WISCONSIN LEGISLATIVE COUNCIL

IssueBrief

November 2022

Developments in Constitutional Law: Elected Officials' Social Media Accounts

Prepared by: Anna Henning, Principal Attorney

The First Amendment of the U.S. Constitution and Article I, Section 3 of the Wisconsin Constitution prohibit government actors, including elected officials acting in an official capacity, from abridging the freedom of speech.[1] Those constitutional guarantees present special considerations with respect to elected officials' social media practices, particularly on platforms designed to serve as "official" accounts for communicating with constituents. This issue brief summarizes legal concepts and recent court decisions relating to this rapidly evolving area of law.

KEY FIRST AMENDMENT CONCEPTS: PUBLIC FORUM ANALYSIS

The level of government regulation allowed under the First Amendment depends, in part, on the context in which constitutionally protected[2] speech occurs. Courts have identified three types of "forums" in which speech might occur: (1) a "traditional" public forum; (2) a "designated" public forum; and (3) a non-public forum.

Courts are most likely to find that a government restriction of speech violates the First Amendment when the speech occurs in a "traditional" public forum, such as a public park or sidewalk, which has "immemorially been held in trust for use of the public and, time out of mind, ha[s] been used for purposes of … communicating thoughts between citizens."[3] In those places, a government may impose reasonable restrictions on the time, place, and manner of protected speech, but the restrictions must: (1) be "content neutral"; (2) be narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels for communicating.[4]

Alternatively, a "designated" public forum is a location or channel for communication that the government intentionally opens for expressive activity.[5] Government regulation of speech in a designated public forum generally must satisfy the same "strict scrutiny" criteria that apply in a traditional public forum, except that the government may limit the forum's scope and purpose at the outset.

Finally, a non-public forum is a setting in which public speech is not traditionally invited, nor did the government express any intention of inviting speech.[6] Generally, courts uphold government regulation of speech in a non-public forum if the regulation is "reasonable." However, even in a non-public forum, government regulation of speech must be applied neutrally as to viewpoint.

The U.S. Supreme Court has yet to definitively resolve whether elected officials' official social media accounts are public forums, and, if so, which type. Majority and dissenting opinions in a 2017 decision, *Packingham v. North Carolina*, did not directly address that question but provided commentary that may provide some insight for future cases.[7] The majority opinion, written by Justice Kennedy, compared today's social media platforms to traditional public forums such as streets and parks, as both are "the most important places … for the exchange of views." In a dissenting opinion, Justice Alito cautioned against equating social media with traditional public forums, suggesting that the Court may be more likely to view elected officials' social media pages as designated or non-public forums in future cases.

APPLICATION TO ELECTED OFFICIALS' SOCIAL MEDIA SITES

Several recent federal court cases, including three U.S. Court of Appeals decisions, involve challenges to actions taken by elected officials to block users or remove content on social media platforms.[8] Before applying public forum analysis in those cases, courts have resolved a critical threshold question: was the elected official acting in an official capacity with respect to the social media account in question? If the

answer is no, the First Amendment – and, therefore, public forum analysis – does not apply, because the First Amendment only limits restrictions imposed by the government, and an elected official only acts as the government when acting in an official capacity. If the answer is yes, then courts have applied public forum analysis to evaluate a challenger's First Amendment claims.

Campbell v. Reisch, a 2021 decision by the U.S. Court of Appeals for the Eighth Circuit, is an example of a case decided based on that threshold question.[9] In *Campbell,* a Twitter user sued a Missouri state representative who had blocked him from her campaign Twitter account. The court held that, because the Twitter account in question was a campaign account, the representative had not acted "under the color of state law" when blocking the user. The court noted that, in practice, a campaign account can shift into an official account, depending on its use over time. In this case, however, the court found that the representative's Twitter account had remained focused on campaign news, rather than on communicating official news or inviting constituents' input on policy issues. Because the court determined that the representative was not acting in an official capacity when blocking users from the site, the court did not apply public forum analysis.

In contrast, the U.S. Courts of Appeals for the Fourth and Second Circuits each found that elected officials were acting under "color of law," and therefore in their official capacities, in 2019 decisions. The Second Circuit case, *Knight First Amendment Institute v. Trump*, involved a challenge to President Trump's practice of blocking certain users from his Twitter account while he was in office.[10] Rejecting President Trump's argument that his Twitter account was private, the court concluded that it was an official account. Turning to the public forum analysis, the court held that the account functioned as a designated public forum and held that blocking certain users from that forum because of their critical views violated the First Amendment.

Similarly, in *Davison v. Randall*, the U.S. Court of Appeals for the Fourth Circuit held that a county board supervisor was acting under "color of law" when she blocked a group organized by a constituent from commenting on a Facebook page that she created as a "tool of governance" to provide information to the public about county board activities. Applying public forum analysis, the court concluded that the page was a public forum. The court then concluded that the board supervisor had unconstitutionally abridged the constituent's freedom of speech by engaging in viewpoint discrimination, which is not allowed in any type of forum. The court declined to determine whether the page constituted a traditional or designated public forum.[11]

Under the recent decisions, it appears that elected officials may have greater latitude to regulate users and content on social media sites that are limited to campaign news, whereas actions taken on a social media site that provides official news or facilitates interaction with constituents may be subject to strict scrutiny under public forum analysis. If courts view social media accounts as designated, rather than traditional, public forums, one practical approach may be to clearly limit the scope of a forum to certain topics, perhaps through a written policy,[12] and then to remove only those comments that fall outside that scope. For example, discussion could be limited to matters of state policy and events in a legislator's district. However, any such limitation must be implemented in a viewpoint neutral manner.

---

[1] U.S. Const., amend. I ("Congress shall make no law … abridging the freedom of speech"); Wis. Const., art. I, s. 3 ("Every person may freely speak … on all subjects … and no laws shall be passed to restrain or abridge the liberty of speech …").

[2] A few, narrow categories of speech are not protected by the First Amendment, including "fighting words," "true threats," and speech that is likely to cause imminent lawless action. [See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *State v. Perkins*, 2001 WI 46.]

[3] *HAGUE v. CIO*, 307 U.S. 496 (1939).

[4] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

[5] *Surita v. Hyde*, 665 F.3d 860, 869 (7th Cir. 2011).

[6] See *Cornelius v. NAACP*, 473 U.S. 788 (1985).

[7] 582 U.S. ____ (2017).

[8] Federal district courts have reached similar conclusions in several other recent decisions. See, e.g., *One Wisconsin Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. 2019); *Czosnyka v. Gardiner*, No. 21-cv-3240 (N.D. Ill. Feb. 10, 2022).

[9] 986 F.3d 822 (8th Cir. 2021).

[10] 928 F.3d 226 (2nd Cir. 2019). The U.S. Supreme Court later vacated the case on mootness grounds. [593 U.S. __ (2021).]

[11] 912 F.3d 666 (4th Cir. 2019).

[12] The National Conference of State Legislators has compiled a list of sample social media policies.