



LEAGUE
OF CALIFORNIA
CITIES

ANNUAL
CONFERENCE
& EXPO 2020



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

Deborah Fox, Principal and Chair
Meg Rosequist, Of Counsel
First Amendment Practice and Trial & Litigation Practice

meyers | nave
A Professional Law Corporation



Oct. 8, 2020

Modern Digital Town Square

1. Classification of Forum
2. Focus of Courts' Legal Analysis
3. Key Functional Questions for Social Media Accounts
4. Lessons from Recent Litigation
5. Setting Policies and Standards for Public Engagement on Accounts



AGENDA

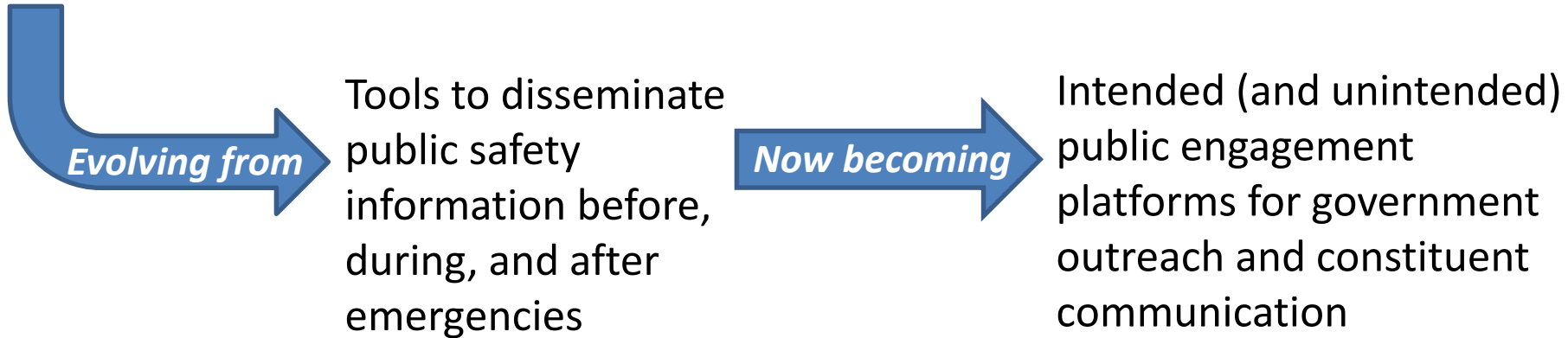


Social Media

- May cities and elected officials **block or regulate** public participation on their social media accounts?
- May elected officials **unfriend, deny or not respond** to friend requests on Facebook?
- May people be blocked, **muted or unfollowed** on Twitter?
- How should **policies** be drafted and enforced regarding the public's use of these social media accounts?

Social Media

- Use of social media, email, and texting by officials and city employees is transforming government



The Challenge

How courts can use established and familiar law to address social media and other communication technologies.

First Amendment

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”

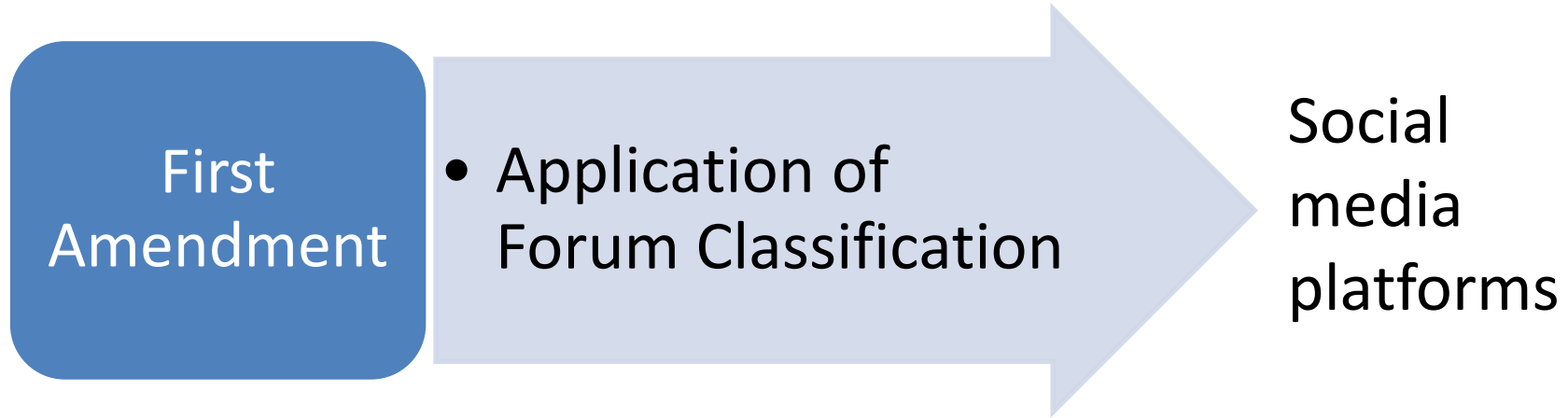
Social media is “perhaps the most powerful mechanism available to a private citizen to make his or her voice heard”

