SOCIAL MEDIA AND THE FIRST AMENDMENT

GUIDANCE FOR ARKANSAS MUNICIPALITIES

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FOREWORD FROM THE GENERAL COUNSEL

Nowadays, many cities and towns use social media to connect and communicate with the citizens. But, as with anything else, there are things cities and towns should know before using any type of social media. Because the use of Facebook, Twitter (now X), and other social media platforms have grown substantially, there are many questions about how cities and towns can manage government pages without violating a citizen's First Amendment right to free speech. Additionally, many officials have concerns about their own First Amendment rights when managing private, non-government social media accounts in their personal capacity as citizens

Unfortunately, there is not a Supreme Court case that answers every question that cities and towns will face when operating a social media page or account, but this guide and sample policy will help officials and employees understand how municipalities can use social media pages without violating someone's rights. When cities and towns know what speech is protected or unprotected, and what actions can be taken on Facebook and other platforms, cities and towns will better know how to avoid lawsuits. While some uncertainty remains, the guidance below will help make wise choices for you, your municipalities, and your citizens.

It is my privilege to serve the municipalities of Arkansas, and if you need any more guidance do not hesitate to contact the Arkansas Municipal League.

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SOCIAL MEDIA GUIDANCE

Social media pages have become one of the most important venues for constituent engagement with government officials in modern society. Many municipalities and public agencies operate social media accounts that are managed by officials and employees to notify the public about public matters. Additionally, many municipal officials and employees manage private social media accounts in their personal capacities alongside the government pages and accounts that they manage. Understanding how the law applies to each different type of page, or "hybrid" pages that intermingle public and private speech is important because while citizens do not forfeit their own First Amendment rights when they enter into public service, they must also ensure that they refrain from infringing on the First Amendment rights of citizens through actions that are attributable to the city or town. Public officials and employees must be diligent in ensuring a clear delineation between personal, private speech and public, government speech with respect to social media and the First Amendment.

Clarifying Personal vs. Government Social Media Accounts

Since the inception of social media, officials have struggled without clear legal guidance as to when their words represent government speech or private citizen speech. When a public official speaks on behalf of the government on a social media page that is maintained for official purposes, the public's First Amendment rights must be respected and protected. However, when a public official is speaking as a private citizen on a social media page maintained for private purposes, the officials themselves enjoy First Amendment protections, and public access and commentary may be limited or denied altogether. However, it is not uncommon for a newly elected or appointed official to transition a personal account into a public or government account once they take office, and until 2024, the law was unclear as to how these hybrid accounts should be governed.

Fortunately, the Supreme Court of the United States (SCOTUS) has issued an opinion that provides guidance on how to determine if an individual's social media page is a protected extension of their private lives or a government page related to their official duties that amounts to a public forum. In Lindke v. Freed[1], the court held that social media posts by an individual who is a public official or employee may only be considered as government action if the official (1) possesses actual authority to speak for the government, and (2) was actually purporting to speak for the government when communicating on social media.

Under this framework, an official's words and actions on social media are not attributable to the government unless the official has been given the authority to speak on behalf of the municipality by a statute, ordinance, or regulation, or when the municipality has established actual authority through custom or usage. Keep in mind custom and usage can establish actual authority where there is a history of prior officials speaking on the city or town's behalf via social media for such an extended period of time that their authority to do so is considered permanent and well settled.[2] Further, he or she must have actually purported to be speaking for the government. Where an official or employee has labeled the social media page with a disclaimer that the page and the opinions therein were personal and not in furtherance of official duties, the official is entitled to a rebuttable presumption that the page is being managed in a personal, non-governmental capacity.

[1] 601 U.S. 187 (2024).
[2] *Id.* at 200-01.

Mixed Use Accounts

However, and again, the legal waters are muddied when individuals with actual authority manage pages that combine personal speech and government speech. Officials and employees are advised to avoid these hybrid social media pages and create a clear separation between private and government speech. Where an individual operates a private social media page, he or she may block other users and/or delete comments as a protected First Amendment activity. As further discussed below, where an official or employee blocks users or deletes comments on a government account, he or she may face liability for a violation of a citizen's First Amendment rights—and the same is true of a social media account that blends private and government speech. In such a case, the court would have to examine the individual post that a comment was deleted from or every post on an account that had blocked other users from seeing the posts.

