

# VIEWPOINT DISCRIMINATION IN A PUBLIC FORUM:

When Government Officials Block Citizens on Social Media

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# Disclaimer

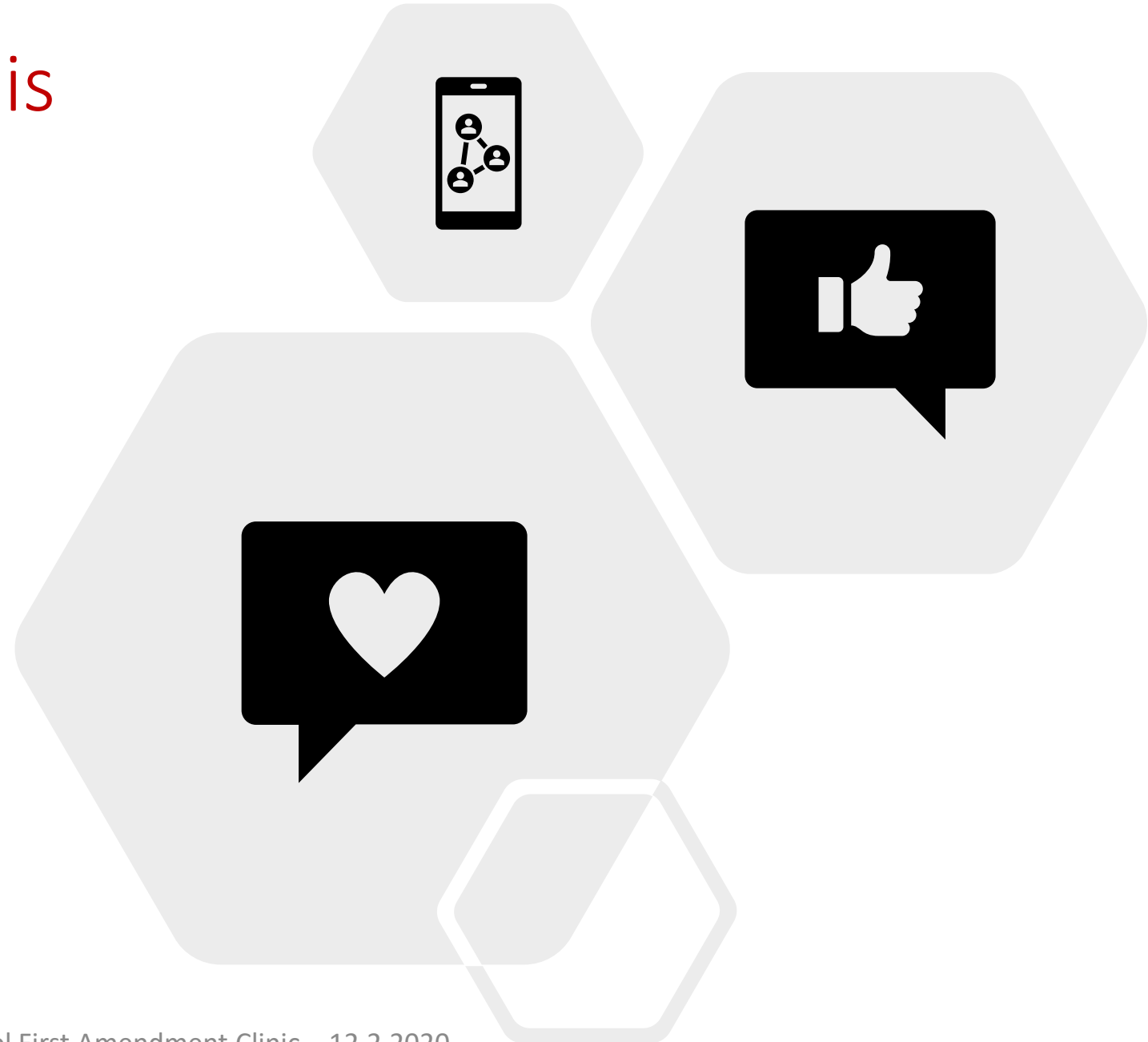
This presentation contains general legal information current as of the date it was given and is not, nor intended to be, legal advice.

