# "LOL NO ONE LIKES YOU": PROTECTING CRITICAL COMMENTS ON GOVERNMENT OFFICIALS' SOCIAL MEDIA POSTS UNDER THE RIGHT TO PETITION

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As technology has continued to evolve and change, so too has the way people across the country communicate with each other. This trend has also affected the ways constituents interact and communicate with their political representatives. As a result, many citizens have taken to social media platforms like Twitter and Facebook to post, tweet, and hashtag about their elected representatives, whether praising them or airing their grievances against them and their policies. Perhaps the best examples of this trend are Kentucky Governor Matt Bevin and Donald Trump, who have utilized these digital platforms to convey policy decisions and stances directly to their followers. However, in the process of maintaining these accounts, both politicians have blocked users from interacting with their accounts for various reasons, and consequentially have impeded those users' ability to communicate with them. As a result, Bevin, Trump and other government officials are being sued for allegedly violating their ex-followers' First Amendment right to freedom of expression. Freedom of expression may offer a viable legal path to those litigants but this article argues that there is another way: the right to petition. Specifically, this article argues that the practice of blocking users from official government accounts acts as a violation of their right to petition the government for redress of grievances. Thus, this article traces the history of the right to petition the government in the United States, seeks to create a modern definition of a "petition," and, applying that definition, shows that blocking social media followers from official government social media pages or feeds violates the right to petition.

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## INTRODUCTION

The increasing use of social media by government officials makes it a viable and, possibly, superior way for citizens to communicate with their representatives. Donald Trump, in particular, seems to exclusively use Twitter to communicate directly with his constituents.[1] Indeed, Trump has boasted about his large social media following and how he can use social media to "go around" the press.[2] He does so to communicate all kinds of things from graphic, misogynistic attacks on reporters[3] to actual announcements of executive policy.[4] And he's not

1. Danny Lam, *How Donald Trump Is Retooling Politics for the 21st Century*, THE CONVERSATION (Jan. 29, 2017, 3:34 PM EST), [https://perma.cc/J3TX-WZ64]; Tamara Keith, *Commander-In-Tweet: Trump's Social Media Use and Presidential Media Avoidance*, NPR (Nov. 18, 2016), [https://web.archive.org/web/20180226193137/https://www.npr.org/2016/11/18/502306687/commander-in-tweet-trumps-social-media-use-and-presidential-media-avoidance].

2. Donald J. Trump (@realDonaldTrump), TWITTER (June 16, 2017, 5:23 AM), [https://perma.cc/8VWY-8XZ6] ("The Fake News Media hates when I use what has turned out to be my very powerful Social Media - over 100 million people! I can go around them").

3. *See, e.g.*, Glenn Thrush & Maggie Haberman, *Trump Mocks Mika Brzezinski; Says She Was 'Bleeding Badly from a Face-Lift,'* N.Y. TIMES (June 29, 2017), [https://web.archive.org/web/20180226195537/https://www.nytimes.com/2017/06/29/business/media/trump-mika-brzezinski-facelift.html].

4. Bryan Bender & Jacqueline Klimas, *Pentagon Takes No Steps to Enforce Trump's Transgender Ban*, POLITICO (July 27, 2017, 11:28 AM EDT), [https://perma.cc/Q5QG-L528]; Julie Hirschfeld Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, N.Y. TIMES (July 26, 2017), [https://web.archive.org/web/20180228194337/https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html]. Trump's tweets have actually been collected and are viewable on a single website. Brendan Brown, TRUMPTWITTERARCHIVE.COM, [https://perma.cc/KK8V-4N3Y].

the only one. Recent reports show that the vast majority of members of Congress use social media to communicate with their constituents.[5]

Social media is an effective way for elected officials to communicate with constituents because it can provide "real-time data" into how constituents feel on a given issue.[6] Social media also presents a unique, interactive method of communication between government officials and their constituents instead of the typical one-direction flow of information presented by mail, e-mail, and even phone calls, which provide little direct interaction.[7] To that end, a recent study has shown that a large majority of congressional staffers believe that social media has enabled "more meaningful interactions with constituents," and has "made Members/Senators more accountable to constituents."[8]

So, what happens when a government official chooses to unilaterally sever that avenue of communication by blocking a constituent on social media? What legal recourse do they have to get that connection back? Recently, lawsuits have been filed against President Donald Trump and other government officials, such as Kentucky Governor Matt Bevin, by blocked followers who have alleged that their First Amendment right to freedom of expression has been violated.[9] Considering that an increasing number of government officials have begun blocking social media followers,[10] it is likely that more lawsuits are imminent.

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5. Rebecca Gale, *Study Finds Congress Is Paying More Attention to Social Media*, ROLL CALL (Oct. 14, 2015, 5:00 AM), [https://perma.cc/E9KY-TQKH].

6. JACOB R. STRAUS & MATTHEW E. GLASSMAN, CONG. RESEARCH SERV., R44509, SOCIAL MEDIA IN CONGRESS: THE IMPACT OF ELECTRONIC MEDIA ON MEMBER COMMUNICATIONS 14 (2016), [https://perma.cc/K9HK-MR55].

7. *Id.* at 16.

8. BRADFORD FITCH & KATHY GODSCHMIDT, CONG. MGMT. FOUND., #SOCIALCONGRESS 2015, at 10 [https://perma.cc/LKV4-MG44].

9. Complaint for Declaratory and Injunctive Relief, *Knight First Amendment Institute, et al. v. Donald J. Trump, et al.* No. 1:17-cv-05205 (S.D.N.Y. 2017) (filed Jul. 11, 2017), [https://perma.cc/2FS2-YWGA]; Alex Abdo, *@realDonaldTrump and the First Amendment*, KNIGHT FIRST AMEND. INST. (June 19, 2017), [https://perma.cc/BKF2-BXY9]; *ACLU Asks Kentucky Governor to Not Block Social Media Users*, U.S. NEWS (July 29, 2017, 1:09 PM), [https://web.archive.org/web/20180326010103/https://www.usnews.com/news/best-states/kentucky/articles/2017-07-29/aclu-asks-kentucky-governor-to-not-block-social-media-users]; Phillip M. Bailey & Morgan Watkins, *Gov. Matt Bevin Blocks Hundreds on Twitter and Facebook*, COURIER J. (June 15, 2017, 10:20 AM ET), [https://perma.cc/8CL5-KU3U].

10. Andrew Abramson, *Politicians Need to Stop the Social Media Block*, SUN SENTINEL (Mar. 3, 2017, 3:00 PM), [https://web.archive.org/web/20180223080814/hhttp://www.sun-sentinel.com/opinion/fl-aacol-political-twitter-blocks-20170303-story.html]; Max Brantley, *Public Officials Who Block Social Media Accounts May Be Running Afoul of*

In addition, a recent case out of the District Court of Virginia lends credence to the argument that, by blocking followers who have posted critical statements, these government officials are engaging in viewpoint discrimination against speech in a public forum.[11] However, as with most freedom of expression cases, this is an extremely murky area, and some scholars have called into question whether a government official's social media page or feed is actually a public forum,[12] and whether these social media postings should be considered government speech, which has far fewer First Amendment protections.[13]

Whether a government official's social media page is a "public," "limited public," or "nonpublic" forum for speech has profound implications for the level of scrutiny under which courts will examine it, with public fora receiving the most First Amendment protection.[14] Whether a forum, even a "metaphysical" one is public is, therefore, an important distinction and depends on the intent of the government, which must be intentional and "demonstrably clear."[15] Moreover, the Supreme Court has been unwilling to extend the public forum designation beyond those places that were public in ancient times, such

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*the Law*, ARK. TIMES (Mar. 17, 2017), [https://perma.cc/28BH-984W?type=image]; Charles Ornstein, *Trump Isn't the Only Politician Blocking Constituents on Twitter*, SLATE (June 7, 2017, 12:59 PM), [https://perma.cc/UC25-ALDH]; Jerry Iannelli, *Miami State Sen. Frank Artiles Has Blocked More Than 400 People on Facebook*, MIAMI NEW TIMES (Mar. 15, 2017, 2:31 PM), [https://perma.cc/JFR5-KK3U]; Marissa Lang, *Politicians Use Twitter's Block Button, and Citizens Feel Censored*, S.F. CHRON. (June 21, 2017), [https://perma.cc/AXH9-65LL]; Jon Worth, *Politicians Blocking Users on Twitter*, JON WORTH EUROBLOG (Apr. 26, 2015), [https://perma.cc/DW9K-RHVD];.

11. Mark Joseph Stern, *Federal Court: Public Officials Cannot Block Social Media Users Because of Their Criticism*, SLATE (July 28, 2017, 2:07 PM), [https://perma.cc/WD35-GCAV?type=image]. Other cases are currently being litigated. *See Price v. City of New York*, 15 Civ. 5871 (KPF), 2017 WL 1437202, at *1 (S.D.N.Y. Apr. 21, 2017) (a 42 U.S.C. § 1983 claim filed for First Amendment violation stemming from blocking plaintiff from two New York City government Twitter accounts), *reconsideration denied*, 15 Civ. 5871 (KPF), 2017 WL 2414825 (S.D.N.Y. June 1, 2017).

12. Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140 (2009).

13. Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 2002, 2008 (2011); Ross Rinehart, Note, *"Friending" and "Following" the Government: How the Public Forum and Government Speech Doctrines Discourage the Government's Social Media Presence*, 22 S. CAL. INTERDISC. L.J. 781, 817 (2013).

