



Social Media, First Amendment and Government: New Rules of Engagement

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Social Media, First Amendment and
Government: New Rules of Engagement

***Social Media & Government:
What are the Emerging Rules of Engagement?***

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I. Introduction

The ubiquitous use of social media, email, text messaging and other communication technologies and practices is transforming government. Whether it's the board member who communicates with agency staff by text messaging to get real time guidance during meetings, the elected official using Twitter to interface with her constituents, or the municipality that maintains a Facebook page to make public announcements and facilitate engagement with its residents, the use of technology is making public entities more efficient, effective, dynamic, and connected to the communities and constituents they serve. Some technologies and platforms are newer than others, and there is invariably a delay in the increasing use of such and the application of established laws and procedures to regulate them. That does not mean, however, that courts have been reluctant to apply old laws to the use of new technologies by public entities when the opportunity presents itself. To the contrary, established and familiar laws and regulations are being utilized by courts in California and throughout the country to ensure that, as used by governments and public officials, social media and other communication technologies are subject to the same regulations as their traditional counterparts.

Indeed, the Supreme Court has recognized the need to apply First Amendment forum classification to new technology² and described the Internet and social networking sites as akin to “the modern public square”³ where anyone can “become a town crier with a voice that resonates farther than it could from any soapbox.”⁴ The Supreme Court has also commented that social media in particular provides “perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard,” pointing out Twitter enables people to “petition their elected representatives and otherwise engage with them in a direct manner.”⁵ In short, courts recognize the importance of social media as a vital, newly developing mode of communication. And it appears, thus far, that the courts will be protective of First Amendment rights and wary of governmental restrictions within this wide-ranging social media environment.

This paper examines the applicable legal standards for these new social media platforms through the lens of forum classification and recent case law. The paper concludes with thoughts on next steps for public entities and officials to consider as they navigate this complex and evolving legal landscape.

² See *Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 739–43, 763–66 (1996).

³ *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017); see also *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F.Supp.3d 1099 (N.D. Cal. 2017); *Twitter, Inc. v. Sessions*, 263 F.Supp.3d 803 (N.D. Cal. 2017).

⁴ *Reno v. ACLU*, 521 U.S. 844, 853 (1997).

⁵ *Packingham*, 137 S.Ct. 1735, 1737.

II. Forum Classification

The Free Speech Clause of the First Amendment of the United States Constitution provides: “Congress shall make no law...abridging the freedom of speech, or of the press.” Under the Fourteenth Amendment, municipal regulations and policies are within the scope of this limitation on governmental authority.⁶ The rise of social media platforms presents a new and evolving arena for public discourse, as well as First Amendment scrutiny. While it remains to be seen exactly how First Amendment jurisprudence will evolve with respect to these digital platforms, forum classification will be at the forefront of the debate.

The forum classification doctrine is a system of categorizing spaces, and then determining the rules accorded to the specified category. Forum classification is crucial because the level of scrutiny and the leeway afforded the government differ based upon the type of forum being regulated.⁷ Thus, the classification of the forum at issue is key to assessing the likelihood that a government entity’s or an elected official’s social media account can withstand a First Amendment challenge.

A. Types Of Fora

Courts first examine whether a public forum is at issue. A traditional public forum is a place such as a park, public street or sidewalk, where people have traditionally been able to express ideas and opinions in public to the public. Even if a forum is not a traditional public forum, the courts next look to whether the government has opened a nonpublic forum to expressive activity and if so whether it has done so in a manner to create a designated public forum or a limited public forum. The terms under which these fora may constitutionally operate differ significantly, meaning that forum classification may be the deciding factor as to whether the government’s restrictions on a forum pass survive scrutiny under the First Amendment.

A designated public forum is created when the government intentionally opens (or “designates”) non-traditional areas for First Amendment activity pursuant to policy or practice.⁸ Examples of situations where courts have found a designated public forum include: state university meeting facilities where the university has an express policy of opening the facilities to registered student groups; school board meetings where the state statute provides for open meetings; a municipal auditorium and a city-leased theater where the city dedicates the property to

⁶ *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 450 (1938).

