

Social Media: First Amendment Implications for Public Officials

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📌 Attention community members: 📌

We're excited to announce an upcoming Narcan training session! Narcan, also known as naloxone, is a life-saving medication that can reverse opioid overdoses. Join us on 5/14/2024, at the Statesville Civic Center, to learn how to administer Narcan and potentially save lives.

Together, we can make a difference and combat the opioid crisis. Don't miss out! Spread the word and tag a friend who should attend. Let's empower our community to be pr... See more



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Downsides



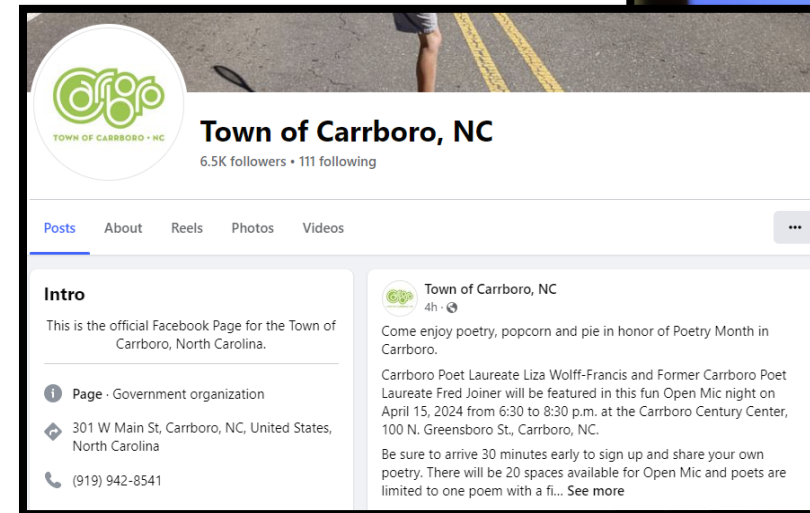
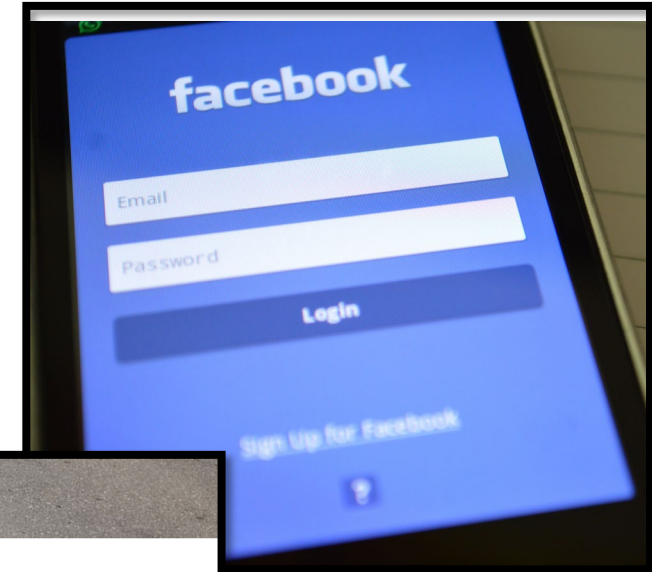
How Social Media Amplifies Misinformation More Than Information

A new analysis found that algorithms and some features of social media sites help false posts go viral.



“Official” vs. “Personal” Accounts

- Types of Accounts:
 - Official Government
 - Individual Public Official
 - Personal



What does the First Amendment protect?

The First Amendment

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of **speech**, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

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First Amendment Lawsuits – 42 U.S.C. §1983

Is defendant acting “under color of law” in operating their social media account?

If yes, what type of “forum” did the defendant create when allowing public interaction?

Based on the standard that applies to the “forum,” did the public official (and/or the unit of government) violate the First Amendment?

“Official” account or “personal” account?

When is an Official's Social Media Use "Under Color of Law"?

Second, Fourth, Eighth, Ninth, and Eleventh Circuits

- Fact-intensive, comprehensive inquiry
- How does the official use the account?
- What are the trappings and appearance? Do they use official title or describe it as their official page? Do they use their government contact info?

VS.

Sixth Circuit

- Is running the social media account part of a public official's actual or apparent duties?
- Can public official only operate the account because of the authority of public office?