14. Lidsky, *supra* note 13, at 1980–92.

15. *Id.* at 1998.

as parks and streets.[16] Thus, it is unlikely that the Supreme Court will designate social media pages as "public."[17]

Further, even if the Supreme Court were willing to designate social media pages as public, there are still other obstacles to freedom of expression claims by blocked followers. More specifically, when examining freedom of expression claims, the Supreme Court has historically emphasized the rights of speakers instead of audience members[18] and has viewed expression as a one-way transmission of information,[19] both of which emphasize the interests of the government officials instead of their social media followers. Accordingly, it is possible that the Court will undervalue the ability of followers to comment on government officials' social media pages and allow the government too much leeway when deciding which comments to delete and which followers to block.

Likewise, due to the Supreme Court's focus on the government's intent when setting up a space for expression, it is likely that the Court will defer to any government official's stated objective to create a nonpublic forum, even if the space functions like a public forum.[20] The government, therefore, can have a lot of power to limit discussion on its social media pages by simply asserting that the purpose of the page is to inform citizens and not to receive feedback.

Another limitation on freedom of expression claims on social media is the defense of "government speech." "Government speech," that is, speech that comes from the government or a government official, is insulated from First Amendment scrutiny.[21] With regard to social media, government speech would most likely include any speech made by government officials over social media where the government official is identified as the speaker.[22] However, it is arguable that comments from followers would not be considered government speech if the government official had explicitly requested feedback from the public.[23] The trouble is that government officials are rarely explicit

16. *Id.* at 2008.

17. According to one scholar, social media pages are likely to be "limited public" fora where the government limits discussion to certain topics but cannot delete comments based on viewpoint. *Id.* at 1998–99.

18. *Id.* at 2014–15; Rinehart, *supra* note 13, at 818.

19. Lidsky, *supra* note 13, at 2019.

20. *Id.* at 2013.

21. Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 904 (2010); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1041 (2005).

22. Norton & Keats, *supra* note 21, at 923–24.

23. *Id.* at 929.

regarding whether they are seeking feedback; sometimes they specifically request responses to their posts,[24] but usually they do not. And some social media outlets such as Twitter anticipate that people will comment, so it is unlikely that a government official would specifically request feedback even if he or she wanted it, particularly because of Twitter's 280-character limit. In such cases, it is unclear whether courts will allow the very nature of the social media outlet to determine whether it is a public or nonpublic forum for First Amendment purposes.

In short, freedom of expression is likely to be a complicated avenue for blocked social media followers to use when seeking redress in court. However, the First Amendment does provide another potential path for blocked social media followers: the right to petition. The right to petition is a largely unexplored part of the First Amendment that is separate from freedom of expression and does not carry all its limitations. A historically important, though underutilized right, the right to petition may provide a legal remedy to blocked constituents who want to communicate directly with their government.

This article explores the history and purpose of the right to petition to identify what qualifies as a "petition" and what does not. With that definition, this article then argues that social media postings by constituents, with an emphasis on Facebook and Twitter, should qualify as petitions. Finally, this article argues that blocking users for merely criticizing elected officials violates these users' right to petition. Accordingly, under the right to petition, social media users should be protected by the First Amendment from being "blocked" from official government (individual or institutional) social media feeds or pages.

## I. THE RIGHT TO PETITION

Under the First Amendment, all citizens have the right to "petition the government for redress of grievances."[25] Although enshrined in the First Amendment to the Constitution, the right to petition has received very little legal attention, particularly in comparison to the other rights contained in the First Amendment. As such, it is somewhat difficult to understand what a "petition to the government for redress of grievances" actually is. A look at the history of petitions reveals how time, government structures and norms, and even new technologies have affected what has been considered a "petition."

24. *See, e.g.*, *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. 2017).

25. U.S. CONST. amend. I.

### *A. A Brief History of the Right to Petition*

The right to petition is an ancient one that originated in England. The right dates back to the Magna Carta in 1215, and was restated in the Petition of Right in 1628.[26] Originally, petitions were private requests to receive something from the Crown but, by the 1600s, they began to include "public petitions" that requested more general changes in the law.[27] By 1780, the right to petition came with an obligation that Parliament would consider and respond to every petition it received.[28]

In addition, historically, the right was absolute—the king or Parliament could not punish petitioners for their words.[29] Nevertheless, there were limitations on petitions:

> Petitions had to have "petitionary parts" and had to be signed by those "legitimately allowed to request a redress of grievances." Parliament also placed limits on the number of signatures that could appear on a petition and on the number of individuals allowed to present it. According to Blackstone, these restrictions were justified "as a means of avoiding riots or disruptive presentation of petitions."[30]

Despite these limitations, "petitions quickly came to dominate Parliament's calendar—indeed, they often became the legislative agenda."[31] One reason Parliament was willing to consider petitions on a wide variety of topics is that it could use those petitions to increase its own power at the expense of the Crown.[32] However, in response to

26. Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1155–56 (1986); *see also* Raymond Ku, *Antitrust Immunity, the First Amendment and Settlements: Defining the Boundaries of the Right to Petition*, 33 IND. L. REV. 385, 394 (2000) ("While the history of petitioning records instances in both England and the United States in which petitioners were in fact prosecuted for petitioning, ultimately, those punished were generally released and their prosecution only served to provide greater recognition for the right.").

27. RONALD J. KROTOSZYNSKI, RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, 'OFFENSIVE' PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 86 (2012).

28. Smith, *supra* note 26, at 1167.

29. *Id.* at 1165.

30. Ku, *supra* note 26, at 395 (internal footnotes omitted).

31. Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2167–68 (1998).

32. *Id.*

Parliament's practice of considering all petitions, the public began to feel that they had a right to have their petitions heard.[33]

The right to petition was also highly respected by the American colonies, particularly because the colonial governments would often petition the Crown themselves.[34] Indeed, King George III's repeated failure to respond to the colonies' petitions was a contributing factor in the Continental Congress's decision to declare independence.[35] Moreover, as with Parliament, colonial general assemblies sought to increase their powers vis-à-vis the Crown by legislating in response to petitions in a widening array of areas and, by doing so in response to petitions, their actions appeared more legitimate.[36] Moreover, colonists, who became increasingly distrustful of government bodies that had been appointed by the Crown—such as the governor and judges of the courts of justice—were more likely to seek redress from the locally-elected general assembly.[37] Consequently, petitions became a primary way for colonists to inform their local assemblies of issues of private or public concern, as well as to "expose mistreatment, corruption, or waste by public officials."[38]

In addition, although a few attempts were made to limit the ability to petition, either through criminal penalties for sedition (brought by the general assembly)[39] or libel lawsuits (brought by individuals who were criticized in the petitions),[40] the vast majority of petitions were seen as legitimate, protected activity.[41] However, as with Parliament, petitions were still subject to restrictions.[42] For example, colonists

33. *Id.* at 2168.

34. KROTOSZYNSKI, *supra* note 27, at 104.

35. Mark, *supra* note 31, at 2192 ("That petitions were a legitimate vehicle by which to complain of the broadest spectrum of grievances is evident from the enumeration preceding the ultimate complaint, that the colonists' petitions fell on the king's deaf ears.").

36. Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 150 (1986).

37. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 933 (1997).

38. Jason Mazzone, *Freedom's Association*, 77 WASH. L. REV. 639, 724 (2002).

39. Seditious libel allows the state to prohibit criticism against the government. KROTOSZYNSKI, *supra* note 27, at 7. *See also* Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 750 (1999).

40. Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 38 (1993).

41. Smith, *supra* note 26, at 1171–72.

42. Lawson & Seidman, *supra* note 39, at 750–55.

could be fined for filing meritless petitions but the finding of lack of merit could not be based on the viewpoint expressed in the petitions.[43]

After independence was declared, most colonies protected the right to petition in their constitutions.[44] Even before the Bill of Rights was enacted, Congress received public and private petitions, which sometimes resulted in the creation of legislation.[45] At the time, the state and federal governments had several avenues to communicate with their citizens but petitions were the primary way for the citizens to talk back.[46] Moreover, at least in the beginning, Congress formally received and read all petitions, even if it did not ultimately respond to them on the merits.[47]

Once the United States adopted the Constitution and the Bill of Rights, the right to petition became an essential part of the freedoms it guaranteed to its citizens. The importance of the right to petition is clearly indicated by its separate mention in the First Amendment, which was extensively debated in Congress.[48] The importance of the right to petition also manifested during the Adams' presidency and the Alien and Sedition Act. While the Alien and Sedition Act was in force, petitions were the only protected way for citizens to speak out against the government.[49] The Alien and Sedition Act "authorized the removal of dangerous aliens and effectively criminalized political dissent."[50] Both Vice President Thomas Jefferson and James Madison opposed the Act as an unconstitutional infringement of freedom of expression.[51] Importantly, despite its sweeping powers, the Alien and Sedition Act was applied to petitioning activity only once: for a petition calling for the repeal of the Act itself.[52] However, the petitioner, Jedidiah Peck, was never prosecuted due to public pressure, though sixteen others were convicted under the Act (and later pardoned by President Jefferson) for other speech activities.[53]

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43. Ku, *supra* note 26, at 395–96.

44. Smith, *supra* note 26, at 1173–74.

45. Mazzone, *supra* note 38, at 726.

46. *Id.* at 724.

47. Mark, *supra* note 31, at 2190. *But see* KROTOSZYNSKI, *supra* note 27, at 11.

48. Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1149–52 (2016); Smith, *supra* note 26, at 1175.

