

Charleston WV 25339-3952

(304) 345-9246 www.acluwv.org

February 5, 2020

Delegate John Mandt Room 218E, Building 1 State Capitol Complex Charleston, WV 25305 sent via email to john.mandt@wvhouse.gov

Re: Blocking Constituents on Social Media

Dear Delegate Mandt:

I am writing in regards to multiple complaints my office has received from constituents who have been blocked from viewing social media content from your official social media pages. The act of blocking individuals from engaging with a public official's social media page violates 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, 270, 84 S. Ct. 710, 721 (1964).

Further, "[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 v. North Carolina, 137 S. Ct. 1730, 1732 (2017). Thus, 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).

Social media has been referred to by the Supreme Court as the "modern public square." *Packingham*, 137 S. Ct. 1737. When a government official creates an official page designed to share information with constituents, or when the official uses a personal account to share that same information, that page becomes a forum for speech. And when a government official blocks or bans individuals from engaging on social media pages used to discuss public business because of the viewpoints the individuals expressed, they are unconstitutionally cutting off access to a place where constituents have the right to speak, listen, and debate on public issues.

Last year, the Fourth Circuit Court of Appeals determined in Davison v. Randall, that an elected official's Facebook page on which she discussed upcoming events and community issues constituted a "public forum," and therefore she 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." Id. at 681.

A public official may also not engage 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 last year 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).

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 you will review those who are blocked from your social media accounts and restore their access appropriately. Our office will be monitoring this matter closely.

Sincerely,

Loree Stark

Legal Director, ACLU-WV