

IN THE SUPREME COURT OF PENNSYLVANIA

No. 3 MAP 2019

Rachel L. CARR,
Appellee.

vs.

DEPARTMENT OF TRANSPORTATION,
Appellant.

Appeal from the Commonwealth Court of Pennsylvania, No. 380 MD 2017,
Reversing the Order of the State Civil Service Commission

BRIEF OF *AMICUS CURIAE*
ELECTRONIC PRIVACY INFORMATION CENTER (EPIC)
IN SUPPORT OF APPELLEE

Marc Rotenberg
Counsel of Record
Alan Butler
Megan Iorio
Electronic Privacy Information Center
1718 Connecticut Avenue, N.W.
Suite 200
Washington, DC 20009
(202) 483-1140

May 6, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. Social media is the “modern public square” for debate on issues of public concern.	6
II. Social media platforms offer a variety of semi-private spaces for speech that the government should not monitor.....	12
III. Reversal in this case would encourage invasive government surveillance and chill protected speech on social media	17
CERTIFICATE OF COMPLIANCE: WORD COUNT	22
CERTIFICATE OF COMPLIANCE: CONFIDENTIAL INFORMATION	23
CERTIFICATE OF SERVICE	24

TABLE OF AUTHORITIES

CASES

<i>Garcetti v. Ceballos</i> , 547 U.S. 414 (2006)	4
<i>Lane v. Franks</i> , 134 S. Ct. 2369 (2014)	12
<i>N.Y. Times v. Sullivan</i> , 376 U.S. 254 (1964)	12
<i>Packingham v. North Carolina</i> , 137 S. Ct. 1730 (2017).	3, 4, 6, 20
<i>Pickering v. Board of Ed. of Township High School Dist. 205, Will City</i> , 391 U.S. 563 (1968).	4
<i>Rankin v. McPherson</i> , 483 U.S. 378 (1987)	5, 12

OTHER AUTHORITIES

A. Michael Froomkin, <i>Pseudonyms by Another Name: Identity Management in a Time of Surveillance, in Privacy in the Modern Age</i> (Marc Rotenberg, Julia Horwitz, & Jeramie Scott eds., 2015)	19
Alex Hern, <i>Facebook is chipping away at privacy — and my profile has been exposed</i> , <i>Guardian</i> (Jun. 29, 2016)	15
Alice Marwick & Rebecca Lewis, <i>Media Manipulation and Disinformation Online</i> (2017)	11
Andrew Perrin & Monica Anderson, <i>Share of U.S. adults using social media, including Facebook, is mostly unchanged since 2018</i> , Pew Research Center (Apr. 10, 2019)	7
Brian Barrett, <i>Facebook Search Now Finds Public Posts—So Hide Yours</i> , <i>Wired</i> (Oct. 22, 2015)	15
Carole Cadwalladr & Emma Graham-Harrison, <i>Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach</i> , <i>Guardian</i> (Mar. 17, 2018)	11
Danielle Keats Citron, <i>Hate Crimes in Cyberspace</i> (2014)	11

<i>DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy: Hearing Before the Subcomm. on Counterterrorism & Intelligence of the H. Comm. on Homeland Sec., 112th Cong. 2 (2012) (statement of Rep. Patrick Meehan, Chairman, Subcomm. on Counterterrorism & Intelligence)</i>	19
Elizabeth Stoycheff, <i>Under Surveillance: Examining Facebook’s Spiral of Silence Effects in the Wake of NSA Internet Monitoring</i> , Journalism & Mass Comm. Q., March 2016.....	20
EPIC, <i>EPIC v. Department of Homeland Security: Media Monitoring</i>	19
Facebook, <i>Basic Privacy Settings & Tools</i> (2019)	14
Facebook, <i>How can I use lists to organize my friends on Facebook?</i> (2019)	14
Facebook, <i>Manage Your Privacy</i> (2019).....	14
Facebook, <i>What are the privacy settings for groups?</i> (2019)	14
Hamza Shaban, <i>Twitter reveals its daily active user numbers for the first time</i> , Wash. Post (Feb. 7, 2019)	7
<i>In the Matter of Facebook, Inc., Complaint, Request for Investigation, Injunction, and Other Relief</i> (Dec. 17, 2009).....	15
<i>In the Matter of Facebook, Inc., Consent Order, FTC Docket No. C-4365</i> (July 27, 2012).....	15
<i>In the Matter of Snapchat, Inc., Complaint, Request for Investigation, Injunction, and Other Relief</i> (May 16, 2013).....	16
Instagram, <i>How do I use Instagram Direct?</i> (2019).....	13
Instagram, <i>Privacy Settings & Information</i> (2019)	13
Jacob R. Strauss, Cong. Research Serv., R45337, <i>Social Media Adoption by Members of Congress: Trends and Congressional Considerations</i> (2018).....	11
Jeffrey Rosen, <i>The Deciders: Facebook, Google, and the Future of Privacy and Free Speech, in Constitution 3.0</i> (Jeffrey Rosen & Benjamin Wittes eds., 2011)	18
Jeremy Bentham, <i>Panopticon, or, the Inspection-House</i> , in <i>The Works of Jeremy: Volume 4 Bentham</i> (1843).....	20
Julie Cohen, <i>Law for the Platform Economy</i> , 51 U.C. Davis L. Rev. 133-204 (2017)	11
Julie E. Cohen, <i>Configuring the Networked Self: Law, Code, and the Play of Everyday Practice</i> (2012).....	18

