VIEWPOINT DISCRIMINATION IN A VIRTUAL PUBLIC FORUM: WHEN GOVERNMENT OFFICIALS BLOCK CITIZENS ON SOCIAL MEDIA

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INTRODUCTION

A critical mass of courts -- including every Circuit Court of Appeals to have so far addressed the issue -- find that it constitutes unconstitutional viewpoint discrimination in violation of the First Amendment for a public official who operates an interactive social media account in their capacity as a state actor to deny individuals access to that account based on dislike of or disagreement with their speech. *See, e.g.*, *Knight First Amendment Institute v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019), *reh'g en banc denied*, 953 F.3d 216 (2020)[1]; *Robinson v. Hunt Cty., Texas*, 921 F.3d 440, 447-48 (5th Cir. 2019), *reh'g denied* (May 16, 2019); *Davison v. Randall,* 912 F.3d 666, 680 (4th Cir. 2019), *as amended* (Jan. 9, 2019); *Clark v. Kolkhorst*, No. A-19-CV-0198-LY-SH, 2020 WL 572727, at *4 (W.D. Texas Feb. 5, 2020); *Faison v. Jones*, 440 F. Supp. 3d 1123, 1137 (E.D. Ca. 2020); *Windom v. Harshbarger*, 396 F. Supp. 3d 675, 683-84 (N.D.W. Va. 2019); *Garnier v. Poway Unified Sch. Dist.*, No. 17-CV-2215-W (JLB), 2019 WL 4736208, at *9 (S.D. Cal. Sept. 26, 2019); *Campbell v. Reisch*, No. 2:18-CV-4129-BCW, 2019 WL 3856591, at *8 (W.D. Mo. Aug. 16, 2019); *Leuthy v. LePage*, No. 1:17-CV-00296-JAW, 2018 WL 4134628, at *14-15 (D. Me. Aug. 29, 2018); *Dingwell v. Cossette*, 327 F. Supp. 3d 462, 470-71 (D. Conn. 2018).

[1] On August 20, 2020, the Justice Department filed a petition for certiorari seeking Supreme Court review of the Second Circuit's decision in *Knight v. Trump*.

Recently, several social-media-censorship cases filed against public officials in Georgia have settled, while other Georgia public officials who have blocked or censored member of the public on social media have entered into pre-litigation settlements.[2]

While the Eleventh Circuit has yet to rule on the merits of a First Amendment claim arising from a public official censoring or blocking an individual on social media, the Circuit has recognized in an interlocutory appeal that such alleged facts sufficiently plead an ongoing First Amendment violation so as to trigger the *Ex parte Young* exception to Eleventh Amendment sovereign immunity. *Attwood v. Clemons*, No. 18-12172, 2020 WL 3096325, at *2-3 (11th Cir. June 11, 2020).

PRIVATE VS. OFFICIAL CAPACITY/STATE ACTION

The interactive spaces on social media pages allow users, other than the account's owner, to engage in speech and expression by commenting, replying, and re-tweeting/re-posting the owner's and other users' comments. *See Knight*, 928 F.3d at 237 ("Replying and retweeting are messages that a user broadcasts, and, as such, undeniably are speech. Liking . . . conveys approval or acknowledgment . . . and is therefore a symbolic message with expressive content."); *Robinson*, 921 F.3d at 447 (deleting plaintiff's comment from sheriff office's Facebook page constituted censorship of speech). *See also Packingham v. North Carolina*, 170 S. Ct. 1730, 1735-36 (2017) ("social media users employ these websites [like Facebook and Twitter] to

[2] *See, e.g.*, Jessica Szilagyi, *Federal Lawsuit Filed Against Douglas County Commissioner Over Free Speech Violations*, ALLONGEORGIA (July 14, 2020), https://allongeorgia.com/local-government/federal-lawsuit-filed-against-douglas-co-commissioner-over-free-speech-violations/ (lawsuit filed after settlement agreement breached and enumerating other public officials who have settled pre-litigation); Meris Lutz, *Cobb Sheriff Warren's Facebook blocks cost taxpayers $30,000*, THE ATLANTA JOURNAL-CONSTITUTION (Feb. 1, 2020), https://www.ajc.com/news/local/cobb-sheriff-warren-facebook-blocks-cost-taxpayers-000/zWK8UVDFyhUArLATAQoL8N/; Randy Travis, *[Walton County] Sheriff's office agrees to stop banning negative Facebook comments*, FOX 5 ATLANTA (July 31, 2019), https://www.fox5atlanta.com/news/sheriffs-office-agrees-to-stop-banning-negative-facebook-comments.

engage in a wide array of protected First Amendment activity"); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("Congress [has] recognized the internet and interactive computer services as offering a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.") (Internal quotation and citation omitted).

