



LEAGUE OF CALIFORNIA CITIES

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

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2. Forum Classification
2. Knight/Trump Biden/Knight Case
3. Circuit Court Rulings
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## Modern Digital Town Square

The Supreme Court has recognized the need to apply the First Amendment to new technology...

*Internet and social media sites are akin to "the modern public square"*

*Social media is "perhaps the most powerful mechanism available to a private citizen to make his or her voice heard"*

*Anyone can "become a town crier with a voice that resonates farther than it could from any soapbox"*

*Twitter enables people to "petition their elected representatives and ... engage with them in a direct manner"*

## First Amendment And Gov't Social Media

Key area where "old" case law meets "new" technologies



*What happens when these platforms are used by elected officials, official policy makers, or other public employees?*

## Forum Classification



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## Forum Classification

### Traditional Public Forum

Where people have traditionally been able to express their ideas.

### Nonpublic Forum

Government property traditionally not open to free exchange of ideas.

### Designated Public Forum

Government opens non-traditional areas for First Amendment activity with no limits.

### Limited Public Forum

Government opens non-traditional areas for First Amendment activity limited to certain groups or topics.

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## The Tests

### Traditional and Designated Public Forum

- Time, place and manner test for content neutral limitations.
- Strict scrutiny test for content based limitations.

### Nonpublic and Limited Public Forum

- Reasonable and viewpoint neutral test.
- Same test for content neutral and content based limitations.

## Forum Classification Applied To Social Media

### Nonpublic Forum

- Social media solely for government's speech with no public comments

### Limited Public Forum

- Social media open to public comments with consistently enforced limits on topics, and categories

### Designated Public Forum

- Social media open to public with no limitations *and* no policy in place

## *Knight v. Trump – 2nd Circuit*

### *Knight First Amendment Inst. at Columbia Univ., et al. v. Trump, et al., 928 F.3d 226 (2nd Cir. 2019)*



**Donald J. Trump** ✓

@realDonaldTrump

45th President of the United States of America 🇺🇸

📍 Washington, DC 🌐 [Instagram.com/realDonaldTrump](https://www.instagram.com/realDonaldTrump) 📅 Joined March 2009

50 Following 85.9M Followers

#### Blocked

- **Philip Cohen**  
university professor
- **Eugene Gu**  
surgery resident
- **Holly Figueroa**  
songwriter & organizer
- **Nicholas Pappas**  
comedy writer
- **Joseph Papp**  
author & former cyclist
- **Rebecca Buckwalter-Poza**  
writer & legal analyst
- **Brandon Neely**  
police officer

## *Knight v. Trump – 2nd Circuit*

### Two Critical Holdings:

1. President's Twitter account is a public forum
2. The blocking by President Trump is official action

Second Circuit **denies** request for *en banc* rehearing



## *Knight v. Trump* – SCOTUS



- Gov't files petition for writ of certiorari to SCOTUS, August 2020
- April 2021, SCOTUS vacates Second Circuit decision in case now titled *Biden v. Knight*, 141 S.Ct 1220 (2021)
- SCOTUS issues instructions to Second Circuit to dismiss case as moot

## *Biden v. Knight* – SCOTUS



- SCOTUS decision does not change immediate legal landscape
- But highlights that jurisprudence in this arena is still very much evolving

## Biden v. Knight – SCOTUS

- SCOTUS decision issued without discussion except concurring opinion by Justice Thomas
- Thomas concerned about Twitter’s ban on Trump
- Thomas notes that the Court will have to consider how “legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms”



## Twitter and Facebook Bans on Trump

Republican leaders in dozens of states introduce bills to allow civil lawsuits against social media platforms for removing posts



- Nonstarter
- Section 230 of Communications Decency Act shields “information distributors” from liability for posts of third parties or for removing posts

## *Davison v. Randall – 4th Circuit*

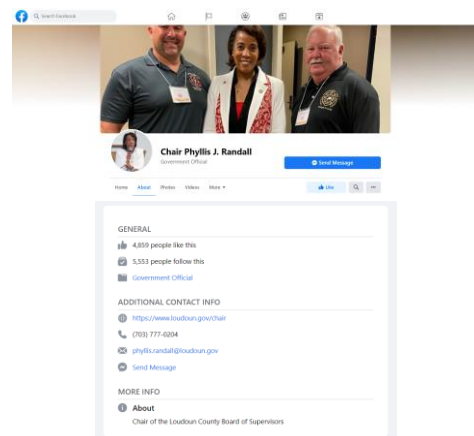
### *Davison v. Randall, 912 F.3d 666 (4th Cir. 2019)*



## *Davison v. Randall – 4th Circuit*

### Randall created the “Chair Phyllis J. Randall” Facebook page

- Chair’s Facebook page identified as “governmental official” page
- Chair used Facebook page to:
  - Notify and post about official duties and responsibilities
  - Advise about official action taken by Loudoun Board





## Davison v. Randall – 4th Circuit

In response to a post on Chair’s Facebook page, Davison made comments about alleged unethical use of government funds.

