight, the better practice in such a circumstance will often warrant the admission of the document and then a consideration by the judge, as factfinder." Tormasi, supra, 443 N.J.Super. at 156-57, 128 A.3d 182.

Authenticity can be established by direct proof — such as testimony by the author admitting authenticity — but direct proof is not required. Biunno, supra, comment 2 on N.J.R.E. 901 (2016); N.J.R.E. 903. "A prima facie showing may be made circumstantially." Konop, supra, 425 N.J.Super. at 411, 41 A.3d 773. "Such circumstantial proof may include demonstrating that the statement `divulged intimate knowledge of information which one would expect only the person alleged to have been the writer or participant to have.'" Ibid. (quoting Biunno, supra, comment 3(b) on N.J.R.E. 901 (2011)). Here, the tweet contained several such details, including "shoe to ya face," information that one would expect only a participant in the incident to have.[6]

Additionally, under the reply doctrine, a writing "may be authenticated by circumstantial evidence establishing that it was sent in reply to a previous communication." Mays, supra, 321 N.J.Super. at 629, 729 A.2d 1074; see Biunno, supra, comment 3(c) on N.J.R.E. 901 (2016). Here, Edwards testified that the tweet was posted in response to her communications with defendant, as part of a "back and forth" between them. Moreover, the tweet said there was "[n]o need for me to keep responding to ya," apparently referring to Edwards who received a "shoe to ya face."

Defendant's Twitter handle, her profile photo, the content of the tweet, its nature as a reply, and the testimony presented at trial was sufficient to meet the low burden imposed by our authentication rules. Those facts established a prima facie case "sufficient to support a finding that the matter is what its proponent claims." N.J.R.E. 901. Other courts have admitted tweets applying their similar authentication standard. See Wilson v. State, 30 N.E.3d 1264, 1267-69 (Ind. Ct. App. 2015); Sublet v. State, 442 Md. 632, 113 A.3d 695, 720-21 (2015); see also 5 Weinstein's Federal Evidence: Discovering and Admitting Computer-Based Evidence § 900.07[4A] (Joseph M. McLaughlin ed., 2016).

Defendant argues the Law Division cited not only the State's evidence but also defendant's testimony in the municipal court that the tweet bore her picture associated with her Twitter account. However, she cites no authority precluding the Law Division from considering the uncontested fact that the tweet bore defendant's photo and Twitter handle, which was established through the testimony of Edwards as well as defendant.

In the municipal court, defendant testified "[a]nybody can make a fake Twitter page and put your name on it and put something on there." She testified that because she deleted her Twitter account months before, someone could have taken the same Twitter handle and used it. After the municipal court did not credit this claim, defendant tried to bolster her testimony by submitting new evidence to the Law Division, including printouts of Twitter policies showing that Twitter "is currently unable to accommodate individual requests for inactive or suspended usernames." The Law Division cited that policy as one of several reasons for finding
that defendant's testimony was not credible and that she "did not actually delete her Twitter account and that she did, in fact, author and publish the Tweet in question."

Defendant now argues it was improper for the Law Division to rely on evidence that was not before the municipal court. Notably, defendant herself presented the Twitter policies to the Law Division and did not object to the court's consideration of them. Therefore, she must show at least plain error. However, she fails to show the court's consideration of the policies was "clearly capable of producing an unjust result." R. 2:10-2. There was ample other evidence supporting the court's decision not to credit defendant's denial that she wrote and posted the tweet.

The Law Division, like the municipal court, provided sufficient reasons for finding the tweet authentic, relevant, and admissible. Defendant's remaining arguments regarding authentication lack sufficient merit to warrant discussion. R. 2:11-3(e)(2). Accordingly, we find no abuse of discretion in admitting the tweet.

III.

The municipal court granted defendant's request for a sequestration order at the start of trial. On appeal, defendant argues for the first time that the order was violated when the State's witnesses were allowed to remain in the courtroom after testifying.

N.J.R.E. 615 provides that, "[a]t the request of a party or on the court's own motion, the court may, in accordance with law, enter an order sequestering witnesses." "Its purpose is 'to prevent prospective witnesses from hearing what the other witnesses detail in their evidence[,]'" State v. Williams, 404 N.J.Sup. 147, 160, 960 A.2d 805 (App. Div. 2008) (emphasis added) (quoting State v. DiModica, 40 N.J. 404, 413, 192 A.2d 825 (1963)), certif. denied, 201 N.J. 440, 991 A.2d 229 (2010); see also Loigman v. Twp. Comm., 185 N.J. 566, 586, 889 A.2d 426 (2006) ("Sequestration of witnesses serves the salutary purpose of ensuring that a witness who is testifying not influence a witness who is about to testify.").

Here, allowing the witnesses to remain in the courtroom after they testified "was no violation of a sequestration order or insult to the purpose of sequestration." Williams, supra, 404 N.J.Sup., at 160, 960 A.2d 805. Edwards was the first witness to be examined by the State. After her testimony concluded, the municipal court told Edwards she "could step down." Edwards apparently remained in the courtroom without objection. Blake then entered the courtroom, testified, and was allowed to remain without objection. Neither Edwards nor Blake was recalled to the stand.

Defendant argues Blake was coached by Edwards. However, the record contains no evidence of Edwards coaching Blake. Accordingly, defendant cannot show plain error. See id. at 160-65, 960 A.2d 805; see also id. at 172-73, 960 A.2d 805 (Fisher, J.A.D., concurring); R. 2:10-2.

IV.

Lastly, defendant argues the municipal court drew an adverse inference against her because she did not call the women who were with her at the party to testify. The municipal court stated: "I think the Court can draw some inferences from the fact that there's reference to Ms. Hannah's sister [and two other women] who [were] somewhere in the area.... And they're not here to testify about anything." However, the Law Division found that "the trial judge was not making an adverse inference."
We need not review whether the municipal court did or could draw such an inference because the Law Division itself declined to draw such an inference. The Law Division stated: "Even if this Court were to construe the trial judge’s findings to include an adverse inference, there is sufficient evidence in the record to convict the defendant of simple assault without the alleged adverse inference."


Thus, defendant's argument solely "challenge[s] the actions of the municipal court judge. However, appellate review of a municipal appeal to the Law Division is limited to 'the action of the Law Division and not that of the municipal court.'" State v. Palma, 219 N.J. 584, 591-92, 99 A.3d 806 (2014) (citations omitted). "For that reason, we do not consider defendant's arguments in respect of the municipal court judge's actions." Ibid.

Affirmed.


[3] A Twitter "handle’ is used to identify a particular user on Twitter and is formed by placing the @ symbol next to a username.” Roca Labs, Inc. v. Consumer Op. Corp., 140 F.Supp.3d 1311, 1319 n.4 (M.D. Fla. 2015). A Twitter username is how you're identified on Twitter, and is always preceded immediately by the @ symbol.” Glossary. A Twitter "header photo" is “[y]our personal image that you upload, which appears at the top of your profile.” Ibid. This "profile photo” appears next to each of your Tweets.” Ibid.


[5] McCormick notes that Griffin "imposed a heavier burden of authentication," but "[a]s with the advent of the telegraph, the computer, and the internet," "the perceived need for this additional burden may dissipate.” McCormick on Evidence, supra, § 227, at 109-10.

[6] In Konop, we cited with approval Kalola v. Eisenberg, 344 N.J.Super. 198, 200, 781 A.2d 77 (Law Div. 2001), which found a threatening phone call to the plaintiff dentist authenticated because the caller "identified himself as the defendant, referenced the plaintiff and described the dental work previously performed." Konop, supra, 425 N.J.Super. at 411-13. 41 A.3d 773.
AMAYLA THURMOND, Plaintiff,

v.

MARGARET BOWMAN & WILFRED TOMBS, Defendants.

No. 6:14-CV-06465 EAW.

United States District Court, W.D. New York.

August 10, 2016.

Amayla Thurmond, Plaintiff, represented by Laurie Marie Lambrix, Monroe County Legal Assistance Center.

Margaret Bowman, Defendant, represented by Clinton E. Curtis, Law Offices of Clint Curtis & Ingrid Morfa, pro hac vice & David D. Benz, Cheney & Blair, LLP.

Wilfred Tombs, Defendant, represented by Clinton E. Curtis, Law Offices of Clint Curtis & Ingrid Morfa, pro hac vice & David D. Benz, Cheney & Blair, LLP.

DECISION AND ORDER

ELIZABETH A. WOLFORD, District Judge.

BACKGROUND

Plaintiff Amayla Thurmond (hereinafter "Plaintiff") commenced this action on August 11, 2014, alleging discrimination in the provision of housing purportedly in violation of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. §§ 3601 et seq. (hereinafter "FHA") when defendant Wilfred Toombs (hereinafter "Toombs") purportedly refused to show Plaintiff property located at 11 Union Street in Geneva, New York, due to the fact that she had two minor children. (Dkt. 1). Plaintiff alleges that Toombs manages the property owned by defendant Margaret Bowman. (Id. ¶ 14). Plaintiff's complaint asserts claims for alleged violations of §§ 804(a) and (c) of the FHA, as codified at 42 U.S.C. §§ 3604(a) and (c). (Id. ¶ 8).

On June 10, 2015, Defendants filed a motion for sanctions pursuant to Fed. R. Civ. P. 37, or in the alternative for spoliation of evidence and injunctive relief pursuant to Fed. R. Civ. P. 65. (Dkt. 37). The motion related to certain alleged Facebook posts of Plaintiff. This Court referred the motion for a preliminary injunction to Magistrate Judge Payson for a Report and Recommendation. (Dkt. 39). Then, on June 12, 2015, Defendants filed a second motion for sanctions, involving the same issue related to the Facebook posts. (Dkt. 40).

Pursuant to the scheduling order issued by the Court, Plaintiff filed papers in opposition to the motions on June 25, 2015. (Dkt. 51-53). Defendants filed reply papers on July 10, 2015. (Dkt. 59). On July 28, 2015, Judge Payson conducted an evidentiary hearing (Dkt. 67), and it was continued on November 18, 2015 (Dkt. 79). On February 16, 2016, Defendants filed their post-hearing submission (Dkt. 84), and Plaintiff filed her post-hearing submission on March 10, 2016 (Dkt. 88).
On March 31, 2016, Judge Payson issued a thorough Decision & Order and Report & Recommendation, denying Defendants' motion for sanctions and recommending that the motion for a preliminary injunction also be denied. (Dkt. 89) (hereinafter "Judge Payson's Decision"). On May 2, 2016, Defendants filed objections to Judge Payson's Decision. (Dkt. 91).

STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 636(b)(1)(A), "a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief. . . . A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). In addition, pursuant to 28 U.S.C. § 636(b)(1)(B), "a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A). . . ." Id. § 636(b)(1)(B). If objections to the proposed findings and recommendations are filed, "[a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." Id. § 636(b)(1). These requirements are supplemented by this Court's local rules, which provide with respect to nondispositive matters, that "[t]he specific matters to which the order is clearly erroneous or contrary to law shall be clearly set out in the objections." Local R. Civ. P. 72(a). With respect to dispositive motions, the local rules provide that any objections must "specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for each objection, and shall be supported by legal authority." Id. 72(b).

Thus, Defendants' objections to Judge Payson's determination with respect to the denial of the motion for a preliminary injunction are reviewed under a de novo standard of review, assuming Defendants have complied with this Court's local rules and filed specific objections to the proposed findings and recommendations of Judge Payson. With respect to the request for sanctions, any non-dispositive spoliation sanctions issued by Judge Payson would be reviewed under a clearly erroneous/contrary to law standard of review, while a recommendation concerning a request for sanctions in the form of dispositive relief, such as dismissal of the lawsuit, requires de novo review. Thomas E. Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522, 525 (2d Cir. 1990) ("Monetary sanctions pursuant to Rule 37 for noncompliance with discovery orders usually are committed to the discretion of the magistrate, reviewable by the district court under the `clearly erroneous or contrary to law' standard. . . . [H]owever, the imposition of certain sanctions under Rule 37, in some instances, may be considered `case-dispositive,' requiring de novo review." (citations omitted)); see also Dorchester Fin. Holdings Corp. v. Banco BRJ S.A., 304 F.R.D. 178, 180 (S.D.N.Y. 2014) (magistrate judge to whom pretrial proceedings, including non-dispositive motions, have been referred, has the authority to impose sanctions for spoliation, including the preclusion of evidence, so long as those sanctions are non-dispositive, and the review of any such non-dispositive decision is under a clearly erroneous or contrary to the law standard, but dispositive spoliation sanctions, such as dismissal, could only be recommended and that recommendation is subject to de novo review); Khaldei v. Kaspiev, 961 F. Supp. 2d 572, 575 (S.D.N.Y. 2013) (reviewing magistrate judge's denial of motion for spoliation sanctions under a clearly erroneous or contrary to law standard of review).

The clearly erroneous/contrary to law standard of review is "highly deferential" and "a district court may reverse the order only if on the entire evidence, the district court is left with the definite and firm conviction
that a mistake has been committed." Rodriguez v. Pie of Port Jefferson Corp., 48 F. Supp. 3d 424, 425 (E.D.N.Y. 2014) (quotations and citations omitted); see also Khaldei, 961 F. Supp. 2d at 575 (explaining that an order "is contrary to law if it fails to apply or misapplies relevant statutes, case law or rules of procedure" (quotation omitted)); Flaherty v. Filardi, No. 03 Civ. 2167(LTS)(HBP), 2009 WL 749570, at *19 (S.D.N.Y. Mar. 20, 2009) ("The clearly erroneous standard is highly deferential, and magistrate judges are afforded broad discretion in resolving non-dispositive disputes. . . ." (internal quotation marks and alterations omitted)). On the other hand, de novo review requires a district court to arrive at its own independent conclusion, although it need not "specifically articulate all of its reasons for rejecting a party's objections." Smith v. Marcellus, 917 F. Supp. 168, 170 (W.D.N.Y. 1995).

ANALYSIS

Here, Defendants have sought both dispositive and non-dispositive relief with their request for sanctions. Under either the more deferential clearly erroneous/contrary to law standard, or an independent de novo review, this Court's conclusion is the same — Defendants are not entitled to sanctions.

As recognized by Judge Payson, "[a] party bringing a spoliation motion must demonstrate the following: (1) the party who purportedly destroyed the evidence had an obligation to preserve it; (2) the evidence was destroyed `with a culpable state of mind'; and (3) the destroyed evidence was relevant to the party's claim or defense." (Dkt. 89 at 15 (citing Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002), Arista Records LLC v. Usenet.com, Inc., 608 F. Supp. 2d 409, 430 (S.D.N.Y. 2009); and Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003)). Defendants do not challenge the legal standard cited by Judge Payson, but rather they challenge her factual findings and legal conclusions with respect to each one of those elements.

With respect to the duty to preserve, Judge Payson concluded as follows:

The motions before the Court indeed raise interesting and complex issues about the duty to preserve information in social media accounts, particularly in cases of alleged discrimination involving claims for emotional distress damages. Here, however, I need not attempt to resolve them because, even assuming arguendo that [Plaintiff] had a duty to preserve her social media accounts when she commenced the action, I conclude that the three posts that defendants have proved were deleted from her Facebook page were deleted inadvertently and were not relevant to this litigation.