49. Spanbauer, *supra* note 40, at 37.

50. Kurt T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 OHIO ST. L.J. 435, 438 (2007).

51. *Id.*

52. Ku, *supra* note 26, at 394.

53. *Id.*

By the 1830s, the right of petition operated as a vehicle for mass agitation on numerous topics, ranging from the legality of the Bank of the United States to the annexation of Texas.[54] Abolitionists saw in the right to petition a means of forcing recalcitrant southern congressmen to confront the issue of slavery and debate it in public.[55] In response, Congress issued a gag order prohibiting the discussion of anti-slavery petitions that lasted for several years.[56] Even after the gag order was lifted, Congress no longer acted as if it were required to consider all petitions.[57] Moreover, a stronger separation of powers and broader franchise offered the public alternative avenues for redress through the courts or the vote, which led to fewer individual and group petitions.[58]

Petitions eventually evolved from individual or group petitions into "mass petitions" to bring about vast social change.[59] Suffragists were the most fervent petitioners throughout the late 1800s and early 1900s.[60] Instead of seeking a change from Congress itself, the Suffragists used petitions as evidence of public support that were combined with parades and other demonstrations.[61] Consequently, the nature and purpose of petitions had begun to shift from informing the government to rallying public support where "[f]ailure to satisfy the petitioners' demands became a political garrote for accountability."[62]

This history shows that petitions have transformed over time in format but their ultimate purpose—raising issues of concern for the government—has remained. Consequently, in the modern world with a dizzying array of new methods of communication, it can be difficult to determine what a petition actually is.

### *B. Characteristics of Petitions*

The historical context of petitions has been instrumental in how that right was perceived by the public and the government. Today, the modern petition looks quite different from its colonial counterpart and the traditional definition should be updated in order to ensure that the

54. David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right of Petition*, 9 L. & HIST. REV. 113, 119 (1991).

55. *Id.*

56. *Id.* at 113.

57. Lawson & Seidman, *supra* note 39, at 751.

58. Higginson, *supra* note 36, at 157–58.

59. KROTOSZYNSKI, *supra* note 27, at 122, 126. Private petitions were still brought during this time, however. Mark, *supra* note 31, at 2227.

60. KROTOSZYNSKI, *supra* note 27, at 122.

61. *Id.* at 126; Mark, *supra* note 31, at 2226–27.

62. Higginson, *supra* note 36, at 157.

purpose of petitions remains intact. And yet, neither courts nor legal scholars have come to a consensus as to what constitutes a petition. According to one scholar, "'[p]etitioning speech' is not all speech, or even all political speech; it is only speech which has as its object changing some policy or practice of the government, and which is aimed at a government official, or group of officials, with some responsibility for the policy or practice in question."[63] Another scholar has defined a petition as "a communication that, 1) had to be addressed to an authority such as the King, 2) had to state a grievance, and, 3) had to pray for relief."[64] Petitions could be, and were, distinguished from other documents, even ones that were addressed to someone in authority and that stated a complaint.[65] According to yet another, a "petition is a formal request or prayer by an individual or group to a governing official for the exercise of the official's authority to redress a wrong or grant a privilege."[66]

Using these definitions and the historical evolution of petitions, the main characteristics of a petition appear to be: (1) a formal request; (2) by an individual or group; (3) to a government official; (4) to redress a wrong or to grant a privilege. Each requirement will be analyzed more fully below.

### 1. A FORMAL REQUEST

The level of formality required for petitions is somewhat unclear. One scholar has argued that petitions must represent a "formal engagement with the government" so that informal communications, such as personal solicitation through lobbying, are not protected as petitions.[67] It is true that early petitions were uniformly written in very formal language. For example, in England, petitions were written in deferential language, typically as "prayers" to their recipients.[68] In addition, instead of simply expressing discontent, petitions were framed as giving information, usually focusing on the personal plight of the author.[69]

63. KROTOSZYNSKI, *supra* note 27, at 164.
64. Mark, *supra* note 31, at 2173–74 (internal footnotes omitted).
65. *Id.*
66. Mazzone, *supra* note 38, at 720 (citing BLACK'S LAW DICTIONARY, 6th ed. 1990).
67. McKinley, *supra* note 48, at 1189.
68. Mazzone, *supra* note 38, at 721–22.
69. *Id.* at 723.

In the colonies and the early United States, petitions maintained their formal and polite language.[70] Despite the tone, however, petitions critical of the sitting government were not uncommon.[71] Indeed, one scholar has noted that at least one surviving colonial petition was quite sarcastic and critical of the sitting general assembly in New York, essentially asking, in very formal terms, that the assembly members remove themselves from office.[72]

Over time, however, courts have been much more flexible on the format of petitions and have allowed petitions to take a variety of forms. As the Supreme Court noted in 1966, "[t]he right to petition for the redress of grievances has an ancient history and is not limited to writing a letter or sending a telegram to a congressman; it is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor."[73] Instead, with regard to communications sent to government representatives, legally recognized petitions have included letters,[74] a telegram,[75] oral communications to government officials,[76] and, most recently, email.[77] No longer confined to formal letters, courts have also allowed communications not in the form of correspondence to be considered petitions, such as lobbying,[78] habeas corpus petitions,[79] and lawsuits.[80]

The variety in formats allowed for petitioning activity is supported by reference to the Framers' intent; James Madison, during Congressional debates on the First Amendment, argued that "[t]he people may publicly address their representatives, may privately advise them, or declare their sentiment by petitions to the whole body; in all these ways they may communicate their will."[81] According to Madison, both formal documents and private conversations were sufficient for a

70. Spanbauer, *supra* note 40, at 31.

71. *Id.* at 32.

72. *Id.* at 30 (citations omitted).

73. *Adderley v. Florida*, 385 U.S. 39, 49–50 (1966) (footnote omitted).

74. *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137–38 (1961); *Yancey v. Commonwealth*, 122 S.W. 123, 124 (Ky. 1909).

75. *Bridges v. California*, 314 U.S. 252, 277 (1941).

76. *Mack v. Warden Loretto FCI*, 839 F.3d 286, 297–98 (3d Cir. 2016); *Holzemer v. Memphis*, 621 F.3d 512, 520–23 (6th Cir. 2010).

77. *Mirabella v. Villard*, 853 F.3d 641, 647 (3d Cir. 2017).

78. *United States v. Harriss*, 347 U.S. 612, 625–26 (1954).

79. *Johnson v. Avery*, 393 U.S. 483, 490 (1969).

80. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909 (1982); *NAACP v. Button*, 371 U.S. 415, 430 (1963).

81. Ku*, supra* note 26, at 400–01.

petition.[82] Consequently, a petition need not be formally worded to be protected under the First Amendment.

In fact, petitions need not even take the form of a request. Courts have also held that petitioning includes a myriad of expressive activities including boycotts[83] and other protests.[84] Perhaps the most unique form of petitioning, however, is *Hustler Magazine*.[85] Although not his best-known case, Larry Flynt has helped develop the right to petition through his unsolicited mailing of *Hustler Magazines* to members of Congress in order "to express [his] political and social views to public officials."[86] A District Court in the District of Columbia held that *Hustler Magazines* represented petitions to the government because Flynt was using them to inform the government.[87] Therefore, the magazines were protected under the First Amendment.[88] Clearly, if a magazine can constitute a petition, the formal request requirement has been relaxed to near nonexistence.

### 2. BY A GROUP OR INDIVIDUAL

Petitions began as individual private pleas for redress or requests for more general changes in the law and Parliament and the colonies treated both types the same.[89] In addition, petitions could also be submitted by groups, complete with multiple signatures.[90] These public petitions were historically connected with the right to assemble and with the ability to assemble as "an antecedent activity to petitioning[;]" people needed to assemble to gather signatures on a petition.[91]

The ability of groups to work together to petition the government was reinforced by the *Noerr-Pennington* doctrine wherein the Supreme Court held that when businesses collaborate to petition the government,

82. *Id.*
83. *Missouri v. Nat'l Org. for Women, Inc.*, 620 F.2d 1301, 1319 (8th Cir. 1980).
84. *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).
85. *U.S. Postal Serv. v. Hustler Mag., Inc.*, 630 F. Supp. 867 (D.D.C. 1986).
86. *Id.* at 871–72.
87. *Id.* at 872.
88. *Id.* at 875.
89. Mark, *supra* note 31, at 2184; Pfander, *supra* note 37, at 930.
90. Mazzone, *supra* note 38, at 723.
91. KROTOSZYNSKI, *supra* note 27, at 5.

even indirectly[92] or dishonestly,[93] because they are engaging in petitioning activity, doing so will not violate the Sherman Anti-Trust Act.[94] According to the Supreme Court, "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."[95] Accordingly, either individuals or groups may submit petitions.

### 3. TO A GOVERNING OFFICIAL

Unlike the first two historical characteristics of petitions, which are rather lax, an enduring requirement for a petition is that it must take the form of a direct communication between a government actor[96] and a constituent or group of constituents.[97] In contrast, speech directed at the "public marketplace" including newspapers or public speeches, is not considered a petition.[98] Historically, the publication of a petition in a newspaper, even if the document was clearly phrased as a communication to a government official, was not given petition status.[99] Indeed, in *Bridges v. California*,[100] the Supreme Court held that a newspaper publication of a petition that had already been sent to the Secretary of Labor was not a petition even though the original

92. *Id.* at 160. The railroad petition activity was indirect because the media campaign was primarily aimed at altering public opinion, not influencing or even informing the government. *Id.*

93. The exception to this rule is the "sham" exception, which the Supreme Court explained more fully in *Prof'l Real Estate In'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993).

94. Ku*, supra* note 26, at 396–99.

95. *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *see also Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510–11 (1972) ("[I]t would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.").