# ONLINE CENSORSHIP

Applying First Amendment Doctrine to Social Media Speech

# Use of Social Media is Protected Speech

- *Packingham v. N.C.*,  
137 S.Ct. 1730 (2017)
- social media interaction  
is protected speech
- Interactions:
  - Comments
  - Reactions
  - Reposts



# CONTENT vs. VIEWPOINT

Different but related concepts

# Content-Based Limitations

Restricts the subject matter or topics that can be discussed

Example: A rule banning political speeches in a city park.

Example: A school board's Facebook page where discussion is restricted to matters relating to the public schools

# Viewpoint Discrimination

Restricts or bans speech based on its perspective, not the topic

Example: Trump blocks people who criticize him or his policies, but does not block people who praise him or his policies

Not the content that Trump disfavors, but the perspective that he dislikes

“an egregious form of content discrimination”

*J. Kennedy*

“Viewpoint discrimination is poison to a free society.”

*J. Alito*

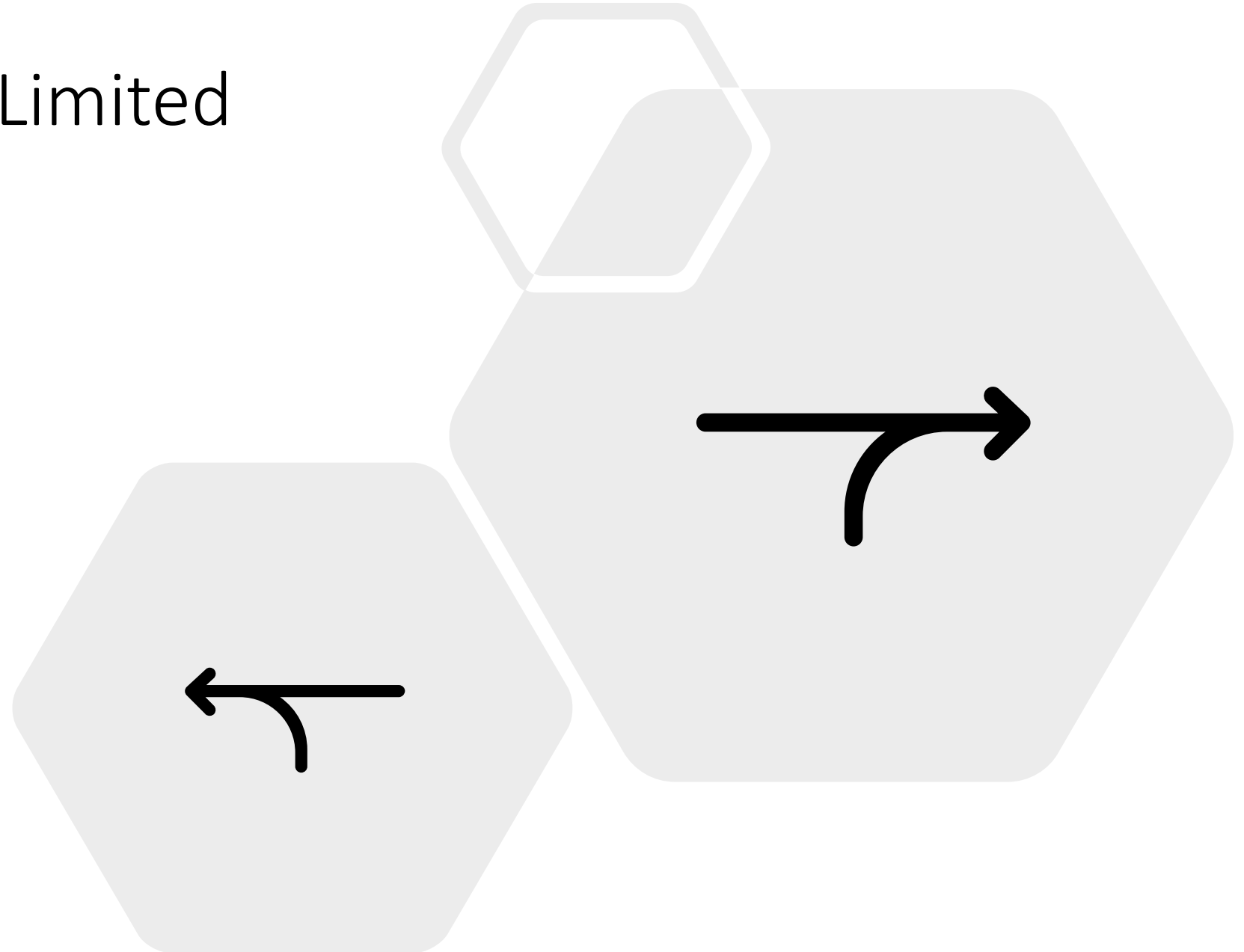
# PUBLIC FORUM ANALYSIS

Government Controlled Social Media



# Designated v. Limited Forum

- Designated – anyone can express themselves without restriction on what topics can be discussed