With respect to managing the interactive spaces on social media pages, the First Amendment restricts government regulation of private speech, not but private regulation of the same. *Knight*, 928 F.3d at 236. Thus, for the First Amendment to apply to a public official's exercise of control over a social media account, the official must be acting under color of state law, as opposed to in their purely personal capacity.[3] Sometimes there is no dispute that the public official is acting in their official capacity as satisfies the state action requirement. *See, e.g.*, *Robinson*, 921 F.3d at 449-50 (plaintiff was censored and blocked from the county sheriff office's official Facebook page pursuant to a written policy, for which the sheriff was the final policy maker, of deleting "inappropriate" comments from the page). However, in the event a defendant disputes that they were acting in their official capacity, no bright-line rule exists for making the determination; it is, instead, a factually-based inquiry. *See Knight*, 928 F.3d at 236 ("Whether First Amendment concerns are triggered when a public official uses his [social media] account . . . will in most instances be a fact-specific inquiry"); *Leuthy*, 2018 WL 4134628, at *8 (noting in social media censorship case that "[w]hether conduct constitutes state action is often fact-intensive, and requires 'sifting facts and weighing circumstances'") (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)). *See also Brentwood Acad. v. Tenn.*

[3] 42 U.S.C. § 1983's "under color of state law" requirement for bringing a federal constitutional claim against a public official is equivalent to the "state action" requirement pursuant to the Fourteenth Amendment. *U.S. v. Price*, 383 U.S. 787, 794 n.7 (1966). "Under color of state law" requires "a close nexus between the state and the challenged action [so] that seemingly private behavior may be fairly treated as that of the state itself." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (internal quotations and citations omitted). "State action," "official capacity," and "under color of state law" are used interchangeably throughout this paper.

Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298 (2001) (determining whether there is action under color of state law is a "necessarily fact-bound inquiry.").

The leading social-media-blocking case, *Knight First Amendment Institute v. Trump* out of the Second Circuit, involved First Amendment claims by members of the public blocked from President Trump's private Twitter account because of their critical comments. There, the Second Circuit found that "evidence of the official nature of the [Twitter] [a]ccount is overwhelming." 928 F.3d at 234. This was based, without limitation, on the fact that the account is registered to "Donald J. Trump, '45th President of the United States of American, Washington, D.C.,'" the President uses the account to communicate with the public about matters related to official government business such as high-level staffing changes and national policy, he uses the account to engage with foreign leaders, and official White House social media accounts direct users to the President's communications via his personal Twitter account and also retweet some of his communications. Additionally, the President's tweets are preserved by the National Archives and Records Administration under the Presidential Records Act. *See* 928 F.3d at 235-36.

Davison v. Randall out of the Fourth Circuit, which is the second leading social-media-blocking case, involved similarly plentiful evidence of official capacity where:

- the title of the defendant's Facebook page included her government title;
- the page was categorized as that of a government official;
- the page listed as contact information the defendant's official county email address and the telephone number of her county office;
- the page included the web address of defendant's official County website;
- many of the posts were addressed to defendant's constituents;
- defendant published posts on the page on behalf of her legislative board;
- defendant had asked her constituents to use the Facebook page as a channel for "back and forth constituent conversations"; and
- the posted content had a strong tendency toward matters related to defendant's office.

912 F.3d at 680-81. *See also Campbell* 2019 WL 3856591, at *2, *6 (W.D. Mo. Aug. 16, 2019) (notwithstanding that defendant's Twitter account contained personal content and had been opened to promote her campaign prior to her election as a state representative, her continued management of the account, including its interactive features, constituted state action because defendant used the account to tweet about her work as a state representative, post pictures of herself on the House floor and with other elected officials, and "indicate her political positions relative to other government officials and/or to engage in political discourse").[4]