(Dkt. 89 at 15-16). Defendants challenge this determination, contending at a minimum that defense counsel's email to Plaintiff's counsel on December 18, 2014,[4] created a duty to preserve her social media posts. (Dkt. 91 at 3). However, Defendants' argument overlooks that Judge Payson agreed for purposes of deciding the motion that a duty to preserve had been established. Therefore, Defendants' objections do not provide any basis to set aside Judge Payson's Decision.

With respect to the second and third elements — culpability and relevance — Judge Payson determined that, in fact, most of Plaintiff's posts had not been deleted, but rather were "simply hidden from defendants' view due to an apparent modification of [Plaintiff's] security settings." (Dkt. 89 at 17). Judge Payson concluded that "no credible evidence in the record demonstrates that [Plaintiff] intentionally or with bad faith deleted posts from her Facebook account." (Id. at 18). According to Judge Payson, only three postings appeared to be missing, and "at worst, [the posts were] negligently deleted." (Id. at 18). Moreover, Judge
Payson determined that Defendants failed to even attempt to demonstrate relevance, and in fact, the three postings that were missing were not relevant. (Id. at 24).

Defendants object to this finding, contending that Plaintiff's alleged failure to implement a litigation hold after the December 18, 2014 email establishes the requisite culpability. Defendants go on to quarrel with the credibility determinations made by Judge Payson, arguing that she "preferred to believe Plaintiff, who perjured herself several times during these proceedings, over a member of the New York Bar." (Dkt. 91 at 9). While still failing to establish relevance, and indeed appearing to acknowledge that the three postings that were deleted were not relevant, Defendants contend that Plaintiff's culpability, by definition, establishes the requisite relevance as a matter of law. (Id. at 10-13).

In the first instance, even under a de novo standard of review, it is inappropriate for this Court to reject out-of-hand Judge Payson's credibility determinations, made after assessing the various witnesses during the course of a two-day evidentiary hearing. "The Second Circuit has instructed that where a Magistrate Judge conducts an evidentiary hearing and makes credibility findings on disputed issues of fact, the district court will ordinarily accept those credibility findings." United States v. Lawson, 961 F. Supp. 2d 496, 499 (W.D.N.Y. 2013) (citing Carrion v. Smith, 549 F.3d 583, 588 (2d Cir. 2008); and Grassia v. Scully, 892 F.2d 16, 19 (2d Cir. 1989)); see also United States v. Raddatz, 447 U.S. 667, 675-76 (1980) (district court is not required to rehear witness testimony when accepting a magistrate judge's credibility findings). Here, based upon the Court's review of the record, including the transcripts of testimony before Judge Payson, the Court concludes that Judge Payson's credibility determinations are well supported by the record.

Moreover, Judge Payson correctly concluded that, at best, it appeared that three postings had been inadvertently deleted, but the rest of the postings were simply hidden from view once Plaintiff changed her privacy settings. In fact, the five specific posts that Defendants had claimed were deleted in their sanctions motion were actually produced by Plaintiff during the evidentiary hearing, demonstrating quite plainly the inaccuracy of Defendants' allegations about the destruction of evidence. (Dkt. 89 at 18).

In essence, Defendants ask that this Court conclude that the failure to formally implement a litigation hold after defense counsel sent an email to Plaintiff's counsel in December 2014, demonstrates gross negligence, which correspondingly establishes relevance as a matter of law, and therefore, according to Defendants' logic, they have satisfied the second and third requisite elements for sanctions. While it is true that the failure to implement a litigation hold can constitute gross negligence, Toussie v. Cty. of Suffolk, No. CV 01-6716(JS)(ARL), 2007 WL 4565160, at *8 (E.D.N.Y. Dec. 21, 2007), and "a showing of gross negligence in the destruction or untimely production of evidence will in some circumstances suffice, standing alone, to support a finding that the evidence was unfavorable to the grossly negligent party," Residential Funding Corp., 306 F.3d at 109 (emphasis added).[5] Defendants' argument in this regard misses the point — there has been no wholesale destruction of evidence in this case. Rather, Plaintiff simply changed her privacy settings so that it appeared to defense counsel that the Facebook postings were deleted, but they were not. As noted by Judge Payson, Defendants moved for spoliation sanctions before even serving a discovery demand seeking the production of Plaintiff's social media accounts, and had they bothered to serve a discovery demand, they would have learned that, contrary to their unfounded belief, Plaintiff's postings were merely hidden from Defendants' view. (Dkt. 89 at 25). Moreover, as recognized by the Court in Toussie, a case relied upon by Defendants, even where a party acts in a grossly negligent manner resulting in the loss of evidence, it is only in the most egregious cases that relevance is determined as a matter of law. 2007 WL 4565160, at *8. That is simply not the case here.
Finally, nowhere in Defendants' objections do they reference their request for a preliminary injunction, which sought an order preventing Plaintiff from accessing her social media accounts during the pendency of this proceeding. Judge Payson recommended as follows with respect to the preliminary injunction motion:

I recommend that defendants' motion for preliminary injunctive relief be denied. Defendants now have a printed copy of Thurmond's Facebook posts during the months prior and subsequent to the alleged discrimination and certainly have had an adequate period of time within which to print or record her Instagram posts. Of course, should the district court agree that no need exists for injunctive relief, that decision would not relieve Thurmond of any independent duty she has to preserve relevant evidence.

(Dkt. 89 at 25). Because Defendants did not file any specific objections to the denial of the request for a preliminary injunction, this Court need not review that recommendation under a de novo standard of review. Greene v. WCI Holdings Corp., 956 F. Supp. 509, 517 (S.D.N.Y. 1997). However, even reviewing that recommendation de novo, the Court agrees with Judge Payson's determination based upon its review of the record in this case and for the reasons set forth in Judge Payson's thorough and detailed analysis. Defendants have plainly failed to satisfy the standard under Fed. R. Civ. P. 65 for the granting of a preliminary injunction.

CONCLUSION

As a result, based on Judge Payson's thorough and detailed Decision & Order and Report & Recommendation, the parties' submissions to Judge Payson, the transcripts of the proceedings before Judge Payson, and Defendants' objections filed with this Court, the Court concludes that Defendants have failed to satisfy the standard for the requested sanctions or a preliminary injunction, and therefore, the Court adopts Judge Payson's Report and Recommendation in its entirety. Defendants' objections (Dkt. 91) are overruled, and Defendants' motions for sanctions and a preliminary injunction (Dkt. 37, 40) are denied.

SO ORDERED.

[1] The caption of the complaint identifies Wilfred "Tombs" as a defendant, although it appears as though the proper spelling is "Toombs."

[2] Judge Payson's Decision also denied Defendants' motion to disqualify Plaintiff's counsel (Dkt. 69), but that motion is not before this Court.

[3] In Kiobel v. Millson, 592 F.3d 78 (2d Cir. 2010), the Second Circuit Court of Appeals left unresolved the issue of whether a magistrate judge has the power to impose sanctions pursuant to Fed. R. Civ. P. 11, although all judges on that split panel appeared to recognize the continuing vitality of Thomas E. Hoar and the ability of magistrate judges to impose non-dispositive sanctions for discovery violations. Id. at 86 (Cabranes, J., concurring) (although rejecting the idea that a magistrate judge has the power to sanction under Rule 11, explaining that sanctions under Rule 37 are different because "discovery disputes are within the core statutory authority of magistrate judges, and it is not surprising that Congress and the courts would grant magistrate judges broader power over the regulation of discovery."). But see Diversified Control, Inc. v. Corning Cable Sys., LLC, No. 05-CV-0277(A)(M), 2010 WL 1371662, at *2 n.2 (W.D.N.Y. Apr. 6, 2010) (suggesting that the Second Circuit's uncertainty expressed in Kiobel "suggests that this uncertainty may now also extend to a Magistrate Judge's authority to impose non-dispositive sanctions under Rule 37").

[4] As noted in Judge Payson's Decision, this email conveyed a settlement offer and also contained a warning about "the concept of spoilage so [Plaintiff] does not try to delete her text messages and facebook account." (Dkt. 89 at 2).

[5] As recognized by Judge Payson, Fed. R. Civ. P. 37 was amended effective December 1, 2015, and that amendment has been interpreted as overruling the holding in Residential Funding Corp. See, e.g., Thomas v. Butkiewicz, CIVIL ACTION NO. 3:13-CV-747 (JCH), 2016 WL 1718368, at *7-8 (D. Conn. Apr. 29, 2016); CAT3, LLC v. Black Lineage, Inc., 14 Civ. 5511 (AT)(JCF), 2016 WL 154116, at *4-5 (S.D.N.Y. Jan. 12, 2016). However, neither party advocated for retroactive application of the current version of Rule 37 and Judge Payson conducted her analysis under the pre-December 2015 framework. (Dkt. 89 at 16 n.6).
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I. Defendants’ Sanctions Motions

Thurmond’s claim in this case arises from her alleged attempt to rent an apartment in a building owned by Bowman and managed by Toombs. (Docket # 1). According to the complaint, Thurmond contacted Toombs on December 28, 2012 to inquire about an apartment that was advertised for rent. (Id. at ¶¶ 13–15). Thurmond alleges that although Toombs indicated that the apartment was available, Toombs refused to rent the apartment to her after learning that her two young children would be living with her. (Id. at ¶¶ 16–19). According to the complaint, Toomb’s refusal to rent to her caused her to continue to be homeless and to be separated from her youngest daughter. (Id. at ¶ 27).

Thurmond commenced this action on August 11, 2014. (Id.). Defendants contend that sometime in November or December 2014 their counsel located several of Thurmond’s social media accounts, including Facebook, Instagram and Twitter accounts. (Docket # 37–1 at ¶¶ 4–5). According to defendants, they considered relevant several posts on those accounts and saved “screenshots” of a few of the Facebook posts. (Id. at ¶ 6 and Exhibit (“Ex.”) A; Docket # 82 at 29).

On December 18, 2014, counsel for defendants emailed counsel for Thurmond to convey a settlement offer (“the December 18, 2014 email”). (Docket # 37–1 at Ex. B). Among other things, the email stated:

[Settlement] will be beneficial to your client because all parties’ lives become open to public inspection. From what my PI tells me this may not be of an advantage to your client. Cases such as these have the potential of reaching national attention. That provides an even greater level of scrutiny. When you address this fact let her know about the concept of spoilage so she does not try to delete her text messages and facebook account.

(Id.).

In a May 15, 2015 letter to the Court from counsel for Thurmond relating to another motion, Thurmond’s counsel acknowledged that her client had Facebook and Instagram accounts and indicated that the accounts were

FACTUAL BACKGROUND

PRELIMINARY STATEMENT

*1 Amayla Thurmond (“Thurmond”) has commenced this action against Margaret Bowman (“Bowman”) and Wilfred Toombs (“Toombs”) (collectively, “defendants”) asserting violations of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq. (Docket # 1). Currently before the Court are defendants’ motions for sanctions and a preliminary injunction enjoining Thurmond from “accessing” her social media accounts during the pendency of this action (Docket # # 37, 37–1 at ¶ 27, 40) and their motion to disqualify Thurmond’s counsel (Docket # 69). For the reasons discussed below, defendants’ motions for sanctions and disqualification of counsel are denied. I further recommend denial of defendants’ motion for a preliminary injunction.
private and could be viewed only by people authorized by Thurmond. (Docket # 28). In a May 19, 2015 affidavit filed with the Court, Thurmond affirmed that she had Facebook and Instagram accounts, both of which were private and could be viewed only by individuals authorized by Thurmond. (Docket # 31 at ¶ 3).

On May 21, 2015, by order to show cause, defendants applied for an order imposing sanctions for spoliation of evidence and a preliminary injunction prohibiting Thurmond from accessing her social media accounts during the pendency of this action. (Docket # 32). Counsel’s supporting declaration asserted that he viewed Thurmond’s Facebook account at the same time as he received Thurmond’s counsel’s May 15 letter and observed posts “disappearing” from view on that account. (Docket # 32–1 at ¶ 9). According to defendants’ counsel, among the deleted posts were two posts from December 28, 2012, the date of the alleged discrimination, and one from two days later. (Id. at ¶ 8). Counsel affirmed that “when [p]laintiff’s Facebook page is observed, there is an obvious gap of posts between December 24, 2012 and May 11, 2014.” (Id. at ¶ 9 and Ex. C).

At oral argument on a different motion on May 21, 2015, the Court explained that it did not have authority to grant injunctive relief, but addressed with counsel the subject of a preservation order. Thurmond’s counsel indicated that Thurmond would be willing to stipulate to an order restricting her from deleting, altering, or moving any posts from her social media accounts while the order to show cause was pending. The Court instructed the parties to confer regarding the precise language of the preservation order and prohibited Thurmond from deleting, altering, or moving any social media posts pending entry of the written preservation order. Thurmond’s counsel agreed to inform Thurmond forthwith of the Court’s order.

On May 22, 2015, the Clerk of the Court notified defendants that their order to show cause application did not comply with the Local Rules for the Western District of New York and would need to be refiled. On June 9, 2015, Thurmond’s counsel wrote to the Court to express her view that a preservation order “no longer makes sense” in view of the deficient order to show cause. (Docket # 46). The next day, defendants filed the pending motion for an order imposing sanctions for spoliation and granting preliminary injunctive relief.2 (Docket # 37). The motion reiterates the allegations and contentions raised in the previously-filed order to show cause. (Compare Docket # 32 with Docket # 37).

In response to the June 9 letter from Thurmond’s counsel, this Court entered a letter order providing:

The Court understood that plaintiff’s counsel at oral argument voluntarily agreed to the terms of a preservation order pending resolution of defendant’s motion. That motion has been refiled. If plaintiff is no longer agreeable to negotiate a preservation order, counsel shall so advise this Court, and defendants shall submit a proposed order to this Court, which this Court shall review and approve, deny, or modify after reviewing comments by plaintiff’s counsel. Pending a stipulated agreement or judicial decision on a proposed preservation order, plaintiff shall not alter her social media accounts.

(Docket # 46).

In their refilled motion, defendants maintain that spoliation sanctions are warranted for the missing Facebook posts. (Docket # 37–1 at ¶¶ 11–27). According to defendants, Thurmond was on notice at least as of the date of the December 18, 2014 email that her Facebook postings might be relevant to the litigation. (Id. at ¶ 11). Defendants maintain that Thurmond’s posts are relevant because they provide evidence of Thurmond’s emotional state and living circumstances after the alleged discrimination. (Id. at ¶¶ 12–13). According to defendants, the missing posts would have demonstrated that she lived with her sister, despite her claim of “homeless[ness],” and was “happy and at a good place in her life,” despite her claim of emotional distress. (Id.). Defendants contend that Thurmond intentionally deleted these relevant posts and thereby impaired defendants’ ability to prove their defenses. (Id. at ¶¶ 16–22, 27). According to defendants, Thurmond’s conduct justifies sanctions and, if an order of dismissal is not granted, an order enjoining Thurmond from accessing her social media accounts during the pendency of this action. (Docket # 37–9).

On June 12, 2015, defendants filed a second motion for sanctions on the grounds that Thurmond violated this Court’s verbal preservation order by deleting posts from her Facebook account. (Docket # 40). According to defendants’ counsel, on May 21, 2015, he accessed Thurmond’s Facebook account and printed the posts that were displayed. (Docket # 40–1 at ¶ 6 and Ex. A). Those
posts consisted of Thurmond’s profile pictures and cover photographs with associated comments between March 24, 2013 and July 28, 2014, and three posts dated March 20, 2013, December 20, 2013, and December 24, 2013 and July 28, 2014, and three posts dated March 4, 2013 and July 13, 2014) had been deleted. (Id. at ¶ 11 and Ex. D). Defendants maintain that the deleted posts are relevant and their deletion “has resulted in extreme prejudice ... and has made it impossible to properly defend or pursue [their anticipated fraud] counterclaim.” (Id. at ¶¶ 17, 19).

