

February 21, 2025

RE: Open Letter re: First Amendment Concerns When Government
Officials Block or Censor Constituents on Social Media Pages



Washington

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Dear Government Officials:

The ACLU of Washington is writing to address complaints that certain government officials in Washington are unconstitutionally censoring and/or blocking constituents on social media. As set forth below, courts have firmly established that restrictions placed by government actors on social media pages are protected by the First Amendment. Accordingly, government officials should take action to bring their activities into compliance with the legal rules discussed below.

Social Media Platforms Are the New Town Square

Social media has become a recognized forum enabling government officials to communicate messages to constituents, receive feedback, and foster debate. Similarly, social media is an important—even critical—tool for constituents to petition their government and engage in participatory democracy.¹ In *Packingham v. North Carolina*, the United States Supreme Court recognized that social media platforms like Facebook and X (formerly known as Twitter) provide “perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.”² The Court explained that these platforms allow individuals to “petition their elected representatives and otherwise engage with them in a direct manner,”³ and acknowledged the large number of elected officials who maintain social media accounts to foster such direct engagement. Building on *Packingham*, numerous courts have held that government officials are subject to First Amendment restrictions on censoring speech and/or blocking users on social media.⁴

¹ See, e.g., Aleem Maqbool, *Black Lives Matter: From social media post to global movement*, BBC News (online), July 9, 2020, <https://www.bbc.com/news/world-us-canada-53273381> (last accessed Sep. 11, 2024).

² *Packingham v. North Carolina*, 582 U.S. 98, 107, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017).

³ *Id.* at 105.

⁴ See, e.g., *Lindke v. Freed*, 601 U. S. 187, 144 S. Ct. 756, 218 L. Ed. 2d 121 (2024); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019), vacated as moot sub nom. *Biden v. Knight First Amend. Inst.*, — U.S. —, 141 S. Ct. 1220 (2021); *Wagschal v. Skoufis*, 857 Fed.Appx 18 (2d Cir. 2021); *Davison v. Randall*, 912 F.3d 666, 681 (4th Cir. 2019); *Robinson v. Hunt Cty., Texas*, 921 F.3d 440, 447 (5th Cir. 2019).

Government Officials Who Censor Speech on Social Media Are Likely Violating the First Amendment

The United States Supreme Court recently affirmed that public officials can violate the First Amendment when censoring speech on social media.⁵ The Court specified that this is the case when officials act using their authority as government officials.⁶

Officials use this authority on social media when they: (1) have the authority to speak on the government's behalf on a particular matter within the official's control, function, or expertise, and (2) appear to use that power when speaking in the relevant social media posts.⁷

When government officials censor speech on social media, the first part of this test is easily satisfied. An official's authority to speak on the government's behalf is given to them by law or even by custom. For example, an official can simply have that authority because they have a history of posting on social media about issues under their control.⁸

The second part of this test is likewise a low threshold to meet based upon our review of social media accounts for government officials throughout the state. Many officials in Washington maintain active social media accounts across multiple platforms that they use in official capacities. Though each case of censorship will depend on the context—like the social media platform used, the history of the official's use of social media, etc.⁹ — it is clear that the vast majority of officials use social media as a tool in exercising their authority as government officials. Even speech on officials' personal social media profiles or pages can be subject to First Amendment protections, as “[a]n official cannot insulate government business from scrutiny by conducting it on a personal page.”¹⁰

Viewpoint-Based Censorship on Social Media Platforms Violates the First Amendment

Where government officials use social media accounts for official purposes, they cannot silence the speech of users simply because they disagree with their viewpoints.¹¹

A government official may have the right to engage in some reasonable

⁵ See *Lindke*, 601 U.S. at 191.

⁶ See *id.* at 193.

⁷ See *id.* at 202.

⁸ See *id.* at 198-202.

⁹ See *id.* at 203.

¹⁰ *Id.* at 202, fn. 2.