At the other end of the private-versus-official-capacity spectrum, a federal district court in Oregon held that a social-media-blocking plaintiff failed to plead that the defendant city commissioner acted in her official capacity when the commissioner complained on her personal, non-official Facebook page that plaintiff, a political activist, was harassing and libeling her and blocked plaintiff from being able to see this personal page. *German v. Eudaly*, No. 3:17–cv–2028–MO, 2018 WL 3212020, *1-2, *6, *8 (D. Or. June 29, 2018). The *Eudaly* court did not conduct a fact-intensive analysis to determine that the city commissioner's Facebook page was personal, making no mention of whether the page was generally accessible to the public, of how the commissioner used her personal Facebook page, or of how others besides the commissioner and plaintiff viewed and used the commissioner's personal Facebook page. The court simply noted that the commissioner had a separate official Facebook page and stated that the commissioner's mention of events that had happened while she was at work in her official capacity did not transform her personal page into state action. *Id*. at *6. As such, the *Eudaly* decision provides little guidance for parsing the line between state action and private action when a public official regulates an interactive social media account.

While the case law is still developing around the issue of when a public official operates a social media account in their official versus private capacity, the following factors are relevant

[4] In *Campbell*, the district court granted declaratory and injunctive relief to the plaintiff based on his having been blocked from the defendant's Twitter account. *Id*. at *9. The case is now pending on appeal to the Eighth Circuit.

to consider under the totality-of-the-circumstances approach endorsed by the Second Circuit in *Knight*, employed by the Fourth Circuit in *Randall*, and utilized by multiple district courts[5]:

- To whom the account is accessible, including whether the general public has access;
- Whether the account is used to promote official events and/or inform constituents/members of the public of activities related to the public official's office;
- Whether the account is used to converse with constituents/members of the public;
- Whether the account includes markers of official status, such as references to the official's title or photographs of the official engaged in official conduct (e.g., delivering official addresses, meeting with other officials, or attending official events); and
- How the account holder, other government officials, and members of the public describe, regard, and treat the social media account.

OFFICAL-CAPACITY INTERACTIVE SOCIAL MEDIA ACCOUNTS CONSTITUE PUBLIC FORUMS THAT CANNOT BE SUBJECT TO VIEWPOINT DISCRIMINATION

I. Interactive Social Media Accounts as Public Forums

Interactive social media accounts, if regulated by a public official acting under color of state law, constitute government-controlled forums and are subject to the same First Amendment requirements as are physical forums managed by the government. *See Knight*, 928 F.3d at 237 (finding that Trump's interactive Twitter account constituted a public forum and noting that forum analysis is not limited to spatial and geographic locations, but applies equally to a "metaphysical forum") (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995)); *Davison*, 912 F.3d at 687 ("the interactive component of the [public official's] Facebook Page constitutes a public forum"); *Faison*, 440 F. Supp. 3d at 1135 (on motion for preliminary injunction, plaintiff "likely to succeed in showing that the interactive component of

[5] *See, e.g.*, *Faison*, 440 F. Supp. 3d 1123 (E.D. Ca. 2020); *Windom*, 396 F. Supp. 3d 675 (N.D.W. Va. 2019); *Reisch*, 2019 WL 3856591 (W.D. Mo. Aug. 16, 2019); *Leuthy*, 2018 WL 4134628 (D. Me. Aug. 29, 2018); *Phillips v. Ochoa*, No.: 2:20-cv-00272-JAD-VCF, 2020 WL 4905535 (D. Nev. Aug. 20, 2020).

the [sheriff's Facebook] page, which [d]efendant left open for public discourse, was a public forum"); *Reisch*, 2019 WL 3856591, at *6 ("the interactive space of Defendant's tweets to which Plaintiff seeks access are sufficiently controlled by Defendant in her capacity as a state legislator, such that the interactive space is government-controlled and subject to forum analysis").

The fact that social media platforms such as Facebook, Twitter, Instagram, etc. are private does not alter the fact that a government official has opened the social media account as a virtual space for public comment and is regulating it, thereby rendering it a government-controlled forum. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (forum analysis applies where a speaker seeks "access to public property or private property dedicated to public use"); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547, 555 (1975) (holding that "a privately owned Chattanooga theater under long-term lease to the city" was a "public forum[ ] designed for and dedicated to expressive activities"); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1122 (10th Cir. 2002) ("forum analysis does not require that the government have a possessory interest in or title to the underlying land. Either government ownership *or regulation* is sufficient for a First Amendment forum of some kind to exist") (emphasis added); *Davison*, 912 F.3d at 689 (rejecting argument in social-media-blocking case that forum analysis should only apply to government-owned spaces); *Garnier*, 2019 WL 4736208 at *9 (lack of government management or funding doesn't exempt a social media page from being a public forum).