On June 19, 2015, Thurmond’s counsel informed the Court that although Thurmond’s social media posts were not relevant to the litigation, she nevertheless was willing to consent to an order preventing her from deleting any social media posts from the time period between December 2012 and March 2013. (Docket # 48). In response, the Court directed the parties to work together to agree on a proposed stipulation and order. (Id.). The parties could not agree and separately submitted proposed preservation orders to the Court.

Using the version submitted by Thurmond, this Court entered a written temporary preservation order on July 16, 2015, prohibiting Thurmond from making any “changes, alterations, or deletions to her social media accounts, including but not limited to Facebook, Instagram and Twitter accounts, for postings covering the time period October 2012 through the present.” (Docket # 63).

On June 25, 2015, Thurmond filed her opposition to both sanctions motions. (Docket # 51). Thurmond maintains that her social media posts are not relevant to this litigation. (Id.). According to Thurmond, she has asserted a “claim for garden variety emotional distress” and does not claim to have sought medical treatment for the emotional damages claimed in the complaint. (Id. at ¶¶ 4–5). Additionally, Thurmond maintains that between December 28, 2012, the date of the alleged discrimination, and March 1, 2013, the date that she secured housing for herself and her children, she alternated between staying with her sister and staying with a friend. (Id. at ¶ 6). Thurmond maintains that she has never alleged that she was living on the street or in a homeless shelter. (Id. at ¶ 6). According to Thurmond, these facts demonstrate that her social media posts are not relevant. (Id. at ¶ 7).

Thurmond also maintains that she has not deleted any Facebook posts. (Id. at ¶ 8). In a sworn affidavit submitted in opposition to the motions, Thurmond stated that she believed that when she created her Facebook account she had employed settings to permit only her Facebook “friends” to view her account. (Docket # 52 at ¶ 2). She also stated that she had not deleted or removed any Facebook posts since May 15, 2015, when she was advised by her attorney that the Court had directed her not to make any deletions. (Id. at ¶ 3). According to Thurmond, between May 15, 2015 and June 17, 2015, she “hid” two or three posts from her timeline that had been posted by other people and in which she had been “tagged.” (Id. at ¶ 4). Thurmond indicated that the posts had not been deleted and were not relevant to the subject matter of this litigation. (Id.). Thurmond also stated that if the defendants were unable to view her entire page, “it may be because I adjusted the privacy settings on my account to ensure that only people I have ‘friended’ can see my posts.” (Id. at ¶ 6).

II. July 28, 2015 Evidentiary Hearing

On July 28, 2015, this Court held an evidentiary hearing. (Docket # 66). During the hearing, defendants presented testimony from two attorneys employed by defendants’ counsel’s law firm, Ingrid Morfa (“Morfa”) and Sylvain Robitaille (“Robitaille”). (Tr. B 5–25, 26–31). Defendants also called Thurmond to testify. (Tr. A 3–37). Morfa testified that she is a partner at the Law Offices of Clint Curtis and Ingrid Morfa and has assisted in the defense of this matter. (Tr. B 5). Morfa testified that she observed Thurmond’s Facebook and Instagram accounts and that the information that she viewed was accessible to the public. (Tr. B 5–6). According to Morfa, neither she nor any one working with her is “friends” with Thurmond on Facebook. (Tr. B 6).

Morfa testified that she first observed Thurmond’s Facebook page sometime between December 15 and 20, 2014. (Tr. B 11–12). At that time, according to Morfa, there were “hundreds” of posts. (Tr. B 7). On May 15, 2015, Morfa looked again at Thurmond’s Facebook page and observed that many posts were able to be viewed, but hundreds were missing. (Tr. B 12–13). Morfa testified that she also viewed the page on July 27, 2015. (Tr. B 13–14). At that time, only one post was displayed on the page. (Tr. B 13). According to Morfa, several posts that were visible in December 2014 were no longer visible. (Tr. B 7–10; Defendants’ Exhibits (“D.Ex.”) 1–4).

Morfa also testified that she viewed Thurmond’s Instagram account in December 2014 and on May 15, 2015,
2015; on May 15, 2015, the account was viewable by the public, and Morfa was able to view various photographs posted to Thurmond’s page and saw some of the same photographs that she had seen in December 2014. (Tr. B 14–20; D. Exs. 7–10). According to Morfa, she also saw some of the same posts on July 27, 2015. (Tr. B 16–20). Morfa testified that she does not “follow” Thurmond on Instagram and was able to view the photographs posted to Thurmond’s Instagram account because it was accessible by the public. (Tr. B 20–21).

According to Morfa, some but not all of the posts on Thurmond’s Instagram account were also posted on her Facebook account. (Tr. B 21). Morfa believed that Thurmond’s Facebook account contained more information than her Instagram account. (Tr. B 23). For example, Morfa testified, one of Thurmond’s Facebook friends had posted information suggesting that Thurmond “was living somewhere new.” (Tr. B 23). Morfa did not testify as to the date of that posting or the date she viewed it.

Morfa testified that postings may be deleted from a Facebook account through a multi-step process. (Tr. B 24–25). According to Morfa, posts may also be hidden from an individual’s Facebook page on a post-by-post basis or all at once by altering the security settings. (Tr. B 24–25).

Robitaille testified that he is a partner at the Law Offices of Clint Curtis and Ingrid Morfa and has also assisted in the defense of this action. (Tr. B 26–27). Robitaille testified that he viewed some of Thurmond’s social media accounts, including her Facebook account, but that neither he nor any one working with him was “friends” with Thurmond on Facebook. (Tr. B 27). According to Robitaille, he first observed Thurmond’s Facebook page in mid February 2015. (Id.). Robitaille indicated that the page was “pretty active” with hundreds of posts. (Tr. B 27–28). Robitaille testified that when he viewed the page again in mid June 2015, he was only able to observe a single post. (Tr. B 29). Robitaille testified that he also viewed Thurmond’s Instagram account, which was accessible by the public, and it appeared identical at the time of the hearing as it had when he first viewed it. (Tr. B 29–30).

*During the hearing, Thurmond affirmed her signature on her June 25, 2015 affirmation. (Tr. A 8–10; D. Ex. 6). Thurmond testified that, to the best of her knowledge, her Facebook page had always been set to private and she believed only her “friends” were able to view her page. (Tr. A 11–12). Thurmond also testified that she had altered the settings on her Instagram account “quite some time ago” to permit the public to view her Instagram profile. (Tr. A 12).

Thurmond admitted that she was notified by her attorney in mid May 2015 that the Court had entered a preservation order regarding her social media accounts; she testified that her understanding of the order was that it permitted her to add new posts but not to delete existing posts. (Tr. A 13). Thurmond testified that she knew that she should not delete anything, but did not recall whether she understood at the time of the order that she should not “modify” her Facebook page. (Tr. A 28). Thurmond testified that she “hid” two or three posts from her timeline in which she had been tagged by others. (Tr. A 13–14). Thurmond explained that she cannot prevent other users from “tag [ging]” her in posts, but she can “untag” herself if she finds a particular post objectionable or does not want her friends to view it. (Tr. A 31–32).

Thurmond testified that counsel did not tell her in December 2014 to refrain from altering her Facebook account. (Tr. A 30). She also testified that after learning in May 2015 that defendants were able to view her Facebook posts, she reviewed the privacy settings on Facebook to “make sure” that they continued to be set to private. (Tr. A 14, 17). According to Thurmond, when she viewed the settings, they were set to permit only “friends” to view her profile, and she believed that she was not altering her privacy settings. (Tr. A 17–18). She further testified that she did not believe she had deleted any posts between December 2014 and May 2015, although she could not recall for certain. (Tr. A 14–15, 36–37).

Thurmond testified that she executed the May 19, 2015 affirmation that stated, “I have a Facebook and Instagram account, both accounts are private in that only people I have given permission can view the content in these accounts.” (Tr. A 20, 22–23; D. Ex. 5). Thurmond conceded that despite the statement in the affirmation, her Instagram account was not private, as a result of a change she made in her privacy settings “quite some time ago.” (Tr. A 23–24). Thurmond testified to her belief that her Facebook page continued to be private. (Tr. A 24). Thurmond testified that she believed her affirmation was truthful when she signed it even though she had altered her settings to make the Instagram account public “a long time ago.” (Tr. A 25).

In response to questioning by defendants’ counsel, Thurmond admitted that she had provided false information to police officers in the past. (Tr. A 6). She testified that she had told the police that someone else had stolen a television, when in fact she had stolen it. (Tr. A 6). Thurmond testified that she pleaded guilty to a larceny
charge related to the theft. (Tr. A 4).

At the conclusion of the hearing, both Thurmond and her attorney offered to provide a copy of her Facebook account to defendants and the Court. (Tr. A 32). According to Thurmond, review of her Facebook account would confirm that the posts that the defendants had identified as missing were still there. (Tr. A 30).

III. Continuation of Evidentiary Hearing on November 18, 2015

*6 The evidentiary hearing was continued on November 18, 2015, and Thurmond called Osbaldo Arce (“Arce”) to testify and defendants called Bernadette Foley (“Foley”), Thurmond, and Morfa. (Tr. C 5–37). Arce testified that he is employed by Legal Assistance of Western New York (“LAWNY”) as a rural test coordinator for the Fair Housing Enforcement Project Unit. (Tr. C 5). On August 7, 2015, Arce met with Thurmond in his office, and Thurmond provided him with her password to access her Facebook account. (Tr. C 5–6). Arce testified that he viewed the account with Thurmond and began the process of printing the material contained in her account. (Tr. C 7–8). With assistance from Foley, over the course of approximately three days, they printed all of the postings between October 29, 2012 and June 14, 2013. (Tr. C 7–9; Plaintiff’s Exhibits (“P.Ex.”) 1–2). Arce testified that he compared the printed set to the Facebook account to ensure that all of the posts had been printed. (Tr. C 10). Arce noted that several posts that defendants had identified as missing or deleted were included in the printed set of posts. (Tr. C 11–12; P. Exs. 1–2). Arce testified that neither he nor anyone else made any deletions or hid any posts during the process. (Tr. C 13).

Foley testified that she had been employed by LAWNY for approximately six months. (Tr. C 17). Foley testified that she assisted Arce to print a set of postings from Thurmond’s Facebook account. (Tr. C 18). Foley testified that Thurmond’s password was kept in a secure place when not in use and that she did not delete, hide, or alter any of the posts on Thurmond’s account. (Id.). Morfa testified that she viewed Thurmond’s Facebook account sometime between December 15 and 20, 2014 and observed a substantial quantity of posts. (Tr. C 25–26, 37). Morfa also reviewed a copy of the printed posts produced by Thurmond. (Tr. C 26–28; D. Exs. A–I). Morfa testified that the copy provided by Thurmond appeared to have the same number of posts for some months as existed when she observed Thurmond’s Facebook page in December 2014. (Tr. C 28). Other months, however, including February and April through May 2013, appeared to have significantly fewer posts than when Morfa saw the account in December 2014. (Tr. C 28–29). According to Morfa, she recalled seeing posts in December 2014 that referenced “events and going out and parties” that were not included in the set of posts produced by Thurmond. (Tr. C 29).

Morfa testified that when she viewed Thurmond’s Facebook account in December 2014, she saved some “screen shots” of the posts. (Tr. C 29). One of the screen shots captured a post made on March 27, 2013 and part of the post above it, which appeared to be a photograph of a child’s arm. (Tr. C 30; D. Ex. J). According to Morfa, that partial picture does not appear in the set of posts provided by Thurmond. (Tr. C 29–30; D. Ex. D; P.Ex. 2).

Morfa also testified that another December 2014 screen shot captured a post dated February 20, 2013. (Tr. C 32; D. Ex. K). The post contained a photograph of a child dressed in pajamas sitting on the floor in front of a black and gold couch. (Tr. C 32; D. Ex. K). According to Morfa, this post is also missing from the printed set of posts produced by Thurmond. (Tr. C 33; D. Ex. E; P.Ex. 2).

Finally, Morfa testified about a third missing post, which had appeared in her December 2014 screen shots. (Tr. C 34; D. Ex. L). The post, dated January 16, 2013, contains a photograph of a child’s face. (Tr. C 34–35; D. Ex. K). Morfa testified that this post is also missing from the set of posts that Thurmond produced. (Tr. C 34–36; D. Ex. F; P.Ex. 2).

IV. Post–Hearing Submissions

In their post-hearing submission, defendants contend that Thurmond had a duty to preserve her Facebook postings that arose when she commenced this action on October 24, 2014 or, at the very latest, on December 18, 2014, when her counsel received the December 18, 2014 email. (Docket # 84 at 4). Defendants maintain that Thurmond’s
Facebook posts are relevant because they reflect her emotional state after the alleged discrimination. (Id. at 6, 8). They also maintain that her Facebook posts refute her allegations of homelessness and separation from her children. (Id. at 8).

*7 Thurmond counters that defendants have failed to establish that any of her Facebook posts are relevant to this litigation, much less that she has deleted any relevant postings. (Docket # 88 at ¶¶ 3–6). According to Thurmond, defendants have identified only three posts that were deleted from Thurmond’s Facebook account. (Id.). Thurmond maintains that the missing posts were deleted inadvertently and were similar to other posts remaining on the account, which defendants have and may use in their defense. (Id.).

Finally, Thurmond concedes that her May 19, 2015 affirmation inaccurately states that her Instagram account was private. (Id. at ¶ 18). According to counsel, the error occurred as a result of counsel’s careless drafting and was not intended to mislead the Court. (Id. at ¶¶ 19–25). Thurmond disputes any contention that the inaccurate statement could be viewed as material because Thurmond’s Instagram account is not the subject of any spoliation allegation. (Id.).

DISCUSSION

I. Spoliation of Facebook Postings


A party bringing a spoliation motion must demonstrate that: (1) the party charged with destroying the evidence had an obligation to preserve it; (2) the records were destroyed with a “culpable state of mind”; and, (3) the destroyed evidence was relevant to the party’s claim or defense. Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d at 107 (citing Byrne v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 107–08 (2d Cir. 2001)); see also Arista Records LLC v. Usetnet.com, Inc., 608 F.Supp.2d 409, 430 (S.D.N.Y. 2009); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003).