Municipalities should develop a clear policy regarding actual authority to speak for the government. Where there is an unclear history that could give credence to a custom or usage of actual authority, the policy should make clear that the policy supersedes. The most powerful tool that this opinion gives cities is the ability to defend itself and its officials/employees through the control of actual authority.

Officials and employees with actual authority must ensure that personal social media pages conspicuously and unambiguously state that they are private to avail themselves of the rebuttable presumption that the account is not a government account. Officials and employees with actual authority should maintain separate public and personal accounts, and that distinction must be made clear. To that extent, an official should never originate content related to their position on their personal page. Content from a public page should only be shared on the personal page without additional commentary. This will ensure that all citizens have access to the public page and can comment there.

If an account is mixed use, only delete comments on posts that are unrelated to your official position. The court stated that deletion of another person's comments will only matter in the context of the post from which it was deleted. However, a page-wide ban will require the court to look at every post on the entire page and analyze those them individually because the citizen was unable to post on anything.

Policy Considerations for Official Government Accounts

In a number of recent cases, courts have held that the spaces on government officials' social media pages where members of the public can comment are subject to the First Amendment and, consequently, that removing comments posted by members of the public may subject government officials to liability.[3] This guidance provides an overview of what types of public comments may permissibly be removed from municipality- operated social media pages and provides a model policy that a municipality may use as a template. This guidance applies equally to social media accounts operated by a municipality, a municipal department or agency, and a municipal official for municipal business.

General Limitations on Public Participation on Social Media Pages

The degree to which the First Amendment restrains a municipality from removing comments made by members of the public depends on how the municipality sets up its social media page. A municipality is under no obligation to permit or invite members of the public to comment on its

[3] *See, e.g., Knight First Amendment Inst. v. Trump*, 928 F.3d 226 (2d Cir. 2019); *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019).

social media page. So long as the social media platform (e.g., Facebook, Twitter (now X), YouTube, etc.) provides a mechanism for prohibiting all comments, a municipality may choose to do so.

Although SCOTUS has not yet ruled on the issue, many of the lower courts that have addressed this issue have found that once a municipality permits members of the public to comment in interactive spaces on its social media page, then the First Amendment imposes limitations on removal of those comments. Once a municipality permits public comments, it generally cannot remove comments based on the views or opinions expressed in posts made by members of the public. This is known as "viewpoint discrimination." Viewpoint discrimination is never permissible, no matter what other limitations are imposed on a municipality's social media page.[4] This remains true even if municipal officials find an individual's views unfair, objectionable or offensive.[5]

A municipality may, however, impose subject matter (or "content-based") limitations on what may be discussed on its social media page.[6] For example, the model policy limits the page to matters concerning the municipality's governance and events. When a municipality limits its own use of the social media page in this manner, it may correspondingly limit posts by members of the public in the same way. When such a subject-matter limitation is in place, the municipality may then be permitted to remove comments that are not related to the listed topics, much as it could cut off a speaker at a public meeting who insisted on speaking about an irrelevant matter.[7]

Restrictions on subject matter must be made clear in advance, should be policed fairly and not arbitrarily, and should not merely serve as a pretense for viewpoint discrimination.[8] If a limitation is not announced in advance, removal of a comment because of its subject matter will likely be deemed a content-based restriction that violates the First Amendment unless "narrowly drawn to effectuate a compelling state interest."[9] This is a difficult test to satisfy. Additionally, failure to consistently enforce any subject matter limitations may give rise to a claim that the municipality is engaging in selective enforcement motivated by impermissible viewpoint discrimination.

Additional Categories of Comments that Municipalities May Restrict

In addition to limiting the subject matter discussed on a social media page, municipalities may also remove certain other categories of comments posted by members of the public. The most common categories are included in the model policy. Additionally, the following discussion categories are included to facilitate best practices in enforcement.

