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Page v. Lexington County School District One

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PAGE V. LEXINGTON COUNTY SCHOOL DISTRICT ONE

In *Page v. Lexington County School District One*,[1] the United States Court of Appeals for the Fourth Circuit held Lexington County School District One's (School District) dissemination of politically charged messages intended to defeat pending legislation in the South Carolina General Assembly through emails, links on its web site, and various other media was government speech.[2]

The theory that "the Government's own speech . . . is exempt from First Amendment scrutiny"[3] is a relatively recent development in American jurisprudence.[4] The government may express support for policies and initiatives that further its own interests without the agreement of all its constituents.[5] As the theory goes, "Government must speak if it is to govern. . . . 'This is particularly true in representative democracies, where governments' speech must consist not just of information but also of explanation, persuasion, and justification to a polity tethered to the policies and preferences acted upon by its representatives.'"[6]

As such, the government is entitled to take "legitimate and appropriate steps to ensure that its message is neither garbled nor distorted."[7] However, the government is not permitted to regulate private expression based on the speaker's viewpoint without running afoul of the First Amendment.[8] Although the First Amendment protects the private speech of all individuals regardless of viewpoint,[9] in the case of speech funded by a compelled subsidy, "[c]itizens may challenge compelled support of private speech, but they have no First Amendment right not to fund government speech."[10] Thus, ascertaining whether

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1. 531 F.3d 275 (4th Cir. 2008).

2. *Id.* at 288.

3. *Id.* at 280 (quoting Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005)) (internal quotation marks omitted).

4. *See, e.g.*, Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 305 F.3d 241, 245 (4th Cir. 2002) (en banc) (Luttig, J., concurring) ("[T]he 'government speech' doctrine is still in its formative stages, and, as yet, it is neither extensively nor finely developed.").

5. *See* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000).

6. Helen Norton, *Government Workers and Government Speech*, 7 FIRST AMEND. L. REV. 75, 76–77 (2008) (quoting Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380 (2001)).

7. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) (citing Rust v. Sullivan, 500 U.S. 173, 198–200 (1991)).

8. *Id.* at 828–29.

9. *See id.* at 828 (citing Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)).

10. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005). Despite the broad holding in *Johanns*, a federal district court in Indiana recently held that the government speech doctrine did not protect the government's speech "in retaliation to a citizen's exercise of his First Amendment rights." Foxworthy v. Buetow, 492 F. Supp. 2d 974, 986 (S.D. Ind. 2007). The general consensus among courts and commentators is that the government's right to speak does not rise to the level of a First Amendment right. *See* Norton, *supra* note 6, at 78. *But see* David Fagundes, *State Actors as*

speech is private speech or government speech is a critical inquiry as a court determines whether and how to apply the First Amendment.[11]

As the Fourth Circuit illustrated in the *Page* case, when determining whether to categorize speech as the government's own speech, courts focus on the ownership and control the government exercises over the message and consider several factors including the purpose of the speech, the government's editorial control, the actual speaker, and the person or entity who bears the ultimate responsibility for the speech's content.[12] The government speech doctrine applies not only to messages written or broadcast exclusively by the government,[13] but also to speech created by third parties for the government when "the government sets the overall message to be communicated and approves every word that is disseminated."[14] Thus, the government need not be the original or sole author of the expression at issue, the "'literal speaker,'"[15] or even identify itself as the source[16] of the challenged expression for it to be recognized as government speech and placed beyond the constraints imposed by the First Amendment.[17]

Randall Page was a supporter of the Put Parents in Charge Act (PPICA or the Act), a legislative proposal designed to offer tax credits to parents who homeschooled their children or who sent their children to private or parochial schools.[18] The School District, a government entity,[19] opposed PPICA, anticipating that the Act would redirect funding from public schools to private and parochial schools, thus "undermining the State's commitment to a free, quality public education for all South Carolina children."[20]

To campaign against passage of the PPICA, the School District disseminated messages via its web site, email, and newsletters to students, parents, faculty, and staff,[21] calling the Act "misguided legislation,"[22] a "Voucher In Disguise,"[23]

First Amendment Speakers, 100 NW. U. L. REV. 1637, 1640 (2006) (arguing that the government may have limited First Amendment rights).