A. Duty to Preserve


*8 The motions before the Court indeed raise interesting and complex issues about the duty to preserve information in social media accounts, particularly in cases of alleged discrimination involving claims for emotional distress damages. Here, however, I need not attempt to resolve them because, even assuming arguendo that Thurmond had a duty to preserve her social media accounts when she commenced the action, I conclude that the three posts that defendants have proved were deleted from her Facebook page were deleted inadvertently and were not relevant to this litigation.
B. Culpability

“[A] finding of bad faith or intentional misconduct is not a sine qua non to sanctioning a spoliator.” Reilly v. NatWest Mkts. Grp. Inc., 181 F.3d at 268. Rather, a finding of gross negligence will satisfy the “culpable state of mind” requirement, as will knowing or negligent destruction of evidence. Id.; Residential Funding Corp., 306 F.3d at 108 (“[t]he sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence”), superseded by rule as recognized by CAT3, LLC v. Black Lineage, Inc., 2016 WL 154116 at *4; Zubulake, 220 F.R.D. at 220 (“a ‘culpable state of mind’ for purposes of a spoliation inference includes ordinary negligence”). “[F]ailure to implement a litigation hold at the outset of litigation amounts to gross negligence.” Toussie v. County of Suffolk, 2007 WL 4565160, *8 (E.D.N.Y. 2007); see also Chan v. Triple 8 Palace, Inc., 2005 WL 1925579, *7 (S.D.N.Y. 2005) (“the utter failure to establish any form of litigation hold at the outset of litigation is grossly negligent”); Zubulake, 220 F.R.D. at 220–21 (“[o]nce the duty to preserve attaches, any destruction of evidence is, at a minimum, negligent”; failure to preserve backup tapes following issuance of lawsuit was grossly negligent); Barsoum v. NYC Hous. Auth., 202 F.R.D. 396, 400 (S.D.N.Y. 2001) (loss of tape recording of conversation was grossly negligent). In contrast, where the document destruction is accidental or without fault, courts have found mere negligence. See, e.g., Port Auth. Police Asian Jade Soc’y of N.Y. & N.J. Inc. v. Port Auth. of N.Y. & N.J., 601 F.Supp.2d 566, 570 (S.D.N.Y. 2009) (destruction of documents following September 11, 2001 terrorist attacks was negligent); Davis v. Speechworks Int’l, Inc., 2005 WL 1206894, *4 (W.D.N.Y. 2005) (no culpability where documents were lost during a move).

*9 Despite defendants’ contentions that Thurmond engaged in widespread deletion of posts from her Facebook account, the evidence adduced during the evidentiary hearing demonstrates that the majority of Thurmond’s posts remain accessible on her account, have not been deleted, but were simply hidden from defendants’ view due to an apparent modification of Thurmond’s security settings. The reasonable conclusion from the evidence adduced at the hearing is that Thurmond’s Facebook account was publically accessible until approximately May 15, 2015 when Thurmond adjusted the privacy settings to make the account accessible only to her Facebook “friends,” an adjustment that removed postings from public view but did not delete them. Thurmond has now produced hundreds of postings from her Facebook account that were posted between October 2012 and June 2013. That period of production spans a few months prior to the alleged discrimination through six months after the incident. Although Morfa testified generally that she believes that Thurmond’s printed posts for a few of the months during that period contain substantially fewer posts than she saw in December 2014, she was able to identify only three particular posts described supra. The rest of her testimony is simply too vague as to timing and content to support a finding that other posts were deleted.4

Indeed, although defendants’ sanctions motions charged Thurmond with deleting a substantial quantity of relevant posts, those submissions in fact identified only five specific posts between the period of October 2012 and June 2013 that were allegedly deleted. (Docket # # 37, 40). Significantly, each of those five posts – two dated December 28, 2012 (one of which referred to a child’s design and the other which referred to Thurmond’s inactivity), one dated December 30, 2012 (complaining about snow plowing), a post dated March 20, 2013, and a profile picture posted on March 24, 2013 (Docket # # 37–1 at ¶ 8; 40 at ¶ 14 and Ex. A) – was including among the hundreds of printed posts produced to defendants during the hearing. (P. Exs. 1, 2).

In sum, no credible evidence in the record demonstrates that Thurmond intentionally or with bad faith deleted posts from her Facebook account. As discussed below, the three identified posts that were deleted contain photographs of children that are similar to many posts preserved on Thurmond’s page that have been produced to defendants. (Compare D. Exs. J–L with P.Ex. 1–2). Thurmond has offered no explanation for how or why these three posts were deleted, although her attorney posited that the deletions inadvertently occurred during the process of printing and producing the posts to defendants. (Docket # 88 at ¶ 6). I can fathom no reason why Thurmond would intentionally delete those three posts while retaining and producing other similar posts. Thus, the record supports a finding that the posts were, at worst, negligently deleted.

C. Relevance

Finally, the moving party must show that the destroyed evidence was relevant to its claims or defenses. Residential Funding Corp., 306 F.3d at 108. As the Second Circuit has explained in the context of an application for an adverse inference instruction,

[R]elevant in this context means something more than sufficiently probative to satisfy Rule 401 of the Federal
Rules of Evidence. Rather, the party seeking an adverse inference must adduce evidence from which a reasonable trier of fact could infer that “the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction.”

Id. at 108–09 (quoting Kronisch v. United States, 150 F.3d 112, 127 (2d Cir. 1998), overruled on other grounds, Rotella v. Woods, 528 U.S. 549 (2000)). A court may assume that the destroyed evidence was relevant if it was destroyed in bad faith or through gross negligence. Id. at 109. “By contrast, when the destruction of evidence is negligent, relevance must be proven through extrinsic evidence.” Arista Records LLC v. Usenet.com, Inc., 608 F.Supp.2d at 439 (citing De Espana v. Am. Bureau of Shipping, 2007 WL 1686327, ¶6 (S.D.N.Y. 2007)). “This corroboration requirement is even more necessary where the destruction was merely negligent, since in those cases it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to him.” Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 431 (S.D.N.Y. 2004) (quoting Turner v. Hudson Transit Lines Inc., 142 F.R.D. 68, 77 (S.D.N.Y. 1991)). Although a finding that the moving party has been prejudiced is not a prerequisite to the imposition of sanctions, Metropolitan Opera Ass’n, Inc. v. Local 100, Hotel Emps. & Rest. Emps., Int’l Union, 212 F.R.D. 178, 229 (S.D.N.Y. 2003), adhered to on reconsideration by, 2004 WL 1943099 (S.D.N.Y. 2004), before awarding “more severe sanctions –such as dismissal, preclusion, or the imposition of an adverse inference – the court must consider ... whether the innocent party has suffered prejudice as a result of the loss of [relevant] evidence.” Williams v. New York City Transit Auth., 2011 WL 5024280, ¶8 (E.D.N.Y. 2011) (quoting Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F.Supp.2d at 467).

*10 At the conclusion of the evidentiary hearing in this matter, the Court expressed its view that defendants had failed to establish widespread deletion of Facebook posts and that the three posts that were deleted did not seem relevant. Despite the Court’s articulated doubts as to relevance, defendants’ post-hearing submission makes no attempt to demonstrate the relevance of the three posts. Rather, defendants broadly assert that Thurmond’s entire Facebook account is relevant to refute her claim for emotional distress damages and that some of her posts might be relevant to her claims of “homeless[ness]” and separation from one or both of her children. (Docket # 84 at 6, 8).

As an initial matter, I disagree that the entirety of a plaintiff’s social media account is per se relevant to any claim for emotional distress damages. Of course, within the specific factual context of a given case, social media postings may be relevant to particular claims or defenses, including where social media posts may contradict claims of physical or emotional injury. See, e.g., Lewis v. Bellows Falls Congregation of Jehovah’s Witnesses, Bellows Falls, Vt., Inc., 2016 WL 589867, ¶1–2 (D. Vt. 2016) (certain categories of Facebook posts relevant to plaintiff’s claims of “severe, life-changing, permanent, emotional damages”); Reid v. Ingerman Smith LLP, 2012 WL 6720752, ¶1 (E.D.N.Y. 2012) (public portions of plaintiff’s account provide “probative evidence of [plaintiff’s] mental and emotional state, as well as reveal the extent of activities in which she engages”; “plaintiff’s private postings may likewise contain relevant information that may similarly be reflective of her emotional state”); Mailhoit v. Home Depot U.S.A., Inc., 285 F.R.D. 566, 571 (C.D. Cal. 2012) (“[p]laintiff has placed her emotional state at issue in this action and it is conceivable that some [social media] communications may support or undermine her claims of emotional distress”); Holter v. Wells Fargo & Co., 281 F.R.D. 340, 344 (D. Minn. 2011) (“given that plaintiff has placed her employment with and termination of employment from defendant, along with her mental disability and emotional state at issue, the defendant is entitled to information from her social media websites that bear on these topics”); E.E.O.C. v. Simply Storage Mgmt., LLC, 270 F.R.D. 430, 435 (S.D. Ind. 2010) (“[i]t is reasonable to expect severe emotional or mental injury to manifest itself in some [social media] content, and an examination of that content might reveal whether onset occurred, when, and the degree of distress”).

That said, “[a] plaintiff’s entire social networking account is not necessarily relevant simply because he or she is seeking emotional distress damages.” Giacchetto v. Patchogue–Medford Union Free Sch. Dist., 293 F.R.D. 112, 115 (S.D.N.Y. 2013). As some courts have cautioned, “the relationship of routine expressions of mood [in a social media posting] to a claim for emotional distress damages is much more tenuous [than the relationship between a post “reflecting engagement in a physical activity” to a claim for physical injury damages].” Id. at 116 (citing Brown, Kathryn R., The Risks of Taking Facebook at Face Value: Why the Psychology of Social Networking Should Influence the Evidentiary Relevance of Facebook Photographs, 14 Vand. J. Ent. & Tech. L. 357, 365 (2012)) (“[b]ecause social networking websites enable users to craft a desired image to display to others, social scientists have posited that outside observers can misinterpret that impression”). Moreover, “routine status updates and/or communications on social networking websites are not, as a general matter, relevant to [a] claim for emotional distress damages, nor are such communications likely to lead to the discovery of
admissible evidence regarding the same.”

For these reasons, many courts have declined to order wholesale production of a litigant’s social media accounts. See Lewis v. Bellows Falls Congregation of Jehovah’s Witnesses, Bellows Falls, Vt., Inc., 2016 WL 589867, at *2 (defendants were not entitled to “unfettered access to [plaintiff’s] Facebook account ... ‘simply because [p]laintiff has a claim for emotional distress damages’”) (quoting Giacchetto v. Patchogue-Medford Union Free Sch. Dist., 293 F.R.D. at 116); Caputi v. Topper Realty Corp., 2015 WL 893663, *8 (E.D.N.Y. 2015) (declining to “give [d]efendants complete access to [p]laintiff’s Facebook account for the purpose of identifying photographs, postings or private messages that may appear inconsistent with someone experiencing emotional distress”); Johnson v. PPI Tech. Servs., L.P., 2013 WL 4508128, *2 (E.D. La. 2013) (“[s]imply placing their mental and physical conditions at issue is not sufficient to allow [defendant] to rummage through [plaintiffs’] social media sites [...]most every plaintiff places his or her mental or physical condition at issue, and this Court is reticent to create a bright-line rule that such conditions allow defendants unfettered access to a plaintiff’s social networking sites”); Reid v. Ingerman Smith LLP, 2012 WL 6720752 at *2 (“this Court declines to require full disclosure of all materials contained in plaintiff’s social media accounts because not all postings will be relevant to her claims”); Mailhoit v. Home Depot U.S.A., Inc., 285 F.R.D. at 571 (“to be sure, anything that a person says or does might in some theoretical sense be reflective of her emotional state[,] but that is hardly justification for requiring the production of every thought she may have reduced to writing, or, indeed, the deposition of everyone she may have talked to”) (quoting Rozell v. Ross-Holst, 2006 WL 163143, *3–4 (S.D.N.Y. 2006)); Holzer v. Wells Fargo & Co., 281 F.R.D. at 344 (“while everything that is posted on a social media website is arguably reflective of a person’s emotional state[,] this [c]ourt would not allow depositions of every friend and acquaintance to inquire about every conversation and interaction with plaintiff[,] so too, the [c]ourt will not require plaintiff to produce all information from all her social media websites to obtain similar information”).

Defendants’ contention that the deletion of any of Thurmond’s Facebook posts warrants sanctions – on the grounds that every post is potentially relevant to her emotional damages claim – sweeps far too broadly. With respect to the three deleted posts, defendants have failed to articulate any basis upon which to conclude that they are relevant to the issue of emotional distress. I likewise can think of none.

I also reject any suggestion that they are conceivably relevant to Thurmond’s allegations of “homelessness” or separation from her children. Her complaint alleges that both before and after the claimed discrimination by defendants, Thurmond and her oldest daughter alternated between staying at residences belonging to her sister and one of her friends, and her youngest daughter was living with Thurmond’s grandfather and father. (Docket # 1 at ¶ 11–12, 27). Defendants appear to believe that any photograph of Thurmond’s daughters inside a premises is relevant because it may undercut Thurmond’s claim that she was “homeless” or separated from her daughter. Thurmond does not claim that she was living on the street or in a shelter or never saw her children during the relevant period. Rather, she alleges that she alternated between two residences belonging to family and friends. It is reasonable to expect that Thurmond would have photographs of her children inside those premises, and likely inside other locations as well. In the absence of any evidence that the deleted photographs depicted her children living in a premises actually leased by Thurmond – and there is none – I am not prepared to find that she had a duty to preserve every photograph of her children taken inside a location so that defendants may scrutinize them in an effort to identify the precise location.

Accordingly, with respect to the three Facebook posts that are missing from the printed posts produced to defendants (D.Exs.J–L), I find that they are not relevant to this action; in any event, defendants possess two of the postings and part of the third, as well as many other photographs depicting Thurmond’s children. Thus, the deletion of the three posts from Thurmond’s account cannot be said to have harmed defendants in their defense of this action and sanctions for spoliation are not warranted. See Centrifugal Force, Inc. v. Softnet Commc’n, Inc., 783 F.Supp.2d 736, 744 (S.D.N.Y. 2011) (spoliation sanctions not warranted where plaintiffs were able to obtain a copy of deleted email and where “there is nothing to suggest that the deleted email or its attachments would have constituted evidence favorable to plaintiff”); Steuben Foods, Inc. v. Country Gourmet Foods, LLC, 2011 WL 1549450, *3 (W.D.N.Y. 2011) (“[c]ourts have found that actual destruction or loss of relevant documents is a prerequisite for sanctions based on spoliation”) (emphasis added); Schwartz v. FedEx Kinko’s Office, 2009 WL 3459217, *10 (S.D.N.Y. 2009) (denying spoliation sanctions where plaintiff “failed to show that the [lost piece of evidence] is relevant to her claims, as they have been consistently advanced in this litigation”) (collecting cases); Scala v. Electrograph Sys., Inc., 262 F.R.D. 162, 179 (E.D.N.Y. 2009) (sanctions not warranted where “[p]laintiff has produced nothing, aside from speculation, as support for her claim that the destroyed emails would have” been favorable to
her claim).

I note that defendants moved for spoliation sanctions before even serving document discovery requests seeking production of information from Thurmond’s social media accounts. The evidence adduced during the hearing demonstrated that defendants’ motion was premised primarily upon their unfounded belief that Thurmond was engaging in wholesale deletion of her Facebook postings. In reality, the majority of Thurmond’s posts were merely hidden from defendants’ view – a fact that defendants could have learned had they requested the information through discovery.

*12 Finally, I recommend that defendants’ motion for preliminary injunctive relief be denied. Defendants now have a printed copy of Thurmond’s Facebook posts during the months prior and subsequent to the alleged discrimination and certainly have had an adequate period of time within which to print or record her Instagram posts. Of course, should the district court agree that no need exists for injunctive relief, that decision would not relieve Thurmond of any independent duty she has to preserve relevant evidence.

