CONSTITUENT ACCESS TO ADVISORY NEIGHBORHOOD COMMISSIONER SOCIAL MEDIA ACCOUNTS

OANC GENERAL GUIDANCE NO. 2023-004

Advisory Neighborhood Commissioners cannot block anyone on any official social media account. Furthermore, ANCs should not block access on personal accounts where they also discuss ANC business.

Overview

Many Advisory Neighborhood Commissioners (ANCs) create and maintain social media accounts (Twitter, Instagram, Facebook, etc.) to help them connect with their constituents. At times maintaining social media accounts can be challenging when those using them attempt to communicate on complex and/or difficult issues, or when the dialogue ceases to be civil and respectful. In some instances, ANCs have blocked constituents on social media when they feel that the communication has ceased being productive and borders on harassment.

However, the Office of the Attorney General for the District of Columbia advises that ANC Commissioners should refrain from "blocking" constituents from viewing and interacting with their social media accounts or deleting their public messages because, under current jurisprudence, that action will likely be held to violate the First Amendment's prohibition on viewpoint discrimination.

Legal Analysis[1]

The Supreme Court has recognized that today's social media is "for many … the principal source for knowing current events [and] speaking and listening in the modern public square," and "provide[s] perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). Concurrently, many public officials in the United States, up to and including the President, have taken advantage of social media "to conduct official business and to interact with the public." *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019), *vacated and dismissed as moot sub nom. Biden v. Knight First*

[1] Analysis provided by Brendan Heath and Marcus Ireland, Office of the Attorney General, Civil Litigation Division, Equity Section.

Amendment Inst. at Columbia Univ., 141 S. Ct. 1220 (2021). "Blocking" individuals on social media can prevent them from engaging in this public dialogue in various ways. *See id* at 231.

While the First Amendment does not extend to purely private restrictions on speech, it does limit governmental regulations on speech. *See id*. at 234. For that reason, officials "may not discriminate based on viewpoint among the private speech occurring in [social media]" when they are acting in a governmental capacity, *id*. at 234–35, or in other words acting "under color of state law." *See* 42 U.S.C. § 1983. If there is a sufficiently "close nexus between the State and the challenged action," even "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, 295 (2001) (citations and quotations omitted).

In the context of social media use, the currently prevailing test of whether an official's social media use constitutes state action asks whether, under the totality of the circumstances, (1) the social media account bears the "trappings of an official, state-run account," and (2) the official furthers their official duties by using the account as a "tool of governance and . . . outreach." *See Knight*, 928 F.3d at 231, 236. This framework, as elaborated by the Fourth Circuit in *Davison v. Randall (Davison II)*, 912 F.3d 666 (4th Cir. 2019), has been adopted or otherwise utilized by the Second, Eighth, and Ninth Circuits, and approvingly cited by the D.C. Circuit. *See Knight*, 928 F.3d 226; *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021); *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158 (9th Cir. 2022); *Small Bus. in Transp. Coal. v. Bowser*, No. 22–7102, 2023 WL 2770986, at *3 (D.C. Cir. Apr. 4, 2023) (unpublished opinion). (One outlier Circuit, the Sixth, has adopted a slightly different approach, focusing on "official duties and use of governmental resources or state employees." *See Lindke v. Freed*, 37 F.4th 1199, 1206 (6th Cir. 2022). However, this formulation was explicitly based on precedent unique to the Sixth Circuit regarding state action, and is therefore of limited general applicability. *See id.*) While the Supreme Court has not directly ruled on this question, *see Knight*, 141 S. Ct. 1220, it has recently granted certiorari on two cases raising it. *See Garnier v. O'Connor-Ratcliff*, No. 22-324, 598 U.S. -- (Apr. 24, 2023); *Lindke v. Freed*, No. 22-611, 598 U.S. -- (Apr. 24, 2023). Until those cases are resolved in the following Term, and unless the Justices adopt a differing interpretation, we recommend that officials procced under the Fourth Circuit's approach.

Under this test, an account bears the trappings of state office when it is presented in connection with the official's position in the government. *See Attwood v. Clemons*, 526 F. Supp. 3d 1152, 1166 (N.D. Fla. 2021). Relevant criteria include, for example, whether the account contains the official's title or other indications of governmental office, whether it lists official contact information or contains links to official websites, and whether posts are expressly addressed to constituents or submitted as on behalf of a governmental official, office, or entity. *See Davison II*, 912 F.3d at 680 (quoting *Davison v. Loudoun Cnty. Bd. of Supervisors (Davison I)*, 267 F. Supp. 3d 702, 714 (E.D. Va. 2017)).

An account is used as a tool of governance and outreach when the government official uses the account in a manner that furthers their official duties. *See Attwood*, 526 F. Supp 3d. at 1166. For this factor, courts may examine messages posted from the account and the account's purpose. For example, an account may be found to be "a tool of governance" if an official "provides information to

the public about … official activities and solicits input from the public on policy issues she … confront[s]." *Davison II*, 912 F.3d at 680. More broadly, this criterion can be met when posts on the account generally are used for "constituent conversations," or the posts have "a strong tendency towards matters related to [the official's] office," including matters relating to public governmental meetings and matters of significant public interest. *Id*. at 681. When examining how the official deals with comments or other engagement, courts are especially sensitive to actions that have the effect of suppressing criticism of the official's actions or fitness for office, because "such speech 'occupies the core of the protection afforded by the First Amendment.'" *Id*. at 688 (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995)).

Social media use by a governmental official therefore falls outside the "state action" test only in limited circumstances. For example, in *Campbell*, the Eighth Circuit examined an official's Twitter account that had been set up to promote their candidacy. 986 F.3d at 826–28. The court held that the account lacked governmental activity and the trappings of state office because the account was used "overwhelmingly" for promoting the official's political campaigns and communications about any other matter were "sporadic," and the account was therefore more akin to a campaign newsletter. *Id.* at 826–27. The Eighth Circuit cautioned, however, that even an account originally set up for a private purpose such as a political campaign can nonetheless "turn into a governmental one if it becomes an organ of official business." *Id*. at 826.

As explained above, the extent to which an official's use of social media implicates the First Amendment stems from both the presentation of the account and the use of the account. If the account mentions the official's position as a government official, or discusses matters related to their government office, use of the account becomes subject to the requirements of the First Amendment. This status applies regardless of whether the account was originally established for purely private purposes, or was created before the owner became a government official. Once an account is deemed governmental, blocking constituents, particularly if they opine on the official's actions or fitness for office, constitutes viewpoint discrimination in violation of the First Amendment. In litigation, reviewing courts are likely to thoroughly review the official's messages and usage of the account to determine whether it is private or governmental in nature.

To avoid the risks and burdens of adverse legal action, the OAG advises that ANC Commissioners not block or ban constituents from accessing or publicly interacting with their accounts or posts, and not delete constituents' public messages.

This recommendation does not apply to accounts on which the owner has never referenced their governmental office and never posted about issues related to their office or matters of public interest. In addition, it does not apply to actions which solely block private messages to the account owner, and do not prevent public messages, comments, or replies.

To be clear, accounts that appear in any way connected to a governmental office and which discuss issues related to that office are likely to be held state action under current federal law and therefore

subject to the requirements of the First Amendment, including its prohibition on viewpoint discrimination. ANC Commissioners cannot block constituents' access to and interaction with such accounts without risking adverse litigation and judicial rulings.