96. The Supreme Court has noted that the right to petition applies to each branch of the government. *Cal. Motor Transp. Co.*, 404 U.S. at 510.

97. Brian W. Schoeneman, *The Scarlet L: Have Recent Developments in Lobbying Regulation Gone Too Far?* 60 CATH. U. L. REV. 505, 510 (2011); McKinley, *supra* note 48, at 1185–86. For example, petitions were historically not considered "published" and so would not be susceptible to libel lawsuits, unless the petition was subsequently published elsewhere. Spanbauer, *supra* note 40, at 38. As noted above, however, those lines began to blur over time.

98. McKinley, *supra* note 48, at 1185–86.

99. *Harris v. Huntington*, 2 Tyl. 129, 146 (Vt. 1802).

100. 314 U.S. 252 (1941).

document was, arguably because the publication was not essential to the act of petitioning.[101]

On the other hand, as noted above, the right to petition includes the right to both send a missive to the government and the right to "lawfully circulate the petition and procure others to sign it."[102] In addition, for issues of public concern, petitions were sometimes posted in a public place like a town square or a church so they could be viewed and signed by multiple people before being sent to the local assembly.[103] These acts did not change the document's status as a petition. Later "mass petitions" also involved publicity in an effort to sway public opinion as well as communicate with the government.[104] However, as long as the government was one of the intended audiences, the quintessential nature of the petition remained intact.[105]

The key difference in these cases appears to be whether the "petition" is meant to be seen by the government. If the document has already been sent to the government, a later publication cannot also be a petition. However, if the document has not yet been sent, it can still be considered a petition, even if shown to others. The order of things appears to be dispositive.

#### 4. FOR THE EXERCISE OF THE OFFICIAL'S AUTHORITY FOR REDRESS OR PRIVILEGE

In the First Amendment, the right to petition is specifically tied to a purpose: for redress of grievances.[106] However, even historically, petitions have been allowed that did not just seek to have a law or policy changed. In colonial times, petitions also served to provide information to the general assembly regarding local concerns or complaints.[107] Similarly, early on in the United States' history, although

101. *Bridges*, 314 U.S. at 277 ("[P]ublication in the newspapers aside, in sending the message to the Secretary, Bridges was exercising the right of petition to a duly accredited representative of the United States government, a right protected by the First Amendment.").

102. *Yancey v. Commonwealth*, 122 S.W. 123, 124 (Ky. 1909). *See also People v. Gottfried*, 314 N.Y.S.2d 725, 726 (N.Y. Crim. Ct. 1970) (holding that soliciting signatures in a state park for a petition calling upon the Assembly of the State of New York to repeal existing laws is protected under the right to petition).

103. Mazzone, *supra* note 38, at 725.

104. KROTOSZYNSKI, *supra* note 27, at 162; Eric Schnapper, *"Libelous" Petitions for Redress of Grievances—Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303, 346–47 (1989).

105. KROTOSZYNSKI, *supra* note 27, at 162.

106. U.S. CONST. amend. I.

107. Lawson & Seidman, *supra* note 39, at 750.

many petitions to Congress sought changes to existing law or recompense for expenses during the war, others simply complained about political issues, such as one early petition that complained about the illegality of a late election to the House of Representatives that took place in New Jersey.[108] Petitions also sought to "expose public oppressions. Maladministration or corruption among public agents, excessive taxation, injustices perpetrated by courts and misconduct by local officials . . . were brought to public attention by petitioners' ire."[109] The Supreme Court has also emphasized a petition's ability to give power to individuals and minorities to effect change by communicating directly with the government.[110]

At its core, then, the right to petition is not just about being able to ask for something; it gives all citizens access to the government and helps them make the government more accountable to its citizens.[111] Indeed, petitions have been described as a "commitment to popular sovereignty" and the ideal that the government's power comes from the people.[112] As noted by the Supreme Court when examining the right to petition, "the whole concept of representation depends upon on the ability of the people to make their wishes known to their representatives."[113] For that reason, petitioners' access must be meaningful so that the government officials can actually see or hear the petitions.[114]

It is, therefore, not surprising that, according to the Supreme Court, the right to petition is not actually limited to "the redress of grievances" but can include "anything connected with the powers or

108. Mazzone, *supra* note 38, at 726.

109. Higginson, *supra* note 36, at 154.

110. *NAACP v. Button*, 371 U.S. 415, 430 (1963) ("And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1152 (1991); Aram A. Gavoor & Daniel Miktus, *Public Participation in Nonlegislative Rulemaking*, 61 VILL. L. REV. 759, 782 (2016); Mazzone, *supra* note 38, at 721. *See also* Emily Calhoun, *Voice in Government: The People*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 427, 428–29 (1994); Mark, *supra* note 31, at 2182.

111. KROTOSZYNSKI, *supra* note 27, at 6, 19; Calhoun, *supra* note 110, at 442.

112. Mazzone, *supra* note 38, at 729.

113. *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137–38 (1961). *See also United States v. Cruikshank*, 92 U.S. 542, 552 (1875) ("The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.").

114. KROTOSZYNSKI, *supra* note 27, at 172.

duties of the government."[115] Under Supreme Court jurisprudence, the key to a petition is an "effort to influence public officials regardless of intent or purpose."[116] As stated by Justice Kennedy, the right to petition "allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives."[117] As such, it serves a different democratic function than freedom of expression, which emphasizes "the public exchange of ideas."[118] Petitions do more than allow debate or develop knowledge; it is not an abstract, intellectual discourse that the petition clause advocates.[119] Instead, as one scholar has put it, the right to petition "guarantees the right to speak to a particular body of persons, those comprising the government" and it "preserves a particular type of speech, the right of the people to petition the government for redress of grievances."[120]

Further, the separation between freedom of expression and the right to petition has profound legal consequences. Due to its underlying purpose, freedom of expression has been subjected to several limitations such as time, place, and manner restrictions and, more importantly, no guarantee that a speaker will reach its intended audience.[121] In contrast, the whole point of the right to petition is that the people have the right to reach their government officials.[122] In other words, petitions allow citizens to inform their government regarding their wants, needs, and opinions.[123] Although there is no corresponding right that a petition must be listened to or given a response by the government, at the very least, it gives citizens "the right to make a clamor."[124] This clamor is more than just symbolic; "[i]t gives the people a chance at a peaceful and lawful alternative to self-help and

115. Gavoor & Miktus, *supra* note 110, at 782 (citing *Cruikshank*, 92 U.S. at 551).

116. *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965).

117. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011). *See also Noerr Motor Freight, Inc.*, 365 U.S. at 137–38 (holding the right to petition allows the people to "make their wishes known to their representatives").

118. *Borough of Duryea*, 564 U.S. at 388.

119. Calhoun, *supra* note 110, at 441–42.

120. Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 624 (1999).

121. KROTOSZYNSKI, *supra* note 27, at 5, 53.

122. *Id.* at 6.

123. Mazzone, *supra* note 38, at 730; Amar, *supra* note 110, at 1156.

124. William V. Luneburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1, 6 (1988).

force. It gives the people a feeling of justice and order in their government."[125]

Accordingly, petitions have served many purposes, even early on. As noted by one scholar, a more comprehensive list of purposes include the following: (1) to bring problems that need governmental response to the attention of the government; (2) to provide information to the government on "popular attitudes concerning the way it has conducted public business[;]" (3) to disclose and allow the government to "remedy incompetence, corruption, waste and other government misconduct[;]" and (4) to "measure the degree of public approval enjoyed by the incumbent government and its prospects for being kept in office."[126]

Although the Supreme Court has, for all intents and purposes, failed to develop the right to petition as a separate and distinct right with a unique method of judicial scrutiny, a distinct and separate definition of "petition" is essential to understand how the right to petition should function in the modern world. Based on the myriad forms a petition can take and the right's various purposes, this article proposes a more expansive, two-part definition of a "petition for redress." First, a petition should consist of a direct communication with the government that can be publicized either simultaneously or in advance. Second, the petition does not explicitly need to request a change in policy but it must fulfill one of the historical purposes of petitions such as providing information about public opinion. To that end, petitions can take the form of a complaint (or grievance) that does not ask for a specific remedy but, by expressing disapproval, tacitly requests a change in the way the government is operating.

## II. IS A TWEET A "PETITION"?

The Supreme Court itself has noted the importance of social media in everyday life for government officials and their constituents. According to Justice Kennedy:

> Social media offers "relatively unlimited, low-cost capacity for communication of all kinds." On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a

125. Andrews, *supra* note 120, at 624.
126. Smith, *supra* note 26, at 1178.

> direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics "as diverse as human thought."[127]

Although merely dicta in a case that concerned a statute that prohibited convicted sex offenders from using social media, Justice Kennedy's use of the word "petition" in connection with Twitter is noteworthy.[128] It is unclear whether he meant an official government petition and, if so, what kinds of tweets would, to him, be sufficient to constitute a petition. However, his words do open the door for courts to consider social media posts as government petitions.

Moreover, Justice Kennedy was correct that the vast majority of government officials use social media to communicate with their constituents for a variety of purposes. Government officials use social media as a powerful campaign tool; it is a cheap and effective way to reach multiple potential voters at once.[129] More importantly, they do not stop using social media once they are elected. Multiple government entities at every level maintain official professional social media pages, often on Facebook, and government officials often have both professional and personal social media pages and accounts that they use for distinctly different purposes.[130] These professional pages are often

127. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–36 (2017) (internal citations omitted).

128. *Id.* at 1733.