Katerina Eva Matsa & Elisa Shearer, <i>New Use Across Social Media Platforms 2018</i> , Pew Research Center (Sept. 10, 2018).....	8
Kurt Wagner, <i>Facebook says millions of users who thought they were sharing privately with their friends may have shared with everyone because of a software bug</i> , Vox (Jun. 7, 2018).....	16
Kurt Wagner, <i>Facebook’s year of privacy mishaps continues—this time with a new software bug that ‘unblocked’ people</i> , Vox (Jul. 2, 2018)	17
Lisa de Moraes, <i>CBS News Partners with Twitter for Democratic Debate on November 14</i> , Deadline (Oct. 26, 2015).....	11
Maeve Duggan & Aaron Smith, <i>The Political Environment on Social Media</i> , Pew Research Center (Oct. 5, 2016)	8
Me too, <i>About: History & Vision</i> (2018).....	9
Mike Isaac & Cecilia Kang, <i>Facebook Expects to Be Fined Up to \$5 Billion by F.T.C. Over Privacy Issues</i> , N.Y. Times (Apr. 24, 2019).....	16
Monica Anderson & Jingjing Jiang, <i>Liberal Democrats more likely than other groups to be politically active on social media</i> , Pew Research Center (Nov. 5, 2018).....	9
Monica Anderson & Paul Hitlin, <i>Social Media Conversations About Race: The hashtag #BlackLivesMatter emerges: Social activism on Twitter</i> , Pew Research Center (Aug. 15, 2016).....	10
Monica Anderson & Skye Toor, <i>How social media users have discussed sexual harassment since #MeToo went viral</i> , Pew Research Center (Oct. 11, 2018).....	10
Monica Anderson, Skye Toor, Lee Raine & Aaron Smith, <i>Activism in the Social Media Age: Public Attitudes toward political engagement on social media</i> , Pew Research Center (July 11, 2018).....	9
Nat’l Conference of State Legislatures, <i>State Social Media Privacy Laws</i> (Nov. 6, 2018)	18
Rani Molla & Kurt Wagner, <i>People spend almost as much time on Instagram as they do on Facebook</i> , Vox (Jun. 25, 2018).....	8
Snapchat, <i>About Chat</i> (2019).....	13
Snapchat, <i>Privacy Settings</i> (2019).....	13
Tanya Sichynsky, <i>These 10 Twitter hashtags changed the way we talk about social issues</i> , Wash. Post (Mar. 21, 2016)	10
Twitter, <i>About Direct Messages</i> (2019).....	13
Twitter, <i>About public and protected Tweets</i> (2019)	13

INTEREST OF AMICUS

The Electronic Privacy Information Center (“EPIC”) is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.¹