- Limited – only certain people can express themselves, or only on certain topics



# Viewpoint Discrimination is Prohibited in All Government-Controlled Forums

- Supreme Court has recognized 4 types of government forums:
  - Traditional public forum
  - Designated public forum
  - Limited public forum
  - Non-public forum
- Viewpoint Discrimination is prohibited in all 4 types



# Privately Owned, Government-Controlled Forums

- Social Media platforms privately owned
- Does not prevent the creation of government-controlled forum
- Public official establishes and manages the account and interactive features enabled  
=> creates the govt. forum



# Circuit Courts of Appeals Decisions

*Knight First Amendment Institute v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019), *reh'g en banc denied*, 953 F.3d 216 (2020)

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

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

# Consensus of the Courts

Public Official Communicates About Official Duties

Acting Under Color of State Law / State Action

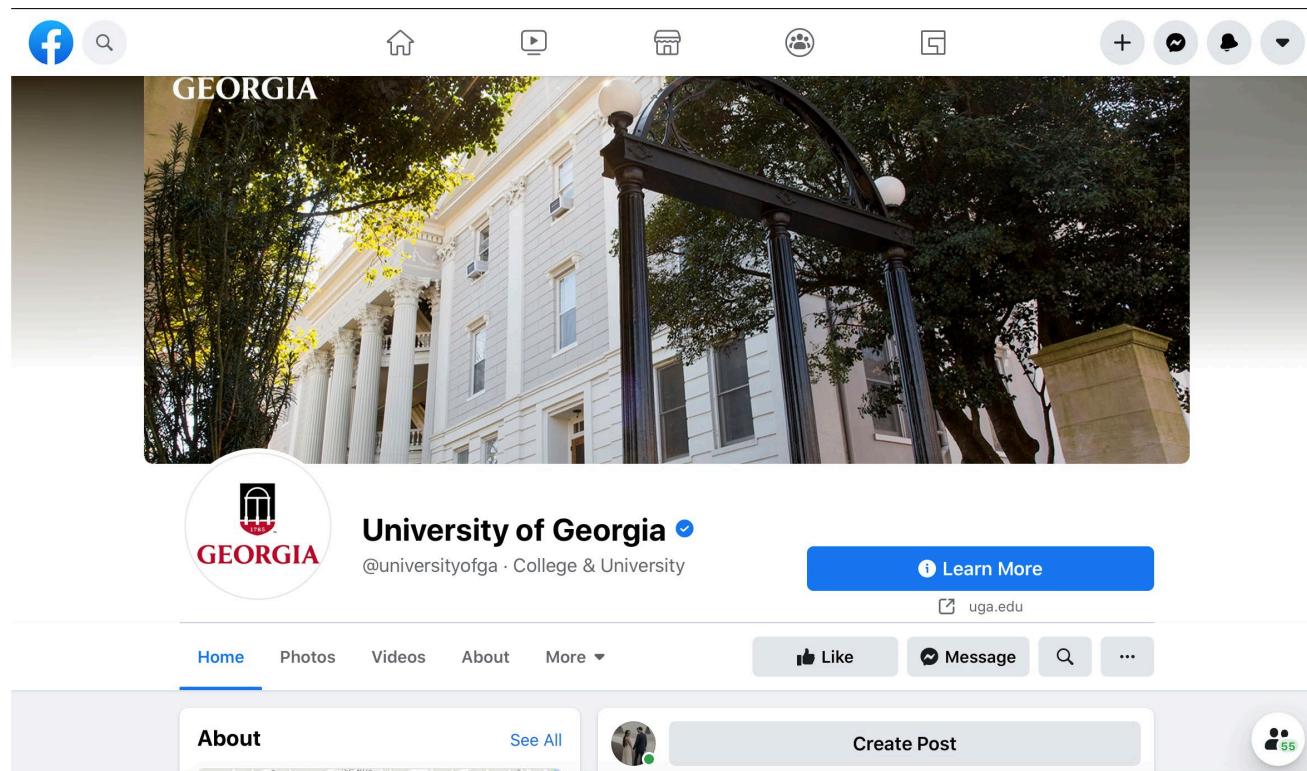
Blocks Users Because Dislikes Their Speech