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

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?

Government-Operated Social Media Platforms

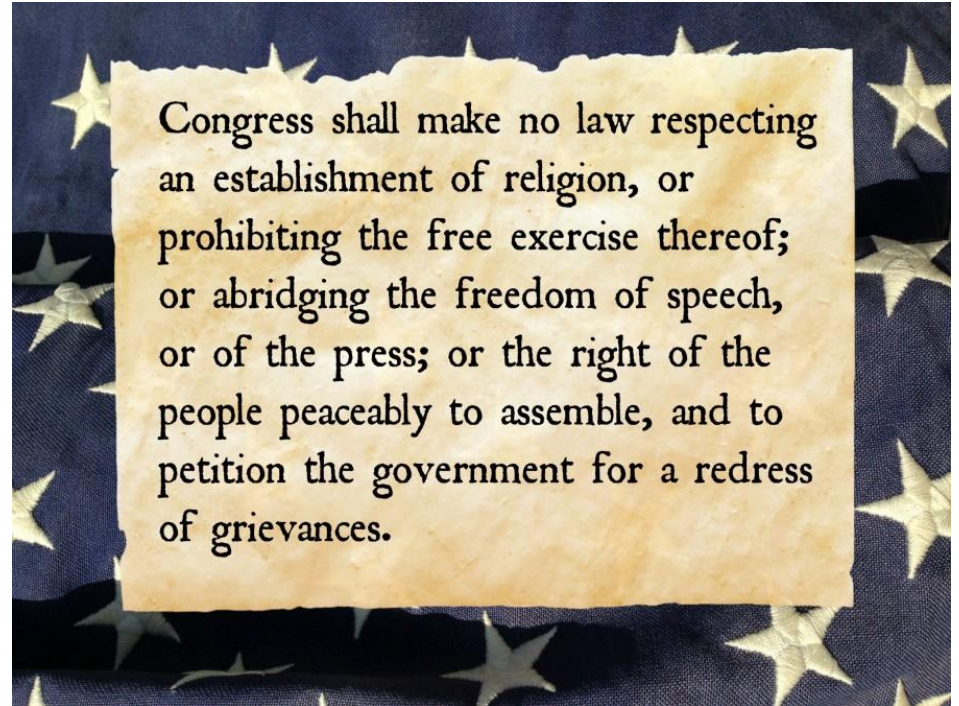
How should a social media platform be classified?

- Is it government sponsored or a private platform?
- Is it a traditional public forum?
- Is social media the “modern public square” for the discourse of ideas?
- Or is it more akin to a bulletin board where only designated topics can be discussed?



What is First Amendment Forum Classification?

1. Categorize spaces
2. Apply established legal standards



Main Categories of Forum Classification



Two Categories of Forum Classification

- **Traditional Public Forum**

- Where people have traditionally been able to express their ideas: *town square, park, public street*



- **Non-Public Forum**

- Government property traditionally not open to the free exchange of ideas: *courthouse lobby, prison, post office, military base*



Public Forum Test

Content Neutral:

1. **Reasonable** time, place and manner;
2. **Narrowly-tailored** to serve a **significant** government interest; *and*
3. Leaves open ample **alternative channels** of communication.