EPIC routinely participates as *amicus curiae* before the United States Supreme Court and other courts in cases concerning emerging privacy and civil liberties issues. EPIC has authored several briefs arguing that the First Amendment protects the right of individuals to engage in a wide range of activities, free from government surveillance. *See, e.g.*, Brief of *Amici Curiae* EPIC et. al, *Packingham v. North Carolina*, 137 F.3d 1730 (2017) (arguing that the First Amendment protects the right to receive information and ideas, particularly on private electronic devices); Brief of *Amicus Curiae* EPIC, *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (arguing that hotel guest registries should not be made available for inspection absent judicial review); Brief of *Amici Curiae* EPIC et al., *Doe v. Reed*, 561 U.S. 186 (2010) (arguing that the First Amendment protects the right to anonymity in referenda signatures); Brief of *Amicus Curiae* EPIC,

¹ In accordance with Pa.R.A.P. 531(b)(2), the undersigned states that no person or entity other than the *amicus curiae*, its members, or counsel paid in whole or in part for the preparation of the *amicus curiae* brief or authored in whole or in part the *amicus curiae* brief.

Americans for Prosperity v. Becerra, 903 F.3d 1000 (2018) (arguing that the First Amendment protects the right to make anonymous charitable donations).

EPIC has also filed several complaints with the Federal Trade Commission concerning the business practices of social media companies, including Facebook, that resulted in the information that users posted online being made more widely available than they anticipated. See *In the Matter of Snapchat, Inc.*, Complaint, Request for Investigation, Injunction, and Other Relief (May 16, 2013);² *In the Matter of Facebook, Inc.*, Complaint, Request for Investigation, Injunction, and Other Relief (Dec. 17, 2009);³ *In the Matter of Facebook, Inc.*, Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation, and for Other Relief (Jan. 14, 2010).⁴

² Available at <https://epic.org/privacy/ftc/EPIC-Snapchat-Complaint.pdf>.

³ Available at <https://www.epic.org/privacy/inrefacebook/EPIC-FacebookComplaint.pdf>.

⁴ Available at https://epic.org/privacy/inrefacebook/EPIC_Facebook_Supp.pdf.

SUMMARY OF ARGUMENT

Social media has fundamentally changed the way Americans communicate on issues of public concern. From groups created to elect candidates for national office to those that debate the latest Avengers movie, social media is now the place where politics occurs and communities are formed. Social media has thus become the “modern public square,” as the Supreme Court declared in *Packingham v. North Carolina*. 137 S. Ct. 1730, 1737 (2017).

Users often select particular groups on social media platforms to post comments and to express their views. For example, a user might share information about medical circumstances in one group that she would not post in another group. But users often believe content they post to social media is more private than it actually is. Privacy settings are not always clear, and Facebook has often changed user privacy settings to make information more widely available. As a consequence, users often have less control than they think over who has access to their social media posts. Thus, a comment made to a small group of friends could easily become more widely available than intended or anticipated.

In these circumstances, allowing the Government to fire a public employee for posts made in a private Facebook group would encourage government supervisors to surveille employees across social media. Such surveillance would chill protected speech and undermine the openness of “the modern public square.”

ARGUMENT

Just a few years ago, the U.S. Supreme Court declared that social media platforms “provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). In *Packingham*, the Court warned that courts should “exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.” *Id.* at 1736.

Over fifty years ago, the Supreme Court also recognized that “the threat of dismissal from public employment is . . . a potent means of inhibiting speech.” *Pickering v. Board of Ed. of Township High School Dist. 205, Will City*, 391 U.S. 563, 574 (1968). The Court found that the Government sometimes has an interest in regulating the speech of its employees, but “[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.” *Garcetti v. Ceballos*, 547 U.S. 414, 418 (2006) (citation omitted). Statements made outside an employee’s official duties “retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government.” *Id.* at 423-24. The Court has warned that “[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public

functions but simply because superiors disagree with the content of the employee's speech." *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

The Court has been particularly skeptical of claims that an employee's speech on a matter of public concern undermines the mission of the public employer, as the Government claims in this case. In *Rankin*, the Court rejected the Government's claim that a clerical worker's stated hope that an assassination attempt on President Reagan succeed undermined the agency's law enforcement mission, finding that, when "an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal." *Rankin, supra*, at 390-91. The Court stressed that, when it comes to claims that employee speech undermines an agency's mission, "[a]t some point, such concerns are so far removed from the effective functioning of the public employer that they cannot prevail over the free speech rights of the public employee." *Id.* at 391. The Court also noted that the Government's interest in policing employee speech is greatly diminished when the speech is made in private conversation rather than in public. *Id.* at 390.