Garnier v. O'Connor-Ratcliff, Ninth Circuit (2022)

- Two school-board trustees deleted comments and blocked users who posted long, repetitive replies on their Facebook or Twitter posts.
- Identified themselves as government officials and used their official titles.
- Used SM accounts to communicate about school-district business and notify the public of board meetings.
- One used her official school-district email address; the other described his page as his “official” school-board member page.

State Action?

Ninth Circuit held trustees' social media use = state action that implicates the First Amendment.

Lindke v. Freed, Sixth Circuit (2022)

- City manager deleted negative comments from a disgruntled citizen and eventually blocked the citizen from the page.
- City manager’s Facebook page:
 - Described him as a “public figure”
 - Listed his title as Port Huron’s “Chief Administrative Officer”
 - Listed the city’s website and city hall’s address
 - Posted a mix of personal updates, community events, and policies made as city manager.

State Action?

Sixth Circuit held that city manager’s social media use did NOT equal state action—so no viable First Amendment claim

Lindke v. Freed, 601 U. S. ____ (2024)

- A public official's social media activity constitutes state action under §1983 only if the official:
 - (1) possessed “**actual authority**” to speak on the **State's behalf**, and
 - (2) **purported to exercise that authority** when he spoke on social media.



Step 1: “Actual Authority” to Speak on Behalf of the Government

1

A written law gave the individual authority to make official announcements (ordinance, statute, regulation...maybe written policy)

2

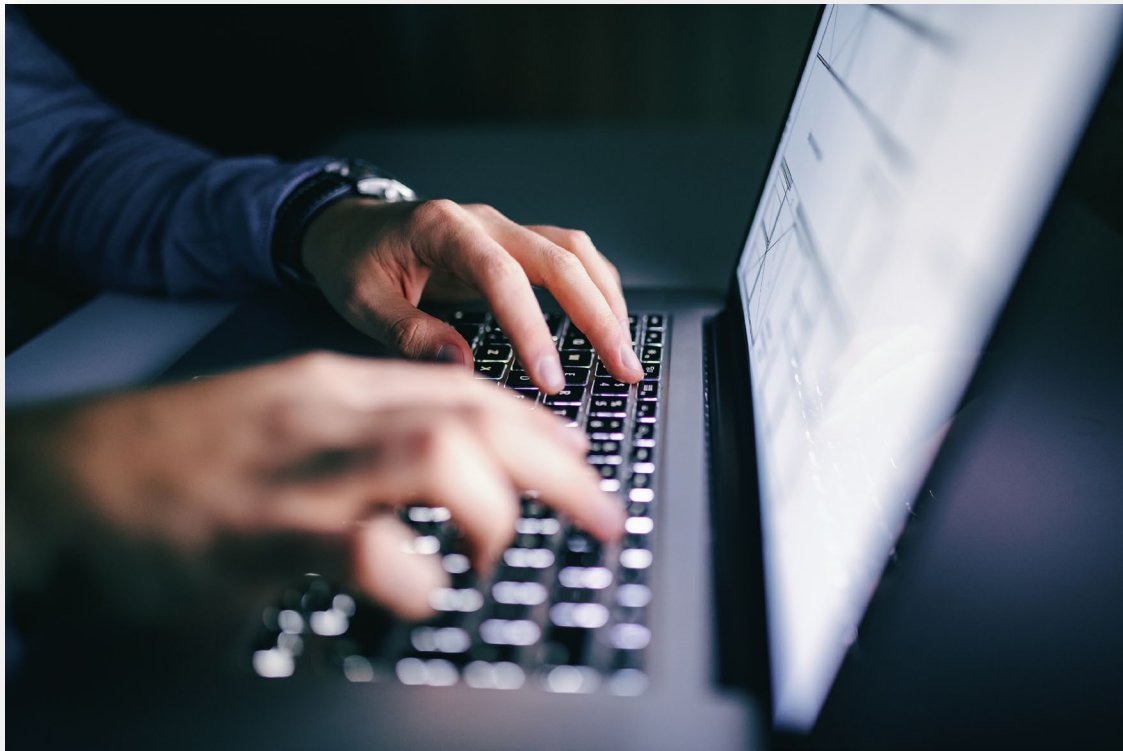
Based on a longstanding practice or custom, such that the authority to speak on behalf of the government has become “permanent and well settled.”

3

The nature and scope of a public official’s power may give them general authority to speak on behalf of the government regarding a particular subject matter. “In some cases, a grant of authority over particular subject matter may reasonably encompass authority to speak about it officially.”

“Actual Authority”...on the topic of the underlying post

Plaintiff must show that the public official’s “alleged censorship” on social media was “connected to speech on a matter within [the public official’s] bailiwick.”