II. Viewpoint Discrimination is Prohibited in Government-Controlled Forums

The Supreme Court has recognized four categories of government fora: the traditional public forum, the designated public forum, the limited public forum, and the non-public forum. *Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1224 (11th Cir. 2017).[6] Common to all four,

[6] Traditional public fora such as streets and parks are defined as spaces that "ha[ve] immemorially been held in trust for the use of the public and, time out of mind, ha[ve] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 215 (2015) (internal quotation marks and citation omitted). A designated public forum exists where a space

once the government creates a forum for speech and expression, it cannot engage in viewpoint discrimination therein, regardless of whether the forum is public or not. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 469-70 (2009) (viewpoint discrimination prohibited in traditional, designated, and limited public forums); *Cornelius*, 473 U.S. at 806, 812-13 (viewpoint discrimination prohibited in nonpublic forums); *Robinson*, 921 F.3d at 448(5th Cir. 2019) (viewpoint discrimination prohibited in both limited and designated public forums); *Barrett*, 872 F.3d at 1226 (11th Cir. 2017) ("Limited public fora likewise do not tolerate viewpoint discrimination."). Thus, in the context of a government-created social media forum, the First Amendment prohibits a public official from using viewpoint as the basis for regulating users' speech by, for instance, deleting their posts or comments, or by blocking a user from accessing some or all of the account. *See*, *e.g.*, *Knight*, 928 F.3d at 230; *Robinson*, 921 F.3d at 447-48; *Davison*, 912 F.3d at 688 ("the interactive component of the [public official]'s Facebook Page constituted a public forum, and [public official] engaged in unconstitutional viewpoint discrimination when she banned [plaintiff] from that forum"); *Faison*, 440 F.Supp3d at 1136 (plaintiffs likely to succeed in showing defendant engaged in viewpoint discrimination where defendant deleted plaintiffs' comments and banned them from his Facebook page after they posted comments critical of defendant and his department); *Reisch*, 2019 WL 3856591, at *8 ("Plaintiff's continued exclusion from the interactive space of Defendant's tweets based on viewpoint is inconsistent with the First Amendment."); *Leuthy* , 2018 WL 4134628, at *14-15 (plaintiffs whose posts were deleted and who were banned from public official's Facebook page plausibly pled a First Amendment claim because "whether the Facebook page is a public forum, a designated public forum, or a non-public forum, viewpoint discrimination is not permissible"); *Price v. City of New York*, 15 CIV. 5871 (KPF), 2018 WL 3117507 at *16 (S.D.N.Y. June 25, 2018) (blocking the Plaintiff from official police Twitter accounts was "viewpoint discrimination

that "has not traditionally been regarded as a public forum is intentionally opened up for that purpose." *Id*. A limited public forum exists where a government has "reserv [ed a forum] for certain groups or for the discussion of certain topics." *Id*. Finally, a non-public forum refers to a space where speech occurs which is not generally open to the public and where the government "act[s] as a proprietor, managing its internal operations." *Id*. at 216.

that results in the intentional, targeted expulsion of individuals from these forums violat[ing] the Free Speech Clause of the First Amendment.")

A. Content or viewpoint-neutral reasons for censorship may be constitutional

Removing constituents' comments from a public official's social media account does not violate the First Amendment if the reason for the removal is viewpoint neutral -- such as the social media account was designated as a public forum only for purposes of discussion of a specific topic and a user posted an off-topic remark. *See, e.g.*, *Davison v. Plowman,* 247 F. Supp. 3d 767, 776-77 (E.D. Va. 2017), *aff'd*, 715 F. App'x 298 (4th Cir. 2018) ("If the speech restricted falls outside the bounds of the designated forum, the Court need determine only whether the speech restriction applied is viewpoint neutral and reasonable in light of the purpose of the forum"); *TinleySparks, Inc. v. Vill. of Tinley Park*, 181 F. Supp. 3d 548, 562-63 (N.D. Ill. 2015) (officials can prohibit political speech in an online forum intended to promote small business growth, so long as they do not engage in viewpoint discrimination).