11. *See* Page v. Lexington County Sch. Dist. One, No. 3:06-249-CMC, 2007 WL 2123784, at *5 (D.S.C. July 20, 2007), *aff'd*, 531 F.3d 275 (4th Cir. 2008).

12. *Page*, 531 F.3d at 281 (citing Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 792–93 (4th Cir. 2004)). The Fourth Circuit first adopted the four-factor test for government speech in *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618–19 (4th Cir. 2002).

13. *See Johanns*, 544 U.S. at 559 (quoting Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000)).

14. *Id.* at 562.

15. *Sons of Confederate Veterans*, 288 F.3d at 618 (quoting Wells v. City & County of Denver, 257 F.3d 1132, 1141 (10th Cir. 2001)).

16. *Johanns*, 544 U.S. at 564 n.7.

17. The government's speech could nevertheless be constrained by other constitutional principles, such as the Establishment Clause. *See, e.g.*, Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1132 (2009) (stating that the Establishment Clause is a limitation on government speech).

18. *See* Page v. Lexington County Sch. Dist. One, 531 F.3d 275, 277 (4th Cir. 2008).

19. *See* S.C. CODE ANN. § 59-17-10 (2004).

20. *Page*, 531 F.3d at 282.

21. *Id.* at 279–80.

and a "Clear Abandonment of Our Public Schools With No Accountability."[24] A Lexington Elementary School memo stated that "PUTTING PARENTS IN CHARGE (aka Education Abandonment Act) is a potentially dangerous piece of legislation;"[25] the School District sent emails stating that proposed changes to the PPICA "ma[de] a bad bill worse"[26] and urged recipients to call a radio show at a specific date and time and join other opponents of the bill at the South Carolina State House to speak with elected officials.[27]

When Page discovered the School District had included information opposing the PPICA on its web site and had distributed materials criticizing the proposed legislation, he requested from the district superintendent the opportunity to disseminate pro-PPICA materials via the same communication vehicles—the district's web site, email, and newsletters—that the district had used to disseminate the anti-PPICA material.[28] The superintendent denied Page's request, and Page filed suit alleging that the School District's refusal to allow him access to its media represented a viewpoint-based denial of his right to free speech.[29] Page claimed the School District's inclusion of nongovernment materials on its web site, email system, and Parent-Teacher-Student Association (PTSA) newsletter created public fora for discussion of the PPICA and that the First Amendment prohibited the School District from denying Page access to the fora because of his viewpoint.[30] Specifically, Page contended the School District did not maintain sufficient control over its channels of communication to render the communication government speech and that only greater control of the speech would have entitled the district to deny Page access to its media.[31]

The district court granted summary judgment in favor of the School District and concluded the information on its web site and email system was government speech not subject to forum analysis.[32] The district court concluded that although the School District was not the speaker in the PTSA newsletter, which precluded

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22. Amended Complaint, Exhibit C, Page v. Lexington County Sch. Dist. One, No. 3:06-cv-00249-CMC (D.S.C. 2007), *aff'd*, 531 F.3d 275 (4th Cir. 2008).

23. *Id.*

24. *Id.*

25. *Id.* at Exhibit D.

26. *Id.* at Exhibit F.

27. *Id.* at Exhibit G. The email stated a meeting time and place and instructed people arriving late to join the group "in the lobby of the State House." *Id.* This email also included an attachment insinuating that implementation of a voucher program in Florida resulted in a school being "accused of physically abusing its students" and "investigat[ed] for using outdated textbooks or none at all." *Id.* The email also stated that "[t]he people . . . behind the funding for this risky idea are from Michigan and Virginia and who knows where else. But if the idea is so good, then maybe they should try it on their own children first." *Id.*

28. Page v. Lexington County Sch. Dist. One, 531 F.3d 275, 279 (4th Cir. 2008).

29. *See* Complaint at 7, Page v. Lexington County Sch. Dist. One, No. 3:06-cv-00249-CMC (D.S.C. 2007), *aff'd*, 531 F.3d 275 (4th Cir. 2008).