II. Disqualification of Counsel

On August 25, 2015, defendants filed a motion to disqualify Thurmond’s attorney, Laurie Lambrix (“Lambrix”), Esq., and LAWNY, from representing Thurmond based upon a conflict of interest. (Docket # 69). The motion is based upon the following legal and factual predicates: (1) Thurmond’s duty to preserve Facebook evidence arose at the latest by December 18, 2014, when counsel for defendants sent an email to Lambrix advising her to counsel her client against spoliation; (2) as Thurmond testified, Lambrix did not advise Thurmond of her preservation duties until sometime in May 2015; and, (3) Thurmond deleted posts prior to May 15, 2015. (Docket # 69–1 at ¶¶ 4–7, 10). On this record, defendants argue that Lambrix’s failure to advise Thurmond of her preservation duties prior to May 2015 caused the spoliation of relevant social media evidence and subjects Thurmond to sanctions. (Id. at ¶¶ 11–12). Defendants maintain that Lambrix and LAWNY are potentially liable for any potential sanctions, creating a conflict of interest between Lambrix, LAWNY, and Thurmond. (Id. at ¶¶ 13–16).

Thurmond opposes the motion, maintaining that the motion should be denied because there has been no finding that Thurmond spoliated any relevant evidence. (Docket # 73 at ¶¶ 3–4). In any event, Thurmond maintains that defendants have failed to meet the “heavy burden” required to warrant disqualification of counsel. (Id. at ¶ 8; Docket # 74).

On February 19, 2015, defendants filed a second declaration in further support of their motion to disqualify counsel. (Docket # 85). The declaration raises factual allegations not previously addressed and relies upon evidence that is not apparently admissible. (Docket # 85 at Ex. A). Defendants argue that LAWNY violated its internal procedures by failing to record the discrimination testing referred to in the complaint. (Docket # 85 at ¶¶ 5–9). Additionally, defendants maintain that LAWNY failed to investigate adequately the criminal background of the tester in this case. (Id. at ¶¶ 13–17). Defendants maintain that they were damaged as a result of LAWNY’s failures and indicate that they intend to sue LAWNY. (Id. at ¶¶ 17–21). According to defendants, the possibility of that lawsuit creates an additional conflict of interest that mandates LAWNY’s disqualification. (Id.). With respect to these new allegations, Lambrix maintains that defendants are relying on inadmissible evidence, apparently police reports, and that the tester in this case was properly screened prior to employment by LAWNY. (Docket # 88 at ¶¶ 7–11 and Ex. A).

Disqualification is not warranted in this case. Insofar as the potential for spoliation sanctions gives rise to a potential conflict, see Baker v. Dorfman, 2000 WL 1010285, *10 (S.D.N.Y.) (“counsel appeared to argue that any motion for sanctions directed against both client and attorney itself creates a conflict of interest[] if this were true, then the sanctions regime, intended in large part to deter vexatious and dilatory litigation tactics, would itself be another weapon in the arsenal of an attorney or litigant seeking to delay: any motion for sanctions would provide grounds for counsel to withdraw, thus causing further delay”), aff’d in part and vacated in part on other grounds, 232 F.3d 121 (2d Cir. 2000); cf. Fed.R.Civ.P. 11(b) and (c) advisory committee’s note to 1993 amendment (“the court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to avoid immediate conflicts of interest and to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation”), I have already concluded that spoliation sanctions are not warranted. Thus, any potential for conflict has been eliminated.

*13 With respect to defendants’ contentions regarding LAWNY’s compliance or non-compliance with internal
procedures in conducting the testing in this case or the background investigation of the tester, defendants have cited no authority for their proposition that LAWNY owed defendants a legal duty to comply with its internal procedures or that, if one existed, defendants have a viable cause of action against LAWNY on the facts of this case. Defendants’ motion for disqualification on the basis of this speculative potential conflict is denied.

III. Thurmond’s Other Conduct

Although I find that Thurmond has not spoliated relevant evidence, her conduct nonetheless raises two issues of concern to the Court. First, the record demonstrates that Thurmond violated this Court’s May 21, 2015 verbal preservation order by hiding posts from her Facebook page. Second, the record makes clear that Thurmond’s May 19, 2015 affidavit (Docket # 31) submitted in connection with her opposition to defendants’ motion to amend contained a false statement.

A court has the inherent authority to sanction a party or its attorney in order to effectively “manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases.”

Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991). The power may also be exercised in response to a party or attorney who has willfully disobeyed a court order or has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.”


With respect to the Facebook posts, defendants contend that on the evening of May 21, 2015, several posts remained visible on Thurmond’s Facebook account, but that none of the posts, except one dated July 13, 2014, were visible when their counsel subsequently checked the account. (Docket # 40–1 at ¶¶ 6, 11 and Exs. A and D). In response, Thurmond has not denied that some of her posts remained visible on May 21, 2015. Rather, she admitted that she “may have” adjusted the privacy settings on her account to prohibit unauthorized individuals from viewing her Facebook account. (Docket # 52 at ¶ 6). When questioned about that statement at the hearing, she testified that she believed that her account was private and was only attempting to confirm her belief by viewing her privacy settings. (Tr. A 14, 17). Thurmond posited that her act of reviewing her settings may have resulted in the modification of the settings from public to private. (Tr. A 18). With respect to the false statement contained in her affidavit about the Instagram account, Thurmond’s attorney argues that it resulted from counsel’s inadvertent drafting error and failure to review the affidavit with her client before dispatching a paralegal to obtain Thurmond’s signature. (Docket # 88 at ¶¶ 18–25).

By altering her Facebook account, Thurmond violated the Court’s May 21 order. Her conduct had the effect of hiding her postings from public view, and hence from defendants’ counsel’s view. Of course, it does not appear that the postings were deleted, and they remain available for defendants’ use, and defendants have not shown that they were prejudiced by Thurmond’s conduct in violating the order. Nevertheless, it is troubling that the posts were removed from public view after this Court issued a consent order designed to preserve the status quo of her social media accounts. Also troubling is Thurmond’s execution of an affidavit that contained a statement she knew to be inaccurate. Although the false statement was ultimately immaterial to the issues in the pending motions, Thurmond’s willingness to sign the affidavit knowing or having reason to know that it included a false statement threatens the integrity of the judicial process. Thurmond’s conduct in both respects is certainly a fair subject for cross-examination at trial and could result in the impeachment of her credibility.

*14 Although I decline to impose sanctions, see 1800 W. Lake Street, LLC v. Am. Chartered Bank, 2016 WL 232423, *2 (N.D. Ill. 2016) (declining to impose sanctions for submission of false statement in affidavit submitted to Court), my decision should not be interpreted to discount the importance of strict compliance with all Court orders and the exercise of careful attention to all sworn statements made to the Court to ensure their accuracy and truthfulness. Plaintiff is admonished that any instances of future similar conduct are likely to result in sanctions. See id. (“public determination” of “inappropriate” conduct “amounts to a sufficient penalty from the standpoint of deterrence”).

CONCLUSION

For the foregoing reasons, defendants’ motions for sanctions (Docket # # 37, 40) and for the disqualification of plaintiff’s counsel (Docket # 69) are DENIED. I recommend that the district court deny defendants’ request for preliminary injunctive relief (Docket # 37).

IT IS SO ORDERED.
2016 WL 1295957

All Citations

Not Reported in F.Supp.3d, 2016 WL 1295957

Footnotes

1 The caption of the complaint identifies Wilfred “Tombs” as a defendant, although it appears that the proper spelling is “Toombs.” (Docket # 1, 5).

2 The portion of the motion seeking preliminary injunctive relief was referred to this Court for report and recommendation. (Docket # 39).

3 The Court’s order expanded the time period of posts subject to the order from March 2013, as proposed by Thurmond, to the present, as proposed by defendants. (Docket # 63).

4 The transcripts of the hearing held on July 28, 2015 shall be referred to as “Tr. A ___” and “Tr. B ___.” (Docket # 75, 81).

5 The transcript of the hearing held on November 18, 2015, shall be referred to as “Tr. C ____.” (Docket # 82).

6 Effective December 1, 2015, the rule governing spoliation sanctions for destruction of electronically stored information was amended. See Fed.R.Civ.P. 37(e). At least one court has interpreted the amendment to be “more lenient [with respect] to the sanctions that can be imposed for violation of the preservation obligation” and has applied the amended rule retroactively. CAT3, LLC v. Black Lineage, Inc., 2016 WL 154116 at *5. The court reasoned that the amendment to Rule 37 was designed to overrule the holding in Residential Funding Corp., 306 F.3d at 108, which permits the imposition of severe sanctions such as dismissal or an adverse inference in the absence of a showing of bad faith or willfulness. See id. at *4 (citing Fed.R.Civ.P. 37(e) advisory committee’s note to 2015 amendment). Although defendants did note the recent amendment in their submission (Docket # 84 at 8), neither party has advocated for the retroactive application of the current version of Rule 37, and I have applied the pre-December 2015 framework. In any event, given the amended rule’s requirement of a finding of prejudice or an intent to deprive another party of information, I conclude that application of the amended rule would not result in a different outcome in this case.

7 The record before the Court does not demonstrate that Thurmond failed to implement any form of a litigation hold at the inception of the case; that issue was not addressed beyond the issue of the preservation of social media postings.

8 In addition, Morfa testified that she recalled seeing posts relating to social functions, but it was unclear when those posts had been posted and whether they would have been included within the period of posts produced by Thurmond. (Tr. C 29).

9 In response to the Court’s expressed views, defendants’ counsel suggested during the proceedings that the furniture depicted in the background of two of the deleted photographs was relevant to demonstrate the location of Thurmond’s children. Defendants failed to articulate this argument in their post-hearing submission. In any event, in the absence of any other evidence, I reject the notion that the deleted photographs are relevant because they depict a patterned couch that might help determine where Thurmond’s children were at a particular point in time.

10 Amendments to the Federal Rules of Civil Procedure effective December 1, 2015 have altered the scope of discovery to “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed.R.Civ.P. 26(b)(1).

11 The nature of the issues of concern to the Court also implicate the authority to impose sanctions pursuant to Rules 11 and 37.

12 Thurmond also admitted that she “hid” two or three posts from her timeline that had been posted by other people and in which she had been tagged, although it is not clear whether this occurred before or after this Court’s May 21, 2015 verbal order. (Docket # 52 at ¶ 4).
The Computer Fraud and Abuse Act

- The Computer Fraud and Abuse Act, 18 U.S.C. §1030, was enacted in 1984 in response to concerns raised by a Matthew Broderick movie, “WarGames,” about hackers breaking in to defense-related computers. The law, which includes both criminal penalties, §1030(c), and civil remedies, §1030(g), penalizes those who “intentionally accesses a computer without authorization or exceeds authorized access,” §1030(a)(2), and thereby obtains “information from any protected computer,” §1030(a)(2)(C), which includes all computers “used in or affecting interstate or foreign commerce or communication,” §1030(e)(2), which has repeatedly been held to cover any computer connected to the Internet.

- A controversy soon arose over whether simply violating a website’s Terms of Service (TOS) constituted exceeding authorized access. The practice of “data scraping” by journalists and others often violates the TOS of many data-intensive Internet sites.

- Data scraping is “a data collection technique that usually relies on automation—through bots, crawlers, or applications—to extract data from a website. As data collection becomes increasingly important for investigative journalists in particular, legal experts worry about civil and criminal penalties that exist under the statute—which has been described by some First Amendment advocates as unconstitutionally vague.” See Baranetsky, D. Victoria, Data Journalism and the Law, Colum. J. Rev. (September 19, 2018), https://www.cjr.org/tow_center_reports/data-journalism-and-the-law.php.

- A 2016 case out of the Ninth Circuit inflated those concerns. The court in Facebook v. Power Ventures, 844 F.3d 1058 (9th Cir. 2016), ruled that while violating the TOS alone was not sufficient to establish liability under the CFAA, such a violation coupled with a cease and desist letter that includes notice of the violation of the TOS would be. In that case, Power Ventures was allowing its customers to update their Facebook profiles through its own website, a practice Facebook sought to stop. The users had to specifically authorize Power Ventures to use their Facebook account login information to obtain this level of access. Importantly, Facebook also alleged that Power Ventures was using Facebook’s routines to solicit business for its service by sending email to the users’ Facebook “friends,” which is said were made to look like they came from Facebook.


- According to the Columbia Journalism Review article, “No journalists to date have been sued or prosecuted under the Computer Fraud and Abuse Act, but there’s evidence that stories have been hindered or held from publication for the threat of penalty.”
• Applicability of the statute to violations of TOS rules and specifically to data scraping is being challenged in a case brought by the ACLU in federal court in Washington, D.C. In an order this year, the court denied the government’s motion to dismiss for lack of standing and failure to state a claim, finding that researchers who intended to test for discrimination and bias in housing, hiring and similar web services had a plausible claim that prosecution under the CFAA would violate their First Amendment rights. *Sandvig v. Sessions*, No. 16–1368, 315 F.Supp.3d 1 (D. D.C., Mar. 30, 2018).

• The Ninth Circuit this year heard arguments in a case that would limit the “cease and desist” rule. In the district court holding under appeal, involving a CFAA claim by LinkedIn by a site that scrapes public LinkedIn profiles, the court said it “is doubtful that the Computer Fraud and Abuse Act may be invoked by LinkedIn to punish [defendant] hiQ for accessing publicly available data; the broad interpretation of the CFAA advocated by LinkedIn, if adopted, could profoundly impact open access to the Internet, a result that Congress could not have intended when it enacted the CFAA over three decades ago.” *HIQ Labs, Inc. v. LinkedIn Corp.*, 273 F.Supp.3d 1099 (N.D. Cal., 2017), *on appeal*, No. 17-16783 (9th Cir., argued Mar. 15, 2018). The case has not been decided as of early November 2018.

• A federal court in California in *Ticketmaster L.L.C. v. Prestige Entertainment West, Inc.*, 315 F.Supp.3d 1147 (C.D. Cal. 2018), applied the *Power Ventures* precedent to a claim brought by Ticketmaster against a data scraper, holding that the individualized cease-and-desist notice of a violation of the TOS was sufficient to establish a claim under the CFAA.

• Relying heavily on Ninth Circuit precedent, a federal court in Indiana held that “CFAA liability may exist in certain situations where a party’s authorization to access electronic data—including publicly accessible electronic data—has been affirmatively rescinded or revoked.” *CouponCabin LLC v. Savings.com, Inc.*, No. 2:14-CV-39, 2017 WL 833337 (N.D. Ind., Jan. 10, 2017).