129. Carrie Kerpen, *Election 2016: How to Use Campaign Social Media Tactics to Build Your Brand*, FORBES (July 20, 2016, 11:03 AM), [https://perma.cc/YD86-9QTD]; Jared Newnam, *Political Campaigns and Social Media—Tweeting Their Way into Office*, S. UNIV. (Oct. 5, 2012), [https://perma.cc/4W3F-TSJ4].

130. Gale, *supra* note 5; Zachary Sniderman, *How Governments Are Using Social Media for Better & for Worse*, MASHABLE (July 25, 2011), [https://perma.cc/2A6A-ZURB]. For example, Kentucky Governor Matt Bevin has an official "Governor Matt Bevin" Facebook page, Governor Matt Bevin, FACEBOOK, https://www.facebook.com/GovMattBevin/ [https://perma.cc/CT56-RNFR] and a candidate "Matt Bevin" page, Matt Bevin, FACEBOOK, https://www.facebook.com/mattbevinforkentucky/ [https://perma.cc/AD4A-QVEF], which he apparently created when he was running for Governor. However, it should be noted that he appears to post both personal and professional items on both pages and many of his posts appear on both pages.

very active and, therefore, an excellent source of information for constituents on policies and events.[131]

However, these professional social media accounts should be the sole avenue of communication for constituents, leaving government officials the ability to create private accounts that, as long as they are not used for government business or communications, can remain private and an inappropriate venue for petitions.[132] The rest of the analysis of this article will assume that the social media followers are posting on the government official's professional social media pages that are used for government business.

When looking at these government officials' professional social media accounts, the importance of social media in modern political campaigns and even governance lends credence to the argument that social media posts can represent an available avenue for petitions to the government. But do comments on a government official's social media posts—most commonly, on Twitter or Facebook—constitute petitions that deserve First Amendment protection? In other words, do social media comments constitute a direct communication with government officials that seeks to inform, criticize, or seek change in policy or government actions?

### *A. Direct Communication*

The first petition requirement that social media post must meet is that it must be a direct communication with the government. Online petitions, often circulated through social media to obtain signatures and then sent to the relevant government official, offer an easy example of a direct communication.[133] Although some have criticized the utility of

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131. As noted above, Trump has even declared executive policy via Twitter. Paul Waldman, *Policy by Tweet: Trump's Transgender Ban Moves Forward*, WASH. POST (Aug. 24, 2017), [https://perma.cc/KTC9-2FEP]; Davis & Cooper, *supra* note 4.

132. Using such a practical approach to determine whether a social media account is intended to reach the public and receive comments from the public is in line with Supreme Court precedent regarding public fora. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 687 (1992) (O'Connor, J., concurring) ("[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.") (quoting *United States v. Kokinda*, 497 U.S. 720, 732 (1990)).

133. Andrew Chadwick, *How Digital Petitions are Replacing Traditional Parties as the Engine of Modern, Popular Democracy*, INDEP. (Nov. 19, 2012, 16:09 GMT), [https://perma.cc/TRL9-KH6Xa].

these petitions, sometimes calling them lazy or "slacktivism,"[134] they have become ubiquitous and have even led to policy changes.[135] At the very least, they alert the government about issues that people care about,[136] which is one of the historic purposes of petitioning.

More generic social media posts or comments can also be effective in directly communicating with government representatives. For example, members of Congress pay attention to comments on their social media pages and a recent study revealed that fewer than thirty comments would be enough for a member's staff to look into an issue.[137] The study also showed that members of Congress feel more connected to their constituents because of social media, and that enough social media pressure can change a government official's mind about an issue.[138] As a recent example, after the violence at a white supremacist rally in Charlottesville, Virginia, "#firebannon" became popular on Twitter and placed pressure on Trump to fire Steve Bannon, Trump's Chief Strategist who had long been reported to have ties to the white nationalist movement.[139] Trump did fire Bannon shortly thereafter.[140]

However, a social media post, although directed at the government official, is also simultaneously made public, which begs the question: is that post still considered a petition because it was sent to the official as well as the public? Or does the publication remove the petition status? Earlier cases clearly did not contemplate such a scenario and dealt only with publication before or after the fact. In those cases, it was easy to

134. Amanda A. Jones, *Challenging "Slacktivism": Activism on Social Media Is Not Enough*, HUFFPOST (Oct. 31, 2016, 8:19 PM ET), [https://perma.cc/2AER-7UYJ].

135. Gail Ablow, *Sign Here to Save the World: Online Petitions Explained*, MOYERS & CO. (Sept. 21, 2016), [https://perma.cc/LG52-2XKT]; *Victories*, CHANGE.ORG, [https://perma.cc/K55G-QM95].

136. Brie Rogers Lowery, *Small Online Petitions Can Effect Change*, GUARDIAN (Apr. 12, 2013, 1:30 EDT), [https://perma.cc/V8QU-8PB3]; Christopher Mele, *Online Petitions Take Citizen Participation to New Levels. But Do They Work?*, N.Y. TIMES (Dec. 28, 2016), https://www.nytimes.com/2016/12/28/us/online-petitions-activism.html [perma].

137. Gale, *supra* note 5.

138. *Id.* Online petitions can also make people more politically active after they have become involved through social media. Daniel Carpenter, *Yes, Signing Those Petitions Makes a Difference — Even If They Don't Change Trump's Mind*, WASH. POST (Feb. 3, 2017), [https://perma.cc/X2PR-85X2].

139. Ed Mazza, *Is Steve Bannon Toast? #FireBannon Trends as Pressure on Trump Grows*, HUFFPOST (Aug. 14, 2017, 1:03 AM ET), [https://perma.cc/3SZ9-HXAW].

140. Jeremy Diamond, Kaitlan Collins & Elizabeth Landers, *Trump's Chief Strategist Steve Bannon Fired*, CNN (Aug. 19, 2017, 9:20 AM ET), [https://perma.cc/AR8T-ZZ4C].

focus on whether the official received the petition first, which removed the petition status from later publications.[141] Technology at that time simply did not allow for simultaneous publication of a communication to a government official.

However, simultaneous publication through social media posts can be compared to the colonial practice of posting a petition in public so that others could sign it if they agreed with the contents. Indeed, social media allows for just such a show of support; both Twitter and Facebook have a "like" function for posts that allow other users to effectively "sign off" on the original post.[142] More importantly, a Facebook or Twitter comment on a government official's page is clearly meant for that official to see and even respond to that post, making it akin to a direct communication with the government even though others can see it.

### *B. Fulfills a Purpose*

The next aspect to consider is whether a social media post fulfills one of the historical purposes of a petition for redress. Part of the problem of characterizing social media posts as petitions is that they are often written informally and quickly so they do not fit within our traditional notions of what a government petition should look like. Moreover, social media communications to government officials often take the form of insults and general criticisms, which also do not fit within a traditional petition framework. For example, a tweet criticizing Trump for his failure to disclose his tax returns[143] appears to be much closer to a government petition than a tweet telling him that "lol no one likes you."[144]

However, criticisms of the government are considered a proper function of petitions. As discussed above, a petition to the government does not actually have to present a clear issue for redress; there is value

141. *See, e.g.*, *Bridges v. California*, 314 U.S. 252, 277 (1941).

142. In addition, the Fourth Circuit has already determined that something as simple as a Facebook "like" is a form of "pure speech" and "symbolic expression" that is protected by the First Amendment. *Bland v. Roberts*, 730 F.3d 368, 380 (4th Cir. 2013).

143. *See* Mark Hensch, *Journalist Who Revealed Tax Forms Mocks Trump Tweet: 'Sad!'*, HILL (Mar. 15, 2017, 8:19 AM EDT), [https://perma.cc/RYH2-37XA].

144. Caitlin Gibson, *Chrissy Teigen Becomes The Latest Celebrity Blocked By President Trump On Twitter*, WASH. POST (July 25, 2017), [https://web.archive.org/web/20180326021157/https://www.washingtonpost.com/news/reliable-source/wp/2017/07/25/chrissy-teigen-becomes-the-latest-celebrity-blocked-by-donald-trump/?utm_term=.73a6d27f20cd].

in simply expressing displeasure with the sitting government. Accordingly, any social media communication to a government official—either as a response to a tweet or a Facebook (or other social media site) post that relates to a political issue or the government official themselves—does fulfill a traditional purpose of the right to petition.

Indeed, when looking back to the list of purposes the right of petition has been meant to fulfill, even the most crass and flippant social media posts appear to fit right in because, at the very least, they inform the government on "popular attitudes concerning the way it has conducted public business" and "measure the degree of public approval enjoyed by the incumbent and its prospects for being kept in office."[145] Accordingly, despite the informal or even mocking nature of these social media posts, their underlying sentiment fulfills the purpose of a petition to the government.[146] In contrast, comments or posts that attack other users or post spam links would not be considered petitions because they are not directed at the government officials. The key is whether the complaint is directed at the government official or their policies.

## III. DOES BEING BLOCKED VIOLATE THE RIGHT TO PETITION?

If a tweet or a Facebook comment is a petition, is blocking a social media follower from an official government feed tantamount to preventing that person from exercising their right to petition under the First Amendment? As a preliminary matter, it is helpful to note what blocking someone on Twitter or Facebook actually means.