30. *Page*, 531 F.3d at 279–80.

31. *Id.* at 283.

32. *See id.* at 280.

the court from characterizing the newsletter as government speech, the newsletter was a limited public forum.[33] However, Page was not "within the class of persons (or entities) for whose benefit the [PTSA] newsletter forum was created."[34] Thus, the district court held Page was not entitled to access any of the School District's media.[35]

Page appealed to the Fourth Circuit and argued the District Court erred by failing to find that public fora existed and that Page was prohibited from expression in those fora based on the School District's viewpoint discrimination.[36] The School District maintained, as it had throughout the litigation, that its speech was government speech and that it had no obligation to permit Page to use its system of communication to express his opinion.[37]

Regarding the hyperlinks on the School District's web site, Page contended the School District did not maintain the requisite control over the links sufficient to meet the second prong of the *Johanns v. Livestock Marketing Association* test.[38] Page argued the School District lacked control because the hyperlinked web sites could alter their content without the School District's knowledge or prior approval, thus precluding the School District from approving third-party statements prior to publication.[39] As a result, third-party individuals had access to the School District's methods of communication such that the School District was sponsoring third-party speech without exercising ultimate control of the speech.[40] Page argued this lack of control created a limited public forum, to which the School District could not constitutionally deny him access solely because of his pro-PPICA viewpoint.[41]

The Fourth Circuit applied the *Johanns* test to determine whether the School District's speech on its web site and email system was government speech.[42] The court concluded the present case was "strikingly analogous" to *Johanns*[43]: "[I]n both situations, the government established the message; maintained control of its content; and controlled its dissemination to the public. Moreover, in both situations, the form of the message was, in part, adopted by the government from private sources."[44] Consequently, the court rejected Page's argument and specifically rejected his underlying assumption that the hyperlinks to external third-party web sites incorporated content from those web sites into the School

33. Page v. Lexington County Sch. Dist. One, No. 3:06-cv-00249-CMC, 2007 WL 2123784, at *8–9 (D.S.C. July 20, 2007), *aff'd*, 531 F.3d 275, 288 (4th Cir. 2008).
34. *Id.* at *9.
35. *Page*, 531 F.3d at 280.
36. *Id.*
37. *See id.*
38. *See id.* at 283.
39. *Id.* at 283–84.
40. *Id.* at 284.
41. *Id.* at 283.
42. *Id.* at 285.
43. *See id.* at 282.
44. *Id.*

District's own web site.[45] Rather, the court found the School District had never incorporated material from a hyperlinked web site but instead had only alerted its visitors to other web sites with opinions on school vouchers.[46] The court concluded that "nothing on the School District's website as it existed invited or allowed private persons to publish information or their positions there so as to create a limited public forum"[47] and that the School District maintained complete control over the hyperlinks on its web site.[48] As such, the speech was wholly government speech and did not create a public forum.[49]

Page also argued the School District created a limited public forum for discussion of the PPICA by disseminating third-party messages via the School District's email system[50] and that the First Amendment proscribed the School District's discrimination based on the speaker's viewpoint.[51] The Fourth Circuit rejected Page's claim that the School District created a forum, reasoning the School District had distributed the information only after it had read and agreed with the information's content.[52] Further, the School District did not disseminate information at the request of third parties, and only the School District's employees and officials had access to the email system.[53]

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45. *Id.* at 284.

46. *Id.*

47. *Id.*

48. *Id.* at 284–85.