Viewpoint Discrimination

# PRIVATE v. OFFICIAL CAPACITY

Threshold Question

# First Amendment Applies to Official Pages



- First Amendment prohibits government regulation of private speech
- Does not govern private regulation of private speech
- First Amendment analysis only applies to regulation of speech on social media by someone acting in their official capacity

First Amendment protections apply  
against officials acting in their  
official capacity on both  
government and personal accounts

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## Government Social Media Accounts

- “Under color of state law”
- Use and regulation of “official” accounts = official capacity
- Use and regulation of “unofficial” or “personal” accounts **requires a fact-specific inquiry**

# “Unofficial” or “Personal” Social Media Accounts

- No bright line rule
- Courts consider, for instance:
  - Does the account include the official’s title?
  - Is account publicly accessible?
  - Is account used to communicate with constituents/public about official duties and activities?
  - Does account have the “trappings” of the official’s public office?
  - How do the public official and others use, regard, and treat the account?



# Social Media Accounts as Public Forums

Interactive Account

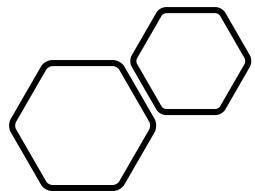
Controlled by Public Official

Acting Under Color of State Law

Public Forum

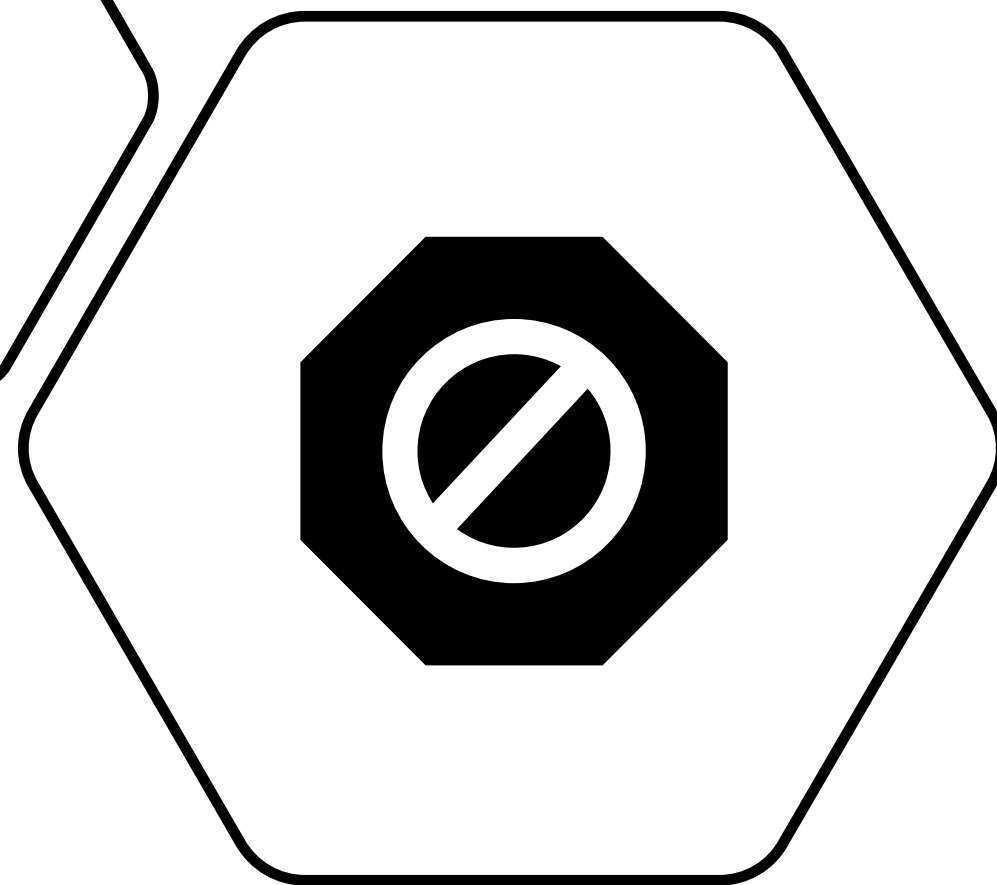
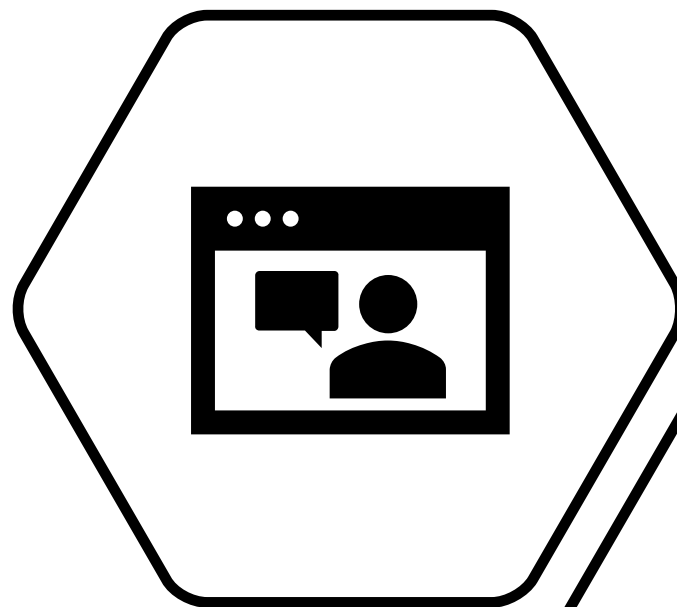
The First Amendment prohibits a public official from using viewpoint as a basis for regulating speech

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## Viewpoint as Basis for Blocking

- The First Amendment prohibits public officials from using viewpoint as a basis for social media content regulation, including:
  - Deleting Posts
  - Deleting Comments
  - Blocking a user from interacting with a page
  - Blocking a user from viewing a page

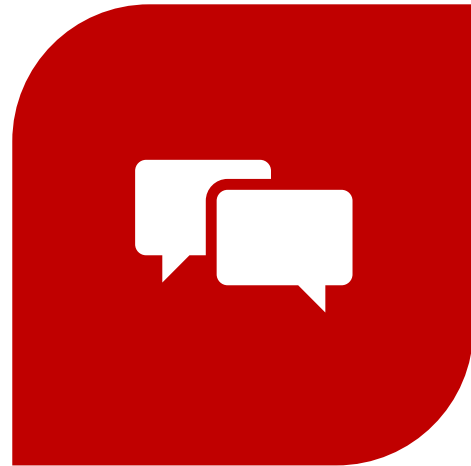


# Viewpoint-Neutral Blocking

- Removing constituents' comments does not violate the First Amendment if the removal is viewpoint neutral
- Most applicable in a limited public forum focused on specific subject matter
- Comments or posts not related to the purpose of the limited forum may be removed
- Courts have warned that claiming content or viewpoint neutrality cannot be merely a pretext for viewpoint discrimination