- Randall deleted Davison’s comments
- Randall deleted her original post and any other comments on the original post
- Randall blocked but then reconsidered and unblocked Davison



## Davison v. Randall – 4th Circuit

Court **unanimously held** defendant could not delete or block critical comments from a constituent on the Facebook page that defendant uses to conduct government business.

- ✓ Official acted under color of state law when banning comment
- ✓ Official’s page had *“power and prestige of h[er] state office”*
- ✓ Official made and used the page to conduct *“actual or apparent dut[ies] of h[er] office”*



## *Davison v. Randall* – 4th Circuit

### Court Found

Interactive component of the Facebook page constituted a public forum

Unconstitutional viewpoint discrimination when she banned Davison from forum

### Court Rejected

Argument that forum analysis does not apply because Facebook is privately owned

Argument that the entire Facebook page was “government speech”

## *Davison v. Randall* – 4th Circuit

### Open Questions

- ✓ Court did not determine whether the public forum at issue was a traditional, designated, or limited forum
- ✓ Concurring opinion notes:
  - Supreme Court guidance is needed on which public officials have the ability to open a public forum on social media platforms
  - Potential tensions between the policies of privately owned social media platforms and a government actor opening a public forum on those sites



## *Robinson v. Hunt* – 5th Circuit

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

#### Allegations:

Plaintiff alleges defendant unconstitutionally removed her comments and blocked her from Hunt County Sheriff's Office Facebook page



Randy Meeks  
Sheriff

## *Robinson v. Hunt* – 5th Circuit

- Plaintiff alleged facts sufficient to sustain claim that removal of comments was unconstitutional viewpoint discrimination
- Whether removal of posts would comply with Facebook's policies did not bar the action
- On remand to district court, case settled and dismissed



## Campbell v. Reisch – 8th Circuit

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

- Plaintiff sues Missouri state representative Reisch for blocking on Twitter campaign page
- Eighth Circuit explains that First Amendment only applies to government abridgment of speech
- The act of a public official taken in “the ambit of their personal pursuits” does not trigger First Amendment concerns



## Campbell v. Reisch – 8th Circuit



- Eighth Circuit reverses lower court and finds that representative Reisch was acting in personal capacity and not “under color of state law” with Twitter campaign page
- Decision distinguishes *Davison* case by noting that Reisch was not using social media campaign page as a tool of governance
- But character of social media page may change over time

## Faison v. Jones – E.D. Cal.

### *Faison, et. al. v. Sheriff Jones of Sacramento County* 440 F.Supp.3d 1123 (E.D. Cal. 2020)

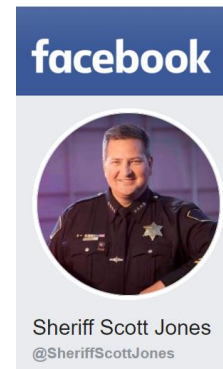
- ACLU files suit on behalf of two Black Lives Matter leaders
- Alleging Sacramento Sherriff blocked them from his official Facebook page for making comments critical of the Sheriff



## Faison v. Jones – E.D. Cal.

### Court grants Plaintiffs' PI motion finding:

- Sheriff acting under color of state law in deleting posts and banning users
- Interactive component of sheriff's social media page is a public forum
- Sheriff engaged in unconstitutional viewpoint discrimination when deleting posts
- Deleted comments are not government speech



## *Faison v. Jones* – E.D. Cal.

State Actor

Sheriff wearing uniform in profile photo, banner photo shows squad car, uses his official title, posts about official business, asks supporters to get involved and oppose outside oversight.

Public Forum

Open to members of public at large for comments and exchanges. Fact that a few other users were banned does not diminish status as public forum.

## *Faison v. Jones* – E.D. Cal.

Viewpoint  
Discrimination

Comments deleted and users banned for critical comments.

Not Government  
Speech

Sherriff's posts may qualify as Government Speech but Plaintiffs' comments do not.