### *A. What Does Blocking on Social Media Do?*

According to Facebook, when you block someone, they will not be able to:

- See things you post on your profile
- Tag you in posts, comments or photos
- Invite you to events or groups
- Start a conversation with you

145. Mazzone, *supra* note 38, at 725.

146. This sentiment rings particularly true when Trump himself uses his official Twitter account to insult and mock others. Kevin Quealy, *Trump is on Track to Insult 650 People, Places and Things on Twitter by the End of His First Term*, N.Y. TIMES (July 26, 2017), https://www.nytimes.com/interactive/2017/07/26/upshot/president-trumps-newest-focus-discrediting-the-news-media-obamacare.html (last visited, Mar. 25, 2018).

- Add you as a friend[.][147]

Accordingly, if a user is blocked from a government official's profile, the ex-follower will not be able to see anything the government official posts and will not be able to post on the government official's Facebook page. In contrast, if the user is simply blocked from an official government page, the user can still look at the posts on the official page but cannot post anything themselves.[148]

On Twitter, blocking someone means that they cannot:

- Follow you
- View your Tweets when logged in on Twitter (unless they report you, and your Tweets mention them)
- Find your Tweets in search when logged in on Twitter
- Send Direct Messages to you
- View your following or followers' lists, likes or lists when logged in on Twitter
- View a Moment you've created when logged in on Twitter
- Add your Twitter account to their lists
- Tag you in a photo[.][149]

In addition, according to Twitter, a user may see Tweets or notifications on their timeline from the blocked account under certain circumstances:

1. Tweets from others you follow that mention accounts you have blocked.
2. Tweets that mention you, along with an account you have blocked.[150]

If a government official blocks a Twitter user, therefore, the blocked user will not be able to comment on the government official's Twitter account and will no longer be able to see tweets from the government official, unless another person tweets to the blocked user and mentions the government official's account. The blocked user will not even be able to search for the government official's tweets and will require assistance from an unblocked intermediary to know anything about the government official's Twitter account.[151]

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147. *What is Blocking? What Happens When I Block Someone?*, FACEBOOK: HELP CENTER, [https://perma.cc/SWW9-Q8DM].

148. *Banning and Moderation*, FACEBOOK: HELP CENTER, [https://perma.cc/HEV3-W4BA].

149. *How to Block Accounts on Twitter*, TWITTER, [https://perma.cc/H3H3-VXMZ].

150. *Id.*

151. For example, J.K. Rowling forwards Donald Trump's Tweets to Stephen King, whom Trump had blocked. Raisa Bruner, *Stephen King Says President Trump Blocked Him on Twitter but J.K. Rowling Is Here to Help*, TIME (June 13, 2017, 1:21

In summary, by blocking a follower on Facebook or Twitter, a government official makes it difficult, if not impossible, for that ex-follower to see what the official has posted or for the ex-follower to post something that the official will see. Although, with some extra effort, a person could see what the official has posted, the ex-follower cannot communicate with them directly anymore; the line of communication is effectively severed.

### *B. Judicial Scrutiny of Blocking Under the Right to Petition*

Assuming that blocking critical social media followers could violate the right to petition, the question remains as to how one should analyze the issue and, if a violation is found, what the remedy should be. Unfortunately, existing right to petition cases provide little guidance for this modern issue. Almost uniformly, right to petition cases did not involve petitioners being prevented from petitioning but instead involved petitioners being punished for their petitions, either under libel, anti-trust, contempt, or a variety of other laws.

More specifically, up until the 1960s, litigation concerning the right to petition was mainly seen in libel or anti-trust cases where parties asserted their right to petition free from punishment, either from libel laws or the Sherman Anti-Trust Act.[152] Libel cases, in particular, proved fertile ground to develop the contours of the right to petition, which is not surprising considering the historical conflict between the right to petition and the ability to criticize the government.

Early libel cases often dealt with petitioners attempting to have someone fired from or not hired for a government position, and those requests were given much leeway under the right to petition.[153] As noted by the Supreme Court of Vermont in 1802:

> An absolute and unqualified indemnity from all responsibility in the petitioner is indispensable, from the right of petitioning the supreme power for the redress of grievances; for it would be an absurd mockery in a government to hold out this privilege to its subjects, and then punish them for the use of it . . . Petitions for redress of grievances will generally point to

PM ET), [https://web.archive.org/web/20180227025850/http://time.com/4816499/stephen-king-trump-block-rowling/].

152. *McDonald v. Smith*, 472 U.S. 479, 485 (1985); *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137–38 (1961).

153. *Yancey v. Commonwealth*, 122 S.W. 123, 124 (Ky. 1909) (letter sent for signatures to be used to impeach the commonwealth's attorney).

> officers of the government, who have, or may be supposed to have abused its confidence by mal-administration; and although the government should refrain from prosecuting the petitioners criminally, yet it would operate as effectual a restraint upon them to expose them to an action for damages at the suit of those of whose conduct they have complained to government.[154]

All this changed over time. In 1945, in *White v. Nichols*,[155] the United States Supreme Court granted only limited immunity to petitions, so that allegedly libelous letters sent to the President and Secretary of the Treasury that requested the removal of a customs collector would be subject to libel laws if they were written with malice and were not written to actually obtain redress.[156] In the 1985 case of *McDonald v. Smith*,[157] the Supreme Court reaffirmed *White's* limitations on petitioners' immunity when it found that letters sent to the President urging him to not hire a particular candidate as a United States Attorney were not protected from libel laws, despite the fact that those letters were petitions.[158] Ultimately, the Supreme Court limited the right to petition by holding that, as with the right to freedom of expression, a petition cannot be made maliciously in order to libel someone.[159]

In addition, the Supreme Court has placed other limitations on the right to petition such as subjecting petitions to the public concern doctrine typically reserved for freedom of expression analysis.[160] As some scholars have noted, the right to petition has repeatedly been combined or even conflated with freedom of expression or assembly, despite its unique history.[161]

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154. *Harris v. Huntington*, 2 Tyl. 129, 139–40 (Vt. 1802).

155. 44 U.S. 266 (1845).

156. *Id.* at 291.

157. *McDonald*, 472 U.S. at 485 (1985).

158. *Id.* at 484.

159. *Id.* at 485.

160. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 398 (2011) (applying the public concern test); McKinley, *supra* note 48, at 1179–80.

161. McKinley, *supra* note 48, at 1177–78. Scholar Ronald Krotoszynski has argued that this effect is due to inattention by the Supreme Court: "the Court believes that it can resolve its cases on other First Amendment grounds, so it does so." KROTOSZYNSKI, *supra* note 27, at 157. Krotoszynski also lays some of the blame at litigants' feet because they have failed to properly frame the issues as involving the right to petition. *Id.* at 157 n.32. *See also* Mark, *supra* note 31, at 2228 (noting that, due to the increasingly informal nature of petitions, they started to become somewhat

For example, in 1952, the Supreme Court analyzed posted lithographs that set forth a pro-segregation petition to the Mayor and City Council of Chicago under freedom of expression and not the right to petition, even though the lithographs closely resembled the historic petitions that would be posted in town squares for signatures.[162] It is unclear why the Court chose to eschew analyzing the lithographs under the right to petition, particularly because the dissent by Justice Black did not,[163] though perhaps the overtly public nature of the posted lithographs made the Court discount the argument that they were actually petitions that had been publicly posted for signatures before being sent to the government.

These cases reflect the early practical limitations on the right to petition, which were caused by the available means of communication available to petitioners, such as mail or telephone. These practical limitations meant that petitioners could not be stopped from sending petitions and could only be punished after the fact and, therefore, existing case law deals only with the right to petition being used as a shield against the government. The digital age has changed that dynamic and, for the first time, petitioners are being prevented from communicating with the government in their chosen milieu and may, therefore, choose to use the right to petition as a sword instead. There is almost no precedent for this use of the right to petition and so it is unclear whether and how courts will circumscribe that right.

The closest case to right to petition being used to protest being blocked by a government official is the previously-mentioned *Hustler Magazine* case. Using 39 U.S.C. § 3008,[164] several members of Congress complained to the Post Office that they were receiving a "pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative," which allowed them to request a prohibitory order.[165] The Post Office issued prohibitory orders on behalf of the members of Congress who complained and, in response, Flynt sent more magazines to the members of Congress who had been named in the orders and explained to those members that "he would continue to send them *Hustler* 'because I'm exercising my First Amendment rights

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indistinguishable from other political speech, which may explain why the Supreme Court has conflated the right to petition and other First Amendment rights).

162. *Beauharnais v. Illinois*, 343 U.S. 250, 252 (1952).

163. *Id.* at 273 (Black, J., dissenting).

164. 39 U.S.C. § 3008 (1982).

165. *U.S. Postal Serv. v. Hustler Mag., Inc.*, 630 F. Supp. 867, 868–69 (D.D.C. 1986).

to express my political and social views to public officials.'"[166] Several members again protested and the Post Office issued complaints that the prohibitory orders had been violated.[167] Flynt then sued for an injunction, which he received from the D.C. district court.[168]

According to this case law, the right to petition arguably entitles blocked users to an injunction that restores their ability to communicate with government officials via social media. Moreover, this case also indicates that the content of the petition should not matter in a court's analysis. The District Court did not examine whether Flynt truly wished to change the opinions of Congress or whether he would likely succeed in doing so. Instead, the question the court examined was merely whether the magazines were petitions based on their ability to inform Congress.[169]

Similarly, once a social media communication has been found to be a petition using the definition outlined above, the content of a user's social media posts should not be examined any further by courts in a right to petition case. A court need merely determine whether a person was impermissibly blocked after petitioning the government and, due to the importance of the right to petition, courts should use a stringent level of review. More specifically, to defend its decision to block a follower on social media, the government should have to identify an important government interest that justifies the decision and show that it used the least restrictive means to achieve its interest.[170] Moreover, courts should start with a presumption that favors the petitioner's access to government officials.[171]

### 1. THE GOVERNMENT'S INTEREST IN BLOCKING

The first step in a court's analysis of the right to petition should be whether a government official has a sufficiently important reason for blocking the petitioner. Of course, posts on social media that do not have the requisite intent of communicating with the government official about the official or a policy, even just to criticize, cannot be considered petitions. Posts that advertise services, are merely repetitive, are libelous, or are otherwise spurious or abusive can reasonably be blocked by government officials without fear of running

166. *Id.* at 868.
167. *Id.*
168. *Id.*
169. *Id.* at 873.
170. KROTOSZYNSKI, *supra* note 27, at 156.
171. *Id.* at 168.

afoul of the First Amendment. Indeed, government officials often have official policies as to what will cause them to block someone on social media.[172] Usually, that means only blocking someone who posts racist or incendiary comments.[173] However, government officials do not always adhere to their policies when they choose to block someone.

