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M E M O R A N D U M July 11, 2022

SUBJECT: May an elected official block, hide, or delete a user or a user's comment on social media? (Work Order No. 33-LS0044)

TO: Representative Sara Hannan
Chair, Legislative Council
Attn: Tim Clark

FROM: Emily Nauman
Deputy Director

You requested an opinion addressing whether an elected official may block a social media user from the official's social media account or may delete or hide a social media user's posts on the elected official's page.[1] Many jurisdictions have recently considered First Amendment challenges to federal, state, and local elected officials blocking social media users,[2] but there is no precedent from the United States Supreme Court, the Ninth Circuit, the District of Alaska, or the Alaska Courts explicitly addressing these

[1] This memo uses the phrase "social media account" to describe public Facebook pages, Twitter accounts, and other forms of potentially interactive social media. As further explained in this memo, the specific nature and use of an account may determine whether the official may block a user. For example, a court will likely treat blocking a user from an "official" Facebook page differently than blocking a user from a personal or private Facebook page. *See, e.g.*, *German v. Eudaly*, 2018 WL 3212020 at *6 (D. Ore. June 29, 2018).

[2] *See, e.g.*, *Wagschal v. Skoufis*, 857 F. App'x 18 (2d Cir. 2021); *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021); *Attwood v. Clemons*, 818 F. App'x 863 (11th Cir. 2020); *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019), *vacated as moot*, 141 S.Ct. 1220 (2021); *Russell v. Brown*, 3:20-CV-811-CHB, 2021 WL 4492857 (W.D. Ky. Sept. 30, 2021); *Lindke v. Freed*, 563 F. Supp. 3d 704 (E.D. Mich. 2021); *Buentello v. Boebert*, 545 F. Supp. 3d 912 (D. Colo. 2021); *Phillips v. Ochoa*, No. 2:20-CV-00272-JAD-VCF, 2021 WL 1131693 (D. Nev. Mar. 24, 2021); *Garnier v. O'Connor-Ratcliff*, 513 F. Supp. 3d 1229 (S.D. Cal. 2021); *Felts v. Reed*, 504 F. Supp. 3d 978 (E.D. Mo. 2020); *One Wisconsin Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. 2019); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y 2018), *vacated*, 141 S. Ct. 1220 (2021).

questions.[3] Because there is no clear answer to your question, this opinion provides an overview of the rapidly developing body of case law addressing this issue.[4] In sum, however, an Alaska court may find that blocking a user from an elected official's social media account is unconstitutional. For similar reasons, it is inadvisable to block a social media user from an elected official's account, or to delete or hide comments on the page of an elected official. Therefore, this office strongly recommends that elected officials disable those functions on their social media accounts.

Although a court with jurisdiction in this state has not ruled on the issue, courts in other jurisdictions have generally engaged in a two-part analysis to determine whether an elected official's actions on social media violate the First Amendment. First, a court will determine whether the action taken by the elected official was a state action. Second, the court will determine whether the action taken by the elected official violated the social media user's right to free speech.

1. Is the Act of the Government Official State Action?

The United States Supreme Court has explained: "[T]he Free Speech Clause [of the First Amendment] prohibits only *governmental* abridgement of speech. The Free Speech Clause does not prohibit *private* abridgement of speech."[5] Because "the First Amendment

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[3] After the election of President Biden, the United States Supreme Court vacated a Second Circuit judgment that former President Trump had violated a social media user's speech rights under the First Amendment by blocking them from his Twitter account. *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S.Ct. 1220 (2021). The court directed the Second Circuit "to dismiss the case as moot." *Id.* Earlier this year, in a decision that has been appealed to the Ninth Circuit, a federal district court in the Southern District of California held that by blocking users on social media, school board members had deprived them "of their right to free speech while acting under color of state law." *Garnier*, 513 F. Supp. 3d at 1253.

[4] Please be aware that this opinion does not address a specific set of facts and does not attempt to answer whether a legislator's specific blocking action on social media has violated a social media user's right to free speech. As this opinion notes, an individual legislator's decision to block a social media user may violate the user's First Amendment rights. Thus, the decision to block a user includes risk. *But see Wagschal*, 857 F. App'x at 21 (holding that the public official was entitled to qualified immunity because the Second Circuit first addressed public officials blocking constituents on social media a year after the conduct challenged in the case and the public official's conduct therefore did not violate clearly established law at the time).

[5] *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1928 (2019) (emphasis in original) (citations omitted). Similar to the Free Speech Clause in the U.S. Constitution, art. I, sec. 5, of the Constitution of the State of Alaska provides that "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." The Alaska Supreme Court has said "the Alaska Constitution protects free speech

restricts government regulation of private speech but does not regulate purely private speech[,]" courts reviewing challenges to government officials blocking users or comments on social media first consider whether the elected official's social media account is "owned or controlled by the government."[6] This question requires evaluation of whether the public official, when blocking a user's comments, is a "government actor" or is acting "under color of . . . law."[7] In other words, the preliminary question is whether an official blocking a private user is "state action."[8]

Courts have not established a uniform test to determine whether a government official blocking a social media user is state action.[9] To determine whether a government official violated a social media user's free speech right, courts have reviewed the specific descriptions, uses, availability, and treatment of the official's social media account.[10] One court recently noted that

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'at least as broad[ly] as the U.S. Constitution' and 'in a more explicit and direct manner.'" *Alaskans for a Common Language, Inc. v. Kritz,* 170 P.3d 183, 198 (Alaska 2007) (internal citation omitted).