49. *Id.* at 284. The court did, however, note that the situation might be different "[h]ad a linked website somehow transformed the School District's website into a type of 'chat room' or 'bulletin board' in which private viewers could express opinions or post information." *Id.*

Notably, several courts have upheld challenges to government involvement in political activity on the basis of a state statute, rather than on the First Amendment. *See* Kidwell v. City of Union, 462 F.3d 620, 625 n.3 (6th Cir. 2006) (citing D.C. Common Cause v. D.C., 858 F.2d 1, 11 (D.C. Cir. 1988)); Mountain States Legal Found. v. Denver Sch. Dist. No. 1, 459 F. Supp. 357, 361 (D. Colo. 1978); Stanson v. Mott, 551 P.2d 1, 10 (Cal. 1976); Citizens to Protect Pub. Funds v. Bd. of Educ., 98 A.2d 673, 677 (N.J. 1953). Although Page failed to properly plead the matter on appeal, he raised the claim to the district court that the School District's use of its resources to oppose the legislation violated state law. Page v. Lexington County Sch. Dist. One, No. 3:06-cv-00249-CMC, 2007 WL 162178, at *14 (D.S.C. Jan. 17, 2007), *aff'd*, 531 F.3d 275 (4th Cir. 2008). The district court did not consider the question. *Id.*

50. *Page*, 531 F.3d at 285.

51. *See id.* In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), the Supreme Court held that the First Amendment protection for freedom of expression does not uniformly apply in every avenue of communication. *See id.* at 44. The availability of protection depends on the location's particular characteristics. *Id. Perry Education Ass'n* presented the now familiar tripartite forum classification system: public fora, nonpublic fora, and limited public fora. *See id.* at 45–46. Public fora are those places, such as sidewalks and parks, that have traditionally been available for speech and assembly. *Id.* at 45 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)). Limited public fora are places the government has made available for expression by particular groups or for particular purposes. *See id.* at 46. The government can place reasonable restrictions on speech expressed in both public fora and limited public fora, so long as those restrictions do not discriminate on the basis of a speaker's viewpoint. *Id.*

52. *See Page*, 531 F.3d at 285.

53. *Id.*

Lastly, Page contended that several PTSA newsletters disseminated by individual schools created a public forum for discussion of the PPICA because they included an article opposing school vouchers written by Dr. Jim Ray, who was not affiliated with the School District.[54] At issue was whether the School District, by presenting third-party messages, created a limited public forum for discussion of the PPICA.[55] The Fourth Circuit held the newsletter was not government speech because it came from the school's Parent Teacher Student Association, "a third-party nongovernment entity."[56] The court noted that "[i]t may be true that by editorially controlling the newsletter, the individual school may have created a limited public or nonpublic forum because the speech in the PTSA newsletter was not the government's own speech, but speech of the Association."[57] Despite this, the court held the School District did not impermissibly exclude Page from any forum created because he would not otherwise have had access to the PTSA newsletter.[58]

Although the court acknowledged that the School District's communications amounted to "grass-roots lobbying,"[59] it rejected Page's contention that governmental advocacy on pending political matters is not protected under the government speech doctrine.[60] The court determined that the School District directed its campaign against the PPICA at members of the state legislature, the campaign was subject to the accountability of the democratic process and presented no other democratic accountability concerns that would weigh against extending the protection of the government speech doctrine to this speech.[61] The court noted its conclusion was supported by the rulings of other circuit decisions that protected governmental advocacy for pending ballot measures.[62]

The *Page* decision is significant because it addresses two developing areas of law: web sites as fora and the government speech doctrine. Although the Fourth Circuit's opinion is neither a great departure from nor a broad extension

54. *Id.* at 279, 285.
55. *See id.* at 283.
56. *Id.*
57. *Id.* at 285–86
58. *See id.* at 286.
59. *Id.* at 287.
60. *See id.* at 288.
61. *See id.* at 287–88.
62. *Id.* at 287 (citing Kidwell v. City of Union, 462 F.3d 620, 626 (6th Cir. 2006)) (considering whether a city's support of or opposition to various ballot referenda regarding land annexation, water and sewer services, and tax levies was government speech); Cook v. Baca, 95 F. Supp. 2d 1215, 1227–29 (D.N.M. 2000) (applying the government speech doctrine to the mayor's message supporting a local ballot referendum), *aff'd*, 12 F. App'x 640, 641 (10th Cir. 2001) (per curiam); Ala. Libertarian Party v. City of Birmingham, 694 F. Supp. 814, 821 (N.D. Ala. 1988) (holding that the First Amendment does not prohibit government speech in support of ballot initiatives).

of existing precedent,[63] *Page* furthers the development—and perhaps the debate—in both areas.