- *Comments that include sexual content or links to sexual content:* If the municipality-operated social media page limits the subject matter about which the public is invited to comment (for example, to the discussion of municipal policies and events as in the model policy), any

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[4]Of course, the fact that a comment contains a viewpoint does not protect it from being removed for other reasons. For example, a municipality may remove the following comment: "Because Mayor Smith is a bad mayor, I will run on stage and attack him at his press conference at City Hall tomorrow." Although this comment expresses a view (that Mayor Smith is a bad mayor), it can still be removed as a "true threat," as discussed below.

[5]*See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting that "debate on public issues. . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

[6]The following example illustrates the difference between a subject-matter (or "content-based") limitation and a viewpoint-based limitation. A policy that prohibits all discussion of college sports imposes a subject-matter limitation. A policy that prohibits only comments that discuss college sports in a negative way imposes a viewpoint-based restriction.

[7]*See, e.g., Green v. Nocciero*, 676 F.3d 748, 753-54 (8th Cir. 2012).

[8]*See Gerlich v. Leath*, 861 F.3d 697, 714 (8th Cir. 2017) ("Participants in a limited public forum, declared open to speech ex ante, may not be censored ex post when the sponsor decides that particular speech is unwelcome." (brackets and internal quotation marks omitted)).

[9]*Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)

sexual content or links to sexual content will likely be unrelated and therefore may be removed. Even where the social media page is not limited to certain subjects, sexually explicit material posted by a member of the public may still be removed if it is "obscene" or child pornography. Obscenity is content that (a) an average person would find appeals to the prurient interest, (b) depicts or describes, in a patently offensive way, sexual conduct, and (c) lacks serious literary artistic, political or scientific value.[10] Child pornography is content that depicts or appears to depict sexual performance and involves a minor.[11]

- *Comments that threaten any individual or incite violence:* Municipal officials may remove true threats from their social media pages. A true threat is a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another, and the recipient's reaction must be a reasonable one.[12] Likewise, a municipality may remove comments that call for "imminent" lawless action and are "likely to incite or produce such action."[13] Patently unrealistic threats and rhetorical support for lawless action more generally would not qualify as true threats or unprotected incitement.[14]

- *Solicitations of commerce, including advertisements or spam:* Much purely commercial speech—i.e., speech that merely proposes a commercial transaction—may be removable as irrelevant to the limited subject matter of a municipality's social media page. More broadly, speech that merely proposes a commercial transaction without providing other informative content may be restricted "if the restriction seeks to implement a substantial government interest, directly advances that interest, and reaches no further than necessary to accomplish its objective."[15] A municipality may have good reasons to remove purely commercial comments from its social media page, including ensuring the usefulness of the discussion on its page to its constituents.

- *Repetitive comments from the same individual:* Repetitive comments from the same individual can, in certain circumstances, impair the ability of other members of the public to participate in public debate on a social media page. When repetitive comments from the same individual disrupt the orderly functioning of a social media page, a municipality may be able to remove those comments, though there is no precise number of duplicative comments that makes removal automatically lawful.[16] It is important, however, that duplicative comments be removed only because of the disruption they entail, not because of the subject matter of those comments or the viewpoint of those comments. To further ensure that repetitive comments are removed only because of their disruptive effect—and not because of their content or viewpoint—a municipality should leave at least one of the duplicative comments on its social media page.

Finally, it is recommended that municipalities provide notice to members of the public if their comments have been removed and a mechanism for challenging removal. The model policy includes one example of procedural safeguards designed to limit the possibility of erroneous removal of comments. The more procedural protections provided by a municipality, the more likely

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[10] *Miller v. California*, 413 U.S. 14 (1973).

[11] *New York v. Ferber*, 458 U.S. 747 (1982).

[12] *Doe v. Pulaski Cty. Special Sch. Dist.,* 306 F.3d 616 (8th Cir. 2002).

[13] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

[14] *See, e.g., Hess v. Indiana*, 414 U.S. 105, 108 (1973) (advocating for "tak[ing] the . . . street again" at some undefined future point is not unprotected incitement).

[15] *Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 802-03 (8th Cir. 2006); *see also Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.,* 447 U.S. 557, 562-63 (1980).

[16] *Cf. White v. City of Norwalk,* 900 F.2d 1421, 1425 (9th Cir. 1990) ("While a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing, it certainly may stop him if his speech becomes... repetitious...Of course the point at which speech becomes unduly repetitious is not mathematically determinable.").

that the municipality will be able to successfully defend against legal challenges to its decision to remove a particular comment, at least on procedural grounds.