[6] *Knight First Amendment Institute at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 565 (S.D.N.Y 2018) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985)).

[7] *Phillips v. Ochoa*, No. 2:20-CV-00272-JAD-VCF, 2021 WL 1131693 at *2 (D. Nev. Mar. 24, 2021).

[8] *Attwood v. Clemons*, 526 F. Supp. 3d 1152, 1164 (N.D. Fla. 2021) (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001)).

[9] Supreme Court Justice Clarence Thomas has opined that perhaps the First Amendment does not ever prohibit a government official blocking social media users on platforms such as Facebook or Twitter because these private social media companies exercise ultimate control over the pages and accounts. *Biden v. Knight First Amendment Institute at Columbia Univ.*, 141 S.Ct. 1220, 1222 (2021) *Thomas, J. concurring* ("Because unbridled control of the account resided in the hands of a private party, First Amendment doctrine may not have applied to respondents' complaint of stifled speech."). Justice Thomas's proposal is, however, inconsistent with opinions issued by the vast majority of courts.

[10] *See, e.g.*, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019) (considering "how the official describes and uses the account; to whom features of the account are made available; and how others, including government officials and agencies, regard and treat the account"), *vacated as moot*, 141 S.Ct. 1220 (2021).

> [a] non-exhaustive list of factors that courts have considered in making this determination include: (i) how the public official describes and uses the page; (ii) how others, including government officials and agencies, regard and treat the page; (iii) whether the public official is identified on the page with the public position he or she holds (such as through the title of the page or cover or profile photos); (iv) whether the public official uses the page to announce official business; (v) how the page is categorized (as either a "government official" or a "public figure"); (vi) whether the page includes governmental contact information; (vii) whether posts are expressly addressed to constituents; (viii) whether the public official solicits comments or invites constituents to have discussions on the page; (ix) whether the content posted relates to official responsibilities and business conducted in an official capacity; (x) to whom features of the page are made available; (xi) the use of government resources, including government employees, to maintain the page; (xii) whether creating the account is one of the public official's enumerated duties; (xiii) whether the account will become state property when the public official leaves office; and (xiv) whether the public official's social media activity takes place during normal working hours.[11]

Thus, for example, when concluding that former President Trump unconstitutionally blocked users from his @realDonaldTrump Twitter account, the Second Circuit found that blocking users from the Twitter account was state action because "the President has consistently used the Account as an important tool of governance and executive outreach."[12] The court recognized that "not every social media account operated by a public official is a government account."[13] But the court noted that the account was "presented by the President and the White House staff as belonging to, and operated by, the President[,]" the account was "registered to 'Donald J. Trump, 45th President of the United States Of America, Washington D.C.[,]'" "[t]he President has described his use of the Account as 'MODERN DAY PRESIDENTIAL[,]'" and that "according to the National Archives and Records Administration, the President's tweets from the Account 'are official records that must be preserved under the Presidential Records Act.'"[14]

Consistent with that decision, the Fourth Circuit found that an elected official was controlling a social media page as a government actor when she used the page to inform

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[11] *Lindke v. Freed*, 563 F. Supp. 3d 704, 710-11 (E.D. Mich. 2021) (citations omitted).

[12] *Knight*, 928 F.3d at 236.

[13] *Id.*

[14] *Id.* at 235.

the public about her government work, solicited input on policy issues through the page, and "swathed" the page "in the trappings of her office."[15]

In contrast, the Eighth Circuit recently found that a state legislator blocking a user from her Twitter account was not state action because the account was not properly characterized as a government account.[16] The court explained that the account, which predated the legislator's election to office, began as a private account and did not "become an organ of official business."[17] The legislator "used the account in the main to promote herself and position herself for more electoral success down the road."[18] Additionally, the court noted that some of the legislator's post-election messages "provide[d] updates on where certain bills were in the legislative process or the effect certain recently enacted laws had had on the state,"[19] but these "occasional stray messages that might conceivably be characterized as conducting the public's business [were] not enough to convert [the] account into something different from its original [private] incarnation."[20]

These decisions highlight the fact-specific nature of courts' state-action inquiries. It is not yet clear the exact facts which will convince Alaska's courts or the Ninth Circuit that a legislator blocking a user on social media is state action. A single fact in isolation, such as listing an official's title in the name of an account, is likely insufficient to establish state action.[21] But blocking users from accounts that exhibit many of the factors considered in other jurisdictions, e.g., the account has the official trappings of government, is used for official business, is operated on government time, was created after the official was elected, etc., increases the likelihood that the blocking is state action.