This case involves a public employee who spoke on the issue of bus driver safety in a closed Facebook group outside of work. As the Supreme Court recognized in *Packingham*, social media platforms such as Facebook have become the most important places for people to discuss political and social issues. Social

media platforms also create semi-private spaces for users to connect. In Facebook's closed groups, posts are only visible to group members. Allowing the Government to dismiss a public employee for speaking on a matter of public concern in a such a space would encourage government supervisors to engage in invasive surveillance to monitor employees on social media. Such surveillance would chill protected speech.

I. Social media is the “modern public square” for debate on issues of public concern.

In *Packingham v. North Carolina*, the Supreme Court declared that “[w]hile in the past, there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular.” *Packingham*, 137 S. Ct. at 1735 (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997)). The Court called social media the “modern public square,” *Id.* at 1737, where individuals “engage in a wide array of protected First Amendment activity on topics ‘as diverse as human thought.’” *Id.* at 1735-36 (quoting *Reno*, 521 U.S. at 870). The Court said that social media platforms “provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to ‘become a town crier with a voice that resonates farther than it could from any soapbox.’” *Id.* at 1737 (2017) (quoting *Reno*, 521 U.S. at 870).

Americans from all demographic groups use social media—particularly Facebook, the platform at issue in this case. Roughly seven-in-ten U.S. adults (69%) are on Facebook, including majorities of all age, race, and gender groups. Andrew Perrin & Monica Anderson, *Share of U.S. adults using social media, including Facebook, is mostly unchanged since 2018*, Pew Research Center (Apr. 10, 2019).⁵ Younger Americans are particularly invested in social media, with nearly eight-in-ten U.S. adults (79%) between 18 and 49 on Facebook, and around three-quarters of Americans between 18 and 24 on Instagram (75%) and Snapchat (73%). *Id.*

Social media has become a daily part of modern life. About three-quarters (74%) of Facebook users visit the site daily, and half of Facebook users log on several times a day. *Id.* Around the world, 1.2 billion people use Facebook each day, and about 126 million use Twitter. Hamza Shaban, *Twitter reveals its daily active user numbers for the first time*, Wash. Post (Feb. 7, 2019).⁶ Users are also spending significant time on these platforms. On average, users spend 58.5 minutes on Facebook, 53 minutes on Instagram, and 49.5 minutes on Snapchat each day.

⁵ <https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/>.

⁶ <https://www.washingtonpost.com/technology/2019/02/07/twitter-reveals-its-daily-active-user-numbers-first-time/>.

Rani Molla & Kurt Wagner, *People spend almost as much time on Instagram as they do on Facebook*, Vox (Jun. 25, 2018).⁷

Most Americans use social media to discuss issues of public concern. Over two-thirds of American adults (68%) say that they get news on social media.

Katerina Eva Matsa & Elisa Shearer, *New Use Across Social Media Platforms 2018*, Pew Research Center (Sept. 10, 2018).⁸ Two-thirds of Facebook users (67%) say they get news on Facebook, as do seven-in-ten (71%) of Twitter users. *Id.*

Nearly half (48%) of younger social media users ages 18-29 say that exposure to news on social media has improved their understanding of current events. *Id.* In the summer of 2016, half of Facebook users reported they posted about politics on the platform. Maeve Duggan & Aaron Smith, *The Political Environment on Social Media*, Pew Research Center (Oct. 5, 2016).⁹ In 2018, over half of Americans had participated in a social media group around a social issue or cause, encouraged others to take action on an issue, looked up information about local protests or rallies, changed their profile picture in support of a social cause, or used a hashtag related to a political or social issue. Monica Anderson, Skye Toor, Lee Raine & Aaron Smith, *Activism in the Social Media Age: Public Attitudes toward political*

⁷ <https://www.vox.com/2018/6/25/17501224/instagram-facebook-snapchat-time-spent-growth-data>.

⁸ <https://www.journalism.org/2018/09/10/news-use-across-social-media-platforms-2018/>.

