



**Public Records & Public Forums:  
*How to Apply Established Case Law  
With Rapidly Emerging Social Media Platforms***

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# Introduction

- Use of social media, email, and texting by officials and city employees is transforming government

## **CHALLENGE:**

*How are courts using established case law to address new communication technologies as their use by public entities becomes ubiquitous?*

# Introduction

## Key areas where “old” case law meets “new” technologies

### First Amendment

- Application to forum classification to various social media platforms

### CA Public Records Act

- Application to content on social media platforms

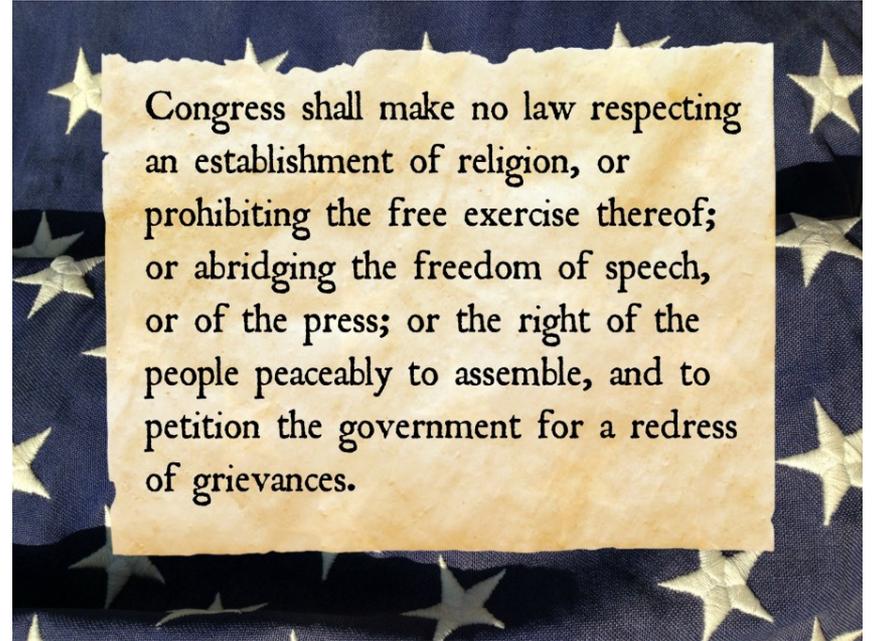
### CA Public Records Act

- Application to content on personal accounts and devices of public entity employees

# First Amendment

# What is First Amendment Forum Classification?

1. Categorize spaces
2. Apply established legal standards



# Main Categories of Forum Classification



# Two Categories of Forum Classification

- **Traditional public forum**
  - Where people have traditionally been able to express their ideas: town square, park, public street
- **Non-public forum**
  - Government property traditionally not open to the free exchange of ideas: courthouse lobby, prison, military base



# Public Forum Restrictions

## Content Neutral:

1. **Reasonable** time, place and manner;
2. **Narrowly-tailored** to serve a significant government interest; *and*
3. Leaves open ample **alternative channels** of communication.

## Content Based:

1. Subject to **strict scrutiny**;
2. Must be **least restrictive** means to achieve compelling government interest; and
3. **Presumptively invalid**

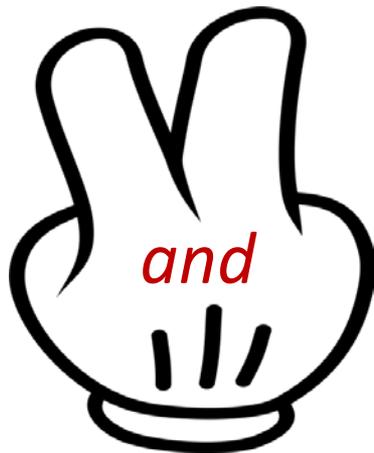
*Level of Scrutiny Depends on Forum*

# Non-Public Forum Restrictions

## Most lenient test

*Restrictions need only be:*

Reasonable



Viewpoint neutral

*Level of Scrutiny Depends on Forum*

# Designated Public Forum

## Designated Public Forum

- Government intentionally opens non-traditional areas for First Amendment activity