Page addressed the impact of web site technology on the creation of a public forum creation under *Johanns*'s control requirement. The court in *Page* determined that the School District had retained so much control over the web site that it was not a forum at all—it was merely an outlet for the government's expression.[64] Because the School District did not post documents on its web site at the request of third parties and only posted documents it determined completely coincided with its established anti-PPICA message, the court found that the speech was attributable to the government alone.[65] The determination that the School District had maintained sufficient control of its web site—despite hyperlinks to nongovernment web sites—was critical to the School District's success. The court rejected Page's underlying assumption that the hyperlinked content was incorporated into the School District's expression.[66] By simply providing a hyperlink on its web site, the School District did not incorporate any content from the hyperlinked web site into its own web site, rather, the hyperlink was analogous to a citation.[67] The court noted the disclaimer on the School District's web site, coupled with the diligent oversight of all hyperlinked materials, protected the School District from any claim that it had created a public forum for discussion.[68]

In *United States v. American Library Ass'n*,[69] the Supreme Court declined to apply forum analysis to the computer terminals in public libraries on the grounds that libraries provided Internet access to library patrons like a virtual stack of books to promote the availability of additional information, rather than for communicative or expressive purposes.[70] The Court ruled there was no First

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63. *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005) ("When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine . . . ."); *Kidwell*, 462 F.3d at 626 ("Because [the defendant's] speech in this case was germane to its role as governor, plaintiffs have failed to show that democratic legitimacy is threatened or that [the defendant's] compelled subsidy of its speech violates the Constitution."); Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 799 (4th Cir. 2004) (finding a violation of the First Amendment when "[t]he State has opened a limited forum for expression, then entered that forum as a covert but dominant speaker, advocating for one viewpoint . . . without political accountability and without authorizing the expression of the opposing viewpoint."); Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 618–19 (4th Cir. 2002) (relying on factors established by sister circuits to determine the scope of the government speech doctrine); *Cook*, 95 F. Supp. 2d at 1226 (D.N.M. 2000) ("The city only could not have discriminated on the basis of viewpoint if the denied message was otherwise includible in the forum's limitations, and here, because the message came from a private group and not the mayor, the message was not otherwise includible.").

64. *Page*, 531 F.3d at 285.

65. *See id.* at 284–85.

66. *Id.* at 284.

67. *Id.*

68. *Id.*

69. 539 U.S. 194 (2003).

70. *Id.* at 206–07.

Amendment violation when libraries installed obscenity filtering software on publicly available computers.[71] However, not every case that has considered the First Amendment in the context of the Internet has determined that hyperlinks on a web site would never constitute a public forum.[72] Before the district court, Page relied on *Putnam Pit, Inc. v. City of Cookeville*,[73] where the Sixth Circuit reversed summary judgment in favor of the City of Cookeville, which had refused to place a hyperlink to the plaintiff's web site on its web site.[74] The Sixth Circuit applied traditional forum analysis to the city's web site as government property.[75]

The Fourth Circuit's opinion in *Page* did not address whether the government speech doctrine is subject to any limitations. Although the School District had used the email system to circulate an article by a third party author, the court reiterated that the government need not be the literal speaker for the speech to be government speech and applied the existing government speech framework to the facts of *Page*.[76] However, the existing framework has proven less than satisfactory, particularly to some members of the Supreme Court. Justice Souter's dissent in *Johanns*, joined by Justice Stevens and Justice Kennedy, argued that courts should not classify speech as a government speech "unless the government . . . put[s] that speech forward as its own. Otherwise there is no check whatever on government's power . . . ."[77] Some commentators have advocated the government speech doctrine should apply only when it is clear the government is the speaker,[78] while others have argued "[t]he Supreme