However, the Southern District of California has warned that content or viewpoint neutrality cannot be used merely as a pretext for censoring or blocking constituents. *Garnier*, 2019 WL 4736208 at *12. In *Garnier*, the defendants argued that they had blocked plaintiffs because of their repetitive posts that were allegedly disrupting and obscuring the content of the defendants' messages. *Id*. Presented with evidence that the plaintiffs did not post repetitive comments within the same post, that Facebook automatically edits the display of lengthy comments to only display the first few lines, and that Facebook also sorts and displays comments by the "most relevant," the court found it to be a disputed issue of material fact whether defendants had blocked plaintiffs for a content-neutral reason or because of viewpoint discrimination. The court denied summary judgement for defendants. *Id*.

B. Public officials are not required to listen

While users of a public official's interactive social media account have a First Amendment right to express their views without being censored or banned, they do not have a right to require the public official to listen to their speech. *Minn. State Bd. For Cmty. Colleges v.*

Knight, 465 U.S. 271, 283 (plaintiff has "no constitutional right to force the government to listen to their views"). This means the public official is free either to ignore the user's comments, or to respond and engage with them. But the public official cannot sever or burden the user's ability to converse -- i.e., limit a user's ability to express themselves and receive the expression of others -- in the interactive spaces of the public official's social media account. *See Knight*, 928 F.3d at 238; *Leuthy*, 2018 WL 4134628, at *16 (public official allowing a citizen's post to remain on the official's social media page does not amount to the official "listening" to the post; "The Court understands the Plaintiffs to be asserting a right to speak; whether their speech is heard and/or whether the Governor is listening are separate questions.").

C. "Workarounds" are not a cure

"Workarounds" to being blocked from a public official's social media account -- such as creating a new account that is not blocked, posting one's views about a public official's actions or espoused positions on one's own social media account, or locating where the public official's posts have been re-tweeted or re-posted by others and engaging with them in that recycled context -- still burden the public citizen's speech rights in violation of the First Amendment. *See Knight*, 928 F.3d at 238-39 ("some ability to 'work around' the blocking does not cure the constitutional violation"). *See also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (government "may no more silence unwanted speech by burdening its utterance than by censoring its content"); *United States. v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2002) ("The distinction between laws burdening and laws banning speech is but a matter of degree.").

D. Users' comments on social media are not government speech

A public official's own posts or tweets on their social media account are government speech and therefore exempt from the First Amendment. *Knight*, 928 F.3d at 239. But social media users' graphic or textual comments and replies that occur in the interactive spaces of the social media account, and are clearly attributable to the user rather than to the account owner, "are not government speech under any formulation." *Id*. *See also Davison*, 912 F.3d at 686 (rejecting public official's government-speech defense where "comments and posts by users

cannot be mistaken for [public official]'s own speech because they identify the posting or replying personal profile or Page, and thereby distinguish that user from [the public official]"); *Faison*, 440 F. Supp. 3d at 1137 ("Defendant's own [Facebook] posts likely qualify as government speech, Plaintiffs' comments [in the interactive spaces] do not."); *Hyman v. Kirksey*, No. 3:18-CV-230-DPM, 2019 WL 2323864, at *2 (E.D. Ark. May 30, 2019) (finding that the defendant police department's Facebook posts were probably government speech, "[b]ut the interactive portion of the page was different. . . The Department provided a public space for citizens to speak, and they spoke."); *Leuthy*, 2018 WL 4134628, at *11 ("the Court must disagree with the premise that all of the information on the [public official]'s Facebook page constitutes his speech. The posts are labeled with the name of the person who posted them, and the [public official]'s speech—his posts—is distinct from the private citizen posts.").

One 2018 district court case out of Kentucky found that the then-Governor Matt Bevin's official accounts on Facebook and Twitter constituted his personal speech as a governmental official and that his entire Facebook page, including users' comments and the Governor's deleting thereof, was immune from First Amendment analysis because it constituted government speech. *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1010-13 (E.D. Ky. 2018) (denying preliminary injunction). However, the *Morgan* court's reasoning has subsequently been rejected by courts deciding the same issues. *See, e.g.*, *Knight*, 928 F.3d at 239-40; *Davison*, 912 F.3d at 686, *et. seq.*; *Faison*, 440 F. Supp. 3d at 1137 ("[*Morgan v.*] *Bevin* is unpersuasive because the court there merged the government and private speech analysis and found that a Governor's Facebook page and Twitter account were privately-owned based on reasoning that is at odds with the more recent Second and Fourth Circuit decisions [in *Knight* and *Davison*]."); *Clark v. Kolkhorst*, 19-CV-0198, 2020 WL 572727, at *4 (W.D. Tex. Feb. 5, 2020) (declining to follow *Morgan* because "Kolkhorst's speech and the comments of private citizens [on Kolkhorst's Facebook page] are distinct."); *Hyman*, 2019 WL 2323864, at *2 (noting, but rejecting, *Morgan*'s government speech holding); *Leuthy* , 2018 WL 4134628, at *16 (declining to follow the *Morgan* court's reasoning on government speech argument).

