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

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I. Introduction

The ubiquitous use of social media, email, text messaging and other communication technologies and practices is transforming government. Whether it's the board member who communicates with agency staff by text messaging to get real time guidance during meetings, the elected official using Twitter to interface with her constituents, or the municipality that maintains a Facebook page to make public announcements and facilitate engagement with its residents, the use of technology is making public entities more efficient, effective, dynamic, and connected to the communities and constituents they serve. Some technologies and platforms are newer than others, and there is invariably a delay in the increasing use of such and the application of established laws and procedures to regulate them. That does not mean, however, that courts have been reluctant to apply old laws to the use of new technologies by public entities when the opportunity presents itself. To the contrary, established and familiar laws and regulations are being utilized by courts throughout the country to ensure that, as used by governments and public officials, social media and other communication technologies are subject to the same regulations as their traditional counterparts.

Indeed, the Supreme Court has recognized the need to apply First Amendment forum classification to new technology² and described the Internet and social networking sites as akin to “the modern public square”³ where anyone can “become a town crier with a voice that resonates farther than it could from any soapbox.”⁴ The Supreme Court has also commented that social media in particular provides “perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard,” pointing out Twitter enables people to “petition their elected representatives and otherwise engage with them in a direct manner.”⁵ In short, courts recognize the importance of social media as a vital, newly developing mode of communication. And it appears, thus far, that the courts will be protective of First Amendment rights and wary of governmental restrictions within this wide ranging social media environment.

This paper examines the applicable legal stands for these new social media platforms through the lens of forum classification and recent case law including in the long awaited Second Circuit decision in *Knight v. Trump*. The paper concludes with thoughts on next steps for public entities and officials to consider as they navigate this complex and evolving legal landscape.

² See *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 739–43, 763–66 (1996).

³ *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017); see also *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F.Supp.3d 1099 (N.D. Cal. 2017); *Twitter, Inc. v. Sessions*, 263 F.Supp.3d 803 (N.D. Cal. 2017).

⁴ *Reno v. ACLU*, 521 U.S. 844, 853 (1997).

⁵ *Packingham*, 137 S.Ct. at 1735, 1737.

II. Forum Classification

The Free Speech Clause of the First Amendment of the United States Constitution provides: “Congress shall make no law...abridging the freedom of speech, or of the press.” Under the Fourteenth Amendment, municipal regulations and policies are within the scope of this limitation on governmental authority.⁶ The rise of social media platforms presents a new and evolving arena for public discourse, as well as First Amendment scrutiny. While it remains to be seen exactly how First Amendment jurisprudence will evolve with respect to these digital platforms, forum classification will be at the forefront of the debate.

The forum classification doctrine is a system of categorizing spaces, and then determining the rules accorded to the specified category. Forum classification is crucial because the level of scrutiny and the leeway afforded the government differ based upon the type of forum being regulated.⁷ Thus, the classification of the forum at issue is key to assessing the likelihood that a government entity’s or an elected official’s social media account can withstand a First Amendment challenge.

A. Types Of Fora

Courts first examine whether a public forum is at issue. A traditional public forum is a place such as a park, public street or sidewalk, where people have traditionally been able to express ideas and opinions in public to the public. Even if a forum is not a traditional public forum, it may still be subject to First Amendment scrutiny if it is deemed a designated public forum or a limited public forum. Only a forum not open to expressive activity or the free exchange of ideas will be deemed a nonpublic forum beyond the reach of First Amendment scrutiny. The terms under which these fora may constitutionally operate differ significantly meaning that forum classification may be the deciding factor as to whether the government’s restrictions on a forum pass survive scrutiny under the First Amendment.

A designated public forum is created when the government intentionally opens (or “designates”) non-traditional areas for First Amendment activity pursuant to policy or practice.⁸ Examples of situations where courts have found a designated public forum include: state university meeting facilities where the university has an express policy of opening the facilities to registered student groups; school board meetings where the state statute provides for open meetings; a municipal auditorium and a city-leased theater where the city dedicates the

⁶ *Lovell v. Griffin*, 303 U.S. 444, 450 (1938).

⁷ *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *see also PMG Int’l Div., LLC. v. Rumsfeld*, 303 F.3d 1163 (9th Cir. 2002); *Hopper v. City of Pasco*, 241 F.3d 1067, 1076 (9th Cir. 2001).