Content Based:

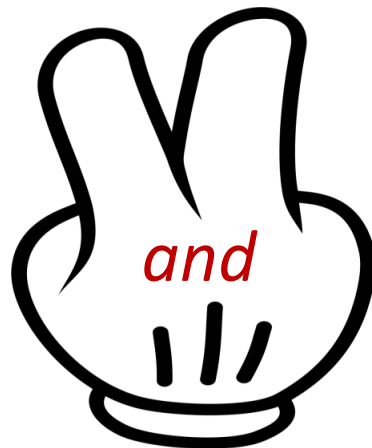
1. Subject to **strict scrutiny**;
2. Must be **least restrictive** means to achieve **compelling** government interest; *and*
3. **Presumptively invalid**

Non-Public Forum Test

Most lenient test

Restrictions need only be:

Reasonable



Viewpoint neutral

Types of Public Fora

Designated Public Forum

*Designated
Public
Forum*

- Government intentionally opens non-traditional areas for First Amendment activity

*Same strict
review as
public forum*

- Interior of city hall (*i.e., city opens building to display art*)
- School board meetings
- Municipal auditorium dedicated to expressive activity

Types of Public Fora

Limited Public Forum

*Limited
Public
Forum*

- Non-public forum opened to First Amendment activity but limited to certain groups, topics

*Same review
as non-public
forum*

- Public library meeting rooms
- Public school property
- State's specialty license plate program

How Courts Determine Classification

- ✓ Determination of *designated* or *limited* public forum **depends on terms of use**

More consistently
enforced with
objective restrictions



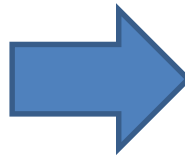
More likely
deemed **limited**
public forum

Social Media as Non-Public Space

- Social media platform **solely for** government's speech

Example

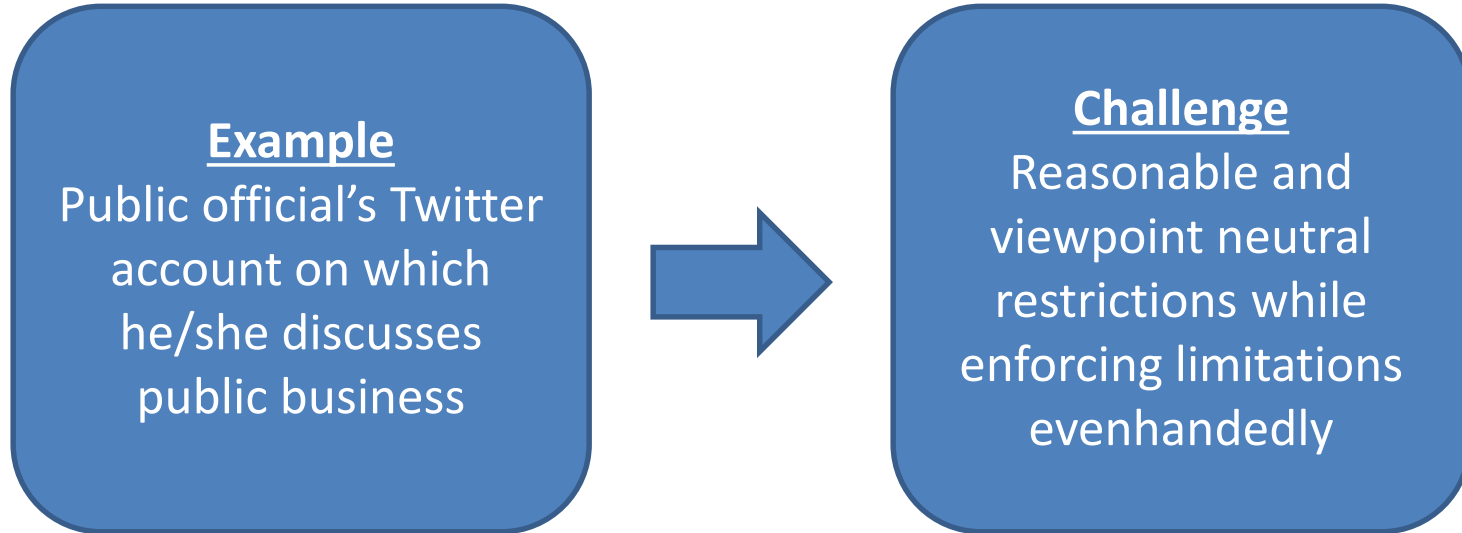
Facebook page for providing information with no option for any public discussion or comments