¹¹ See *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

regulation of speech on social media pages in order to preserve the purpose of the forum¹²—for example, limiting posts that propose commercial transactions or are spam. However, such limitations cannot be based on vague, overbroad criteria such as prohibitions against disparaging public officials or prohibition of comments that are “disrespectful” or “inappropriate.”¹³ Viewpoint discrimination—for example, removing posts or blocking users on the basis of the point of view expressed—is never permissible. In *Knight*, the Second Circuit held that President Trump engaged in unconstitutional viewpoint discrimination when he blocked individuals from his Twitter account because they expressed views he disliked.¹⁴ The court explained that the First Amendment does not permit a public official who utilizes a social media account “for all manner of official purposes” to exclude individuals from an open dialogue because they express opinions with which the official disagrees.¹⁵

Courts have also taken a broad view of the social media platform features and spaces that may be protected by the First Amendment. A government official may violate the First Amendment on social media not just when they ban users or delete their content, but also when they use social media platform features to suppress speech.¹⁶ In *Leighty v. Spokane County*, the Eastern District of Washington found the government liable for damages after it violated the First Amendment by “hiding” critical comments on posts made on the local sheriff office’s Facebook page. In *Knight First Amendment Institute*, the Second Circuit found that the space on Twitter where individuals could interact with other users was itself a forum. Therefore, government actions on social media implicate the First Amendment even when the user in question may be able to access the underlying content.

Complaints we have received suggest that some government officials in Washington are engaging in exactly this kind of unconstitutional censorship. For example, posts expressing viewpoints critical of the way a given government official does their job have simply been deleted by the administrator of the official’s Facebook page, silencing the speech to other members of the public engaging in the policy debate at issue. In other

¹² *Id.*

¹³ See *Robinson v. Hunt Cty.*, 921 F.3d 440, 447 (5th Cir. 2019). In this case, a government official’s act of banning a constituent from an official government Facebook page was unconstitutional viewpoint discrimination where the official stated a policy of deleting “inappropriate” comments.

¹⁴ *Knight First Amendment Institute*, 928 F.3d at 238.

¹⁵ *Id.*

¹⁶ See, e.g., *Leighty v. Spokane Cnty.*, No. 2:24-CV-0165-TOR, 2024 WL 3432364 (E.D. Wash. Jul. 16, 2024); *Davison*, 912 F.3d at 687-88; *Attwood v. Clemons*, No. 1:18CV38-MW/MJF, 2021 WL 1020449, at *11-12 (N.D. Fla. Mar. 17, 2021); *Garnier v. Poway Unified Sch. Dist.*, No. 17-CV-2215-W (JLB), 2019 WL 4736208, at *9 (S.D. Cal. Sept. 26, 2019); *Faison v. Jones*, 440 F. Supp. 3d 1123, 1135-36 (E.D. Cal. 2020).

instances, users have been blocked from a government official's Facebook page entirely, limiting their ability both to see content posted by the official and to engage in the policy debate taking place in the forum. These types of actions have been found by courts to violate the First Amendment.

Local Government Officials Should Ensure Their Social Media Activity Is Consistent with the First Amendment

Washington public officials are sworn to uphold our nation's Constitution, including its First Amendment free speech protections, as well as our state constitution and its protection for free speech and the right to petition. As courts have consistently recognized, the exercise of First Amendment rights via social media is increasingly vital to ensuring the vibrancy of our democracy. We wish to remind local government officials of the constitutional rules pertaining to such spaces.

All officials should review their use of social media platforms, whether their account is designated as persona or official. In particular, officials should carefully review their decisions to block, delete, or otherwise suppress individual comments or users. As the cases illustrate, these actions often implicate the First Amendment and result in the violation of the rights of constituents. Practices that violate the provisions discussed above should be revised.

Thank you for your prompt consideration and action.

Sincerely,

Brent Low
Staff Attorney