2. Right Infringement: Forum Analysis.
Assuming a court concludes that blocking a user from a specific government official's social media account is state action, the court will likely then apply the United States Supreme Court's "forum based approach for assessing restrictions that the government

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[15] *Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019), *as amended* (Jan. 9, 2019).

[16] *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021).

[17] *Id.* at 826.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 827.

[21] *Russell v. Brown*, 3:20-CV-811-CHB, 2021 WL 4492857 at *7 (W.D. Ky. Sept. 30, 2021).

seeks to place on the use of its property."[22] This approach "recognize[s] three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums."[23] To varying degrees, the government may regulate speech in these spaces.

In traditional and designated public forums, "the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny."[24] At least one court found that continued blocking of a social media user that went on for three years was unconstitutional because the block, by the nature of its duration, was not narrowly tailored, as required for an action to overcome strict scrutiny.[25]

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[22] *Minnesota Voters Alliance v. Mansky*, 138 S.Ct. 1876, 1885 (2018) (quoting *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992)); *see, e.g.*, *Attwood v. Clemons*, 526 F. Supp. 3d 1152, 1166-72 (N.D. Fla. 2021) (first considering whether a government official blocking a user on social media is state action and subsequently characterizing the social media account as a type of forum). In a very limited number of cases, courts have applied the "government speech exception" to forum analysis. *See, e.g.*, *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1011 (E.D. Ky. 2018) (citing the government speech exception when concluding that forum analysis does not apply). Under this exception to forum analysis, the government may restrict speech, even based on viewpoint, when "engaging in expressive conduct." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 216 (2015). Thus, for example, Texas did not violate an entity's right to free speech when refusing to create specialty license plates with the confederate battle flag because the specialty license plate program was a form of government expression. *Id*.

[23] *Id.*

[24] *Id.* (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009)).

[25] *Garnier v. O'Connor-Ratcliff*, 513 F. Supp. 3d 1229, 1251 (S.D. Cal. 2021) ("While blocking was initially permissible, its continuation applies a regulation on speech substantially more broadly than necessary to achieve the government interest.") The Court in that case noted that temporarily hiding or deleting a social media user may be permissible to avoid "unduly repetitious or largely irrelevant" posts (a threshold the court notes originated in the Ninth Circuit). Relatedly, *see Wagschal v. Skoufis*, 442 F. Supp. 3d 612, (S.D.N.Y. 2020), *aff'd*, 857 F. App'x 18 (2d Cir. 2021), holding that a claim against an elected official for blocking a social media user was moot once the official unblocked the user.

In a limited public forum, the government "may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'"[26] The government has even more "flexibility" to regulate speech in a nonpublic forum "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[27] A viewpoint-based speech restriction is, nonetheless, prohibited in all forums—including a nonpublic forum.[28]

Thus, when an elected official blocks a user, or hides or deletes a user's comments based on the user's expressed viewpoint, assuming the blocking, hiding, or deleting is state action, the official unconstitutionally restricts the user's speech.[29] If, however, the elected official blocks a user for another reason, e.g., blocking comments that are off-topic, then characterizing the social media account as a traditional, designated, limited, or nonpublic forum may determine whether the blocking action was constitutional. This type of action may be reasonable if an official's social media page is a limited public forum but is more likely a free speech violation if the page is a traditional public forum.

Because there is uncertainty in this developing area of law, an elected official seeking to minimize the likelihood of a successful free speech challenge should treat participants in an official social media account as if they are participating in a traditional public forum at which the elected official, as moderator, allows all an equal opportunity to participate, even if they stray off topic or use salty language. That does not mean that the elected official must tolerate offensive conduct without comment or allow unlawful conduct or threats of violence.

In summary, case law from other jurisdictions suggests that an Alaska court may find that blocking a social media user from an elected official's social media account is an

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[26] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)). "[A] limited public forum is a sub-category of a designated public forum that 'refer[s] to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics.'" *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (quoting *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999)).

[27] *Minnesota Voters All.*, 138 S. Ct. at 1885 (citing *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

[28] *Cornelius,* 473 U.S. at 801.

[29] *See Knight First Amendment Institute at Columbia Univ. v. Trump*, 928 F.3d 226, 237-39 (2d Cir. 2019) (explaining that viewpoint discrimination is prohibited in all government forums and noting that former President Trump "used the blocking function to exclude the Individual Plaintiffs because of their disfavored speech), *vacated as moot*, 141 S.Ct. 1220 (2021).

unconstitutional violation of the First Amendment. On the other hand, deleting or hiding a comment only temporarily limits a social media user's access to a public forum, and is an action to which a court may grant more leniency, especially if the post is disruptive. However, it is entirely possible, given the facts of a specific case, a court may find that even temporarily deleting or hiding a comment is unconstitutional under the First Amendment as well.

Please advise if you have any additional questions or concerns.

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