*Same strict review as public forum*

- State university meeting facilities for student groups
- School board meetings
- Municipal auditorium dedicated to expressive activity
- Interior of city hall - when city opens building to display art but does not consistently enforce restrictions

# Limited Public Forum

## Limited Public Forum

- Non-public forum opened to First Amendment activity but limited to certain groups, topics

*Same review as non-public forum*

- Public library meeting rooms
- Public school property
- State's specialty license plate program

# How Courts Determine Classification

- ✓ Designation of *public* or *limited public* forum depends on terms of use

More consistently  
enforced and  
objective restrictions



More likely forum  
deemed a *limited*  
public forum

# Government-Operated Social Media Platforms

## *How should they be classified?*

- Are they a traditional public forum?
- Is social media the modern public square for discourse of ideas?
- Is it more akin to a bulletin board where only designated topics can be discussed?
- Do you need to be concerned with electeds' social media platforms?



# Government-Operated Social Media Platforms

*Knight First Amendment Institute at Columbia University, et al. v. Trump, et al., No. 17-cv-5205 (NRB) (S.D.N.Y. 2017)*

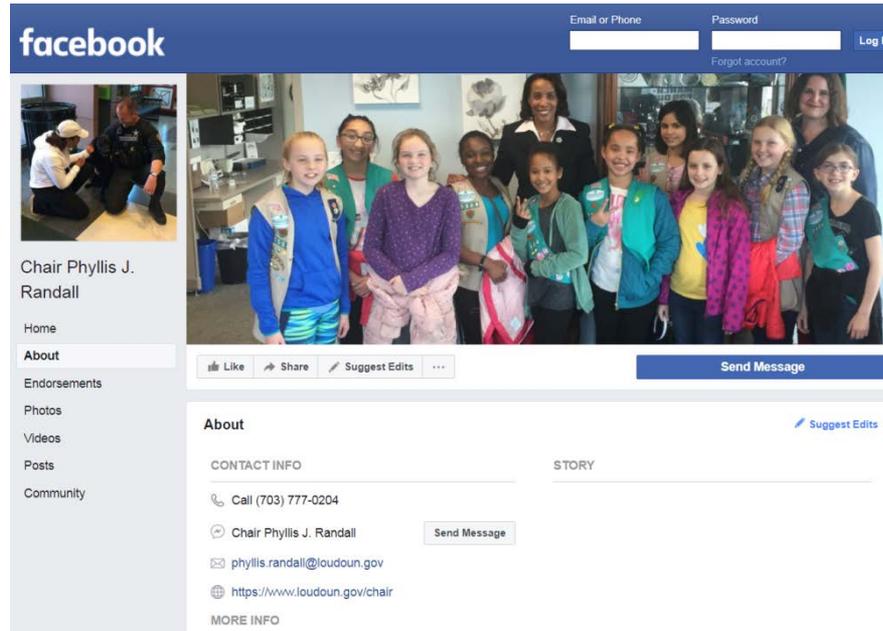
- Seven Twitter users sue President Trump for blocking them from his official social media account



- *“Trump is right. The government should protect the people. That’s why the courts are protecting us from him.”*
- *“To be fair you didn’t win the WH: Russia won it for you”*

# Government-Operated Social Media Platforms

## *Brian C. Davison vs. Loudon County Board of Supervisors, et al., No. 16-cv-932 (JCC/IDD) (E.D.V., 2017)*



The screenshot displays a Facebook profile for Chair Phyllis J. Randall. The top navigation bar includes the Facebook logo and login fields for 'Email or Phone' and 'Password', with a 'Log In' button and a 'Forgot account?' link. The profile picture shows a person in a uniform, and the cover photo depicts a group of diverse children. The left sidebar lists navigation options: Home, About, Endorsements, Photos, Videos, Posts, and Community. The main content area shows the 'About' section with tabs for 'CONTACT INFO' and 'STORY'. Under 'CONTACT INFO', the following details are listed: a phone number (703) 777-0204, the name Chair Phyllis J. Randall with a 'Send Message' button, an email address phyllis.randall@loudoun.gov, and a website URL https://www.loudoun.gov/chair. A 'MORE INFO' link is also present.