⁹ <https://www.pewinternet.org/2016/10/25/the-political-environment-on-social-media/>.

engagement on social media, Pew Research Center (July 11, 2018).¹⁰ Most American adults across the political spectrum think that social media is important for creating sustained movements for social change, for getting elected officials to pay attention to issues, and for influencing policy decisions. Monica Anderson & Jingjing Jiang, *Liberal Democrats more likely than other groups to be politically active on social media*, Pew Research Center (Nov. 5, 2018).¹¹ Black and Hispanic people are particularly likely to believe that social media is important to them personally for making their voices heard, finding like-minded individuals, and getting involved in issues important to them. Anderson, Toor, Raine & Smith, *supra*.

Many of the most important social movements today are known by a hashtag, demonstrating how central social media platforms are to modern public debate. Sexual assault survivors have shared their stories under the hashtag #MeToo, which has become a global conversation about sexual violence in modern society. Me too, *About: History & Vision* (2018).¹² As of September 2018, the #MeToo hashtag was used more than 19 million times on Twitter alone. Monica Anderson & Skye Toor, *How social media users have discussed sexual harassment*

¹⁰ <https://www.pewinternet.org/2018/07/11/public-attitudes-toward-political-engagement-on-social-media/>.

¹¹ <https://www.pewresearch.org/fact-tank/2018/11/05/liberal-democrats-more-likely-than-other-groups-to-be-politically-active-on-social-media/>.

¹² <https://metoomvmt.org/about/#history>.

since #MeToo went viral, Pew Research Center (Oct. 11, 2018).¹³ Since 2013, the #BlackLivesMatter hashtag has marked discussion of police brutality against black people in the United States and broader discussions about race. Monica Anderson & Paul Hitlin, *Social Media Conversations About Race: The hashtag #BlackLivesMatter emerges: Social activism on Twitter*, Pew Research Center (Aug. 15, 2016).¹⁴ Between mid-2013 and March 2016, the hashtag #BlackLivesMatter appeared on Twitter almost 11.8 million times. *Id.* The #Ferguson hashtag, which was adopted in the wake of Michael Brown's murder to organize the Ferguson protests and to raise awareness of police violence against black people, was Twitter's most popular social cause hashtag by March 2016, with over 27 million uses. Tanya Sichynsky, *These 10 Twitter hashtags changed the way we talk about social issues*, Wash. Post (Mar. 21, 2016).¹⁵ Other social cause hashtags, such as #LoveWins, #YesAllWomen, and #BringBackOurGirls, were posted over three million times. *Id.*

Social media has also provided important fora for politicians and campaigns to engage with constituents. Nearly all Members of the last two congresses have had social media accounts. Jacob R. Strauss, Cong. Research Serv., R45337, *Social*

¹³ <https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/>.

¹⁴ <https://www.pewinternet.org/2016/08/15/the-hashtag-blacklivesmatter-emerges-social-activism-on-twitter/>.

¹⁵ <https://www.washingtonpost.com/news/the-switch/wp/2016/03/21/these-are-the-10-most-influential-hashtags-in-honor-of-twitters-birthday>.

Media Adoption by Members of Congress: Trends and Congressional

Considerations 1 (2018).¹⁶ Presidential debates in the United States encourage engagement on social media, with some streaming related tweets and even taking questions through social media. *See, e.g.,* Lisa de Moraes, *CBS News Partners with Twitter for Democratic Debate on November 14*, *Deadline* (Oct. 26, 2015).¹⁷

The Cambridge Analytica scandal and Russian information warfare in the 2016 election demonstrate the lengths to which interested parties will go to manipulate the political discussion on social media. *See* Carole Cadwalladr & Emma Graham-Harrison, *Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach*, *Guardian* (Mar. 17, 2018);¹⁸ *see generally* Alice Marwick & Rebecca Lewis, *Media Manipulation and Disinformation Online* (2017). While social media has opened public debate to more participants, some researchers observe that it has also increased polarization of viewpoints and that diminished decency and civility has led to new kinds of abusive behavior. *See, e.g.,* Julie Cohen, *Law for the Platform Economy*, 51 *U.C. Davis L. Rev.* 133-204, 149-153 (2017); Danielle Keats Citron, *Hate Crimes in Cyberspace* (2014). But this case does not involve abuse or harassment. The First

¹⁶ <https://crsreports.congress.gov/product/pdf/R/R45337>.

¹⁷ <https://deadline.com/2015/10/cbs-news-twitter-democratic-debate-donald-trump-1201593757/>.

¹⁸ <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>.

Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014) (quoting *Roth v. United States*, 354 U.S. 486, 484 (1957)). Thus, “the inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern. ‘[D]ebate on public issues should be uninhibited, robust, and wide-open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.’” *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)). After all, “it is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions.” *N.Y. Times v. Sullivan*, 376 U.S. at 269 (quoting *Bridges v. California*, 314 U.S. 252, 270 (1941)).

II. Social media platforms offer a variety of semi-private spaces for speech that the government should not monitor.

In *Rankin v. McPherson*, the Supreme Court noted that the Government’s interest in policing employee speech is greatly diminished when the speech is made in private conversation rather than in public. *Rankin*, 483 U.S. at 390. Most social media spaces are not purely public but exist somewhere along a gradient between purely public and purely private. In most contexts, users have some control over who sees their social media content, although these settings are often opaque and, sometimes, do not work as advertised.

Users' options for communication on social media cover the spectrum from purely public to one-on-one, private conversations. In some circumstances, users must take steps to limit who has access to their posts. On Twitter, Tweets are public by default, and users must change their account settings to limit who can view and interact with their Tweets. Twitter, *About public and protected Tweets* (2019).¹⁹ Similarly, on Instagram, user profiles and posts are public by default, and users must make their account private to prevent non-followers from viewing their content. Instagram, *Privacy Settings & Information* (2019).²⁰ In contrast, Snapchat users by default must be friends with another user in order to view their content. Snapchat, *Privacy Settings* (2019).²¹ On all of these platforms, users can also direct message another user or engage in a group chat. Instagram, *How do I use Instagram Direct?* (2019);²² Snapchat, *About Chat* (2019);²³ Twitter, *About Direct Messages* (2019).²⁴

Facebook users can make more granular decisions on which of their content can be viewed by whom. Unlike on the other platforms, Facebook users choose who can view each individual post. Facebook, *Basic Privacy Settings & Tools*

¹⁹ <https://help.twitter.com/en/safety-and-security/public-and-protected-tweets>.

²⁰ <https://help.instagram.com/196883487377501>.

²¹ <https://support.snapchat.com/en-US/article/privacy-settings2>.

²² <https://help.instagram.com/684926628219030>.

²³ <https://support.snapchat.com/en-US/article/chat>.

²⁴ <https://help.twitter.com/en/using-twitter/direct-messages>.

(2019).²⁵ The setting the user chose in their last post becomes their default setting.

Id. Facebook users choose between sharing their posts with the public at large, sharing with their friends list, with a subset of their friends list, or with no one at all. *Id.*; Facebook, *How can I use lists to organize my friends on Facebook?*

(2019).²⁶ Facebook users can also participate in groups that have their own access and privacy settings: public, closed, and secret. Facebook, *What are the privacy settings for groups?* (2019). The content posted to “closed” Facebook groups, like the one Appellee posted to, can only be viewed by members of the group. *Id.* Thus, there is an expectation in a closed Facebook group that a user’s speech will not be available to the general public, but only to the select few who are members of the group.

But social media spaces may not be as private as users expect. Privacy settings are often difficult to understand and companies, notably Facebook, frequently change privacy settings to make information more widely available than a user would anticipate. Facebook’s privacy settings are a prime example.

Controlling privacy on Facebook is so complex that the company has a thirteen-step tutorial on how to use the settings. Facebook, *Manage Your Privacy* (2019).²⁷

When Facebook has changed privacy settings in the past, content that users posted

²⁵ <https://www.facebook.com/help/325807937506242/>.

²⁶ <https://www.facebook.com/help/200538509990389>.

²⁷ <https://www.facebook.com/about/basics/manage-your-privacy>.

that they thought was not generally accessible suddenly became public. Amicus EPIC has particular expertise in this matter. In 2009, EPIC brought a complaint to the Federal Trade Commission that documented changes in Facebook privacy settings that made user information and content, such as profile pictures, public that users had previously designated as private. *In the Matter of Facebook, Inc., Complaint, Request for Investigation, Injunction, and Other Relief* (Dec. 17, 2009).²⁸ The complaint led to a 2011 consent order against Facebook. *In the Matter of Facebook, Inc., Consent Order*, FTC Docket No. C-4365 (July 27, 2012).²⁹ But even after the FTC consent order, Facebook continues to publicly expose previously private user content. *See, e.g., Alex Hern, Facebook is chipping away at privacy — and my profile has been exposed*, *Guardian* (Jun. 29, 2016);³⁰ Brian Barrett, *Facebook Search Now Finds Public Posts—So Hide Yours*, *Wired* (Oct. 22, 2015).³¹ The 2011 consent order is now the basis of an enforcement action that could produce the largest fine in the history of the Federal Trade Commission.