⁷ *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *see also PMG Int’l Div., L.L.C. v. Rumsfeld*, 303 F.3d 1163 (9th Cir. 2002); *Hopper v. City of Pasco*, 241 F.3d 1067, 1076 (9th Cir. 2001).

⁸ *See Cornelius v. NAACP Leg. Def. Fund and Educ. Fund, Inc.*, 473 U.S. 788, 800, 803 (1985); *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 45-46 (1983).

expressive activity; and the interior of a city hall where the city opens the building to display art and does not consistently enforce any restrictions.⁹

When the government opens a nonpublic forum for expressive activity, instead of creating a designated public forum, it may instead create a limited public forum. To establish a limited public forum when the government opens a nonpublic forum to First Amendment activity, it must have a clear and evenhandedly enforced policy that states the restrictions on the forum such as limiting it to certain activities or topics.¹⁰ Examples of situations where courts have found a limited public forum include: public library meeting rooms where policy limits it to certain uses, and public school property where policy limits use to particular groups.¹¹ The government is not required to indefinitely keep a designated public forum or a limited public forum open, but so long as it remains open, the forum must comply with the requisite standards for its classification.¹² In short, with a limited public forum the government deliberately opens the forum only for limited uses and topics with clear written limitations. By contrast a designated public forum is created where the forum is opened with no clear written limitations in place or where the limitations are not in fact enforced.

Finally, in certain limited circumstances, government-owned and controlled property falls outside the scope of the Free Speech Clause and the forum classification doctrine. These are instances where the government has not opened a forum to general discourse, but rather, engages in its own speech—government speech—wherein it is entitled to “speak for itself” and “select the views it wants to express.”¹³ Examples of government speech include a city’s acceptance of a privately funded monument for its public park¹⁴ and a state’s specialty license plates program.¹⁵

B. Standard Of Review

The classification of the forum can be pivotal in determining whether government policies or regulations pass constitutional muster. This is because in a traditional public forum and a designated public forum restrictions are subject to an exacting review standard—strict scrutiny—where content-based restrictions are constitutional only if they are the least restrictive means for achieving a compelling

⁹ *Widmar v. Vincent*, 454 U.S. 263, 267 (1981); *Madison Joint Sch. Dist. v. Wisconsin Emp’t Relations Comm’n*, 429 U.S. 167, 174 (1976); *Southeastern Promotions, Ltd v. Conrad*, 420 U.S. 546, 555 (1975); *Hopper*, 241 F.3d at 1075-6.

¹⁰ *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1049 (9th Cir. 2003).

¹¹ *Faith Center Church v. Glover*, 480 F.3d 891, 908 (9th Cir. 2007) (abrogated on other grounds by *Winter v. Natural Res. Def. Coun.*, 129 S.Ct. 365 (2008)); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102, 106 (2001); *Arizona Life Coalition v. Paisley*, 515 F.3d 956, 969 (9th Cir. 2008).

¹² *Perry*, 460 U.S. at 46.

¹³ *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009).

¹⁴ *Id.*

¹⁵ *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245–2246.

government interest.¹⁶ Content-neutral restrictions in a traditional public forum and a designated public forum are subject to the time, place, and manner standard where they must be narrowly tailored to serve a significant government interest and must leave open ample alternatives for communication.¹⁷ Thus, in these two fora, First Amendment activities generally may not be prohibited. By contrast, in a nonpublic forum or limited public forum, the government is given more leeway and its regulations need only be reasonable and viewpoint neutral to pass constitutional muster.¹⁸ Only viewpoint neutrality—not content-neutrality—is required for regulations of a nonpublic or limited public forum.¹⁹ For a regulation to be content-neutral the government must not make any distinctions based on the topic of the speech. By contrast, viewpoint neutrality allows the government to distinguish based on the topic, but it may not favor one view over another view on the same topic, such as allowing speech in favor of government policies but prohibiting speech that is critical of government policies.