**First Amendment
does not apply**

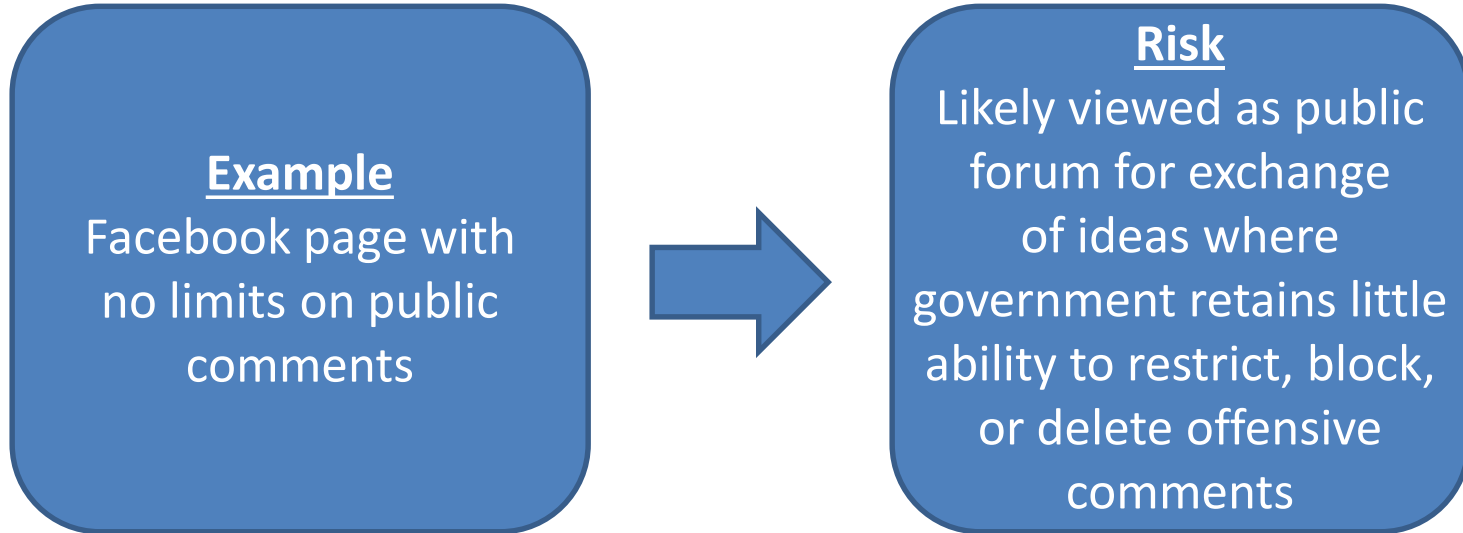
Social Media as *Limited* Public Forum

- Social media with some **limits** on public discourse



Social Media as *Designated* Public Forum

- Social media 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)



- **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

Knight v. Trump

- **Trump created Twitter account in 2009**
- **85.9 million followers @realDonaldTrump**
- **Account used for public issue discussion**
- **The National Archives has deemed the President's tweets to be official records**



Donald J. Trump  @realDonaldTrump · Sep 13

Actually falling very steadily and fast. Deaths and hospitalizations way down, and even cases down despite far more Testing than any other country in the World, by far. India second!



Donald J. Trump  @realDonaldTrump · 22h

Just signed a new Executive Order to LOWER DRUG PRICES! My Most Favored Nation order will ensure that our Country gets the same low price Big Pharma gives to other countries. The days of global freeriding at America's expense are over...



Donald J. Trump  @realDonaldTrump · Sep 13

But people don't want to get mugged, beaten up, or killed. Let New York's Finest (who proudly endorsed me!) do their job. Rehire crime squad and fired police. They will bring safety back to NYC, FAST!!!