# Government-Operated Social Media Platforms

## *Brian C. Davison vs. Loudon County Board of Supervisors, et al., No. 16-cv-932 (JCC/IDD) (E.D.V., 2017)*

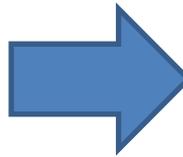
- Defendant acted under color of state law in maintaining her “Chair Phyllis J. Randall” Facebook page
- Banning Plaintiff from her page for 12 hours violated plaintiff’s right of free speech
- County not held liable, but Board Chair held liable in her individual capacity
- No injunctive relief, but declaratory judgment granted

# Social Media as Non-Public Space

- Social media platform solely for government's speech

## Example

Facebook page for providing information with no option for any public discussion or comments



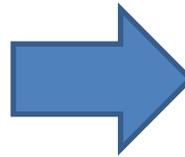
**First amendment does not apply**

# Social Media as *Limited* Public Forum

- Social media with some limits on public discourse

## Example

Public official's  
twitter account on  
which he/she  
discusses public  
business

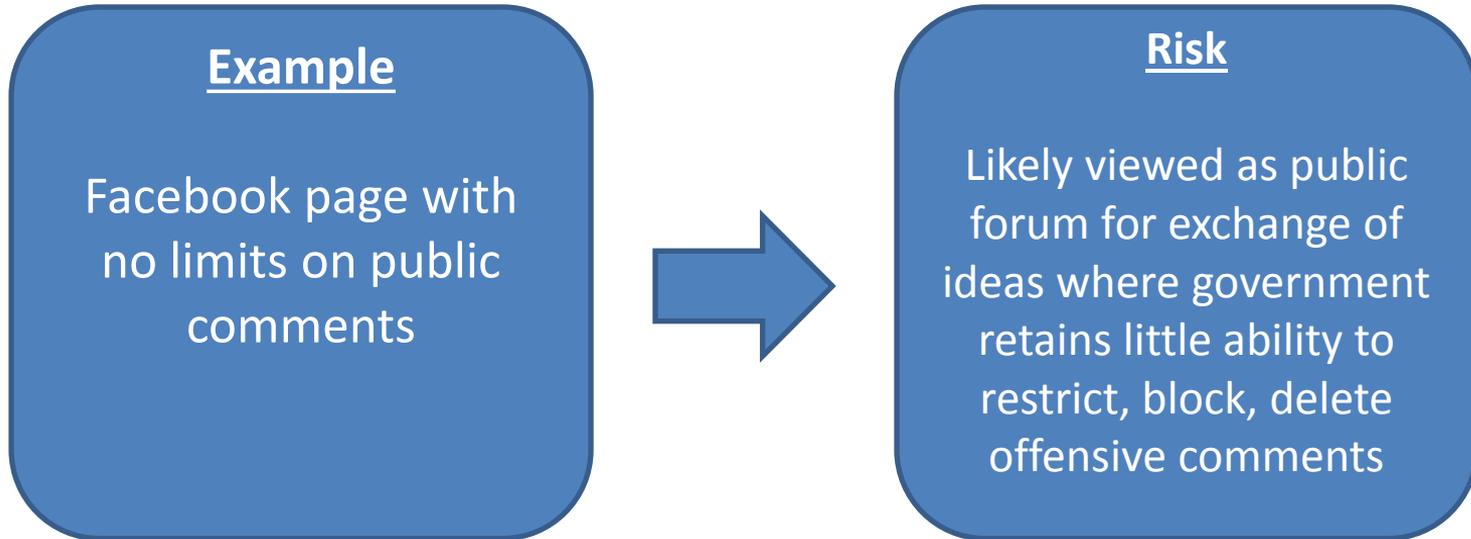


## Challenge

Reasonable and  
viewpoint neutral  
restrictions and  
enforcing limitations  
in evenhanded fashion