Given the different standards of review, it is crucial to determine whether a non-traditional public forum that has been opened to expressive activity is operating as a designated public forum or a limited public forum. In making this classification, courts typically examine the terms on which the forum operates,²⁰ critically examining the actions and policies of affiliated government actors.

Practice Pointer: The more consistently enforced and selective restrictions are, the more likely the forum will be deemed a limited public forum.²¹ By contrast, where restrictions are not enforced, or if exceptions are haphazardly permitted, the forum is more likely to be deemed a designated public forum.²² The challenge is applying these concepts to the various forms of social media.

III. Key Developments In Case Law

A. Circuit Decisions

The Supreme Court has opined that social media platforms may operate like a modern day town square, but it has not yet been faced with applying forum classification to a social media platform operated by a public agency or public

¹⁶ *Perry*, 460 U.S. at 46; *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999).

¹⁷ *Perry*, 460 U.S. at 46.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Hopper*, 241 F.3d at 1074–75.

²¹ *Id.*, at 1076–78; *Cornelius*, 473 U.S. at 804–05; see also *Perry*, 460 U.S. at 47; *Lehman v. Shaker Heights*, 418 U.S. 298, 302–04 (1974); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999).

²² *Hills*, 329 F.3d at 1049.

official. To date, the Ninth Circuit has not addressed this issue but the Second, Fourth, Fifth, and Eighth Circuits have and their opinions are instructive.

The most well-known and closely watched of these case is the lawsuit filed against Donald Trump during his presidency. In that case, *Knight First Amendment Institute at Columbia University v. Trump*, the Second Circuit offered a detailed analysis of the application of First Amendment jurisprudence to social media platforms.²³ While this decision has now been vacated by the Supreme Court on mootness grounds, the Second Circuit’s analysis is still useful for understanding how courts look at these issues. The Second Circuit issued its unanimous decision on July 9, 2019, and forum analysis was critical in the Court’s conclusion that President Trump’s viewpoint based blocking of followers on his @realDonaldTrump Twitter account was unconstitutional.²⁴ Specifically, the Second Circuit affirmed the lower court, finding that the @realDonaldTrump account was a public forum because it was opened as an “instrumentality of communication”²⁵ for “indiscriminate use by the general public.”²⁶ The decision made clear that if government officials open social media accounts to the public as a way of communicating about official business, the accounts will be analyzed under the public forum doctrine where blocking users as a result of criticism is not allowed. The DOJ appealed the decision and the Supreme Court accepted review of the case.

After accepting review of the case, the Supreme Court then vacated the Second Circuit’s decision in *Knight* (retitled *Biden v. Knight*) and issued instructions to dismiss the case as moot given that President Biden has now assumed office in place of Trump.²⁷ The Supreme Court issued its unanimous decision without discussion, save a concurring opinion by Justice Thomas. In his concurring opinion, Justice Thomas took aim at Twitter’s recent ban on President Trump (which happened after the Second Circuit issued its opinion) noting that today’s digital platforms provide unprecedented amounts of speech and unprecedented concentrated power in the hands of a few private parties.²⁸ Justice Thomas opined that the Court would “soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.”²⁹

The Supreme Court’s decision to vacate the Second Circuit’s ruling with directions to dismiss based on mootness, does not change the immediate legal

²³ *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2nd Cir. 2019), cert. granted, judgment vacated sub nom. *Biden v. Knight First Amend. Inst. At Columbia Univ.*, 141 S. Ct. 1220, 209 L. Ed. 2d 519 (2021).

²⁴ *Id.*

²⁵ *Id.*, at 237.

²⁶ *Id.* (citation omitted).

²⁷ *Biden v. Knight First Amend. Inst. At Columbia Univ.*, 141 S. Ct. 1220 (2021).

²⁸ *Id.*, at 1221.