²⁸ Available at <https://www.epic.org/privacy/inrefacebook/EPIC-FacebookComplaint.pdf>.

²⁹ Available at <https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf>.

³⁰ <https://www.theguardian.com/technology/2016/jun/29/facebook-privacy-secret-profile-exposed>.

³¹ <https://www.wired.com/2015/10/facebook-search-privacy/>.

Mike Isaac & Cecilia Kang, *Facebook Expects to Be Fined Up to \$5 Billion by F.T.C. Over Privacy Issues*, N.Y. Times (Apr. 24, 2019).³²

Further, privacy settings do not always operate as advertised, with the result that content users believe to be private or to be deleted are not, in fact, so.

Snapchat, a social media platform that claimed it deleted user content once it was viewed by the recipient, actually allowed recipients to store the content on their device. EPIC also documented this problem in a complaint to the Federal Trade Commission. *In the Matter of Snapchat, Inc.*, Complaint, Request for Investigation, Injunction, and Other Relief (May 16, 2013).³³

Facebook has been especially prone to privacy failures. For instance, in May 2018, Facebook made public the posts of as many as 14 million users that thought they were only sharing with their friends or a smaller group. Kurt Wagner, *Facebook says millions of users who thought they were sharing privately with their friends may have shared with everyone because of a software bug*, Vox (Jun. 7, 2018).³⁴ A few weeks later, Facebook unblocked users who had been previously blocked by other users, allowing the newly unblocked users to view content they should not have been permitted to view. Kurt Wagner, *Facebook's year of privacy*

³² <https://www.nytimes.com/2019/04/24/technology/facebook-ftc-fine-privacy.html>.

³³ Available at <https://epic.org/privacy/ftc/EPIC-Snapchat-Complaint.pdf>.

³⁴ <https://www.vox.com/2018/6/7/17438928/facebook-bug-privacy-public-settings-14-million-users>.

mishaps continues—this time with a new software bug that ‘unblocked’ people,
Vox (Jul. 2, 2018).³⁵

On social media, users engage in many types of semi-private conversations. Allowing the Government to dismiss a public employee for speaking on a matter of public concern in a private Facebook group would encourage government supervisors to monitor employees’ social media activities.

III. Reversal in this case would encourage invasive government surveillance and chill protected speech on social media.

If this Court finds that the Government has a permissible interest in policing posts on an individual user’s private Facebook account, it will encourage government supervisors to pursue invasive surveillance to monitor the private and semi-private posts of government employees across social media. Such surveillance would discourage public employees from engaging in discussions with others, particularly if the employee believes their supervisor would not approve of their opinion.

A finding that the Government has an interest in what public employees say in closed Facebook groups could also encourage the Government to access non-public social media content. To access these spaces, government supervisors could adopt pseudonyms, or persuade co-workers to report nonconforming conduct. The

³⁵ <https://www.vox.com/2018/7/2/17528220/facebook-software-bug-block-unblock-safety-privacy>.

Government might even request direct access to employee social media content, although twenty-six states, the District of Columbia, and Guam have found these practices unacceptable and banned private employers from demanding access to social media content employees have taken steps to protect. Nat'l Conference of State Legislatures, *State Social Media Privacy Laws* (Nov. 6, 2018).

Government surveillance of the social media posts of public employees will have a chilling effect on protected speech. Faced with the knowledge that a prying supervisor may collect and scrutinize the contents of their social media accounts, individuals will inevitably trend towards greater self-censorship. *See* Jeffrey Rosen, *The Deciders: Facebook, Google, and the Future of Privacy and Free Speech*, in *Constitution 3.0* at 72–73 (Jeffrey Rosen & Benjamin Wittes eds., 2011) (explaining how “ubiquitous surveillance” through Facebook might “violate[] the right to autonomy,” just as “citizens in the Soviet Union were inhibited by ubiquitous surveillance from expressing and defining themselves”). The impact of potentially “panoptic surveillance” is severe, as “surveillance of online activities alters the experience of space in the same ways that surveillance of real places does.” Julie E. Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* 143 (2012).