# Officials Don't Have to Listen



USERS HAVE A RIGHT TO  
INTERACT WITH OFFICIAL  
SOCIAL MEDIA ACCOUNTS



THIS RIGHT DOES NOT  
REQUIRE OFFICIALS TO  
LISTEN TO THIS SPEECH

Log In

[Forgot account?](#)



University of Georgia ✓

@universityofga

Home

Posts

Photos

Videos



Like

Share



Learn More

Send Message

Posts

University of Georgia

College & University in Athens, Georgia

# “Work arounds” are not a cure

Ability to view content despite being blocked does not cure the First Amendment violation



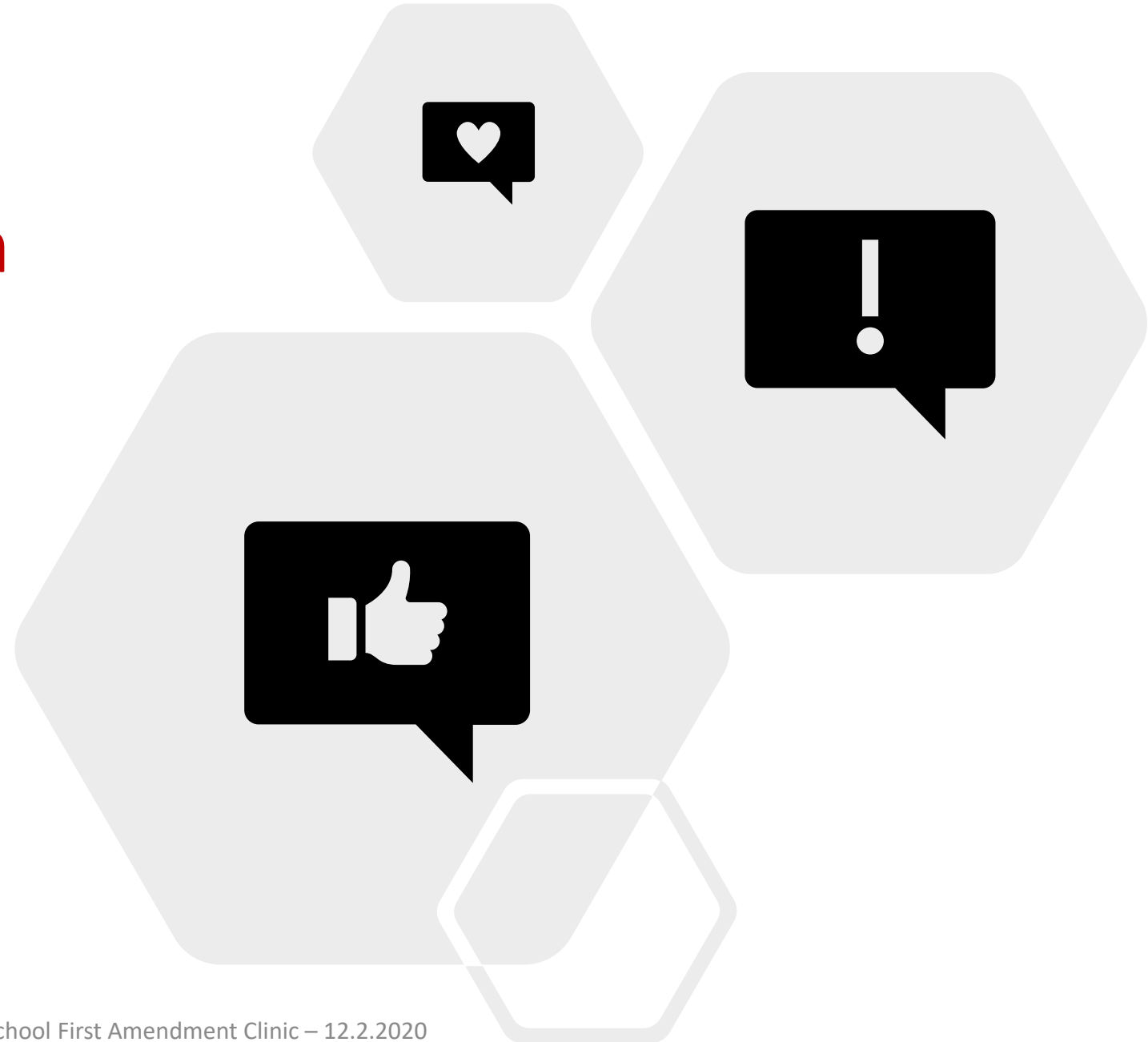
# Government Speech

- Public Officials' posts are government speech
- Government speech is exempt from First Amendment