²⁹ *Id.*, at 1221.

landscape. But it is a foreshadowing that the jurisprudence in this arena is still very much evolving. Both the Fourth Circuit’s decision in *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) and the Fifth Circuit’s decision in *Robinson v. Hunt County Texas*, 921 F.3d 440 (5th Cir. 2019) still stand and in those cases the courts viewed the interactive component of a government official’s social media account as a public forum. The most recent decision from the Eighth Circuit in *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021), however, highlights the fact-intensive nature of the analysis as in that case the Court found the social media page at issue did not trigger First Amendment scrutiny.

The Fourth Circuit’s decision in *Davison v. Randall* stands as the leading case that provides the most detailed legal analysis on forum analysis as applied to a public official’s use of social media. In *Davison*, the Fourth Circuit unanimously ruled that the interactive component of a Facebook page operated by Randall, the Chair of the Loudoun County Board of Supervisors, was a public forum and that deleting and blocking an individual who posted critical comments was impermissible viewpoint based discrimination.³⁰ The Fourth Circuit first found that Randall acted “under the color of the state law” when she banned the comments by the plaintiff.³¹ Randall created and administered the Facebook page to further her duties as a municipal official by using it as a “tool of governance,” providing information to the public about her and the Board’s official activities, and soliciting input from the public on policy issues she and the Board confronted.³² The Court found that Randall’s Facebook page was clothed in the “the power and prestige of h[er] state office,”³³ and that she created and administered the page to “perform[] actual or apparent dut[ies] of h[er] office.”³⁴ Further, Randall’s banning of the plaintiff’s comments was related to events arising out of her official status.³⁵

After finding that Randall acted under color of state law, the Fourth Circuit then went on to find that Randall’s Facebook page bore all the hallmarks of a public forum.³⁶ First, Randall did not place any restriction on the public’s access to the page or use of the page’s interactive components.³⁷ Therefore, in accordance with Randall’s invitation, the public made posts on matters of public concern.³⁸ Moreover, the fact that Facebook itself is privately owned did not change the analysis as it was Randall who controlled her Facebook page including the decision of whom to block. Thus, when Randall suppressed the plaintiff’s ability to comment on the Facebook page because the plaintiff was critical of the Board’s actions, the Fourth Circuit found that such was unconstitutional viewpoint-based

³⁰ *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019).

³¹ *Id.*, at 680.

³² *Id.*

³³ *Id.*, at 681, citing *Harris v. Harvey*, 605 F.2d 330, at 337.

³⁴ *Id.*, at 681, citing *Martinez v. Colon*, 54 F.3d 980, at 986.

³⁵ *Id.*

³⁶ *Id.*, at 682.

³⁷ *Id.*

³⁸ *Id.*

discrimination.³⁹ Because view discrimination is prohibited in all forums, the Fourth Circuit did not reach the question of whether the Facebook page constituted a traditional, designated, or limited public forum.⁴⁰

The Fifth Circuit has also examined the intersection between the First Amendment and a public official's use of social media platforms. Specifically, in *Robinson v. Hunt*, the Fifth Circuit considered, and reversed, a lower court's grant of a motion to dismiss, explaining that based on the pleadings, the allegations about deleting and blocking individuals who posted critical comments on the Sheriff Department's Official Facebook page were sufficient to state a claim for impermissible viewpoint-based discrimination.⁴¹ The plaintiff had posted critical comments including describing a law enforcement officer as a "terrorist pig with a shiny badge." While the Facebook page said that "positive" comments were welcome, a government actor cannot attempt to create a limited public forum based on such viewpoint-based distinctions. On remand from the Fifth Circuit to the district court, the case settled and was dismissed.