For example, according to a spokesperson for Governor Bevin's administration, the reasons users have been blocked from his social media accounts are due to "posting obscene and abusive language or images, or repeating off-topic comments and spam."[174] However, this policy is in contradiction with the reality of the situation, as plaintiffs for the ACLU suit against Governor Bevin were blocked due to comments regarding his overdue property taxes and criticisms of his right-to-work policies and apprenticeship programs.[175] As part of that litigation, the Attorney General of Kentucky recently found that Governor Bevin's office violated open records law when it refused to release the "key words" it uses to filter social media comments to choose which social media users to block.[176]

Similarly, in Maryland, Governor Hogan has blocked users for "vulgar, derogatory, hateful or racist," language in addition to those who were perceived as commenting as "part of an organized effort" to demand that the Governor criticize Trump's Muslim travel ban.[177] Trump's practice of blocking users on Twitter has been even less clear-cut. Trump has also blocked numerous users on Twitter for their tweets criticizing his administration and his policies.[178]

It, therefore, appears that at least some of the time, government officials are blocking people on social media because they do not like

172. Ovetta Wiggins & Fenit Nirappil, *Gov. Hogan's Office has Blocked 450 People from His Facebook Page in Two Years*, WASH. POST (Feb. 8, 2017), [https://web.archive.org/web/20180319182244/https://www.washingtonpost.com/local/md-politics/gov-hogans-office-has-blocked-450-people-from-his-facebook-page-in-two-years/2017/02/08/54a62e66-ed45-11e6-9973-c5efb7ccfb0d_story.html?utm_term=.a6fb5f9b914b].

173. *Id.*

174. Charles Ornstein (@charlesornstein), *Charles Ornstein Posting Comments of Woody Maglinger*, TWITTER (June 13, 2017, 12:26 PM), [https://perma.cc/K8MB-2SDV].

175. *See* Verified Complaint at 8, 10, *Morgan et al. v. Bevin*, No. 3:17-cv-00060-GFVT, 2017 WL 3268223 (E.D. KY 2017).

176. Deborah Yetter, *Bevin's Office Broke Law After Not Saying How It Blocks People on Facebook, Beshear Rules*, COURIER J. (Dec. 18, 2017, 11:02 A.M. ET), [https://perma.cc/5ZZ5-CGBQ].

177. Wiggins & Nirappil, *supra* note 172.

178. Complaint for Declaratory and Injunctive Relief at 2, *Knight First Amendment Institute, et al. v. Trump, et al.* No. 1:17-cv-05205 (S.D.N.Y. 2017) (filed Jul. 11, 2017), [https://perma.cc/2FS2-YWGA].

what the person has said, which cannot be a legitimate purpose under the First Amendment. As noted in the recent Virginia District Court case, even offensive social media posts must be protected: "[b]y prohibiting Plaintiff from participating in her online forum because she took offense at his claim that her colleagues in the County government had acted unethically, Defendant committed a cardinal sin under the First Amendment."[179] Accordingly, it is one thing to have a policy where social media posts will be deleted if they are off-topic[180] but merely critical or even offensive posts should still retain First Amendment protection as petitions to the government. Government officials who block users because they are offended by their comments have therefore failed to meet their obligations under the First Amendment.

### 2. Least Restrictive Means

In addition to having, at the very least, a legitimate purpose for blocking users on social media, the government must also use the least restrictive means for achieving its purpose. Consequently, even if the government were blocking users for legitimate reasons, such as preventing users from posting racist or obscene material, if there are means to achieve this goal that are less restrictive of the right to petition, the government must use them.

Arguably, social media is just one way to reach a government official so being blocked on social media does not prevent constituents from petitioning the government. However, the First Amendment has never required that the burden on speech be absolute; even incidental burdens on speech can trigger First Amendment protections.[181] Similarly, any burden on speech—even a simple "time, place, and manner" restriction elicits intermediate scrutiny and may still run afoul of the First Amendment.[182] Accordingly, even if blocking a follower on

179. *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 717–18 (E.D. Va. 2017).

180. *Id.* at 717–18 n.5.

181. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968) (holding that an "incidental" burden on freedom of speech is justified only:

> [I]f it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

182. Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 384 (2014).

social media does not absolutely prevent that follower from petitioning that government official, it still burdens their speech by restricting access to the government official and, therefore, triggers First Amendment scrutiny.

Moreover, social media provides unique benefits as a communication medium, which makes a government official's choice to block a constituent from that media even more problematic under the First Amendment. Although a relatively new technology, courts have already begun to assert the importance of accessing social media. As early as 1997, the Supreme Court noted the value of the internet as a provider of "relatively unlimited, low-cost capacity for communication of all kinds."[183] That finding was applied to social media in *Packingham v. North Carolina*[184] when the Supreme Court held that a statute that prohibited convicted sex offenders from accessing social media violates the First Amendment.[185]

Moreover, social media provides a unique and, in some ways, superior venue for petitioning the government. First, social media is incredibly direct; it allows constituents to directly contact their representative, often without going through their staff. Unlike telephones and mail, a tweet to President Donald Trump is likely to be read (and perhaps retweeted)[186] by him and not his just staff.[187] Similarly, there is substantial evidence that Texas Governor Greg Abbott's personal Twitter account is a secret and effective way to reach the Governor to advocate for policy changes or ask for favors.[188]

Second, posting on an official government Facebook page or tweeting in response to a government official's tweet is more likely to reach an audience of people who have similar interests and want to

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183. *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 870 (1997) (holding that the Communications Decency Act, which, in part, prohibited the transmission of obscene or indecent communications over the internet to anyone under age eighteen constituted a content-based restriction on speech).

184. 137 S. Ct. 1730 (2017).

185. *Id.* at 1732 ("Foreclosing access to social media altogether thus prevents users from engaging in the legitimate exercise of First Amendment rights.").

186. Adam Edelman, *Trump Retweets 16-Year-Old California Boy During Tirade Over CNN*, DAILY NEWS (Nov. 29, 2016, 12:08 PM), [https://web.archive.org/web/20180319182407/http://www.nydailynews.com/news/politics/trump-retweets-16-year-old-california-boy-tirade-cnn-article-1.2891267].

187. It appears that his staff have little to no control over Trump's Twitter account. Sarah Westwood, *Trump Clings to Control of His Twitter Feed as John Kelly Consolidates Authority*, WASH. EXAMINER (Aug. 8, 2017, 3:00 PM), [https://perma.cc/DN3U-DWPH].

188. Edgar Walters, *Want Gov. Greg Abbott's Ear? Try a Twitter Message—If You Can Make His List*, TEX. TRIB. (Aug. 24, 2017, 12:00 AM), [https://perma.cc/SK47-FNM2].

engage in similar conversations, particularly for more specialized areas of governance.[189] By petitioning on a government page, the petitioner is more likely to get support from like-minded followers who can "sign" the comment via the "like" button and amplify the petition's reach and importance.

Third, social media is a superior method of communicating with government officials because, in addition to frequently using social media themselves, government officials deliberately encourage social media participation or seek responses from their followers on social media.[190] For example, over the course of Governor Bevin's term in office, he has repeatedly used social media sites such as Facebook and Twitter to communicate with and reach out to his constituents. As the Governor explains in certain Facebook videos, he insists that social media is a great tool to communicate with the people of Kentucky without having to deal with the biases in "fake news" and mainstream media.[191] And his administration has stated that he "is a strong advocate for constructive dialogue, and he welcomes thoughtful input from all viewpoints on his social media platforms."[192]

Similarly, while there is no formal policy stating how President Trump handles his social media account, his actions tend to show that communication with his followers is an important way to be informed about important policy decisions and official statements from the President himself.[193] Moreover, President Trump has effectively eschewed traditional media and communicates directly to his followers on Twitter,[194] consistently using his personal account, @realDonaldTrump, instead of the @POTUS account.[195]

189. Lidsky, *supra* note 13, at 2009 ("No other online forum is likely to reach quite as interested an audience or foster political association as effectively as a government sponsored one.").

190. *See, e.g.*, Mary Hansen, *Springfield Aldermen Experience Highs, Lows of Social Media*, ST. J. REG. (July 14, 2017, 8:51 AM), [https://web.archive.org/web/20180319182703/http://www.sj-r.com/news/20170713/springfield-aldermen-experience-highs-lows-of-social-media] (Alderman seeking out constituents' opinions over Facebook); *Governor Matt Bevin*, *supra* note 130.

191. *See, e.g.*, *Governor Matt Bevin*, *supra* note 130.