Knight v. Trump: 2nd Circuit

Is @realDonaldTrump a *designated* public forum?

- DOJ argued President Trump's Twitter account is not public property
- Blocked users claim Twitter account acts as a digital town hall meeting

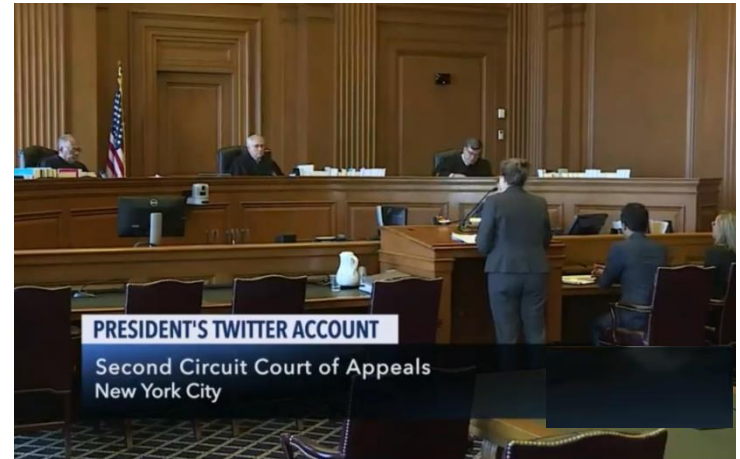


Knight v. Trump: 2nd Circuit

Second Circuit: Oral Argument

Two Critical Questions:

1. Is the President's Twitter account a public forum?
2. Is the blocking by President Trump official action?



Panel: Parker, Hall, Droney

Knight v. Trump: 2nd Circuit

DOJ Argument

- Conceded some tweets were official statements, but argued blocking was not state action
- Noted President Trump created the account before becoming president and will retain control of it after leaving office
- Claimed it is not a public forum; instead, it is an account that was opened as a platform for his own speech
- President Trump is not acting in his official capacity when he blocks users – blocking function is available to all users
- Blocking did not ban or burden anyone’s speech – work arounds available



Knight v. Trump: 2nd Circuit

Second Circuit's Ruling

- Governmental control of the account subjects it to First Amendment forum analysis
- Account's interactive features are open to the public
- Evidence of the public nature of the account is overwhelming
- Opening an instrumentality of communication for indiscriminate use by the general public creates a public forum → viewpoint discrimination not allowed
- President's initial tweets are government speech, but the case turns on his actions taken in the interactive space of the account, not his initial tweets



Knight v. Trump: 2nd Circuit

Judges further note...

- Of course, not every social media account operated by a public official is a government account...
- Factually nuanced
- Depends on how the account is used
- What features are made available



Key Second Circuit Holding

President Trump's Twitter account is a **public forum** because:

1. It was opened as an “instrumentality of communication” for “indiscriminate use by the general public,”
2. Account was used to announce, describe, and defend official policies, and
3. Account's interactive features are accessible to the public without limitation



Knight v. Trump: SCOTUS


- DOJ's request for an *en banc* rehearing denied
- DOJ appeals case to SCOTUS
- Supreme Court will likely decide this fall whether to hear the case



Davison v. Randall – 4th Circuit

facebook

Email or Phone Password [Log In](#)
[Forgot account?](#)



Chair Phyllis J. Randall

Home

About


Endorsements

Photos

Videos

Posts

Community



Like Share Suggest Edits ... [Send Message](#)

About [Suggest Edits](#)

CONTACT INFO

[Call \(703\) 777-0204](tel:7037770204)

[Chair Phyllis J. Randall](#) [Send Message](#)

phyllis.randall@loudoun.gov

<https://www.loudoun.gov/chair>

MORE INFO

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

Davison v. Randall – 4th Circuit

First federal court of appeals to consider whether free-speech protections prevent public officials from barring critics from social media



Plaintiff:

Davison, outspoken Loudoun County resident

Defendant:

Randall, Chair of Loudoun County Board of Supervisors

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



Davison v. Plowman – E.D. Va.