A recent ruling from the Eighth Circuit in *Campbell v. Reisch*, highlights that not all social media pages operated by a public official will necessarily be subject to First Amendment scrutiny.⁴² Rather, the First Amendment only prohibits governmental abridgement of speech. Thus, where a public official is not acting under color of state law, the First Amendment is not triggered. As explained by the Eighth Circuit, the act of a public official taken in "the ambit of their personal pursuits" does not trigger liability under U.S.C. Section 1983.⁴³ In *Campbell*, the plaintiff sued a state representative, Representative Reisch, for excluding him from the representative's social media account.⁴⁴ The Eighth Circuit reversed the lower court's judgment in favor of the plaintiff and ruled that Representative Reisch was acting in a private capacity and not "under the color of state law."⁴⁵ The Eighth Circuit distinguished Representative Reisch's social media account from the one operated by Randall in *Davison* as, unlike Randall who used her social media account as a tool of governance, Representative Reisch opened and used her social media account for the limited purpose of running for public office and used the account to emphasize her suitability for public office.⁴⁶

The Eighth Circuit explained that Representative Reisch's social media account was best characterized as a campaign page that acted like a campaign newsletter where it was her prerogative to "select her audience and present her page as she sees fit."⁴⁷ The Eighth Circuit further noted that "Reisch's own First

³⁹ *Id.*, at 688.

⁴⁰ *Id.*, at 687.

⁴¹ *Robinson v. Hunt Cnty., Texas*, 921 F.3d 440 (5th Cir. 2019).

⁴² *Campbell v. Reisch*, 986 F.3d 822, 823 (8th Cir. 2021).

⁴³ *Id.*, at 824.

⁴⁴ *Id.*, at 823.

⁴⁵ *Id.*, at 827.

⁴⁶ *Id.*, at 826-27.

⁴⁷ *Id.*, at 827.

Amendment right to craft her campaign materials necessarily trumps Campbell's desire to convey a message on her Twitter page that she does not wish to convey.”⁴⁸ Thus, the Eighth Circuit found that Reisch’s social media page was fundamentally different from the ones at issue in the *Davison* and *Knight* cases and that Reisch’s post-election use of the account was too similar to her pre-election use to suggest that it had morphed into something altogether different.⁴⁹ The Court did, however, note that the essential character of a social media account is not fixed forever, highlighting that how a court classifies the forum can change over time depending on how the public official is using his or her social media accounts.⁵⁰

Practice Pointer: Elected officials should consider having separate Facebook pages (or other social media pages) so that they can dedicate one page to business related to their office, one page to campaign activities and one page to purely personal posts. Separating information into these different pages should allow public officials to retain more control over who posts and what is posted on their campaign pages and personal pages. This, however, hinges on ensuring that these social media pages are not seen as “tools of governance” which in turn hinges on having a separate page for information and activities related to their public office.

B. District Court Decisions From The Ninth Circuit

In addition to the above-discussed Circuit Court decisions, there are also three decisions from the district courts here in California that have addressed First Amendments challenges to a public official’s restrictions on social media accounts. As with the Circuit Court decisions, the district court decisions rely heavily on the forum classification doctrine.

In *Garnier v. Poway Unified School District*, parents sued the school district after the school board members deleted posts by the parents and blocked the parents from their public social media pages.⁵¹ Citing to the Fourth Circuit’s decision in *Davison*, the district court found that the school board members acted “under the color of state law” as they were using their social media pages “as tools of governance” to inform the public about their official activities.⁵² The court went through a detailed factual analysis of how the social media sites were being used by the public officials, highlighting that this is a very fact intensive inquiry that will be dependent on the particular facts of each case. The court also found that the school board members had created a public forum with their social media pages

⁴⁸ *Id.*

⁴⁹ *Id.*, at 826.

⁵⁰ *Id.*

⁵¹ *Garnier v. Poway Unified Sch. Dist.*, No. 17-CV-2215-W (JLB), 2019 WL 4736208, at *1 (S.D. Cal. Sept. 26, 2019).

