



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Hawai‘i

January 11, 2019

BY U.S. MAIL AND ELECTRONIC EMAIL

Governor David Ige

Office of the Governor
415 South Beretania #5
Honolulu, HI 96813

Re: Blocking of Members of the Public on Social Media Platforms

Dear Governor Ige:

The American Civil Liberties Union of Hawai‘i Foundation (“ACLU of Hawai‘i”) writes to inform you of the constitutional implications of blocking members of the public on social media, such as Facebook and Twitter, or otherwise limiting others’ ability to access and engage in public discourse on these platforms. This letter is not intended to suggest that your office has engaged in unconstitutional practices. Rather, we are writing to advise you about how the law has evolved to address the use of social media by government officials and what you can do to make sure your office practices comply with the First Amendment. We are also sending similar letters to other elected public officials in Hawai‘i.

Like most elected public officials, your office probably uses social media as an important way to communicate and interact with constituents and members of the public. If that is the case, then your official social media pages and personal social media pages used for official purposes qualify as limited public forums and members of the public have a First Amendment right to express their opinions in them. Accordingly, policies on members of the public posting on your official social media pages should be drafted to respect freedom of speech. The First Amendment prohibits public officials from blocking members of the public because of their questions and opinions on various issues and criticisms of specific policy positions. Censorship of specific points of view is not allowed and restrictions on the content of posts are subject to strict scrutiny and almost never permitted. Social media policies may, however, include content-neutral and reasonable time, place, and manner restrictions that are narrowly tailored and leave ample alternative means of communication available.

Social Media Platforms are the New Town Halls

The Supreme Court has held that government creates a public forum when it opens a nontraditional forum for public expression. *Perry Educ. Ass'n. v. Perry Local Educator's Ass'n.*, 460 U.S. 37, 45 (1983). The government may reserve a public forum for use by certain groups “or for the discussion of certain topics,” *Rosenberger v. Rector*, 515 U.S. 819, 830 (1995). These public forums can be physical or metaphysical spaces and can be publicly or privately owned. *Id.* In *Packingham v. North Carolina*, the U.S. Supreme Court recognized that social media platforms like Facebook and Twitter provide “perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.” 137 S. Ct. 1730, at 1737 (2017).

Given the prominent place social media has taken as a forum for today’s marketplace of ideas, courts have “repeatedly affirmed the First Amendment significance of social media, holding that speech utilizing Facebook is subject to the same First Amendment protections as any other speech.” *Davidson v. Loudoun County*, 1:16v932 (JCC/IDD) slip op. at *5 (E.D. Va. Jan. 4, 2017). Several federal courts have held that interactive, government-run social media pages constitute limited public forums, because such pages are open to members of the public to express themselves and petition the government. *Hawaii Defense Fund v. Honolulu*, No. 1:12-CV-0049, (D. Haw. Jan. 21, 2014); *Knight First Amendment Institute v. Trump*, No. 17 Civ. 5205, (S.D.N.Y. May 23, 2018); *Odermatt v. Way*, 188 F. Supp.3d 198, 213 (E.D. N.Y. 2016). In *Knight*, a United States District Court held that the President’s personal Twitter account constituted a public forum. *Id.* at 566. Further, the court noted that “[b]ecause the President and [the White House Social Media Director] use the [Twitter account] for governmental functions, the control they exercise over it is accordingly governmental in nature.” *Id.* at 569. Thus, if you, as an elected official, use your personal social media accounts for official purposes and to interact with members of the public, then your personal accounts may *also* qualify as limited public forums and must therefore be open to public discussion.¹

Viewpoint-Based Censorship on Such Platforms Violates the First Amendment

While public officials may regulate the time, place, and manner of speech on social media,² they cannot censor or block a speaker based on the speaker’s criticism or disagreement with the official’s viewpoint. *See Knight* at 577 (“While we must recognize, and are sensitive to, the President’s personal First Amendment rights, he cannot exercise those rights in a way that infringes the corresponding First Amendment rights of those who have criticized him.”). Such censorship actions by government officials constitute state action when the intention is to suppress speech critical of official duties or fitness for public office. *Davison v. Randall*, No. 17-2002, 2019 WL 114012 (4th Cir. Jan. 7, 2019), as amended (Jan. 9, 2019). Taking offense at

¹ Social media pages for agencies and high agency officials that are open to the public may also qualify as limited public forums, where members of the public have a First Amendment right to post, interact, and petition such agencies and officials. As chief executive, we recommend you direct such agencies and officials to use their accounts in a manner consistent with the First Amendment principles described in this letter.

² During the time that a forum is open for public expression, the government may set content-neutral reasonable time, place, and manner restrictions that are narrowly tailored and leave ample alternative means of communication open. Content-based limitations, however, are subject to strict scrutiny so that they “must be narrowly drawn and effectuate a compelling state interest.” *Perry Educ. Ass'n.* at 45.

constituents' views is an illegitimate basis for censoring public posts. *Davison v. Loudoun County Bd. of Supervisors*, 267 F.Supp.3d 702, 717 (E.D. Va. 2017), *aff'd sub nom. Davison v. Randall*.

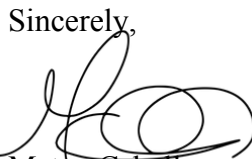
Your social media pages, including Facebook and Twitter, likely promote your positions on issues, provide a way to correspond with constituents, and highlight political or policy differences with others. These official social media pages are public, promote your official title and role, and track your political positions and official activities. Just as you may post links and commentary as a means of engaging voters, your constituents and the public are free to post their own views, questions, commentary, and links on the interactive space of such pages. Thus, you may not establish a social media site as a forum for dialogue with constituents and then selectively prohibit people from speaking in that forum based on the viewpoints they express. Accordingly, blocking users, deleting, and hiding selected comments or criticisms from members of the public are prohibited under the First Amendment.

You, personally, also have the right to express yourself and associate with others in social media under the First Amendment. If you have personal social media pages that you have *not* opened to the public for discussion of policy or governmental matters, then you may continue to decide who you allow access, block, or restrict at your discretion. *German v. Eudaly*, No. 3:17-CV-2028-MO (D. Or. June 29, 2018).

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We urge your office to set clear policies and adopt best practices to avoid either inadvertently or purposefully censoring constituents by blocking them from public social media pages based on their viewpoints. Public officials should carefully review their use of social media platforms, whether nominally designated as personal/individual or official, to determine whether such platforms are subject to the limited public forum rules described above. If applicable, we encourage you and your staff to restore the posting privileges of all those who may have been unlawfully blocked in the past.

We would be happy to discuss any questions you may have on this issue. Please feel free to contact us by email at mcaballero@acluhawaii.org, or by telephone, (808) 522-5908. Thank you for your time and consideration of this important issue.

Sincerely,

Mateo Caballero
Legal Director
ACLU of Hawai'i