

# Fourth Circuit Holds that Blocking on Public Official's Social Media Page Violates First Amendment

## *Facebook Page Used for Official Purposes a Public Forum*

By Katie Fallow and Ella Solovtsova Epstein

On January 7, 2019, the Court of Appeals for the Fourth Circuit became the first appellate court to address how the First Amendment applies to social media accounts operated by public officials – an issue that has become increasingly important as more and more government officials turn to social media as the primary way to speak to, and hear from, their constituents. In [Davison v. Randall](#), 912 F.3d 666 (4th Cir. 2019), *as amended* (Jan. 9, 2019), the court found in favor of free speech rights online, holding that a local county official's Facebook page, which she used for official purposes, was a public forum and that her decision to temporarily block plaintiff Brian Davison from posting on the page was unconstitutional viewpoint discrimination.

### Background

Defendant Phyllis Randall was elected Chair of the Loudoun County Board of Supervisors at the end of 2015. The night before she was sworn in as chair in January 2016, Randall created the “Chair Phyllis J. Randall” Facebook page for the stated purpose of allowing all of her constituents to start a “back and forth conversation” on any topic. *Davison* at 673. She also used the page to update her constituents about key issues facing their community, including upcoming Board meetings and public safety threats. Constituents could – and did – post comments on the page, responding to Randall and discussing various issues with each other.

Brian Davison is an outspoken resident of Loudoun County who is particularly concerned about public school financing. During a February 2016 Loudoun County Board meeting, chaired by Randall, Davison asked a question implying that some school board members had acted unethically. Shortly thereafter, Randall posted about the meeting on her page, and Davison commented on Randall's post, reiterating his accusations about school board members' potential conflicts of interest. Believing Davison's comments to be inappropriate, Randall deleted her original post and all public comments under it, including Davison's. She then blocked Davison from posting to her official Facebook page. About twelve hours later, Randall unblocked Davison.

Proceeding *pro se*, Davison sued Randall and the Loudoun Board in the District Court for the Eastern District of Virginia, alleging violations of his First Amendment right to free speech

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and his Fourteenth Amendment right to due process. Randall moved to dismiss Davison’s lawsuit, arguing among other things that because she personally created and operated the Chair Phyllis J. Randall Facebook page, it was not a government-operated account and therefore was not subject to the First Amendment. After a one-day bench trial, the district court ruled in the summer of 2017 that Randall acted under color of state law in banning Davison, and that the temporary block violated Davison’s right to speak in a public forum free from viewpoint discrimination. The district court granted Davison declaratory relief. The parties then filed cross-appeals with the Fourth Circuit.

### Fourth Circuit Decision

Fourth Circuit Court Judge Wynn wrote the majority opinion, joined by Judge Harris, and Judge Keenan concurred.

The majority opinion first rejected Randall’s argument that Davison lacked standing to pursue his First Amendment claim because Randall had only blocked Davison for 12 hours and therefore, according to Randall, Davison was not injured in fact. Noting that standing requirements are somewhat relaxed in First Amendment cases, the court held that Davison had standing to sue because he intended to continue to engage in speech on Randall’s Facebook page and because Randall continued to take the position that her page was not subject to the First Amendment and therefore she could block him again. In those circumstances, the court concluded, there remained a credible threat of Davison being blocked again, and thus the injury in fact requirement was met.

Having concluded that it had jurisdiction over Davison’s claim, the court held that Randall’s blocking of Davison violated the First Amendment because it constituted viewpoint-based discrimination in a public forum.

To begin, the court held that Randall acted under color of state law in administering the page and banning Davison from it. To determine this, the court tested whether Randall’s “purportedly private actions [bore] a ‘sufficiently close nexus’ with the State to satisfy Section 1983’s color-of-law requirement when the defendant’s challenged ‘actions are linked to events which arose out of his official status.’” *Davison* at 680.

The court concluded that Randall created and administered the page to “further her duties as a municipal official,” making it a “tool of governance,” and that she used the page in a way in which a private citizen could not, linking her actions with her role as a public official. *Id.* at 680. In addition, “the specific actions giving rise to Davison’s claim—Randall’s banning of Davison’s...Page—are linked to events which arose out of her official status.” *Id.* at 681.

The court then held that Randall’s page was a public forum under the Supreme Court’s public forum doctrine. The court found that Randall’s Facebook page was by its very nature compatible with expressive activity, and that she intentionally opened up the comment section of her page to speech by members of the public without restriction. As the court observed, “[a]

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n ‘exchange of views’ is precisely what Randall sought—and what in fact transpired—when she expressly invited ‘ANY Loudoun citizen’ to visit the page and comment ‘on ANY issues,’ and received numerous such posts and comments.” *Id.* at 682.

In light of these facts, the court decided that the interactive section of the page—in other words, the comment portion of the page—constituted a First Amendment-protected public forum. The court did not reach the question of the type of public forum (traditional, limited, or designated) involved, because the viewpoint discrimination in which Randall engaged is banned in all fora. *Id.* at 687-88.

The court rejected Randall’s argument that the public forum analysis should not apply because Facebook in its entirety is a privately-owned platform. The court noted that the Supreme Court has never limited forum analysis solely to government-owned property, but has instead held that forum analysis could be applied to private property dedicated to public use or controlled by the government. *Id.* at 683.

The court also rejected Randall’s argument that the page amounts to government speech, which is not subject to the First Amendment requirement of viewpoint neutrality. The court held that even if Randall’s own posts were government speech, the interactive component of the page, where the public could post comments, was not government speech. *Id.* at 686.

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### Concurring Opinion

Judge Keenan joined the majority opinion in full, but filed a separate concurrence “to call attention to two issues regarding governmental use of social media that do not fit neatly into our precedent.” *Id.* at 692. First, she questioned “whether any and all public officials, regardless of their roles, should be treated equally in their ability to open a public forum on social media.” *Id.* at 692.

Second, she noted the legal complexities introduced by the interplay of private and public actors in online spaces in which third-party speech occurs. Since private companies host the social media sites which government actors manage, it can be difficult to determine which party is responsible for “burdens placed on a participant’s speech.” *Id.* at 693. Judge Keenan called on the Supreme Court to consider further the reach of the First Amendment in social media.

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