⁵² *Id.*, at *7.

and that the category of public forum created was a designated public forum as they had opened the interactive portion of their social media pages to the general public without setting any limiting criteria.⁵³

The district court in *Garnier* went on to find that the school board officials' actions in blocking the parents was content-neutral action as the blocking was based on the fact that the parents had been sending hundreds of repetitive comments.⁵⁴ The blocking, however, had gone on for nearly three years and this length of time did not meet the narrow tailoring requirement and thus the continued blocking was unconstitutional.⁵⁵ Accordingly, public officials must be cognizant of how their social media policies are being implemented and make adjustments with the passage of time. While an initial decision to block repetitive comments may be valid, the continued or permanent blocking of individuals by a public official is likely to be frowned upon by the courts.

In *Faison v. Jones*, the court considered a challenge brought by two Black Lives Matter leaders who had been blocked from the Sacramento Sheriff's Facebook page because of critical comments they had posted.⁵⁶ The district court first examined and found that the Sheriff's administration of the social media page bore a close nexus with his official responsibility and duties and that thus the Sheriff acted "under the color of state law" in monitoring, deleting and blocking comments on his Facebook page.⁵⁷ The district court then found that, similar to *Garnier*, the interactive portion of the Sheriff's social media page was a public forum because the Sheriff posted content related to his position as a public official, and opened the page to the public without limitation.⁵⁸ Thus, the court ruled that the Sheriff had engaged in unconstitutional viewpoint discrimination when he deleted critical comments by the plaintiffs and banned them from his social media page.⁵⁹

The final district court decision out of California to analyze a First Amendment challenge to a public official's use of social media is the *West v. Shea* case.⁶⁰ In *West*, the district court rejected an attempt by the Mayor of Irvine to end the case at the motion to dismiss stage.⁶¹ The plaintiff had alleged that he was blocked by the Mayor from her public Facebook page because of critical comments he had posted. The court found that at the pleading stage the allegations were sufficient to support an inference that the social media page was a public forum.⁶² Moreover, the allegations were sufficient to state a claim even if the social media

⁵³ *Id.*, at *9-10.

⁵⁴ *Garnier v. O'Connor-Ratcliff*, 513 F.Supp.3d 1229, 1248 (S.D. Cal. 2021).

⁵⁵ *Id.*, at 1249.

⁵⁶ *Faison v. Jones*, 440 F.Supp.3d 1123, 1129 (E.D. Cal. 2020).

⁵⁷ *Id.*, at 1134.

⁵⁸ *Id.*, at 1135.

⁵⁹ *Id.*, at 1136.

⁶⁰ *West v. Shea*, 500 F.Supp.3d 1079 (C.D. Cal. 2020).

⁶¹ *Id.*, at 1082.

⁶² *Id.*, at 1085.

page was a nonpublic forum as the allegations were that the plaintiff was blocked because of his viewpoint which is not allowed in either a public forum or nonpublic forum.⁶³ Thus, where there are allegations that support a claim that the public official acted under color of state law, any allegation of viewpoint-based discrimination is likely to defeat a motion to dismiss. This is in contrast to the situation where public officials are acting in the “ambit of their personal pursuits” (such as in the *Campbell* case discussed above) and the First Amendment is not triggered at all.

C. Other Notable Cases

Politicians from both sides of the political aisle have run afoul of the First Amendment when operating their social media accounts.

In 2019, Dov Hikind, a former New York State Assemblyman, sued U.S. Congresswoman Alexandria Ocasio-Cortez for blocking him from her @AOC Twitter account. The Congresswoman has called attention to, and pushed back against, the many abusive comments she and other women have faced on social media. However, in the lawsuit filed by Hikind, his comments were not harassing or abusive and Ocasio-Cortez agreed to settle and publicly apologized for blocking him. Ocasio-Cortez has continued to assert her right to block people from her social media accounts whom she believes are harassing her online, but the courts have not yet had the opportunity to examine what types of restrictions, if any, will pass constitutional muster in such a scenario. Hate filled speech may be abusive and vile, but it falls within the protections of the First Amendment and lawsuits over deleting or banning such speech will present challenging issues for the courts to consider.