# Social Media as *Designated* Public Forum

- Social media with no limitations and no policy in place



# What Should Cities Do?

- Carefully consider if a city wants social media platforms to serve as town halls for public comment and expression



**Courts unlikely to tolerate most restrictions of the speech that occurs**





# California Public Records Act

# California Public Records Act (CPRA)

- Public records
  - “any writing containing information relating to the conduct of the public’s business, owned, used, or retained by any state or local agency regardless of physical form or characteristics”
- CPRA grants any person
  - Access to public records held by state and local agencies unless an exception applies



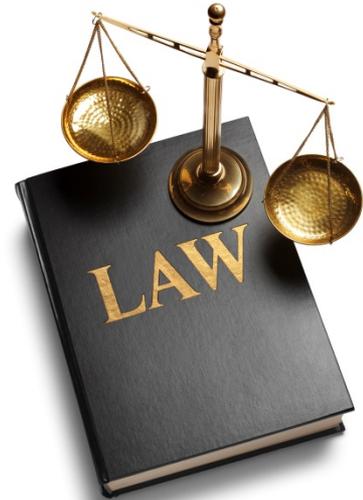
# California Public Records Act (CPRA)

- Today's Challenge
  - Enacted in 1968 – long before prevalence of electronic communications
  - Until 2017, unclear whether CPRA applied to personal accounts



# California Public Records Act (CPRA)

- In 2017, California Supreme Court addressed whether CPRA extends to personal accounts
- *City of San Jose v. Superior Court*, 2 Cal. 5th 608 (2017)



# *San Jose Case*



# San Jose Case – the issue and holding

- Requester sought emails and text messages sent and/or received on private devices used by mayor and members of city council

**City's position** = these were not public records

**Holding:** CPRA extends to otherwise “public records” even if sent through personal accounts



# San Jose Case – the Court’s reasoning

- **“Local agencies”**
  - Can only act through individuals
- **“Public records”**
  - Do not lose public character because employee “takes them out the door”
- **As policy matter**
  - Allowing public employees to avoid CPRA by simply “clicking” into a personal account would undermine CPRA



# San Jose Case – how Court addressed privacy

- Court recognized privacy concerns of subjecting personal accounts to CPRA
- Case-by-case basis, not categorical
- No particular search method is required or adequate
- **Court's Guidance**
  - Inform employees of CPRA request
  - Allow them to search their own records for responsive content
  - Approved Washington Supreme Court's approach – employees must submit affidavit



# Implications of *San Jose*

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- Increased risk of CPRA liability
  - Which carries attorneys' fees







# Open Questions After *San Jose*

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Court did not prescribe **specifics for performing defensible searches** on personal devices and accounts.

Identifying “employees in question”?

Training and ability to run searches?

Policing employee searches and representations?



# Open Questions After *San Jose* (cont.)

## *How are State Records Retention Requirements Affected?*

**State law governs:** Generally, must retain for 2 years

**Options:** Prohibit use of personal accounts  
or train employees to comply with retention rules

**Question:** Treat transitory social media differently?



# Practice Tips

- ✓ **Ensure employees/officials understand** that use of personal accounts and devices does not shield CPRA
- ✓ **Consider requiring use of government accounts** and devices for all official business
- ✓ **Develop procedures** for conducting defensible searches:
  - Notify employees of a request
  - Determine if they use personal accounts and to what extent
  - Train on searching and keeping record of compliance



# Presenters



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