III. Additional First Amendment Claims: Retaliation, Right-to-Petition, and Prior Restraint/Due Process

Courts have recognized that blocking a user or deleting their comments from an online public forum because of the opinions or positions they express can also give rise to a number of other First Amendment claims besides viewpoint discrimination:

Retaliation: Censoring or blocking a user because of their expressed views arguably constitutes an adverse action that would deter a person of ordinary firmness from engaging in expression of those views, or other views the public official disfavors, in the future. *See*, *e.g.*, *Dingwell*, 327 F. Supp. 3d at 471 (social media blocking is suggestive of retaliation "because the blocking of Facebook access is by its nature an injury even if it is only a minimal constitutional violation.")

Right-to-Petition: Censoring or blocking a user also engenders claims for interference with the First Amendment right to petition the government for grievances. This right encompasses allowing "citizens to express their ideas, hopes, and concerns to their government and their elected representatives." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388 (2011). *See, e.g.*, *Leuthy*, 2018 WL 4134628, at *16-17 (refusing to dismiss right-to-petition claim where plaintiff blocked by governor from his Facebook page); *German*, 2018 WL 3212020, *3 (D. Or. June 29, 2018) (plaintiff asserted interference with right to petition government for grievances when blocked from commissioner's Facebook page; claims dismissed for other reasons).

Prior Restraint/Due Process: Banning or blocking a user to prevent them from engaging in speech or expression in a virtual public forum because of their previously expressed viewpoint is also a form of prior restraint on speech that involves exercise of unfettered discretion by the public official who is managing the account and implicates procedural due process rights – i.e., lack of notice and an opportunity to be heard either pre- or post-deprivation. *See, e.g.*, *Robinson*, 921 F.3d at 450 n.5 (5th Cir. 2019) (reinstating prior-restraint claim where citizen banned from

sheriff office's Facebook page without due process); *Clark*, 2020 WL 572727, at *5 (recommending denial of motion to dismiss Fourteenth Amendment prior restraint/due process claim).

Some or all of these additional First Amendment claims tend to be pled as part of a social-media-blocking complaint, along with viewpoint discrimination.

IMMUNITY ISSUES

I. Qualified Immunity

Qualified immunity – *i.e.*, an argument that the law was not clearly established at the time of the alleged unconstitutional conduct – can be a defense against damages claims, but not claims for injunctive relief. *See Swint v. City of Wadley, Ala.*, 51 F.3d 988, 1001 (11th Cir. 1995); *Robinson*, 921 F.3d at 452. Injunctions are typically the primary form of relief sought in social-media-blocking cases -- i.e., requests that social media users be unblocked from the public official's account(s) and/or that the public official be prohibited, going forward, from blocking users or deleting their comments because of dislike of the viewpoints expressed.

Neither the Supreme Court nor the Eleventh Circuit has yet ruled on the merits of a First Amendment claim arising out of a public official's blocking users on social media. Meanwhile, multiple district courts granted qualified immunity on social-media-blocking damages claims for conduct that occurred prior to the Second, Fourth, and Fifth Circuit Courts of Appeals' 2019 decisions in, respectively, *Knight*, *Davison*, and *Robinson*. *See, e.g.*, *Wagschal v. Skoufis*, 442 F. Supp. 3d 612, 625 (S.D.N.Y. 2020); *Garnier*, 2019 WL 4736208 at *5; *Hyman*, 2019 WL 2323864, at *2; *McKercher v. Morrison*, No. 18CV1054 JM(BLM), 2019 WL 1098935, at *4-5 (S.D. Cal. Mar. 8, 2019); *Price*, 2018 WL 3117507, at *18; *Davison*, 247 F. Supp. 3d at 778-80; *Davison v. Rose*, No. 1:16CV0540 (AJT/IDD), 2017 WL 3251293, at *10 (E.D. Va. July 28, 2017), *appeal dismissed and remanded*, 715 Fed. App'x. 298 (4th Cir. 2018).

