



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

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Re: Blocking Constituents on Social Media

Dear Members of the West Virginia Legislature:

In recent weeks, we have received a number of reports alleging that sitting legislators—from both political parties—have engaged in the unlawful blocking of constituents on social media pages or deleted comments critical of legislative action. The act of blocking individuals from engaging with an elected official’s social media page may violate free speech rights guaranteed to those constituents under the First Amendment and article III, section 7 of the West Virginia Constitution.

The right to critique public officials lies at the very heart of the First Amendment. Fundamental to the First Amendment is the principle that “debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The United Supreme Court has referred to social media as a “modern public square.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017). When the government provides a forum for speech, the actor “ordinarily may not exclude speech or speakers from the forum on the basis of viewpoint.” See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019). Such a venue provided by the government for speech is commonly referred to as a “public forum.” See, e.g., *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469, (2009) (noting that under long-established First Amendment law, “governmental entities are ‘strictly limited’ in their ability to regulate private speech” in a public forum).

In 2019, the Fourth Circuit Court of Appeals held that an elected official’s Facebook page on which she discussed upcoming events and community issues constituted a “public forum,” and that the official engaged in unconstitutional viewpoint discrimination when she banned a constituent from her Facebook page. See *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019). The Court found the official acted “under the color” of state law in when she banned the constituent from commenting on her page, because she treated the Facebook page “as a tool of governance,” clothing it “in the power and prestige of h[er] state office.”¹ *Id.* at 681.

In light of the Fourth Circuit’s ruling in *Davison*, it is now settled case law in this Circuit that a constituent’s constitutional rights extend to comments made on a public official’s social media page. An official may not block protected speech on an account dedicated to their official duties. Officials may, however, delete speech that is not considered protected under the Constitution, including speech that makes a true and immediate threat to another person, incites others to imminently violate the law, or contains obscene language² as defined by the United States Supreme Court.

¹ West Virginia is one of five states in the Fourth Circuit, and therefore West Virginia is bound by opinions issued by that Court.

² The definition of what qualifies as obscenity, and therefore unprotected speech, is quite limited. In *Miller v. California*, the Supreme Court defined it as follows: “The category of the obscene is very narrow; to be obscene, expression must be found by the

The analysis is not limited to accounts that are categorized by a public official as an “official” page. A public official is also prohibited from engaging in viewpoint discrimination on a *personal* social media account if that account is used to discuss public matters or for other public purposes. The Second Circuit Court of Appeals has held that “the First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise-open dialogue because they expressed views with which the official disagrees.” *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019).

A fundamental First Amendment principle is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. *Packingham*, 137 S. Ct. at 1730. The ability to debate and critique public officials freely, on social media or otherwise, is protected under the First Amendment and under the West Virginia Constitution. I trust this information has been instructive and that all members will review individuals who are blocked from your social media accounts and restore their access as is appropriate.

Sincerely,



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