⁸ *See Cornelius v. NAACP Leg. Def. Fund*, 473 U.S. 788, 800, 803 (1985); *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 45-46 (1983).

property to expressive activity; and the interior of a city hall where the city opens the building to display art and does not consistently enforce any restrictions.⁹

The limited public forum, a type of designated public forum, is created when the government opens a non-public forum to First Amendment activity but limits access to certain groups or topics.¹⁰ Examples of situations where courts have found a limited public forum include: public library meeting rooms where policy limits it to certain uses, and public school property where policy limits use to particular groups.¹¹ The government is not required to indefinitely keep a designated public forum or a limited public forum open, but so long as it remains open, the forum must comply with the requisite standards for its classification.¹²

Finally, in certain limited circumstances, government-owned and controlled property falls outside the scope of the Free Speech Clause and the forum classification doctrine. These are instances where the government has not opened a forum to general discourse, but rather, engages in its own speech—government speech—wherein it is entitled to “speak for itself” and “select the views it wants to express.”¹³

B. Standard Of Review

The classification of the forum can be pivotal in determining whether government policies or regulations pass constitutional muster. This is because in a public forum and a designated public forum restrictions are subject to an exacting review standard—strict scrutiny—where content-based restrictions are constitutional only if they are the least restrictive means for achieving a compelling government interest.¹⁴ Content-neutral restrictions in public and designated public fora are subject to the time, place, and manner standard where they must be narrowly tailored to serve a significant government interest and must leave open ample alternatives for communication.¹⁵ Thus, in these two fora, First Amendment activities generally may not be prohibited. By contrast, in a non-public forum or limited public forum, the government is given more leeway and its regulations need only be reasonable and viewpoint neutral to pass

⁹ *Widmar v. Vincent*, 454 U.S. 263, 267 (1981); *Madison Joint Sch. Dist. v. Wisconsin Emp’t Relations Comm’n*, 429 U.S. 167, 174 (1976); *Southeastern Promotions, Ltd v. Conrad*, 420 U.S. 546, 555 (1975); *Hopper*, 241 F.3d at 1075-6.

¹⁰ *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1049 (9th Cir. 2003).

¹¹ *Faith Center Church v. Glover*, 480 F.3d 891, 908 (9th Cir. 2007) (abrogated on other grounds by *Winter v. Natural Res. Def. Coun.*, 129 S.Ct. 365 (2008)); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102, 106 (2001); *Arizona Life Coalition v. Paisley*, 515 F.3d 956, 969 (9th Cir. 2008).

¹² *Perry*, 460 U.S. at 46.

¹³ *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009).

¹⁴ *Perry*, 460 U.S. at 46; *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999).

¹⁵ *Perry*, 460 U.S. at 46.

constitutional muster.¹⁶ Only viewpoint neutrality—not content-neutrality—is required for regulations of a non-public or limited public forum.¹⁷

Given the different standards of review, it is crucial to determine whether a non-traditional public forum that has been opened to expressive activity is operating as a designated public forum or a limited public forum. In making this classification, courts typically examine the terms on which the forum operates,¹⁸ critically examining the actions and policies of affiliated government actors. In particular, the more consistently enforced and selective restrictions are, the more likely the forum will be deemed a limited public forum.¹⁹ By contrast, where restrictions are not enforced, or if exceptions are haphazardly permitted, the forum is more likely to be deemed a designated public forum.²⁰ The challenge is applying these concepts to the various forms of social media.

III. Key Developments In Case Law

A. Circuit Decisions

The Supreme Court has opined that social media platforms may operate like a modern day town square but it has not yet been faced with applying forum classification to a social media platform operated by a public agency or public official. To date, three of the Circuit Courts have had occasion to analyze this issue directly. In the closely watched case of *Knight First Amendment Inst. v. Trump*, the Second Circuit offered a detailed analysis of the application of First Amendment jurisprudence to social media platforms.²¹ In its unanimous July 9, 2019 opinion, forum analysis was critical in the Court’s conclusion that President Trump’s viewpoint based blocking of followers on his @realDonaldTrump Twitter account was unconstitutional.²² The Second Circuit affirmed the lower court, finding the @realDonaldTrump account to be a public forum because it was opened as an “instrumentality of communication”²³ for “indiscriminate use by the general public.”²⁴

The Second Circuit examined the policy, practice, and intent in operating the account as well. Taking note that the header photograph of the account shows

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Hopper*, 241 F.3d at 1074–75.