Limitation of This Guidance

This guidance and appended model policy are not intended to constitute the provision of legal advice or create an attorney-client privilege. Nor do these documents purport to provide comprehensive guidance for public officials and municipal employees who operate officials social media accounts. Municipalities may intend to use their social media accounts for different purposes, and this document provides only general guidance. Finally, the guidance and the accompanying policy are limited in the following important ways:

Both local conditions and social media websites may vary, so issues may arise that are not covered by these documents for which First Amendment analysis is required. For example, the model policy is geared toward a municipality's Facebook page, and it may not be entirely suitable for Twitter (now X), Instagram, or other social media platforms. Furthermore, as Facebook continues to change its own policies and terms of service, new issues may arise that raise First Amendment questions for municipalities.

Application of these principles to any particular user-generated social media content may prove challenging. Whether a particular comment meets a given legal threshold is a fact-intensive inquiry that escapes easy characterization. Moreover, constitutional sound principals may, of course, be implemented and applied in unsound, even unconstitutional, ways.[17]

This guidance and model policy focuses on what third-party-generated content may be removed from a government social media site. These documents do not address whether and in what circumstances justifiable removal of content may in turn serve as the basis for blocking the offending user's account from commenting in the future, whether temporarily or indefinitely.

This guidance and model policy do not address what limitations municipalities may impose on the content that officials and employees who have actual authority to speak on behalf of the municipality may post using social media accounts. When clothed with actual authority, officials and employees may be subject to additional restrictions that would not be permissible in limiting the comments of member of the public who are speaking on their own behalf.

Other than suggesting that genuinely personal pages be disclaimed as such, the analysis does not otherwise apply to the use of social media by municipal officials solely in their private capacity. The First Amendment protects, but does not limit, actions taken by public officials and employees on their genuinely personal accounts.

[17] *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-84 (1992).

SAMPLE Municipal Facebook Comments Policy

Welcome to the [Municipality Name ("City")] Facebook page!

The purpose of this site is to share information related to City governance and City events and to receive your comments, questions and concerns about those topics. Because we hope to maintain a constructive dialogue on this page, we encourage the public to post comments with the following in mind:

The City intends to limit the topics discussed on this page in order to maintain its usefulness for the public. Therefore, discussion on this page is limited to matters related to [City Name] governance and City events.

Comments will not be removed, deleted or hidden because of the speaker's point of view or opinion.

Comments expressed on this site by people who are not City officers or employees do not reflect the opinions and positions of [City Name], its officers or employees. Comments are entirely public, and users should not include confidential information in their comments.

We encourage all users to be respectful of one another and to keep in mind that children and adults are able to view users' comments on this page.

Please be advised that Facebook may not be the most effective way to receive a response to any recommendation, concern or complaint. We encourage you to raise issues requiring a response with your elected representatives through other channels. [Note: this could be made more specific based on the mechanisms available in each municipality.]

The following types of comments are prohibited on the City's page:

- Comments that are not topically related to City governance or City events [Note: as discussed in the Guidance, these subject-matter limitations may be expanded or restricted];
- Comments that include sexual content or links to sexual content;
- Comments that contain or link to malware;
- Comments that threaten any individual or incite lawless action;
- Repetitive comments from the same individual;
- Solicitations of commerce, including advertisements or spam; and
- Comments that contain copyrighted or trademarked material in violation of state or federal law.

a. If you post that falls into one of the prohibited categories listed in Paragraph 6, the comment may be hidden from view temporarily. If your comment has been hidden you will be notified, and the notice will identify the rule that your comment violated. Following that notice, you will be provided 24 hours either to edit the comment so as to bring it into compliance with this policy or to challenged the determination that your comment violates this policy. Any challenge must include a written explanation of why you believe your comment complies with this policy. All challenges will be resolved by close of business they next day. b. If your edited comment no longer violates this policy or your challenge is successful, your comment will be shown. c. Your comment may be deleted if:

- You fail to respond to the notice in Paragraph 7.a;
- Your edited comment continues to violate this policy; or
- Your challenge is rejected.

Any determination rejecting a challenge will be accompanied by a written explanation.

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