# Comments are not Government Speech

- User comments on official social media accounts are not government speech
- Interactive features of social media are clearly attributable to the individual users
- The fact that a user's comments appear on the official page does not make them government speech



# Additional First Amendment Claims

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## **Retaliation**

- Censoring or blocking a user as a response to the user's interactions

## **Right to Petition**

- An separate enumerated right under the First Amendment
- Could prevent someone from communicating their concerns to officials

## **Prior Restraint/Lack of Due Process**

- Blocking prevents speech before it happens
- This raises due process concerns

## **Unbridled Discretion**

- No standards for regulation of speech

# IMMUNITY

Qualified, Sovereign, and Legislative

# Qualified Immunity

- Argument that the law was not clearly established at the time of the alleged unconstitutional conduct
- A defense to damages
- Does not bar declaratory or injunctive relief
- Neither the Supreme Court nor 11<sup>th</sup> Circuit have ruled on qualified immunity and social media blocking



# Established Law

- Harder to argue officials are not on notice since *Knight v. Trump*
- The First Amendment principles implicated by these cases well established
  - viewpoint discrimination
  - speech-based retaliation
  - prior restraint

- Supreme Court:

*Packingham v. N.C.* (2017) - social media use is protected speech

*Brown v. Entm't Merchants* (2011) - basic 1<sup>st</sup> A. principles the same when applied to new technology





# Sovereign and Legislative Immunity

- State officials cannot claim 11<sup>th</sup> Amendment immunity in a suit alleging a violation of the federal Constitution
- Social media use does not constitute core legislative or state activity
- Blocking and censoring users not protected by this immunity

# CURRENT STATE OF LAW

Overview & Suggested Practices



# OVERVIEW

- Interactive social media pages controlled by public officials and used to communicate with public about official duties are government forums
- These virtual forums are subject to the same First Amendment analysis as physical forums
- Blocking or censoring a user based on viewpoint violates established First Amendment doctrine

# CONTROLLING JURISDICTION

## Supreme Court

- *Packingham v. N.C.* (2017) - social media use is protected speech
- *Brown v. Entm't Merchants* (2011) - basic 1<sup>st</sup> A. principles the same when applied to new technology

## 11<sup>th</sup> Circuit

- *Attwood v. Clemons* (2020) - recognized that a social media blocking case fell within the *Ex parte Young* exception to sovereign immunity

# SUGGESTED PRACTICES

Personal vs. Official Social Media Pages

# Maintaining an Official-Capacity Social Media Account

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**For maintaining an account used to communicate with constituents and the public about official duties and activities, keep the following in mind:**

- Consult with Counsel before...
  - Blocking users in response to comments or posts
  - Removing comments posted by users
  - Limiting users' access to any interactive features
- If concerned about a social media platform's community standards being violated, make a complaint to the platform rather than blocking a user
- Develop social media policy at the office, city, or county level
- If an official page is limited to a specific purpose or topic, make sure that limitation is clearly communicated on the page

# Maintaining a Private Social Media Account

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**To minimize risk of First Amendment violations, keep the following in mind:**

- ✓ Do not associate official title, government address, or government email with the account
- ✓ Do not encourage constituents or the public to use the account as a means to contact the official.
- ✓ Do not link the account to any official social media accounts -- either the owner's or the their public office's.
- ✓ Do not refer to or re-post comments from the personal account on official social media accounts.
- ✓ Avoid including photos taken in an official setting or engaged in official business
- ✓ Limit posts related to official activities or events, and address any such posts explicitly to friends and family
- ✓ Set the account to be private rather than public

**If any of these items are not checked account, it creates ambiguity where a court may find that it is an official page**

QUESTIONS??