“For example, imagine that Freed [the city manager] posted a list of local restaurants with health-code violations and deleted snarky comments made by other users. If public health is not within the portfolio of the city manager, then neither the post nor the deletions would be traceable to Freed’s state authority—because he had none. For state action to exist, the State must be ‘responsible for the specific conduct of which the plaintiff complains.’”

Step 2: Purporting to Exercise Authority to Speak on Behalf of the Government

Example: A school board official announces pandemic-related restrictions being lifted in a school board meeting and then subsequently shares the same news at a backyard barbeque with friends



Labels and Context Matter

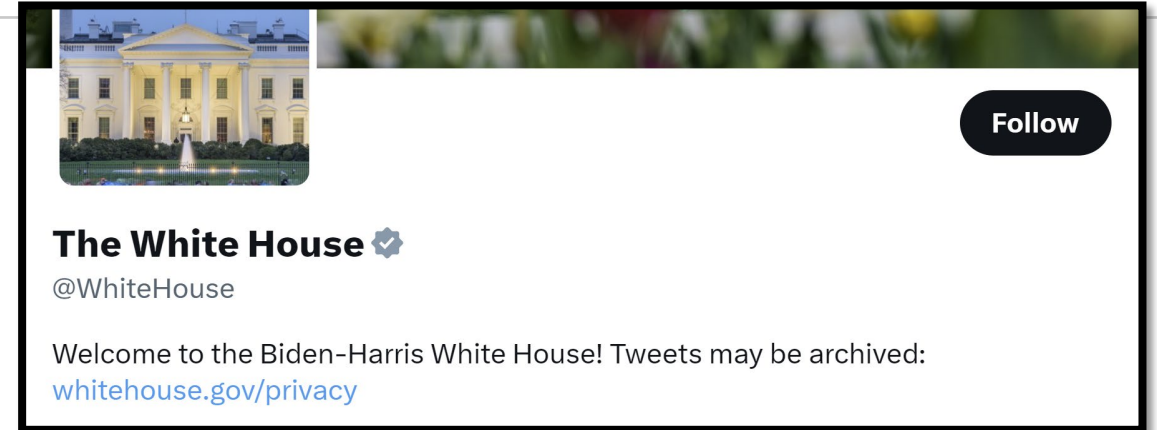
Careful **labels** or **disclaimers** may serve as strong evidence that a public official did not intend to speak on behalf of the government.

“Had Freed’s account carried a label (e.g., ‘this is the personal page of James R. Freed’) or a disclaimer (e.g., ‘the views expressed are strictly my own’), he would be entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal.”



Labels and Context Matter

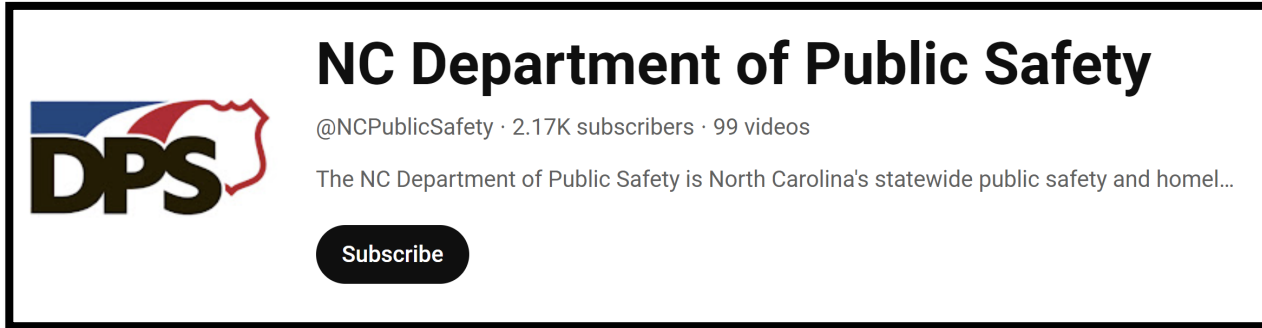
If a social media page or account features strong indicators that it belongs to a particular state or local government (or a particular office or agency within that government), action taken on that account will likely be presumed to be an exercise of government authority.



