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SOCIAL MEDIA: THINK BEFORE YOU BLOCK

In a 2017 First Amendment case, *Packingham v. North Carolina*, the U.S. Supreme Court opined that social media is, "one of the most important places to exchange views." In that decision, the Court struck down as overly broad a state law that barred sex offenders from accessing many websites including sites such as Facebook and Twitter. However, the decision acknowledged that "[t]hough the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor." The *Packingham* case is important because for the first time the Court recognized that the First Amendment applied to limit government restrictions on social media access.

Increasingly, constituents engage with public officials through platforms such as Facebook and Twitter. In January, the U.S. Court of Appeals for the 4th Circuit ruled on important free speech implications of social media use. In *Davison v. Loudoun County*, a three-judge panel of the court unanimously held that an elected county board supervisor violated the First Amendment when she blocked a constituent from a personal Facebook page because the constituent had accused the Board of corruption. The court:

1) Held that the supervisor's personal Facebook page became a governmental forum subject to the First Amendment because the supervisor picked a name for the page that included her official title, ("Chair's Facebook Page"), labeled at least part of the site as a "government official page," which included her official contact information and other information about the board, promoted her personal page in an official newsletter, invited her constituents to comment about government issues on her personal site, shared control of the page with her government chief of staff, and used the Chair's Facebook Page to keep constituents informed of board events and issues.
2) Discussed at length whether the Chair's Facebook page should be analyzed as a traditional public forum (having very strong First Amendment Protections) or only a limited public forum, to which public access could be restricted to within the limited purposes of the site, but ultimately held that the distinction did not matter and declined to decide the issue.

The court refused to decide how to characterize the forum because the blocking was motivated by the **content** of the constituent's expression. The First Amendment prohibits government censorship based on what is said rather than based on the time, place, or manner of expression regardless of the type of for public forum.

Even a personal Facebook page can become official. In the *Loudoun* case, the elected official's personal page attached to her official persona when she promoted her page in a newsletter and invited comment. To avoid a similar issue, a local government in Maryland instituted a social media policy creating an official page purely for complaints, removing only spam and malware.

Although *Loudoun* is not a Fifth Circuit case, Texas might be months away from a similar ruling. In *Robinson v. Hunt County,* a resident was blocked by the Sheriff for commenting on the Sheriff's Office Facebook page last year. After her case was dismissed by a district court in Dallas, this resident appealed the case to the 5th Circuit, which heard oral argument on December 6, 2018.

The district court in *Robinson* dismissed the complaint's claims arising from alleged First Amendment violations because the plaintiff failed to eliminate the possibility that the sheriff had removed a post not because it criticized the sheriff's office but instead because it was disrespectful to a deceased officer. Interestingly, the Facebook site stated that the site was not a public forum even though it invited public comments. The district court decision did not depend on the disclaimer but relied on precedents under the federal Civil Rights Act that government officials are immune from liability for violating a claimed federal right when the right has not been "clearly established." The district judge was swayed by the absence of clear precedent on whether a Facebook page is public forum.

LESSONS LEARNED

1) If you want to avoid federal law restrictions, keep personal social media entirely separate from governmental business and avoid referring to personal sites in official printed or web publications, or even when speaking to the public at meetings, news conferences, or other events. Keeping personal and governmental platforms separate is important to limit First Amendment restrictions on personal social media sites and to avoid making personal social media sites subject to the Texas Public Information Act.
2) Do not use personal social media sites as platforms for publishing governmental information or announcements.
3) Do not use official titles or seals, logos, or mottos as part of the name or design of personal social media pages.
4) Do not give or share control of personal media sites with other governmental officers or employees.
5) If you establish a social media site for a government:
    a. Consult with attorneys regarding the proper limits of what, if any, content can be banned and how to express the scope of permissible posts.
    b. Clearly state any limits on the purpose of any public posts to the site, such as: "Constructive suggestions for how to keep parks clean." It probably will be held acceptable to remove posts on other topics regardless of how the courts may end up characterizing First Amendment rights to post on governmental social media sites.
    c. Do not block individuals or remove specific posts without consulting a lawyer.

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