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71. *Id.* at 211–12. Still, there are some who urge for the application of the public forum analysis to web sites. *See, e.g.*, R. Johan Conrod, Note, *Linking Public Websites to the Public Forum*, 87 VA. L. REV. 1007, 1009 (2001) (advocating for courts to consider government web sites as public fora). Other commentators offer varying solutions to the unique complications resulting from the convergence of expanding web technology and the realm of free speech policy. *See, e.g.*, Ronnie Cohen & Janine S. Hiller, *Towards a Theory of Cyberplace: A Proposal for a New Legal Framework*, 10 RICH. J.L. & TECH. 2, 58 (2003) (suggesting a "place of public communication" standard for web sites, which balances common law tort doctrine and free speech concerns); Pearson Liddel, Jr. et al., *This Little Piggy Stayed Home: Accessibility of Governmentally Controlled Internet Marketplaces*, 15 ALB. L.J. SCI. & TECH. 31, 53 (2004) (positing that the Internet should not be subject to forum analysis, but rather should be subject to "nonlegal categories").

72. *See, e.g.*, Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 842 (6th Cir. 2000) (applying traditional forum analysis to a government web site).

73. *Id.* at 834.

74. *Id.* at 839, 846.

75. *Id.* at 842 (stating that the same analysis applies whether a forum is "metaphysical" or "spatial or geographic") (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995)).

76. Page v. Lexington County Sch. Dist. One, 531 F.3d 275, 282 (4th Cir. 2008).

77. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 571 (2005) (Souter, J., joined by Kennedy, J., and Stevens, J., dissenting).

78. *See, e.g.*, Gia B. Lee, *Persuasion, Transparency and Government Speech*, 56 HASTINGS L.J. 983, 988–89, 1005 (2005) (applying social science research to people's perception of government speech and arguing that government participation should be transparent); Case Comment, *Government Speech Doctrine—Compelled Support for Agricultural Advertising*, 119

Court should consider shifting its focus from who is speaking to what rights, if any, are implicated in a particular arrangement."[79]

The content of the messages promulgated by the School District in *Page* is unsettling. While none of the statements were clearly false, some were gross extrapolations that resembled a political pundit's script rather than an informational pamphlet critical of the PPICA or school vouchers.[80] The Fourth Circuit has not yet considered whether an audience should be entitled to rely on the veracity of the government's speech. In determining the proper limits, if any, to impose on the government's expression, the Fourth Circuit should consider whether the government as a speaker should be held to a higher standard of truthfulness than individuals. In *New York Times Co. v. Sullivan*,[81] the Supreme Court declared that "[t]he constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered."[82] The Court held that "half-truths," "misinformation,"[83] and "defamatory content"[84] are protected by the broad sweep of the First Amendment because protecting free expression and open debate in the democratic process outweighs the risk of falsehood.[85] Given the magnified potential that the government as a speaker could distort issues in the marketplace of ideas,[86] courts should carefully consider whether to lower the tolerance for political or partisan advocacy when the government is the speaker.

As *Page* demonstrates, government speech is a relatively undeveloped doctrine in constitutional jurisprudence; constantly evolving forms of technology, communication, and expression only increase the need for courts to develop fully the proper framework. As the Fourth Circuit considers the proper shape that the developing government speech doctrine should take, it should also consider whether the government's identity as the speaker should be transparent and whether to hold the government to a higher standard of veracity.

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HARV. L. REV. 277, 286 (2005) (arguing that accepting the transparency requirement suggested in Justice Souter's dissent would prevent "feedback loops and combat entrenchment").

79. Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2432 (2004) (arguing that the "germaneness requirement" from the compelled speech doctrine should apply to the government speech doctrine). This Note predated *Johanns*.

80. *See supra* text accompanying notes 21–27.

81. 376 U.S. 254 (1964).

82. *Id.* at 271 (quoting NAACP v. Button, 371 U.S. 415, 445 (1963)).

83. *Id.* at 273 (quoting Pennekamp v. Florida, 328 U.S. 331, 342, 343 n.5, 345 (1946)).

84. *Id.*

85. *Id.* at 272 (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942)).

86. *See* Lee, *supra* note 78, at 1004.

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