

SENT VIA ELECTRONIC MAIL

November 29, 2021

RE: First Amendment Concerns When Government Officials Block or Censor Constituents on Governmental Social Media Pages – Do Your Practices Need Revision?



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FOUNDATION

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Dear Government Officials:

The ACLU of Washington is writing to address complaints we have received that certain government officials in Washington are unconstitutionally censoring and/or blocking constituents from the officials' social media pages and accounts. As set forth below, courts have recognized that restrictions placed by government actors on social media pages are subject to First Amendment standards. Accordingly, we are hopeful that all officials will take action to bring their activities into compliance with the legal rules discussed below.

Social Media Platforms are the New Town Square

Social media has become a recognized forum that enables government officials to communicate their messages to constituents, receive their feedback, and foster debate about policies relating to the official work of those government officials. Similarly, social media is an important—even critical—tool for constituents to petition their government and engage in participatory democracy.¹ In *Packingham v. North Carolina*, the Supreme Court recognized that social media platforms like Facebook and Twitter provide “perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.”² The Court explained that these platforms allow individuals to “petition their elected representatives and otherwise engage with them in a direct manner,”³ and acknowledged the large number of elected officials who had set up social media accounts to foster such direct engagement. Building on *Packingham*, numerous courts have held that government actors are subject to First Amendment restrictions on censoring and blocking others' speech when use of social media platforms for government purposes is involved.⁴

¹ See, e.g., Aleem Maqbool, *Black Lives Matter: From social media post to global movement*, BBC News (online), July 9, 2020, <https://www.bbc.com/news/world-us-canada-53273381> (last accessed Nov. 12, 2021).

² *Packingham v. North Carolina*, 137 S. Ct. 1730, at 1737 (2017).

³ *Id.*

⁴ See, e.g., *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019), *vacated as moot sub nom. Biden v. Knight First Amend. Inst.*, — U.S. —

Courts Take a Broad View of When Government Officials Are Acting as State Actors in Censoring Constituents

Courts have scrutinized the decision of government officials to block accounts or suppress comments regardless of whether the accounts in question are actually designated as “government” accounts or “private” accounts.⁵ The test of whether a given social media account falls under constitutional rules is functional, rather than label-driven. In other words, if a given social media account is used by a public official as a space to engage with the public and/or their constituents, or to carry out any official functions, it is immaterial whether the account is formally designated as “official.” In the *Knight First Amendment Inst.* case involving President Trump, the Second Circuit noted in concluding that President Trump was acting in an official capacity in blocking users, that the account posted photos of him engaging in official activities, was used to make official pronouncements, and was used as a tool to engage with other leaders and elected officials.⁶ Similarly, in *Davison v. Randall*, the Fourth Circuit relied on the fact that the account in question was used to inform the public about the office’s official activities, and found persuasive the fact that the government official used her official title, and included her official email address on the account. In sum, while there is no bright line rule, courts employ a flexible, fact-specific approach, and have evinced a willingness to hold public officials to First Amendment standards when they block accounts or suppress comments.

Viewpoint-Based Censorship on Social Media Platforms Violates the First Amendment

Where government officials use social media accounts for official purposes, they cannot silence the speech of particular users simply because they disagree with their viewpoints.⁷

—, 141 S. Ct. 1220 (2021); *Wagschal v. Skoufis*, No. 20-871, 2021 WL 1568822, at *1 (2d Cir. Apr. 22, 2021); *Davison v. Randall*, 912 F.3d 666, 681 (4th Cir. 2019); *Robinson v. Hunt Cty., Texas*, 921 F.3d 440, 447 (5th Cir. 2019).

⁵ See *Lewis v. Jones*, 440 F. Supp. 3d 1123, 1134 (E.D. Cal. 2020) (summarizing cases and employing a functional, fact-specific test in resolving the question of whether a government official acted in their official capacity in censoring constituents).

⁶ Though the Second Circuit’s ruling in *Knight* was vacated due to the case being moot after President Trump left office, *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220 (2021), the Second Circuit’s analysis is still a useful guide. See *Wagschal v. Skoufis*, No. 20-871, 2021 WL 1568822, at *1 (2d Cir. Apr. 22, 2021) (citing Second Circuit’s analysis in *Knight* after judgment was vacated and noting that it was undisputed amongst the parties that a state senator blocking a constituent from his public Facebook page would violate First Amendment.); *Buentello v. Boebert*, No. 1:21-CV-00147-DDD, 2021 WL 2588856, at *4 (D. Colo. June 24, 2021) (relying on Second Circuit’s thoughtful analysis in *Knight*).