• As mentioned earlier, no journalists have been charged or sued under the CFAA for scraping data from a web site. In addition, those cases finding CFAA liability for exceeding the authorized use of a computer typically involve either a competitor trying to obtain information to compete with the targeted service or the “improper” use of passwords from authorized users or company insiders. The cases also generally restrict unauthorized *access* to the web site’s data, not subsequent unauthorized *use*; there is no authority for the argument that a web site’s Terms of Service could restrict the uses that a journalist makes of data from a web site.
**Topic: Compliance with Social Media Terms & Conditions**
by Jerry Birenz, Advance Legal

**Use of Social Media**

- When employees of a client establish a social media account on behalf of the company, the company should exercise control over the password (e.g., in case employee leaves) to avoid future problems:
  - Cannot update
  - Could transfer to someone else
  - Could post bad material
  - Cannot remove content if a problem
  - Might not receive notices of problems

- Client should be advised to clear the name of the page (trademark)
  - Risk of infringement
  - Consistent with public relations
  - Possible multiple pages by same company
  - Consider registering trademark

- Employees should be instructed to exercise care in posting – all the usual rules apply, but usually no editing filter, and dangers inherent in the sense of immediacy and informality.
  - Libel
  - Copyright
  - Confidentiality
  - Language
  - Employee policies (e.g., harassment, political views)

- FTC Endorsement Guides and related “rules” apply to social media posts
  - Company’s employees/agents posting on its site without revealing connection
  - Company’s employees/agents posting on other sites without revealing connection

- Materials posted by 3rd parties on company’s social media page do not belong to company
  - There is no contract/license directly between company and 3rd party – only the social media platform’s T&Cs
  - Consider including language of license to company on company’s social media page
• Personal social media pages of employees used for company business
  o Different policies at different companies
• Rights to material you post on social media sites
  o 3rd party materials – can you use it in social media account on a 3rd party website?
  o A reason to try to get as broad a rights grant upfront as possible
  o Releases – restrictions (individuals, homes)
  o Are social media pages editorial or promotional (i.e., commercial)?
  o Use of FB “likes” (photos) in advertising

_T&Cs When You Post Material on or Use Material from Social Media sites_
• Clients and their employees should be advised that when they post, use material from, or otherwise interact with social media platforms (including on what they may perceive of as “their own” social media pages), they are agreeing to the terms and conditions of the social media platform.
  o Such T&Cs are generally considered binding, either because the person setting up the account expressly agreed to them and/or because the platform gives appropriate notice of the T&Cs to users of the platform. See, e.g., Meyer v. Uber Technologies, 868 F.3d 66 (2d Cir. 2017), setting a lenient standard for what constitutes adequate notice of and consent to T&Cs (albeit in a non-social media context), in materials.
  o T&Cs usually include a very broad grant of rights to the content posted by the user to the social media platform, including but not limited to:
    ▪ right to permit 3rd parties to use
    ▪ worldwide
    ▪ right to use commercially
    ▪ right to alter and create derivative works
    ▪ typical license language (e.g., Twitter T&Cs [https://twitter.com/en/tos#update]):
      By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed). This license authorizes us to make your Content available to the rest of the world and to let others do the same. You agree that this license includes the right for Twitter to provide, promote, and improve the Services and to make Content submitted to or through the Services available to other companies,
organizations or individuals for the syndication, broadcast, distribution, promotion or publication of such Content on other media and services, subject to our terms and conditions for such Content use. Such additional uses by Twitter, or other companies, organizations or individuals, may be made with no compensation paid to you with respect to the Content that you submit, post, transmit or otherwise make available through the Services.

Twitter has an evolving set of rules for how ecosystem partners can interact with your Content on the Services. These rules exist to enable an open ecosystem with your rights in mind. You understand that we may modify or adapt your Content as it is distributed, syndicated, published, or broadcast by us and our partners and/or make changes to your Content in order to adapt the Content to different media.

- T&Cs typically include a similarly broad grant of rights to use information about the user and his/her/its activities (e.g., Facebook T&Cs [https://www.facebook.com/terms.php]):
  - Facebook: Permission to use your name, profile picture, and information about your actions with ads and sponsored content: You give us permission to use your name and profile picture and information about actions you have taken on Facebook next to or in connection with ads, offers, and other sponsored content that we display across our Products, without any compensation to you. For example, we may show your friends that you are interested in an advertised event or have liked a Page created by a brand that has paid us to display its ads on Facebook. Ads like this can be seen only by people who have your permission to see the actions you’ve taken on Facebook. You can learn more about your ad settings and preferences.

- T&Cs also typically include a representation and warranty that the user possesses all of the rights necessary to grant the licenses to the social media platform.
  - Twitter: You represent and warrant that you have, or have obtained, all rights, licenses, consents, permissions, power and/or authority necessary to grant the rights granted herein for any Content that you submit, post or display on or through the Services. You agree that such Content will not contain material subject to copyright or other proprietary rights, unless you have necessary permission or are otherwise legally entitled to post the material and to grant Twitter the license described above.

- **Are client personnel checking that the client company possesses these rights before they post material on social media sites? Are client personnel even conscious that they are permitting, on behalf of their employers, these uses by social media sites and other third parties?**

- When clients use accounts, materials, or apps available on social media sites, the sites do not make any warranties or service commitments, they have a right to
terminate at any time, and they may impose restrictions on activities (e.g., sweepstakes, advertising, data gathering).

- Any use is subject to the T&Cs:
  - T&Cs often permit your use only in the context of the site or APIs it authorizes
  - T&Cs may prohibit certain uses – e.g., commercial use (often with an unclear definition of what is commercial)
  - A social media site may have multiple T&Cs for different aspects of site, and the T&Cs may incorporate other documents


- Social media platform T&Cs may change at any time, with or without notice or explanation.

- **Applicability of T&Cs to Branded Content**
  - Aside from compliance with FTC guides, state and federal unfair/deceptive business practices and consumer protection laws, and right of publicity, clients who post native advertising, influencer, and related content on social media platforms must also be aware of the platforms’ own T&Cs, which may be stricter than legal requirements, may impose additional obligations, and may cause confusion about legal compliance and rights.

  - **Facebook** requires that its branded content tool (sometimes called its “handshake tool”) be used for all branded content posted on Facebook, whether or not the branded content is posted as a paid advertisement.

    - Facebook defines “Branded Content” broadly as “a creator or publisher's content that features or is influenced by a business partner for an exchange of value.” “Creators are celebrities, influencers or public figures. Publishers refer to media companies and entities. Business partners include brands, advertisers, marketers or sponsors.”
      

    - Facebook’s Branded Content Policies are here: [https://www.facebook.com/policies/brandedcontent/](https://www.facebook.com/policies/brandedcontent/). These policies contain restrictions on how branded content may appear on Facebook, that may be inconsistent with how branded content is created for other platforms and uses.

    - The effect of using Facebook’s handshake tool is that the branded content will automatically tag the advertiser (i.e., “MEDIA COMPANY with ADVERTISER”) and will be labelled “Paid Partnership.”
• If a publisher is posting purely editorial content that has an advertising sponsor (e.g., think a modern version of “Masterpiece Theatre, sponsored by Mobil”), and the sponsor’s name will appear in the post with the editorial content, that is considered Branded Content because it features a business partner for an exchange of value even though the sponsor’s product or service is not in the editorial content itself. The handshake tool will apply the tag and “Paid Partnership” label to the post, raising the possibility that the post will be seen as commercial content by celebrities or others who may be seen in the content, especially if they are on the opening screen of a video or in a photograph. That could lead such persons to assert right of publicity claims over what is really editorial content.

• If Branded Content is posted as a paid advertisement, including as a “dark post” (i.e., targeted ad), in addition to the labelling described above, Facebook’s Advertising Policies must be adhered to.


Instagram’s Branded Content Policies are almost identical to Facebook’s, however use of the Instagram handshake tool will automatically label the post “Paid partnership with [NAME OF ADVERTISER]”, which may make the issue regarding editorial content sponsored by an advertiser more troublesome.


Like all other social media T&Cs, these T&Cs may change at any time, with or without notice or explanation, and they probably have by the time you read this outline.

• Applicability of T&Cs to Content About Political Topics

Facebook and Instagram, as part of their “transparency” promise to Congress’ criticism of social media platforms’ role in spreading false and misleading political content, have instituted new rules for “ads related to politics or issues of national importance.”


• The platforms often consider paid posts (ads) that promote news coverage of political topics and issues of national importance to fall within the definition above. (Application of the policy has not been limited to advocacy ads.)

• The policies include a detailed and invasive procedure by which media companies seeking to post such ads must register to be approved. Among other things, it requires the name, home address, photograph, last 4 digits of the Social Security number, and other identifying information of each
individual employee or other person authorized to place the ads on behalf of the company.  
https://www.facebook.com/business/help/208949576550051(click on “United States” link). Facebook has refused to permit a company to have its own registration instead of requiring its employees to register.

- The policies also require that all such ads bear a prominent “Paid for by [XYZ]” label, akin to real political advertising, and invite the public to report such ads that do not bear the label.  
https://www.facebook.com/help/180607332665293

- The posts must also be archived within a publicly-accessible political advertising archive that also contains information about the performance of the ad. (Recently Facebook created a subsection for “news” within the (political) ad archive.)  
https://www.facebook.com/ads/archive/?active_status=all&ad_type=political_and_issue_ads&country=US

- As a result of the foregoing, many media companies have refused to register and are not paying to advertise their political news content; this dissatisfaction was expressed in a June 11, 2018 letter signed by NMA, DCN, MPA and others to Mark Zuckerberg (copy in materials). News organizations that have not registered have had ads promoting such “political” content rejected by Facebook. Recently, however, it seems that more news organizations have registered and their “political” ads are now appearing in the news section of the archive.

- Twitter, on the contrary, has created an exemption for advertising of news content in its political ad policy.  
Spencer MEYER, Individually and on behalf of those similarly situated, Plaintiff-Counter- Defendant-Appellee,  

v.  

UBER TECHNOLOGIES, INC., Defendant-Counter-Claimant-Appellant,  
Travis Kalanick, Defendant-Appellant,  
Ergo, Third-Party Defendant.  

Docket Nos. 16-2750-cv, 16-2752-cv.  

United States Court of Appeals, Second Circuit.  

Decided: August 17, 2017.  

In this putative class action filed in the United States District Court for the Southern District of New York (Rakoff, J.), a user of a technology company’s car service smartphone application alleges that the company and its former chief executive engaged in illegal price fixing. Defendants moved in the district court to compel arbitration, contending that the user agreed to a mandatory arbitration provision in the company’s terms of service when he registered for an account using the application. The district court denied the motions. In these consolidated appeals, defendants contend, inter alia, that the district court erred in concluding that the notice of the Terms of Service was not reasonably conspicuous and that the user did not unambiguously manifest assent to the arbitration provision by registering for an account.  

VACATED AND REMANDED.  


THEODORE J. BOUTROUS JR. (Daniel G. Swanson, Cynthia E. Richman, Joshua S. Lipshutz, Reed Brodsky, on the brief), Gibson, Dunn & Crutcher LLP, Los Angeles, California, Washington, D.C., and New York, New York, for Defendant-Counter-Claimant-Appellant Uber Technologies, Inc.  


In 2014, plaintiff-counter-defendant-appellee Spencer Meyer downloaded onto his smartphone a software application offered by defendant-counter-claimant-appellant Uber Technologies, Inc. ("Uber"), a technology company that operates, among other things, a ride-hailing service. Meyer then registered for an Uber account with his smartphone. After using the application approximately ten times, Meyer brought this action on behalf of himself and other similarly situated Uber account holders against Uber's co-founder and former Chief Executive Officer, defendant-appellant Travis Kalanick, alleging that the Uber application allows third-party drivers to illegally fix prices. The district court joined Uber as a defendant and denied motions by Kalanick and Uber to compel arbitration. In doing so, the district court concluded that Meyer did not have reasonably conspicuous notice of and did not unambiguously manifest assent to Uber's Terms of Service when he registered. The district court held that Meyer therefore was not bound by the mandatory arbitration provision contained in the Terms of Service.

For the reasons set forth below, we vacate and remand for further proceedings consistent with this opinion.

BACKGROUND

A. The Facts

The facts are undisputed and are summarized as follows:

Uber offers a software application for smartphones (the "Uber App") that allows riders to request rides from third-party drivers. On October 18, 2014, Meyer registered for an Uber account with the Uber App on a Samsung Galaxy S5 phone running an Android operating system. After registering, Meyer took ten rides with Uber drivers in New York, Connecticut, Washington, D.C., and Paris.

In support of its motion to compel arbitration, Uber submitted a declaration from Senior Software Engineer Vincent Mi, in which Mi represented that Uber maintained records of when and how its users registered for the service and that, from his review of those records, Mi was able to identify the dates and methods by which Meyer registered for a user account. Attached to the declaration were screenshots of the two screens that a user registering in October 2014 with an Android-operated smartphone would have seen during the registration process.[1]

The first screen, at which the user arrives after downloading the application and clicking a button marked "Register," is labeled "Register" and includes fields for the user to enter his or her name, email address, phone number, and a password (the "Registration Screen"). The Registration Screen also offers the user the option to register via a Google+ or Facebook account. According to Uber's records, Meyer did not sign up using either Google+ or Facebook and would have had to enter manually his personal information.[2]
After completing the information on the Registration Screen and clicking "Next," the user advances to a second screen labeled "Payment" (the "Payment Screen"), on which the user can enter credit card details or elect to make payments using PayPal or Google Wallet, third-party payment services. According to Uber’s records, Meyer entered his credit card information to pay for rides. To complete the process, the prospective user must click the button marked "REGISTER" in the middle of the Payment Screen.

Below the input fields and buttons on the Payment Screen is black text advising users that "[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." See Addendum B. The capitalized phrase, which is bright blue and underlined, was a hyperlink that, when clicked, took the user to a third screen containing a button that, in turn, when clicked, would then display the current version of both Uber’s Terms of Service and Privacy Policy.[3] Meyer recalls entering his contact information and credit card details before registering, but does not recall seeing or following the hyperlink to the Terms and Conditions. He declares that he did not read the Terms and Conditions, including the arbitration provision.

When Meyer registered for an account, the Terms of Service contained the following mandatory arbitration clause:

Dispute Resolution

You and Company agree that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof or the use of the Service or Application (collectively, "Disputes") will be settled by binding arbitration, except that each party retains the right to bring an individual action in small claims court and the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents or other intellectual property rights. You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding. Further, unless both you and Company otherwise agree in writing, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of any class or representative proceeding. If this specific paragraph is held unenforceable, then the entirety of this "Dispute Resolution" section will be deemed void. Except as provided in the preceding sentence, this "Dispute Resolution" section will survive any termination of this Agreement.

Appellants' App. at 111-12.[4] The Terms of Service further provided that the American Arbitration Association ("AAA") would hear any dispute, and that the AAA Commercial Arbitration Rules would govern any arbitration proceeding.

**B. The District Court Proceedings**

On December 16, 2015, Meyer, on behalf of a putative class of Uber riders, filed this action against Kalanick, alleging that the Uber App allows drivers to fix prices amongst themselves, in violation of the Sherman Act, 15 U.S.C. § 1, and the Donnelly Act, N.Y. Gen. Bus. Law § 340. Meyer amended his complaint on January 29, 2016; the Amended Complaint also named only Kalanick, and not Uber, as the defendant.
The district court denied Kalanick's motion to dismiss the Amended Complaint for failure to state a claim. K Kalanick filed a motion to join Uber as a necessary party, and Uber separately moved to intervene. On June 19, 2016, the district court granted Kalanick's motion and ordered that Uber be joined as a defendant. It subsequently denied Uber's motion as moot.

After the parties began to exchange discovery materials, Kalanick and Uber filed motions to compel Meyer to arbitrate. The district court denied the motions, concluding that Meyer did not have reasonably conspicuous notice of the Terms of Service and did not unambiguously manifest assent to the terms. See Meyer v. Kalanick, 200 F.Supp.3d 408, 420 (S.D.N.Y. 2016). Holding that no agreement had been formed, the district court did not reach Meyer's other defenses to arbitration, including whether defendants waived their right to arbitrate by actively participating in the litigation and whether Kalanick was also entitled to enforce an arbitration agreement to which he was not a signatory. Id. at 412.