Davison v. Plowman, 247 F.Supp.3d 767 (E.D. Va. 2017)

Limited Public Forum

- Not a First Amendment violation when **off-topic comment removed** from Loudoun County Commonwealth's Attorney Facebook page.
- **Social Media Comments Policy created limited public forum** open for purpose of moderated discussion on select topics.



We welcome comments to our Facebook page. Please follow the link to our social media comment policy before you post.
<http://tinyurl.com/bt7mtzh>

Robinson v. Hunt – 5th Circuit

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

Allegations:

- Plaintiff alleges Hunt County Sheriff Meeks and several Sheriff's Office employees unconstitutionally removed her comments and blocked her from Hunt County Sheriff's Office ("HCSO") Facebook page



Randy Meeks
Sheriff



Robinson v. Hunt – 5th Circuit

- Robinson described a dead law enforcement officer as a “terrorist pig with a shiny badge.”
- HCSO deleted her comments & blocked her from its Facebook page.

COURT



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

Garnier v. Poway – S.D. Cal.

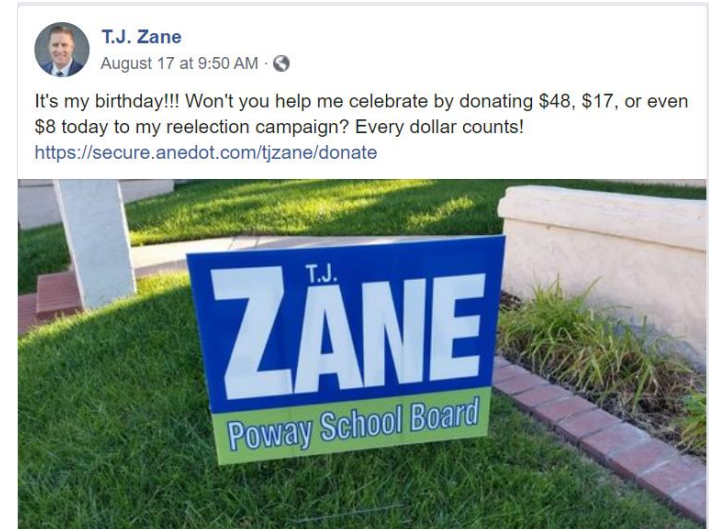
Garnier v. Poway Unified Sch. Dist., 2019 WL 4736208 (S.D. Cal. 2019)

- Plaintiffs

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

- Defendants

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



Garnier v. Poway – S.D. Cal.

- **Court** rejects Defendants' request for summary judgment
 - Defendants acted under color of state law
 - Interactive portion of Facebook page is public forum
 - Category of forum created is designated public forum
 - Disputed facts as to whether deleting posts is content-based
- **Plaintiffs** ➡ blocked for criticizing board members
- **Defendants** ➡ blocked for posting repetitive, unrelated comments

Garnier v. Poway – S.D. Cal.

Defendants acted under color of state law

Social media pages:

- “tools of governance”
- “swathed in the trappings of their office”

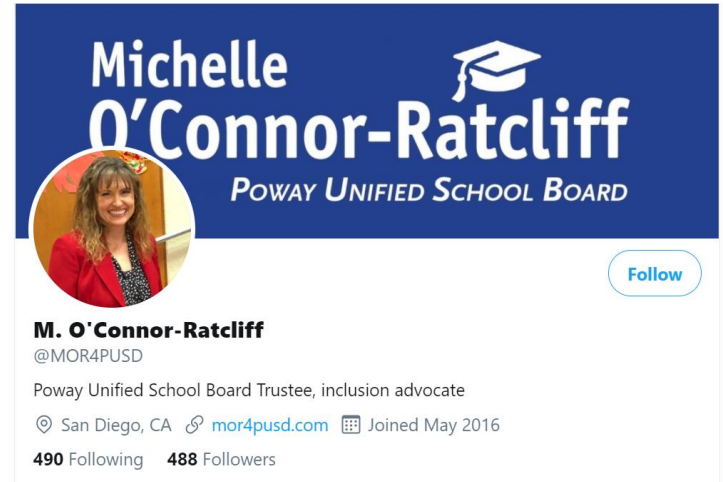
- Post board’s positions and policies
- Identify themselves by official titles
- Official school board email addresses
- Provide information about school board activities and other school board information

Garnier v. Poway – S.D. Cal.