## Garnier v. Poway – S.D. Cal.

**Garnier v. Poway Unified Sch. Dist., 2019 WL 4736208 (S.D. Cal. 2019); 2021 WL 129823 (S.D. Cal. 2021)**

### Plaintiffs

Parents of children attending school in the district frequently posted on school board members' social media pages.



## Garnier v. Poway – S.D. Cal.

**Garnier v. Poway Unified Sch. Dist., 2019 WL 4736208 (S.D. Cal. 2019); 2021 WL 129823 (S.D. Cal. 2021)**



### Defendants

School board members that blocked Plaintiffs from their public Facebook and Twitter pages.

## *Garnier v. Poway* – S.D. Cal.



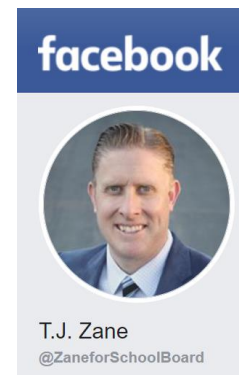
### Court Finds:

- Defendants acted under color of state law
- Interactive portion of Facebook page is a designated public forum
- Blocking comments violated First Amendment

## *Garnier v. Poway* – S.D. Cal.

### Blocking Violated First Amendment

- Blocking lasted too long (2 years)
- Blocking continues to present
- Court acknowledges the choice is between unblocking Plaintiffs and closing the forum

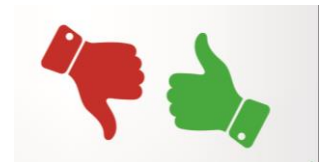




## West v. Shea – C.D. Cal.

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

- District Court finds plaintiff's allegations regarding being blocked from mayor's Facebook page sufficient to state a claim at the motion to dismiss stage
- Allegations support inference that the Facebook page is a public forum and even if a nonpublic forum allegations are that plaintiff was blocked based on viewpoint



## @AOC Twitter Account

### HiKind v. Ocasio-Cortez, Case No. 1:19-CV-03956 (E.D.N.Y. 2019)

- Plaintiff, former New York State Assemblyman, blocked from @AOC Twitter account
- Case settles, Plaintiff's posts not harassing, AOC unblocks
- AOC continues to block several conservative activists and right-wing groups

The New York Times

*Ocasio-Cortez Apologizes for Blocking Critic on Twitter*



## @mtgreenee Twitter Account

### *MeidasTouch v. Greene*, Case No. 2:21-cv-00993 (C.D. Cal. 2021)

- Rep. Marjorie Taylor Greene sued by Los Angeles-based political action committee after being blocked on Twitter
- Case settles, Greene is barred from blocking anyone from her public Twitter account or other social media while she's in office, and agrees to pay \$10,000 for plaintiff's legal fees



## Practice Pointers – Social Media Policy

### 1. Identify the social media platforms

(e.g., Facebook, Twitter, Snapchat, Instagram, etc.)

- Recognize that personal accounts might remain personal or might be changed to a public forum, depending on their use.
- For each platform, will the forum be truly public?  
Or will it be a limited public forum, or government speech?
- Evaluate the purpose of each platform – which ones will be recognized as part of the agency's limited public forum?



## Practice Pointers – Social Media Policy

### 2. Establish rules for public participation

- a. Include warning that violation of rules could result in removal of comments.
- b. Set out retention period for comments.
- c. Provide a procedure for contesting restrictions based on violations
  - require timely response
  - provide email address for challenge to decision
- d. Add disclaimers.



## Practice Pointers – Social Media Policy

### 3. Identify person(s) who may post on behalf of the public entity on official social media sites

- a. Ensure the employee has knowledge about all aspects of the public entity, or knows who to contact to get information.
- b. Allow adequate time/resources for the employee to devote to the social media platforms.
- c. Provide training so the employee knows how to use the platforms and what social media policies apply, and understands legal considerations



## Practice Pointers – Social Media Policy

### Policy Examples

- Policy adopted in settlement of litigation brought by the ACLU against the Governor of Maryland
- Draft IMLA model social media policy for city, county, and local governments



([https://www.aclu-md.org/sites/default/files/field\\_documents/social-media-policy.pdf](https://www.aclu-md.org/sites/default/files/field_documents/social-media-policy.pdf))

## Practice Pointers – Social Media Policy

### Final Thoughts:

- Is the social media page necessary?
- Consider subject matter based restrictions
- Uniformly enforce
- Tolerate criticism
- Review before deleting or banning





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