⁷ See *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

A public official may have the right to engage in some reasonable regulation of speech on social media pages in order to preserve the purpose of the forum⁸—for example, limiting posts that propose commercial transactions or are spam.⁹ However, such limitations cannot be based on vague, overbroad criteria such as prohibitions against disparaging public officials or prohibition on comments that are “disrespectful” or “inappropriate.”¹⁰ Viewpoint discrimination—for example, removing posts or blocking particular users on the basis of the point of view expressed—is never permissible. For example, in *Knight*, the Second Circuit had held that President Trump engaged in unconstitutional viewpoint discrimination where he blocked individuals from his Twitter account because they expressed views he disliked.¹¹ The court explained that the First Amendment does not permit a public official who utilizes a social media account “for all manner of official purposes” to exclude individuals from an open dialogue because they express opinions with which the official disagrees.¹²

Courts have also taken a broad view of the spaces on social media that may be subject to First Amendment limitations. Courts have found a government actor may violate the First Amendment when he or she bans an individual from a page or when a government official deletes critical comments or posts.¹³ In the *Knight First Amendment Institute* case, the Second Circuit found that the space on Twitter where individuals could interact with other users was itself a forum. Therefore, a decision to block a user implicates the First Amendment notwithstanding that the user in question may nevertheless be able to access the underlying content.

Complaints we have received suggest that some government officials in Washington are engaging in exactly this kind of unconstitutional censorship. For example, particular posts expressing viewpoints critical of the way a given government official does his or her job have simply been deleted by the administrator of the Facebook page at issue, making it invisible to other members of the public engaging in the policy debate at issue. In other instances, users have been blocked from a Facebook page

⁸ *Id.*

⁹ Courts have not definitively resolved the type of forum created by government officials, but the cases cited in this letter have concluded that the accounts in question were designated public forums.

¹⁰ *See Robinson v. Hunt Cty.*, 921 F.3d 440, 447 (5th Cir. 2019). In this case, a government official’s act of banning a constituent from an official government Facebook page was unconstitutional viewpoint discrimination, where the official stated a policy of deleting “inappropriate” comments.

¹¹ *Knight First Amendment Institute*, 928 F.3d at 238.

¹² *Id.*

¹³ *See, e.g., Davison*, 912 F.3d at 687-88; *Attwood v. Clemons*, No. 1:18CV38-MW/MJF, 2021 WL 1020449, at *11-12 (N.D. Fla. Mar. 17, 2021); *Garnier v. Poway Unified Sch. Dist.*, No. 17-CV-2215-W (JLB), 2019 WL 4736208, at *9 (S.D. Cal. Sept. 26, 2019); *Faison v. Jones*, 440 F. Supp. 3d 1123, 1135-36 (E.D. Cal. 2020).

entirely, limiting their ability both to see content posted by the official and to engage in the policy debate taking place on the forum by responding to that content. These types of decisions have been found by courts to violate the First Amendment.

Local Government Officials Should Ensure Their Social Media Activity is Consistent with the First Amendment

Washington public officials are sworn to uphold our nation's Constitution, including its First Amendment free speech protections, as well as our state constitution and its protection for free speech and the right to petition. As courts have recognized, the exercise of First Amendment rights via social media is increasingly vital to ensuring the vibrancy of our democracy. We wish to remind local government officials of the constitutional rules pertaining to such spaces.

All public officials should review their use of social media platforms, whether nominally designated as personal/individual or official. In particular, such officials should carefully review their decisions to block, delete, or otherwise suppress individual comments or users. As the cases illustrate, these decisions often implicate First Amendment concerns, and result in the violation of the rights of constituents. Practices that violate the provisions discussed above should be revised.

Thank you for your prompt consideration and action.

Sincerely,

A handwritten signature in black ink, appearing to read "Michele Storms". The signature is fluid and cursive, with a large, stylized "S" at the end.

Michele Storms
Executive Director

cc: Governor Jay Inslee & Lt. Governor Denny Heck
Washington State Senators
Washington State Representatives
Senate and House Counsel
Attorney General Bob Ferguson
County Commissioners
Washington Sheriffs