On the other end of the political spectrum, U.S. Congresswoman Marjorie Taylor Greene was sued by a political action committee that was blocked from the Congresswoman’s Twitter account. The parties settled the case, and Congresswoman Greene agreed to pay \$10,000 for the plaintiff’s legal fees and was barred from blocking anyone from her public Twitter account or other social media accounts while she is in office.

And in a final example of a cautionary tale, the ACLU brought a lawsuit against U.S. Congressman Paul Gosar when he blocked an user from his Facebook page for using profanity. The suit led Gosar to adopt new guidelines for posting and removing comments. In dismissing the complaint, the ACLU noted its overarching goals had been achieved since (1) comments would not be hidden or deleted based on viewpoint, (2) users would only be blocked for repeated violations (and then only for a limited time), and (3) the Congressman’s staffers responsible for managing the page would implement the new policy in a viewpoint-neutral and non-discriminatory manner.

⁶³ *Id.*, at 1085-1086.

IV. Next Steps For Public Officials And Entities

As courts at all levels are increasingly asked to address the use of various social media platforms by public officials and agencies. The crucial first-step for all government agencies is to figure out which social media platforms are actually being utilized, and by whom. This includes understanding not only the platforms currently put in place by the agency, but also which platforms are controlled by elected officials and any municipal employees who are in a position such that their remarks/comments/posts may be construed to speak on behalf of the public entity. The digital town square phenomenon highlights the importance for government entities and elected officials to proactively set policies and standards for public engagement on these platforms. The critical inquiry is whether public entities or officials have opened digital channels for expressive activity *and* on what terms.

Elected officials should be cognizant that if they want their social media platforms to remain private—and beyond the reach of the First Amendment—they should not post information that relates to the conduct of their official duties, nor should they open the interactive portion of their accounts to the general public. Once elected officials use their personal or quasi-personal social media accounts in association with official business, they need to be aware that they have likely established a public forum. Subsequently, officials will have limited ability to restrict their accounts. Any restrictions will need to be clearly established and enforced. Moreover, blocking users or deleting comments because of criticism will likely be seen as unconstitutional viewpoint-based discrimination.

Public agencies may choose to operate social media platforms in a manner where information is only pushed out and the forum is not opened for public discussion or comments. For example, on Facebook, page owners can choose to restrict users from leaving comments, and under that scenario, the government has likely not opened the forum for any type of public discourse but is, instead, engaging only in its own speech. More often, however, government entities operate social media platforms that allow comments and posts from the general public. If the government wants to establish restrictions or limitations on social media platforms where there is this two-way flow of information, the challenge becomes crafting regulations that pass constitutional muster. Factors to consider include: ensuring that comments will not be hidden or deleted based on viewpoint; considering whether to only block users for repeated violations of the limitations (and then only for a limited period of time); and ensuring that personnel who are responsible for managing social media accounts will implement the policy in a viewpoint-neutral and non-discriminatory manner. Even with clear policies in place, government entities and public officials/employees will be faced with difficulties in the application of any posting restrictions. For example, how does one decide when provocative speech has crossed over into fighting words or actual threats of bodily harm? Many courts have been permissive in allowing provocative or inflammatory speech in public parks and at city council meetings, and the courts may be similarly permissive with speech on government entities' or elected officials' social media accounts open for public discourse.

V. Conclusion

Social media platforms are usually engineered to allow for the flow of public comments and discussion, so it is common for them to be used to engage in civil discourse. Public entities and officials need to evaluate whether these platforms are the appropriate forum to discuss issues with constituents. If restrictions are placed on a social media platform, such a restriction may be viewed as creating a limited public forum. This poses the dual challenge of crafting reasonable and viewpoint neutral restrictions, as well as the challenge of enforcing the limitations in an evenhanded fashion. On the other hand, with no limitations and no stated policy in place, social media platforms are likely to be viewed as designated public forums open for the free exchange of ideas where the government will retain little ability to restrict, block or delete offensive comments. In this area of law, the old adage may sum it up most fittingly: The best defense is a good offense.

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