Defendants timely appealed the district court's July 29, 2016 order denying the motions to compel arbitration pursuant to 9 U.S.C. § 16, which permits interlocutory appeals from the denial of a motion to compel arbitration. The district court stayed the underlying action pending appeal on the joint motion of defendants, taking into account, inter alia, "the need for further appellate clarification of what constitutes adequate consent to so-called 'clickwrap,' 'browsewrap,' and other such website agreements." Meyer v. Kalanick, 203 F.Supp.3d 393, 396 (S.D.N.Y. 2016).

DISCUSSION

We consider first whether there is a valid agreement to arbitrate between Meyer and Uber and then whether defendants have waived their right to enforce any such agreement to compel arbitration.

I. The Arbitration Agreement

We review de novo the denial of a motion to compel arbitration. Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 26 (2d Cir. 2002). The determination of whether parties have contractually bound "73 themselves to arbitrate is a legal conclusion also subject to de novo review. Id. The factual findings upon which that conclusion is based, however, are reviewed for clear error. Id.

The parties dispute whether the district court's determinations regarding the lack of reasonably conspicuous notice or an unambiguous manifestation of assent are findings of fact, subject to clear error review, or conclusions of law, subject to de novo review. Although determinations regarding mutual assent and reasonable notice usually involve questions of fact, Chi. Title Ins. Co. v. AMZ Ins. Servs., Inc., 188 Cal.App.4th 401, 115 Cal.Rptr.3d 707, 725 (2010) (mutual assent); Union Oil Co. v. O'Riley, 226 Cal.App.3d 199, 276 Cal.Rptr. 483, 492 (1990) (reasonable notice), the facts in this case are undisputed, and the district court determined as a matter of law that no reasonable factfinder could have found that the notice was reasonably conspicuous and the assent unambiguous. Cf. HM DG, Inc. v. Amini, 219 Cal. App.4th 1100, 162 Cal.Rptr.3d 412, 418 (2013) ("[I]f the material facts are certain or undisputed, the existence of a contract is a question for the court to decide." (citation and internal quotation omitted)).

We therefore review the district court's conclusions de novo. See Specht, 306 F.3d at 27-28; Long v. Provide Commerce, Inc., 245 Cal.App.4th 855, 200 Cal.Rptr.3d 117, 123 (2016) ("Because the material evidence consists exclusively of screenshots from the Web site and order confirmation e-mail, and the
authenticity of these screenshots is not subject to factual dispute, we review the issue de novo as a pure question of law.

A. Applicable Law

1. Procedural Framework

Under the Federal Arbitration Act (the "FAA"), "[a] written provision in... a contract ... to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. The FAA reflects "a liberal federal policy favoring arbitration agreements," AT & T Mobility LLC v. Concepcion, 563 U.S. 333, 346, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)), and places arbitration agreements on "the same footing as other contracts," Schnabel v. Trilegiant Corp., 697 F.3d 110, 118 (2d Cir. 2012) (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974)). It thereby follows that parties are not required to arbitrate unless they have agreed to do so. Id.

Thus, before an agreement to arbitrate can be enforced, the district court must first determine whether such agreement exists between the parties. Id. This question is determined by state contract law. Nicosia v. Amazon.com, Inc., 834 F.3d 220, 229 (2d Cir. 2016).

Here, the question of arbitrability arose in the context of a motion to compel arbitration. Courts deciding motions to compel apply a "standard similar to that applicable for a motion for summary judgment." Id. (quoting Bensadoun v. Jobe-Riat, 316 F.3d 171, 175 (2d Cir. 2003)). On a motion for summary judgment, the court "consider[s] all relevant, admissible evidence submitted by the parties and contained in ̀pleadings, depositions, answers to interrogatories, and admissions on file, together with ... affidavits," Chambers v. Time Warner, Inc., 282 F.3d 147, 155 (2d Cir. 2002) (quoting Fed. R. Civ. P. 56(c)) (second alteration in original), and draws all reasonable inferences in favor of the non-moving party. Nicosia, 834 F.3d at 229.

"W]here the undisputed facts in the record require the matter of arbitrability to be decided against one side or the other as a matter of law, we may rule on the basis of that legal issue and ̀avoid the need for further court proceedings." Wachovia Bank, Nat. Ass'n v. VCG Special Opportunities Master Fund, 661 F.3d 164, 172 (2d Cir. 2011) (quoting Bensadoun, 316 F.3d at 175). If a factual issue exists regarding the formation of the arbitration agreement, however, remand to the district court for a trial is necessary. Bensadoun, 316 F.3d at 175; 9 U.S.C. § 4.

If the district court concludes that an agreement to arbitrate exists, "it should then consider whether the dispute falls within the scope of the arbitration agreement." Specht, 306 F.3d at 26 (quoting Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 844 (2d Cir. 1987)). In this case, the parties do not dispute that Meyer's claims would be covered by the arbitration provision of the Terms of Service.

2. State Contract Law

"State law principles of contract formation govern the arbitrability question." Nicosia, 834 F.3d at 231. The district court applied California law in its opinion, but acknowledged that it "[d]id not view the choice between California law and New York law as dispositive with respect to the issue of whether an arbitration agreement was formed." Meyer, 200 F.3d at 412-13. Defendants have not challenged the district court's choice of
law but state that "if this Court concludes that New York law differs from California law with respect to any determinative issues, it should apply New York law." Appellants' Br. at 17 n.2. We agree with the district court's determination that California state law applies, and note that New York and California apply "substantially similar rules for determining whether the parties have mutually assented to a contract term." Schnabel, 697 F.3d at 119.

To form a contract, there must be "[m]utual manifestation of assent, whether by written or spoken word or by conduct." Specht, 306 F.3d at 29. California law is clear, however, that "an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious." Id. at 30 (quoting Windsor Mills, Inc. v. Collins & Aikman Corp., 25 Cal.App.3d 987, 101 Cal. Rptr. 347, 351 (1972)). "Thus, California contract law measures assent by an objective standard that takes into account both what the offeree said, wrote, or did and the transactional context in which the offeree verbalized or acted." Id. at 30.

Where there is no evidence that the offeree had actual notice of the terms of the agreement, the offeree will still be bound by the agreement if a reasonably prudent user would be on inquiry notice of the terms. Schnabel, 697 F.3d at 120; Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1177 (9th Cir. 2014). Whether a reasonably prudent user would be on inquiry notice turns on the "[c]larity and conspicuousness of arbitration terms," Specht, 306 F.3d at 30; in the context of web-based contracts, as discussed further below, clarity and conspicuousness are a function of the design and content of the relevant interface. See Nicosia, 834 F.3d at 233.

Thus, only if the undisputed facts establish that there is "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms" will we find that a contract has been formed. See Specht, 306 F.3d at 35.

3. Web-based Contracts

"While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract." Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004). 
"Courts around the country have recognized that [an] electronic `click' can suffice to signify the acceptance of a contract," and that "[t]here is nothing automatically offensive about such agreements, as long as the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement." Sgouros v. Trans Union Corp., 817 F.3d 1029, 1033-34 (7th Cir. 2016).

With these principles in mind, one way in which we have previously distinguished web-based contracts is the manner in which the user manifests assent—namely, "clickwrap" (or "click-through") agreements, which require users to click an "I agree" box after being presented with a list of terms and conditions of use, or "browsewrap" agreements, which generally post terms and conditions on a website via a hyperlink at the bottom of the screen. See Nicosia, 834 F.3d at 233; see also Nguyen, 763 F.3d at 1175-76. Courts routinely uphold clickwrap agreements for the principal reason that the user has affirmatively assented to the terms of agreement by clicking "I agree." See Ptjeja v. Facebook, Inc., 841 F.Supp.2d 829, 837 (S.D.N.Y. 2012) (collecting cases). Browsewrap agreements, on the other hand, do not require the user to expressly assent. See Juliet M. Moringiello, Signals, Assent and Internet Contracting, 57 Rutgers L. Rev. 1307, 1318 (2005) ("[B]rowse-wrap encompasses all terms presented by a web site that do not solicit an explicit manifestation of assent."). Because no affirmative action is required by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of the
browzewrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions." Ng y en, 763 F.3d at 1176 (citation omitted); see also S chnabel, 697 F.3d at 129 n.18; Specht, 306 F.3d at 32.

Of course, there are infinite ways to design a website or smartphone application, and not all interfaces fit neatly into the clickwrap or browzewrap categories. Some online agreements require the user to scroll through the terms before the user can indicate his or her assent by clicking "I agree." See B erkson v . Gogo L LC, 97 F.Supp.3d 359, 386, 398 (E.D.N.Y. 2015) (terming such agreements "scrollwraps"). Other agreements notify the user of the existence of the website's terms of use and, instead of providing an "I agree" button, advise the user that he or she is agreeing to the terms of service when registering or signing up. Id. at 399 (describing such agreements as "sign-in-wraps").

In the interface at issue in this case, a putative user is not required to assent explicitly to the contract terms; instead, the user must click a button marked "Register," underneath which the screen states "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY," with hyperlinks to the Terms of Service and Privacy Policy. We were first presented with a similar agreement in S chnabel, but the plaintiffs had not preserved the issue of whether they were on inquiry notice of the arbitration provision by a "terms and conditions" hyperlink on an enrollment form available before enrollment. S chnabel, 697 F.3d at 121 n.9, 129-30. Most recently in Nicosia, we held that reasonable minds could disagree regarding the sufficiency of notice provided to Amazon.com customers when placing an order through the website. Nicosia, 834 F.3d at 237.[8]

Following our precedent, district courts considering similar agreements have found them valid where the existence of the terms was reasonably communicated to the user. Compare C ullinane v . Uber Techs., Inc., No. 14-14750-DPW, 2016 WL 3751652, at *7 (D. Mass. July 11, 2016) (applying Massachusetts law and granting motion to compel arbitration); S tarke v . Gilt G roupe, Inc., No. 13 Civ. 5497(LLS), 2014 WL 1652225, at *3 (S.D.N.Y. Apr. 24, 2014) (applying New York law and granting motion to dismiss); and F teja, 841 F.Supp.2d at 839-40 (granting defendant's motion to transfer based on, inter alia, forum selection clause in terms of service); with A pp lebaum v . Lyft, Inc., No. 16-cv-07062 (JGK), 2017 WL 2774153, at *8-9 (S.D.N.Y. June 26, 2017) (applying New York law and denying motion to compel arbitration where notice of contract terms was insufficient to bind plaintiff). See also Woodrow Hartzog, Website Design As Contract, 60 Am. U. L. Rev. 1635, 1644 (2011) ("Courts oscillate on `notice sentence browzewraps,' which provide users with a link to terms of use but do not require users to acknowledge that they have seen them.").

Classification of web-based contracts alone, however, does not resolve the notice inquiry. See J uliet M. M oringiello and W illiam L. R eynolds, From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting, 72 Md. L. Rev. 452, 466 (2013) ("Whether terms are classified as clickwrap says little about whether the offeree had notice of them."). Insofar as it turns on the reasonableness of notice, the enforceability of a web-based agreement is clearly a fact-intensive inquiry. See S chnabel, 697 F.3d at 124. Nonetheless, on a motion to compel arbitration, we may determine that an agreement to arbitrate exists where the notice of the arbitration provision was reasonably conspicuous and manifestation of assent unambiguous as a matter of law. See Specht, 306 F.3d at 28.

B. Application

Meyer attests that he was not on actual notice of the hyperlink to the Terms of Service or the arbitration provision itself, and defendants do not point to evidence *77 from which a jury could infer otherwise.
Accordingly, we must consider whether Meyer was on inquiry notice of the arbitration provision by virtue of the hyperlink to the Terms of Service on the Payment Screen and, thus, manifested his assent to the agreement by clicking "Register."

As an initial matter, defendants argue that Meyer is precluded from arguing that no contract was formed by an allegation in his complaint that "[t]o become an Uber account holder, an individual first must agree to Uber's terms and conditions." Appellants' Br. at 18-19, 32 (quoting Compl. ¶ 29; Am. Compl. ¶ 29). We disagree. First, as the district court observed, the pleading is not obviously a concession in that it makes no reference to Meyer's knowledge. See Meyer, 200 F. Supp. 3d at 413. Second, Meyer volunteered to amend his complaint on the record to delete the allegation at issue, an offer that was accepted by the district court. Third, regardless of the allegation or even the validity of Meyer's amendment, Meyer has attested that, at the time he signed up for an Uber account, he was not aware of the existence of the Terms of Service or the arbitration clause contained therein. Construing the facts in Meyer's favor, we decline to hold that he agreed to arbitration based on the purported concession in his complaint. See Windsor Mills, Inc., 101 Cal. Rptr. at 351 ("[A]n offeror, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious.").

1. Reasonably conspicuous notice

In considering the question of reasonable conspicuousness, precedent and basic principles of contract law instruct that we consider the perspective of a reasonably prudent smartphone user. See Schnabel, 697 F.3d at 124 ("[T]he touchstone of the analysis is whether reasonable people in the position of the parties would have known about the terms and the conduct that would be required to assent to them."). "[M]odern cell phones ... are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." Riley v. California, ___ U.S. ___, 134 S.Ct. 2473, 2484, 189 L.Ed.2d 430 (2014). As of 2015, nearly two-thirds of American adults owned a smartphone, a figure that has almost doubled since 2011. See U.S. Smartphone Use in 2015, Pew Research Center, at 2 (Apr. 2015), http://assets.pewresearch.org/wp-content/uploads/sites/14/2015/03/PI_Smartphones_0401151.pdf (last visited Aug. 17, 2017). Consumers use their smartphones for, among other things, following the news, shopping, social networking, online banking, researching health conditions, and taking classes. Id. at 5. In a 2015 study, approximately 89 percent of smartphone users surveyed reported using the internet on their smartphones over the course of the week-long study period. Id. at 33. A purchaser of a new smartphone has his or her choice of features, including operating systems, storage capacity, and screen size.

Smartphone users engage in these activities through mobile applications, or "apps," like the Uber App. To begin using an app, the consumers need to locate and download the app, often from an application store. Many apps then require potential users to sign up for an account to access the app's services. Accordingly, when considering the perspective of a reasonable smartphone user, we need not presume that the user has never before encountered an app or entered into a contract using a smartphone. Moreover, a reasonably prudent smartphone user knows that text that is highlighted in blue and underlined is hyperlinked to another webpage where additional information will be found.

Turning to the interface at issue in this case, we conclude that the design of the screen and language used render the notice provided reasonable as a matter of California law.[9] The Payment Screen is uncluttered, with only fields for the user to enter his or her credit card details, buttons to register for a user account or to
connect the user's pre-existing PayPal account or Google Wallet to the Uber account, and the warning that "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." The text, including the hyperlinks to the Terms and Conditions and Privacy Policy, appears directly below the buttons for registration. The entire screen is visible at once, and the user does not need to scroll beyond what is immediately visible to find notice of the Terms of Service. Although the sentence is in a small font, the dark print contrasts with the bright white background, and the hyperlinks are in blue and underlined. This presentation differs sharply from the screen we considered in Nicosia, which contained, among other things, summaries of the user's purchase and delivery information, "between fifteen and twenty-five links," "text ... in at least four font sizes and six colors," and several buttons and advertisements. Nicosia, 834 F.3d at 236-37. Furthermore, the notice of the terms and conditions in Nicosia was "not directly adjacent" to the button intended to manifest assent to the terms, unlike the text and button at issue here. Id. at 236.