192. Ornstein, *supra* 174.

193. *See* Complaint for Declaratory and Injunctive Relief at 2, *Knight First Amendment Inst., et al. v. Donald J. Trump, et al.* No. 1:17-cv-05205 (S.D.N.Y. 2017) (filed Jul. 11, 2017), [https://perma.cc/2FS2-YWGA]; *see also* Rebecca Morin, *Trump: My Social Media Use is 'Modern Day Presidential'*, POLITICO (July 1, 2017, 7:26 PM EDT), [https://perma.cc/83JE-3DKM].

194. Paul LeBlanc, *Trump Defends Social Media Use After Controversial Tweets*, CNN (July 2, 2017, 8:58 AM ET), [https://perma.cc/EM68-SSJ7]; Susan Milligan, *Who Needs the Media?*, U.S. NEWS (Nov. 6, 2015, 6:00 AM),

Indeed, as the Knight Institute's complaint against President Trump argues, he uses his @realDonaldTrump "account to make formal announcements, defend the President's official actions, report on meetings with foreign leaders, and promote the administration's positions on health care, immigration, foreign affairs, and other matters," and that government officials and the courts have recognized such tweets as "official statements."[196] For example, his tweets stating that he would ban transgender people from serving in the military came from his @realDonaldTrump account, not the @POTUS account.[197] In response, his critics and followers have used his @realDonaldTrump account to communicate with him,[198] effectively making both the @POTUS and @realDonaldTrump accounts official government accounts and the @realDonaldTrump account the most effective way to reach him on social media.

Courts have previously held that whether the government officials asked for participation on their social media pages is also relevant for First Amendment analysis. For example, in a Fourth Circuit case, a school district's website was deemed a private forum in part because the website only provided information one way and did not "invite[] or allow[] private persons to publish information or their positions there so as to create a limited public forum."[199] In contrast and more recently, a Virginia District Court specifically noted that the defendant government official solicited communication on her government Facebook account and the District Court used that information to find that the defendant had violated the First Amendment when she blocked people from her page.[200] The District Court also noted that the defendant was active on

[https://web.archive.org/web/20180319194252/https://www.usnews.com/news/the-report/articles/2015/11/06/presidential-candidates-dont-need-the-media].

195. Marcus Gilmer, *Trump to Use Personal Twitter Account Instead Of @POTUS, Report Says*, MASHABLE (Jan. 15, 2017), [https://perma.cc/XL48-FGEM]; Donald J. Trump (@realDonaldTrump*), Posting of Donald J. Trump*, TWITTER, [https://perma.cc/T2NH-WCDA] (July 26, 2017).

196. Complaint, *supra* note 175, at 2.

197. Aaron Blake, *Trump's Haphazard Transgender Military Ban*, WASH. POST (Aug. 30, 2017), [https://web.archive.org/web/20180326022114/https://www.washingtonpost.com/news/the-fix/wp/2017/08/30/trumps-haphazard-transgender-military-ban/?utm_term=.a4d183731dc5].

198. Diana Pearl, *A Cancer Patient, Rosie O'Donnell and More Critics President Trump Has Blocked on Twitter*, PEOPLE POLITICS (Sept. 20, 2017, 6:18 PM), [https://perma.cc/4YTS-P2GZ].

199. *Page v. Lexington Cty. Sch. Dist. One*, 531 F.3d 275, 284 (4th Cir. 2008).

200. *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 717–18 (E.D. Va. 2017).

her Facebook page and used "the comments section of her posts . . . to engage with her constituents."[201]

Fourth, the removal of dissenting voices from government officials' social media pages creates an echo chamber that can falsely indicate to the official that their policies are universally beloved. The echo chamber effect can also falsely show the remaining followers that there is no opposition and thereby stifle meaningful discussion among the official's followers.[202] Allowing a dissent to be seen also allows the media to present an accurate view of the popularity of a government official or policy.[203]

Fifth, government officials have recently been blocking or underutilizing other methods of communication, making social media much more essential for petitioning. Congress is understaffed so telephone calls are often unanswered or dealt with in a perfunctory manner.[204] Similarly, members of Congress have also severely curtailed the practice of holding town hall meetings, particularly during the Obamacare repeal efforts.[205]

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201. *Id.* at 709.

202. KROTOSZYNSKI, *supra* note 27, at 12 ("[T]he fact of dissent helps to generate a dialogue within the citizenry that might otherwise not exist. . ."). *See* also Lee, *supra* note 21, at 1010–11 (noting social science research that "ideas perceived to have achieved broad acceptance are generally more persuasive").

203. KROTOSZYNSKI, *supra* note 27, at 166.

204. John Cluverius, *Don't Bother Calling Congress*, BOS. GLOBE (May 21, 2017), [https://web.archive.org/web/20180319194122/https://www.newyorker.com/magazine/2017/03/06/what-calling-congress-achieves]; Francine Kiefer, *Getting a Busy Signal When You Call Congress? Here's How to Get Through.*, CHRISTIAN SCI. MONITOR (Feb. 13, 2017), [https://perma.cc/DX3Q-Z4A4]; Kathryn Schulz, *What Calling Congress Achieves*, NEW YORKER (Mar. 6, 2017) http://www.newyorker.com/magazine/2017/03/06/what-calling-congress-achieves [perma]. Arkansas Senator Tom Cotton has apparently been issuing cease and desist letters to constituents who have called him and used what his staff called "vulgar language." Nicole Karlis, *Tom Cotton's Cease-and-Desist Letter to an Activist Raises Serious First Amendment Questions*, SALON (Jan. 19, 2018, 7:57 AM), [https://perma.cc/V6BY-DK94]. At least one constituent who received the letter said she was merely critical of Senator Cotton and has now been told she cannot call him again or risk being reported to the police. *Id.*

205. Heidi M. Przybyla, *Republicans Avoid Town Halls After Health Care Votes*, USA TODAY (Apr. 10, 2017, 4:34 PM ET), [https://web.archive.org/web/20180319194431/https://www.usatoday.com/story/news/politics/2017/04/10/republicans-avoid-town-halls-after-health-care-votes/100286290/]; Al Weaver, *Congress Dodging Town Hall Meetings Over Memorial Day Break*, WASH. EXAMINER (May 25, 2017, 12:01 AM), [https://perma.cc/46NY-9SA5].

As noted by the Supreme Court, when petitioners cannot use traditional means to reach the government, they should be allowed to use whatever means may be effective as long as they are peaceful:

> Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable. . . .[206]

Due to the prevalence and preference of social media use by government officials, lack of access to those social media channels is arguably a failure of the government to be responsive to its citizens. A noted First Amendment scholar, Ronald Krotoszynski, has argued that:

> [A]t its core, the Petition Clause stands for the proposition that government, and those who work for it, must be accessible and responsive to the people. Governance in a representative democracy is supposed to be a collaborative enterprise in which those holding government power engage and respond to the citizenry, not only at election time, but also while engaged in the day-to-day task of governing. Moreover, this is not merely a theoretical commitment; classic forms of petitioning . . . involve the power of ordinary, average people to put items on the government's agenda for consideration and response—regardless of whether or not those holding public office wish to consider, much less address, those precise issues.[207]

Finally, even if the government were permitted to regulate the content of its social media pages, it has other means of doing so besides

206. *Adderley v. Florida*, 385 U.S. 39, 50–51 (1966). Similarly, the District Court in the *Hustler Magazine* case held that constituents have limited avenues to express their opinions to their representatives and any restrictions on certain avenues—at the time, mail and the telephone— could "effectively deny [constituents'] right to petition Congress at all." *U.S. Postal Serv. v. Hustler Mag., Inc.*, 630 F. Supp. 867, 873 (D.D.C. 1986).

207. KROTOSZYNSKI, *supra* note 27, at ix.

blocking users. The right to petition does not include a right to a response, so the government can simply ignore the messages it does not like. In addition, Twitter and Facebook also allow its users to filter tweets or posts they receive—for example, for profanity—or change their notification settings to only their followers.[208] Alternatively, it can simply delete the offensive posts. As noted above, blocking a user removes the user's ability to communicate on any topic with the government official, which is a heavy punishment and certainly not the least restrictive one.

Using this analysis, blocking social media followers for simply criticizing government officials constitutes an impermissible infringement of the right to petition. Government officials have no important interest in blocking these followers, particularly compared to the importance of the ability to complain or otherwise communicate directly with government officials using their preferred method of communication. Moreover, blocking a follower should be the last resort to effectuate any government purpose because it unilaterally cuts off an essential avenue of communication.

## CONCLUSION

Clearly, the interplay between the right to petition and other First Amendment rights is a complex and nuanced issue and should be further explored in future scholarship. As a preliminary matter, however, this article has shown the importance of the right to petition and that it does apply to social media communications with government officials. Moreover, due to the unique history and importance of the right to petition, this article has presented a clear case that the right to petition should be analyzed in a distinct manner and not conflated with other First Amendment rights.

The availability of social media is an important advance for political speech between the government and its constituents. Moreover, because social media allows constituents to directly communicate their grievances with government officials, social media has opened a new avenue of petitioning the government. When a government official blocks someone on social media they have enacted an impermissible restriction on that right. Blocking someone from a

208. *New Ways to Control Your Experience on Twitter*, TWITTER: BLOG, (Aug. 18, 2016), [https://perma.cc/C5JB-MPRN]; Josh Constine, *Facebook Adds Keyword Moderation and Profanity Blocklists to Pages*, ADWEEK (Feb. 10, 2011), [https://perma.cc/J63R-B9RC].

government or government official's social media page or account should, therefore, be strictly curtailed, if not prohibited, by courts under the First Amendment.