¹⁹ *Id.* at 1076–78; *Cornelius*, 473 U.S. at 804–05; see also *Perry*, 460 U.S. at 47; *Lehman v. Shaker Heights*, 418 U.S. 298, 302–04 (1974); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999).

²⁰ *Hills*, 329 F.3d at 1049.

²¹ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2nd Cir. 2019).

²² *Id.*

²³ *Id.* at 237.

²⁴ *Id.* (citation omitted).

the President engaged in his official duties,²⁵ the President and his aides have characterized his tweets as official statements,²⁶ and the President extensively uses the account to announce, describe, and defend official policies,²⁷ the Court found the evidence of the official nature of the account was “overwhelming.”²⁸ Moreover, because the interactive features of the President’s Twitter account are accessible to the public without limitation, the Second Circuit held the President could not selectively exclude users from his account when they expressed views that he disliked because the account had been intentionally opened for public discussion as an official vehicle for governance.²⁹ The decision made clear that if government officials open social media accounts to the public as a way of communicating about official business, the accounts will be analyzed under the public forum doctrine where blocking users as a result of criticism is not allowed.

However, the Second Circuit opinion also clearly called out that not every elected official’s social media account will necessarily be a public forum.³⁰ The outcome of that inquiry will be informed by how the official describes and uses the account, to whom features of the account are made available, and how others regard and treat the account.³¹ It is important to note that the Court specifically stated: “We do not consider or decide whether an elected official violates the Constitution by excluding persons from a wholly private social media account. Nor do we consider or decide whether private social media companies are bound by the First Amendment when policing their platforms. We do conclude, however, that the First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise-open online dialogue because they expressed views with which the official disagrees.”³²

The Fourth Circuit and Fifth Circuit have also examined the intersection between the First Amendment and use of social media platforms by public officials. In *Davidson v. Randall*, 912 F.3d 666 (4th Cir. 2019) the Fourth Circuit found that the interactive component of a Facebook page operated by a County Board of Supervisor was a public forum and deleting and blocking an individual who posted critical comments was impermissible viewpoint based discrimination.³³ Likewise, in overruling a lower court’s grant of a motion to dismiss, the Fifth Circuit also found, at least based on the pleadings, that deleting and blocking individuals that posted critical comments on a Sheriff Department’s

²⁵ *Id.* at 231.

²⁶ *Id.* at 232.

²⁷ *Id.* at 231.

²⁸ *Id.* at 234.

²⁹ *Id.* at 237.

³⁰ *Id.* at 236.

³¹ *Id.*

³² *Id.* at 230.

³³ *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019).

Official Facebook page was impermissible viewpoint based discrimination.³⁴ It remains to be seen, as the case develops, whether the facts will support a finding that the restrictions were viewpoint based or whether the Sheriff Department’s Facebook page will be deemed a limited public forum, where reasonable and viewpoint neutral regulations pass muster, or a designated public forum, where restrictions must be content-neutral unless supported by a compelling government interest.

B. Survey of Key District Court Decisions To Monitor

To date, only the Second, Fourth and Fifth Circuits have addressed this issue and accordingly, we offer a sampling of district court decisions from various circuits to monitor in this ever evolving area of First Amendment jurisprudence.

Table 1: District Court Decisions Applying Forum Classification To Social Media Platforms

Case Name	District Ct.	Forum Holding	Case Description	Relevant Circuit³⁵
<i>Leuthy v. Gov. LePage</i>	D.Me. (8/29/2018)	Type of forum not decided to deny motion to dismiss – viewpoint discrimination not allowed	Blocked from Governor's Facebook page and comments deleted	1st Cir.
<i>Price v. City of New York</i>	S.D.N.Y. (6/25/2018)	Viewpoint discrimination not allowed - state actors have qualified immunity	Blocked from Police Department Twitter account	2nd Cir.
<i>Windom v. Delegate Harshbarger</i>	N.D.W.Va. (6/6/2019)	Type of forum not decided – held viewpoint discrimination is prohibited in all forums	Blocked/comments deleted on House of Delegate's Facebook page	4th Cir.
<i>Morgan v. Gov. Bevin</i>	E.D. Ky. (3/30/2018)	Accounts are not akin to a public park; privately owned channels of communication are not converted to public property by the use of a public official; and that constituents don't have a right to be heard and [the Governor] has no obligation to listen	Blocked from Governor's Facebook and Twitter accounts	6th Cir.
<i>One Wisconsin Now v. Assemblyman Kremer</i>	W.D.Wis. (5/17/2019)	Interactive space is a designated public forum	Blocked from State Assembly member's Twitter accounts	7th Cir.
<i>Campbell v. State Representative Reisch</i>	W.D.Mo. (2/8/2019)	Interactive space subject to forum analysis – finds that type of forum does not need to be determined for denial of motion of dismiss	Blocked from State Representative's Twitter account	8th Cir.
<i>German v. Commissioner Eudaly</i>	D.Or. (6/29/2018)	Held Commissioner is not a state actor on her personal Facebook page	Blocked from Commissioner's personal Facebook page	9th Cir.