Defendants created a public forum

Not determinative that district did not “own” social media pages because social media pages:

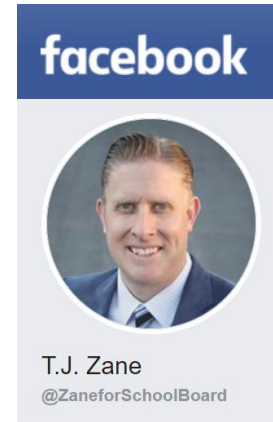
- Controlled by board member as government officials
- Used to keep constituents updated on board events
- Opened for “indiscriminate use by the general public”



Garnier v. Poway – S.D. Cal.

Court → social media pages are designated public forum

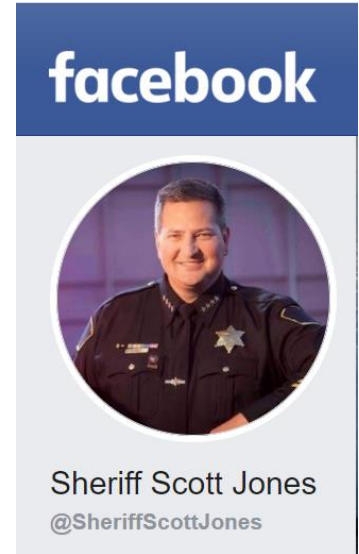
- Any member of the public could access and post comments (unless they were blocked)
- Defendants did not identify restrictions limiting groups or categories of speech as needed to establish a limited public forum
- Disputed facts remain as to whether deleting Plaintiffs' posts was an unconstitutional content-based action
- Bench trial set for September 2020



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, and claims in case arise from his role as sheriff.



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. Defendant offers no alternative explanation.


Not Government
Speech

Sherriff's posts may qualify as Government Speech exempt from First Amendment scrutiny, but Plaintiffs' comments do not.

After PI ruling, case settles, dismissed July 17, 2020

@AOC Twitter Account



Alexandria Ocasio-Cortez  @AOC · Aug 29, 2019 

 US House candidate, NY-14

1. I have 5.2 million followers. Less than 20 accounts are blocked for ongoing harassment. 0 are my constituents.

2. Harassment is not a viewpoint. Some accounts, like the Daily Caller, posted fake nude photos of me & abused my comments to spread it. No one is entitled to abuse.

 5.4K

 14.7K


 116.4K



Alexandria Ocasio-Cortez  @AOC · Aug 29, 2019 

 US House candidate, NY-14

People are free to speak whatever classist, racist, false, misogynistic, bigoted comments they'd like.

They do not have the right to force others to endure their harassment and abuse. 

HiKind v. Ocasio-Cortez – E.D.N.Y.

Case No. 1:19-CV-03956 (E.D.N.Y. 2019)

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

The New York Times

Ocasio-Cortez Apologizes for Blocking Critic on Twitter



Practice Pointers – Social Media Policy

1. Identify the social media platforms

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



- a. Recognize that personal accounts might remain personal or might be changed to a public forum, depending on their use.
- b. For each platform, will the forum be truly public? Or will it be a limited public forum, or government speech?
- c. 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

4. For officials using personal accounts for public business

- a. Learn requirements for following the agency's policy.
- b. Identify employees subject to the policy. Who might be “official actors” or “acting under color of state law” for § 1983 liability?
- c. Factors to consider:
 - Can disciplinary action be imposed on employees for violating the policy?
 - Will defense/immunity be triggered when elected officials do not use their personal platforms in accordance with the policy?

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





Presenters



Deborah J. Fox

Principal

Chair, First Amendment Practice

Chair, Trial and Litigation Practice

dfox@meyersnave.com, 213.626.2906



Meg Rosequist

Of Counsel

First Amendment Practice

Trial and Litigation Practice

mrosequist@meyersnave.com, 213.626.2906