The risk of government surveillance of social media is not speculative. In 2012, a Freedom of Information Act lawsuit by EPIC revealed that the Department

of Homeland Security was monitoring “online forums, blogs, public websites, and messages boards” and disseminating the results to law enforcement agencies and private companies. EPIC, *EPIC v. Department of Homeland Security: Media Monitoring*.³⁶ As a consequence, Congress undertook oversight hearings to rein in this practice. Representative Patrick Meehan, Chairman of the House Subcommittee on Counterterrorism and Intelligence, warned at the hearing that “collecting, analyzing, and disseminating private citizens’ comments could have a chilling effect on individual privacy rights and people’s freedom of speech and dissent against their government.” *DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy: Hearing Before the Subcomm. on Counterterrorism & Intelligence of the H. Comm. on Homeland Sec., 112th Cong. 2 (2012)* (statement of Rep. Patrick Meehan, Chairman, Subcomm. on Counterterrorism & Intelligence).³⁷

Yet, as Professor Michael Fromkin has noted, the average citizen “is almost defenseless” in the “environment of increasingly pervasive surveillance of communications, transactions, and movements.” A. Michael Fromkin, *Pseudonyms by Another Name: Identity Management in a Time of Surveillance, in Privacy in the Modern Age* 63 (Marc Rotenberg, Julia Horwitz, & Jeramie Scott eds., 2015). Without free speech protections, individuals fall victim to a “spiral of

³⁶ <https://epic.org/foia/epic-v-dhs-media-monitoring/> (last visited Dec. 14, 2016).

³⁷ <https://homeland.house.gov/files/02-16-12%20Meehan%20Open.pdf>.

silence” where “motivated by fear of isolation, [they] continuously monitor their environments to assess whether their beliefs align with or contradict majority opinion.” Elizabeth Stoycheff, *Under Surveillance: Examining Facebook’s Spiral of Silence Effects in the Wake of NSA Internet Monitoring*, Journalism & Mass Comm. Q., March 2016, at 1.

* * *

Given the centrality of social media to modern political life, this Court should not permit the dismissal of a public employees for statements made online on a matter of public concern, particularly when the speech occurred in a semi-private space, such as a closed Facebook group. To do otherwise would turn the “modern public square,” *Packingham*, 137 S. Ct. at 1737, into a panopticon, a prison designed for social control, as Jeremy Bentham described, “a new mode of obtaining power of mind over mind, in a quantity hitherto without example.” Jeremy Bentham, *Panopticon, or, the Inspection-House*, in *The Works of Jeremy: Volume 4 Bentham* 39 (1843).

CONCLUSION

For the foregoing reasons, this court should affirm the decision of the Commonwealth Court.

May 6, 2019

Respectfully submitted,

/s/ Marc Rotenberg

Marc Rotenberg

Alan Butler

Megan Iorio

Electronic Privacy Information Center

1718 Connecticut Ave. NW

Suite 200

Washington, DC 20009

(202) 483-1140

Counsel for Amicus

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word count limitation of Pa.R.A.P. 531(b)(3). The brief contains 4,226 words. In preparing this certificate, the word count feature of Microsoft Word was relied upon.

Dated: May 6, 2019

/s/ Megan Iorio
Megan Iorio

CERTIFICATE OF COMPLIANCE

In compliance with Pa.R.A.P. 127, I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: May 6, 2019

/s/ Megan Iorio _____
Megan Iorio

CERTIFICATE OF SERVICE

I certify that on May 6, 2019, two (2) true and correct copies of this brief were served in compliance with Pa.R.A.P. 121 by U.S. Postal Service to each of the lead counsel of the parties in this case:

Denise H. Farkas
Office of Chief Counsel
Dep't of Transportation Occ
301 5th Ave Ste 201
Pittsburgh, PA 15222-2438
(412) 565-7555
Counsel for Appellant

Kyle Bruce Milliron
Law Office of Kyle B. Milliron
6 Fitzsimmons St
Box 331
Duke Center, PA 16729
(904) 652-3246
Counsel for Appellee

Dated: May 6, 2019

/s/ Megan Iorio _____
Megan Iorio