In addition to being spatially coupled with the mechanism for manifesting assent—i.e., the register button—the notice is temporally coupled. As we observed in Schnabel,

inasmuch as consumers are regularly and frequently confronted with non-negotiable contract terms, particularly when entering into transactions using the Internet, the presentation of these terms at a place and time that the consumer will associate with the initial purchase or enrollment, or the use of, the goods or services from which the recipient benefits at least indicates to the consumer that he or she is taking such goods or employing such services subject to additional terms and conditions that may one day affect him or her.

Schnabel, 697 F.3d at 127. Here, notice of the Terms of Service is provided simultaneously to enrollment, thereby connecting the contractual terms to the services to which they apply. We think that a reasonably prudent smartphone user would understand that the terms were connected to the creation of a user account.

That the Terms of Service were available only by hyperlink does not preclude a determination of reasonable notice. See Fteja, 841 F.Supp.2d at 839 ("[C]licking [a] hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket. In both cases, the consumer is prompted to examine terms of sale that are located somewhere else."). Moreover, "79 the language "[b]y creating an Uber account, you agree" is a clear prompt directing users to read the Terms and Conditions and signaling that their acceptance of the benefit of registration would be subject to contractual terms. As long as the hyperlinked text was itself reasonably conspicuous—and we conclude that it was—a reasonably prudent smartphone user would have constructive notice of the terms. While it may be the case that many users will not bother reading the additional terms, that is the choice the user makes; the user is still on inquiry notice.

Finally, we disagree with the district court's determination that the location of the arbitration clause within the Terms and Conditions was itself a "barrier to reasonable notice." Meyer, 200 F.Supp.3d at 421 (citing, inter alia, Sgouros, 817 F.3d at 1033). In Sgouros, the Seventh Circuit determined that the defendant's website actively misled users by "explicitly stating that a click on the button constituted assent for TransUnion to obtain access to the purchaser's personal information," without saying anything about "contractual terms," and without any indication that "the same click constituted acceptance of the Service Agreement." 817 F.3d at 1035-36. The website did not contain a hyperlink to the relevant agreement; instead, it had a scroll box that contained the entirety of the agreement, only the first three lines of which were visible without scrolling, and it had no prompt for the reader to scroll for additional terms. See id. at 1035-36 ("Where the terms are not displayed but must be brought up by using a hyperlink, courts outside of Illinois have looked for a clear prompt directing the user to read them. . . . No court has suggested that the presence of a scrollable
window containing buried terms and conditions of purchase or use is, in itself, sufficient for the creation of a binding contract. . ."). Here, there is nothing misleading. Although the contract terms are lengthy and must be reached by a hyperlink, the instructions are clear and reasonably conspicuous. Once a user clicks through to the Terms of Service, the section heading ("Dispute Resolution") and the sentence waiving the user's right to a jury trial on relevant claims are both bolded.

Accordingly, we conclude that the Uber App provided reasonably conspicuous notice of the Terms of Service as a matter of California law and turn to the question of whether Meyer unambiguously manifested his assent to those terms.

2. Manifestation of assent

Although Meyer's assent to arbitration was not express, we are convinced that it was unambiguous in light of the objectively reasonable notice of the terms, as discussed in detail above. See Register.com, 356 F.3d at 403 ("[R]egardless whether [a user] did or did not say, `I agree' ... [the user's] choice was either to accept the offer of contract, taking the information subject to the terms of the offer, or, if the terms were not acceptable, to decline to take the benefits."); see also Schnabel, 697 F.3d at 128 ("[A]cceptance need not be express, but where it is not, there must be evidence that the offeree knew or should have known of the terms and understood that acceptance of the benefit would be construed by the offeror as an agreement to be bound."). As we described above, there is ample evidence that a reasonable user would be on inquiry notice of the terms, and the spatial and temporal coupling of the terms with the registration button "indicate[d] to the consumer that he or she is ... employing such services subject to additional terms and conditions that may one day affect him or her." Schnabel, 697 F.3d at 127. A reasonable user would know that by clicking the registration button, he was agreeing to the terms and conditions accessible via the hyperlink, whether he clicked on the hyperlink or not.

The fact that clicking the register button had two functions—creation of a user account and assent to the Terms of Service—does not render Meyer's assent ambiguous. The registration process allowed Meyer to review the Terms of Service prior to registration, unlike web platforms that provide notice of contract terms only after the user manifested his or her assent. Furthermore, the text on the Payment Screen not only included a hyperlink to the Terms of Service, but expressly warned the user that by creating an Uber account, the user was agreeing to be bound by the linked terms. Although the warning text used the term "creat[e]" instead of "register," as the button was marked, the physical proximity of the notice to the register button and the placement of the language in the registration flow make clear to the user that the linked terms pertain to the action the user is about to take.

The transactional context of the parties' dealings reinforces our conclusion. Meyer located and downloaded the Uber App, signed up for an account, and entered his credit card information with the intention of entering into a forward-looking relationship with Uber. The registration process clearly contemplated some sort of continuing relationship between the putative user and Uber, one that would require some terms and conditions, and the Payment Screen provided clear notice that there were terms that governed that relationship.

Accordingly, we conclude on the undisputed facts of this case that Meyer unambiguously manifested his assent to Uber's Terms of Service as a matter of California law.

3. Remand for trial
Finally, we see no need to remand this case for trial. Meyer offers no basis for his argument that we should remand for further factfinding if we vacate the district court's ruling, other than his assertion that no circuit has previously compelled arbitration in similar circumstances. Although Meyer purports to challenge the evidentiary foundation for the registration screens, defendants have submitted a declaration from an Uber engineer regarding Meyer's registration for and use of the Uber App, as well as the registration process and terms of use in effect at the time of his registration. Accordingly, we conclude on this record, as a matter of law, that Meyer agreed to arbitrate his claims with Uber.[11]

II. Waiver

Meyer argues in the alternative that defendants have waived their right to arbitrate by actively litigating the underlying lawsuit. "[O]rdinarily a defense of waiver brought in opposition to a motion to compel arbitration ... is a matter to be decided by the arbitrator." S & R Co. of Kingston v. Latona Trucking, Inc., 159 F.3d 80, 82-83 (2d Cir. 1998) (citing Doctors Assocs., Inc. v. Distajo, 66 F.3d 438 (2d Cir. 1995)). When the party seeking arbitration has participated in litigation regarding *81 the dispute, the district court can properly decide the question of waiver. Bell v. Cendant Corp., 293 F.3d 563, 569 (2d Cir. 2002). Because Meyer's waiver argument is based on defendants' defense of this litigation in the district court, we conclude that is a question for the district court rather than an arbitrator. Accordingly, we remand the case to the district court to consider in the first instance whether defendants have waived their right to arbitrate.

CONCLUSION

For the reasons set forth above, the order of the district court denying defendants' motions to compel arbitration is VACATED, and the case is REMANDED to the district court to consider whether defendants have waived their rights to arbitration and for any further proceedings consistent with this opinion.

Attachment

Addendum A (Appellants' App. at 560)

Addendum B (Appellee's Br. at 38)

[1] In his brief, Meyer argues that defendants did not establish a foundation for the screenshots, but yet concedes that the evidence in the record is undisputed.

[2] The screenshots attached to the Mi Declaration are larger than the actual size of the Samsung S5's screen, which is 5.1 inches, measured diagonally. The record does not contain accurately sized images of both screens. Uber submitted an accurately scaled screenshot of the Payment Screen with defendants' joint motion to stay the case pending appeal, which is reproduced below as Addendum A. In his brief on appeal, Meyer included what he represents are accurately scaled screenshots of both the Registration and Payment Screens. These are reproduced below as Addendum B. Although the parties have not challenged the accuracy of these images, we note that the screenshots in Meyer's brief are slightly smaller (approximately 4.8 inches, measured diagonally) than the screenshot of the Payment Screen in the record.

[3] Although the hyperlink on the Payment Screen referenced "Terms of Service," the following screen referenced "Terms and Conditions." Because the initial hyperlink, which defendants argue notified Meyer of the arbitration clause, refers to the relevant agreement the Terms of Service, we use that title throughout this opinion.
[4] A copy of the Terms of Service in effect at the time Meyer registered for an account was attached to the declaration of Uber Operations Specialist Michael Colman, submitted in support of Kalanick's motion to dismiss the Amended Complaint. The applicable version of the Terms of Service had been updated last on May 17, 2013.

[5] In his motion to dismiss, Kalanick "expressly reserve[d] his right to move to compel arbitration in other cases arising out of the User Agreement." Supp. App. at 34 n.9.

[6] Meyer argues that the district court proceedings constituted, in essence, a bench trial "on the papers" and therefore that the district court's conclusions are factual findings subject only to clear error review. Appellee's Br. at 33-34. The district court here did not present the proceedings as a bench trial, and the record does not reflect that it conducted any fact-finding: there were no material facts in dispute, no hearings conducted, and only limited development of the record. Those factors distinguish the district court proceedings here from the exceptional case in which, although a district court did not conduct an evidentiary hearing, we might treat as factual findings the court's conclusions about whether parties entered into an arbitration agreement. See U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., 241 F.3d 135, 145 (2d Cir. 2001) (holding that district court findings were subject to clear error review where parties did not seek evidentiary hearing and "filed multiple briefs and extensive evidence with the court over a two-year period").

[7] This nomenclature derives from so-called "shrinkwrap" licenses, in which a software consumer arguably assents to the license terms contained inside after breaking the shrinkwrap seal and using the enclosed software. See Specht, 306 F.3d at 22 n.4.

[8] In Nicosia, the Amazon website stated on the left side of the page: "By placing your order, you agree to Amazon.com's privacy notice and conditions of use," with the latter phrases hyperlinked to the terms and conditions. Nicosia, 834 F.3d at 236. The user placed an order by clicking on a "Place your order" button on a different part of the page. Id.

[9] In evaluating the application interface, we use the actual-size screenshot of the last step in the registration process, as it would have appeared on Meyer's Samsung Galaxy S5.

[10] Defendants challenge the district court's purported reliance on a low-resolution duplication of the Registration and Payment Screens. Defendants offer no basis, however, for their assumption that the district court evaluated the black-and-white images reproduced in its opinion rather than the clearer versions available in the record. See Meyer, 200 F.Supp.3d at 415 (describing blue hyperlink).

[11] Although Kalanick is not a party to the Terms and Conditions between Uber and Meyer, he is nonetheless protected by them. "Courts in this and other circuits consistently have held that employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement." See Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1360 (2d Cir. 1993) (holding that individual defendants were entitled to rely on arbitration provisions incorporated into their employers' agreements with investors notwithstanding that the individual defendants were not signatories to any of the agreements).

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June 11, 2018

Mark Zuckerberg
Chairman and CEO
Facebook, Inc.
1 Hacker Way
Menlo Park, CA 94025

Re: Alternative Solution for Politics Tagging

Dear Mr. Zuckerberg:

We write on behalf of a broad collection of news publishers from around the world. We represent organizations who have existed for nearly two centuries and digital-natives who launched in the last handful of years; publishers with subscription models, publishers with advertising models, publishers with licensing and distribution models; local news institutions covering small regions and cities, and news organizations that cover nations and the world.

We are concerned with Facebook’s inclusion of news content in its new policies to label all political and issue-based advertising, and to create a searchable archive for all such content. It is from our view of highest importance that the framework, which is currently being developed by Facebook, recognizes and values high-quality journalism separately and apart from political or issue-based advocacy found across the platform.

Below, we share comments and three broad recommendations on your ad archive and a process to exempt news content from the ad archive. They reflect the ideals and shared point of view of the news industry – founded on cherished principles of press freedom enshrined in the First Amendment – an industry on which you rely to provide content that drives “time well spent” on your platform.

Placing news ads in an archive designed to capture political advertising implies that Facebook considers there is a political agenda behind journalism. This is not a marketing or business issue. We see your policy as another step toward furthering a false and dangerous narrative that blurs the lines between real reporting from the professional media and propaganda. Marketing our products, or subscriptions to our products, is not separate from our journalism or from press freedom. Our marketing must reflect our journalism and tell the
story of what it takes to produce credible, source-reported, quality news. We cannot and will not engage in any process that conflates legitimate newsgathering with politics or advocacy.

We believe it is in the interest of both Facebook and news organizations, particularly during this season of primaries leading up to federal elections in the United States, to ensure that you apply a clear exemption for publishers of professional journalism so that:

(1) all marketing by news organizations remains outside any archive until full solutions are put into place.

(2) all of our advertising is treated as general advertising and is not placed into the political category by the mere fact that it mentions politics or issues.

(3) the global news industry plays a leadership role in developing and contributing to the maintenance of a news exemption observed by Facebook.

It is Facebook’s responsibility to retrofit its original policy and exclude from their political advertising archive those who produce news and cover political events around the world. This responsibility resides with Facebook alone. At the same time, Facebook’s observance of the exemption, without industry input, would likely deepen rifts between Facebook and the news industry, lead to undesirable outcomes for our readers and users of Facebook and cause greater harm to the availability of quality news on the platform.

While we recognize that there are many dozens of news organizations with various models and priorities, it is our job – in fact, our expertise – to make critical judgments across a complicated array of facts and ideas, which is what distinguishes our professional media from political advertising and other information provided by political or advocacy groups.

We are confident that we can help lead Facebook to a reasonable, scalable solution working through a coalition of associations, who happen to already spend their time thinking about these issues.

**Proposed criteria for identifying qualified news organizations:**

It is important that several criteria are taken into consideration when determining a publisher eligible to be exempted. Those could include news organizations that (i) have a dedicated professional editorial staff that create and disseminate original news and related content
concerning local, national, or international matters of public interest on at least a weekly basis, and (ii) is commercially marketed through subscriptions, advertising, or sponsorship, or is a democratically accountable, properly constituted not-for-profit. The criteria for getting exempted could also include looking at audience size, and membership in accepted industry associations that represent a broad spectrum of publishers. A process could also be formed to enable publishers that are not members of any of the listed organizations to be exempted from the ad archive.

- NMA
- DCN
- ASNE
- SPI
- WAN-IFRA
- INMA
- ONA
- MPA
- EPC

We suggest that there are highly credible organizations that support reporters in countries emanating from repressive regimes or where there are no publishers’ organizations, who would be good partners for Facebook in identifying and exempting credible news organizations. These include, but are certainly not limited to: International Center for Journalists (www.icfj.org), Committee to Protect Journalists (cpj.org/), the Knight Center for Journalism in the Americas (knightcenter.utexas.edu), and Reporters Sans Frontieres (rsf.org/en). A partnership with Facebook on this issue could support these organizations’ efforts both substantively and financially.

Most fundamentally, Facebook is making a serious mistake in pursuing strategies that are (i) automated and do not involve partner organizations, and (ii) attempt to make article-by-article content distinctions without looking at the credibility and professionalism of the source of that content. Such strategies will necessarily lead Facebook to censoring high-quality journalism, and furthering anti-journalism narratives around the world.
Given your new policy has already gone into effect and that news advertising is currently subject to your new rules, we would appreciate your prompt attention to our concerns. Please reach out to any of the undersigned associations, who will then help coordinate a meeting with all of us.

Sincerely,

Alfredo Carbajal  
President  
American Society of News Editors

Jason Kint  
CEO  
Digital Content Next

Angela Mills Wade  
Executive Director  
European Publishers Council

Linda Thomas Brooks  
President and CEO  
MPA – The Association of Magazine Media

David Chavern  
President and CEO  
News Media Alliance

Alison Bethel McKenzie  
Executive Director  
Society of Professional Journalists

Michael Golden  
President  
WAN IFRA