Since 2019, qualified immunity becomes less plausible as social-media-blocking litigation and settlements proliferate around the country, including in Georgia (see footnote 2

above), putting public officials on notice that the First Amendment prohibits censoring or banning users because of their expressed viewpoints.[7] As a further consideration, the First Amendment principles implicated by public officials regulating private-citizen speech on social media – *e.g.*, viewpoint discrimination, speech-based retaliation, prior restraint – have long been well established. *See Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790 (2011) ("whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech . . . do not vary when a new and different medium for communication appears") (internal quotations and citations omitted);

II. Sovereign Immunity & Legislative Immunity

State-level public officials who otherwise enjoy sovereign immunity under the Eleventh Amendment (unless waived) cannot avail themselves of this defense in "a suit alleging a violation of the federal constitution against a state official in his official capacity for injunctive relief on a prospective basis." *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011) (explaining *Ex parte Young* exception to sovereign immunity). *See also Virginia Office for Protection and*

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[7] *See also, e.g.*, Vinny Vella, *In federal court settlement, Montgomery County commissioner agrees to unblock constituents on social media*, THE PHILADELPHIA INQUIRER (Sept. 1, 2020), https://www.inquirer.com/news/joseph-gale-federal-lawsuit-settlement-social-media-blocked-20200901.html;
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Michael Gold, *Ocasio-Cortez Apologies for Blocking Critic on Twitter*, THE NEW YORK TIMES (Nov. 4, 2019), https://www.nytimes.com/2019/11/04/nyregion/alexandria-ocasio-cortez-twitter-dov-hikind.htm;Jackie Borchardt, *Ohio lawmaker who blocked constituent on Facebook will pay $20,000 in lawsuit settlement*, CINCINNATI.COM/THE ENQUIRER (Feb. 13, 2019), https://www.cincinnati.com/story/news/politics/2019/02/13/ohio-lawmaker-settles-lawsuit-over-blocking-constituent-facebook/2862724002/;
ACLU Wins Free Speech Settlement Over Governor Hogan's Facebook Censorship, ACLU MARYLAND (Apr. 2, 2018), https://www.aclu-md.org/en/press-releases/aclu-wins-free-speech-settlement-over-governor-hogans-facebook-censorship.

Advocacy v. Stewart, 563 U.S. 247, 255 (2011) ("when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the state for sovereign-immunity purposes"). Under *Ex parte Young*, the Eleventh Circuit affirmed the denial of sovereign immunity to a Florida state representative who maintained Twitter and Facebook accounts for purposes of communicating with the public, making official statements, and sharing information about legislative activities, and who had blocked from both accounts a member of the public who had criticized the state representative's vote on a gun-control bill. *Attwood,* 2020 WL 3096325, at *1-3. *Cf. Wagschal,* 442 F. Supp. 3d at 623 (dismissing social-media-blocking plaintiff's claim against state representative for monetary damages based on Eleventh Amendment sovereign immunity).

The Eleventh Circuit in *Attwood* also affirmed the denial of absolute legislative immunity to the defendant state representative, holding that maintaining social media accounts did not constitute core legislative activity but was more akin to public distribution of a press release or newsletter -- activities that do not receive absolute legislative immunity. *Id*. at *4 (citing *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979)). *See also Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1062 (11th Cir. 1992) (distinguishing legislative acts from non-legislative).

CONCLUSION

Public officials using social media to communicate with constituents and the general public on matters relating to their official duties and activities should be mindful of First Amendment forum analysis that prohibits government actors from regulating private speech based on viewpoint (or content, except in a limited or non-public forum). Public officials operating such social media accounts – whether they are official government accounts or personal accounts that bear the trappings of the public official's office -- should be encouraged to consult with counsel prior to deleting, blocking, or otherwise restricting users' access to the account and its interactive features. Such consultation is necessary to ensure that regulation of the social media account is not unconstitutionally based on prohibited viewpoint discrimination, which also gives rise to related claims of retaliation, interference with the right to petition the government for grievances, and prior restraint/due process. As a best practice, counsel may also

wish to discuss with their public official clients whether they have already blocked or censored any users based on viewpoint in order to assess the client's risk of exposure to social-media-blocking claims and to take mitigating steps, such as restoring access to blocked users and adopting policies not to delete users' comments for viewpoint-based reasons.