³⁴ *Robinson v. Hunt Cnty., Texas*, 921 F.3d 440 (5th Cir. 2019).

³⁵ Circuit Court in which appeal would be heard if matter moves to appeal.

And, in another recent cautionary tale, the ACLU filed suit in the United States District Court for the District of Arizona against U.S. Congressman Paul Gosar when he blocked a user from his Facebook page for using profanity. The suit led Gosar to adopt new guidelines for posting and removing comments. In dismissing the complaint, the ACLU noted its overarching goals had been achieved since (1) comments would not be hidden or deleted based on viewpoint, (2) users would only be blocked for repeated violations (and then only for a limited time), and (3) the congressman's staffers responsible for managing the page would implement the new policy in a viewpoint-neutral and non-discriminatory manner.

IV. Next Steps For Public Officials and Entities

As courts at all levels are increasingly asked to address the use of various social media platforms by public officials and agencies, the crucial first-step for all government agencies is to figure out which social media platforms are actually being utilized, and by whom. This includes understanding not only the platforms currently put in place by the agency, but also which platforms are controlled by elected officials and any municipal employees who are in a position such that their remarks/comments/posts may be construed to speak on behalf of the public entity. The digital town square phenomenon highlights the importance for government entities and elected officials to proactively set policies and standards for public engagement on these platforms. The critical inquiry is whether public entities or officials have opened digital channels for expressive activity *and* on what terms.

Elected officials should be cognizant that if they want their social media platforms to remain private—and beyond the reach of the First Amendment—they should not post information that relates to the conduct of their official duties, nor should they open the interactive portion of their accounts to the general public. Once elected officials use their personal or quasi-personal social media accounts in association with official business, they need to be aware that they have likely established a public forum. Subsequently, officials will have limited ability to restrict their accounts. Any restrictions will need to be clearly established and enforced. Moreover, blocking users or deleting comments because of criticism will likely be seen as unconstitutional viewpoint-based discrimination.

Public agencies may choose to operate social media platforms in a manner where information is only pushed out and the forum is not opened for public discussion or comments. For example, on Facebook, page owners can choose to restrict users from leaving comments, and under that scenario, the government has likely not opened the forum for any type of public discourse but is, instead, engaging only in its own speech. More often, however, government entities operate social media platforms that allow comments and posts from the general public. If the government wants to establish restrictions or limitations on social

media platforms where there is this two-way flow of information, the challenge becomes crafting regulations that pass constitutional muster. Factors to consider include: ensuring that comments will not be hidden or deleted based on viewpoint; considering whether to only block users for repeated violations of the limitations (and then only for a limited period of time); and ensuring that personnel who are responsible for managing social media accounts will implement the policy in a viewpoint-neutral and non-discriminatory manner. Even with clear policies in place, government entities and public officials/employees will be faced with difficulties in application of any posting restrictions. For example, how does one decide when provocative speech has crossed over into fighting words or actual threats of bodily harm? Many courts have been permissive in allowing provocative or inflammatory speech in public parks and at city council meetings, and the courts may be similarly permissive with speech on government entities' or elected officials' social media accounts open for public discourse.

V. Conclusion

Social media platforms are usually engineered to allow for the flow of public comments and discussion, so it is common for them to be used to engage in civil discourse. Public entities and officials need to evaluate whether these platforms are the appropriate forum to discuss issues with constituents. If restrictions are placed on a social media platform, such a restriction may be viewed as creating a limited public forum. This poses the dual challenge of crafting reasonable and viewpoint neutral restrictions, as well as the challenge of enforcing the limitations in an evenhanded fashion. On the other hand, with no limitations and no stated policy in place, the social media platforms are likely to be viewed as a designated public forums open for the free exchange of ideas where the government will retain little ability to restrict, block or delete offensive comments. In this area of law, the old adage may sum it up most fittingly: The best defense is a good offense.

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