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PRESS RELEASE

NRSC asks Supreme Court to respect and preserve the First Amendment rights of elected officeholders using social media platforms

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Washington, DC – Wiley Rein LLP submitted an amicus brief in the U.S. Supreme Court on behalf of the NRSC (the National Republican Senatorial Committee) in a pair of cases that will decide whether social media activity by public officials constitutes state action. In its brief, the NRSC explained that social media platforms are one of the most important places for political candidates to exercise their core First Amendment rights and that clarity is necessary to avoid chilling protected expression by officeholders running for reelection.

Both cases arise from suits against officeholders who removed third-party content from their social media communications. In *O'Connor-Ratcliff v. Garnier*, the Ninth Circuit applied a totality of the circumstances analysis used by several circuits to hold that two elected school board members were engaged in state action when they deleted hundreds of negative and repetitive comments about school board policy posted to their pages by other social media users and eventually blocked the users from making further posts. By contrast, in *Lindke v. Freed*, the Sixth Circuit held that a city manager was not engaged in state action when he blocked a user that posted comments critical of his job performance on his Facebook page because that activity was not dependent on the city manager's official authority and was not taken pursuant to his official duties.

The NRSC's brief argues the First Amendment should shape the Supreme Court's resolution of this circuit split. "In deciding whether social media activity by a public official constitutes state action, th[e]

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[Supreme] Court must respect and preserve the First Amendment rights of elected officeholders," the brief says. "Just as an incumbent candidate may hold a campaign rally that promotes his official accomplishments without transforming that event into state action, an incumbent candidate may also discuss his official acts on a non-government resourced social media page without that page becoming state action, either." As a consequence, the brief says, "the candidate can remove" messages he does not like "from his social media communications."

The NRSC's brief also argues that the Supreme Court should adopt a clear test so ambiguity does not chill protected activities: "Incumbent candidates must be permitted to shape their electoral advocacy on social media without fear that a costly court battle under a vague and unpredictable standard could hinder their campaign." Endorsing the test used by the Sixth Circuit, the brief argues that "[s]o long as an officeholder's social media account is not operated pursuant to any governmental authority or duty, activity on the account is not state action."

The brief was authored by Wiley partner and Election Law & Government Ethics Practice chair Michael E. Toner, partner Brandis L. Zehr, partner Jeremy J. Broggi, and associate Boyd Garriott. Mr. Broggi served as counsel of record.