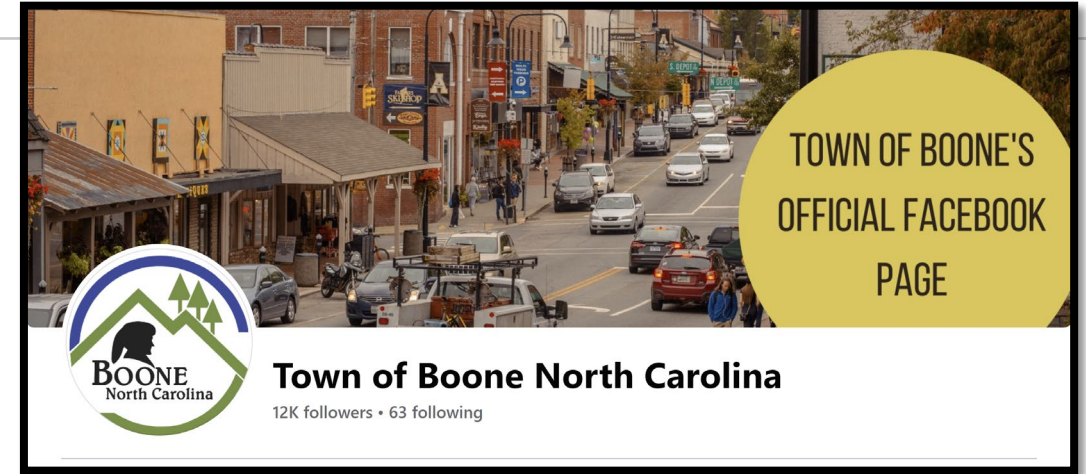
Twitter Officially Transfers @POTUS Account to President Biden



Labels and Context Matter



NC Department of Public Safety
@NCPublicSafety · 2.17K subscribers · 99 videos
The NC Department of Public Safety is North Carolina's statewide public safety and homel...
[Subscribe](#)



Town of Boone North Carolina
12K followers · 63 following

TOWN OF BOONE'S OFFICIAL FACEBOOK PAGE

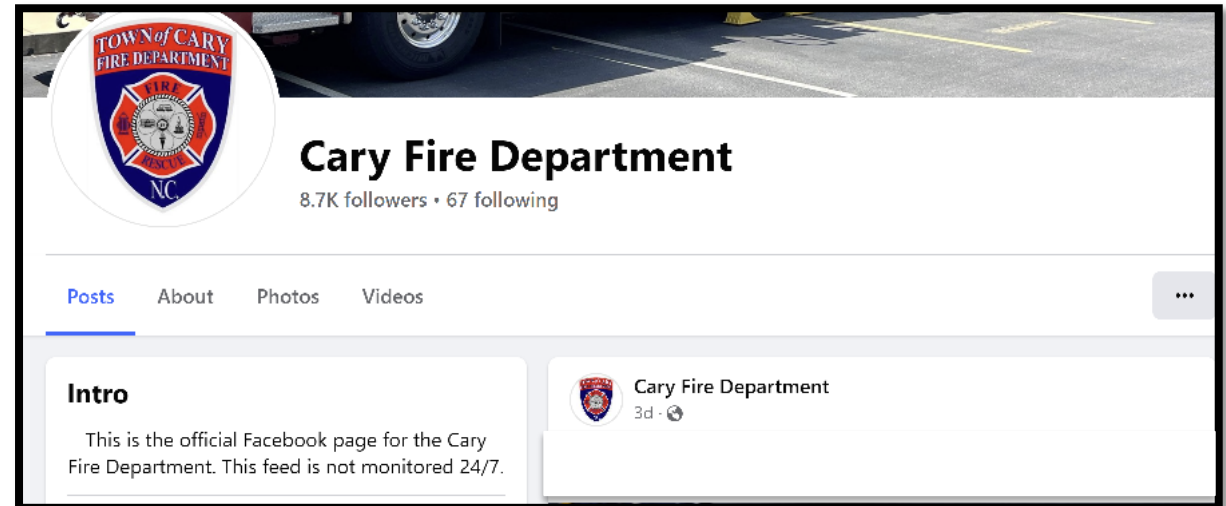


Henderson County, NC Government
7K followers · 122 following

Posts About Photos Videos

Intro
The official Facebook page for Henderson County, NC local government.

Henderson County, NC Government
1d ·



Cary Fire Department
8.7K followers · 67 following

Posts About Photos Videos

Intro
This is the official Facebook page for the Cary Fire Department. This feed is not monitored 24/7.

Cary Fire Department
3d ·

Deleting Comments vs. Blocking Users



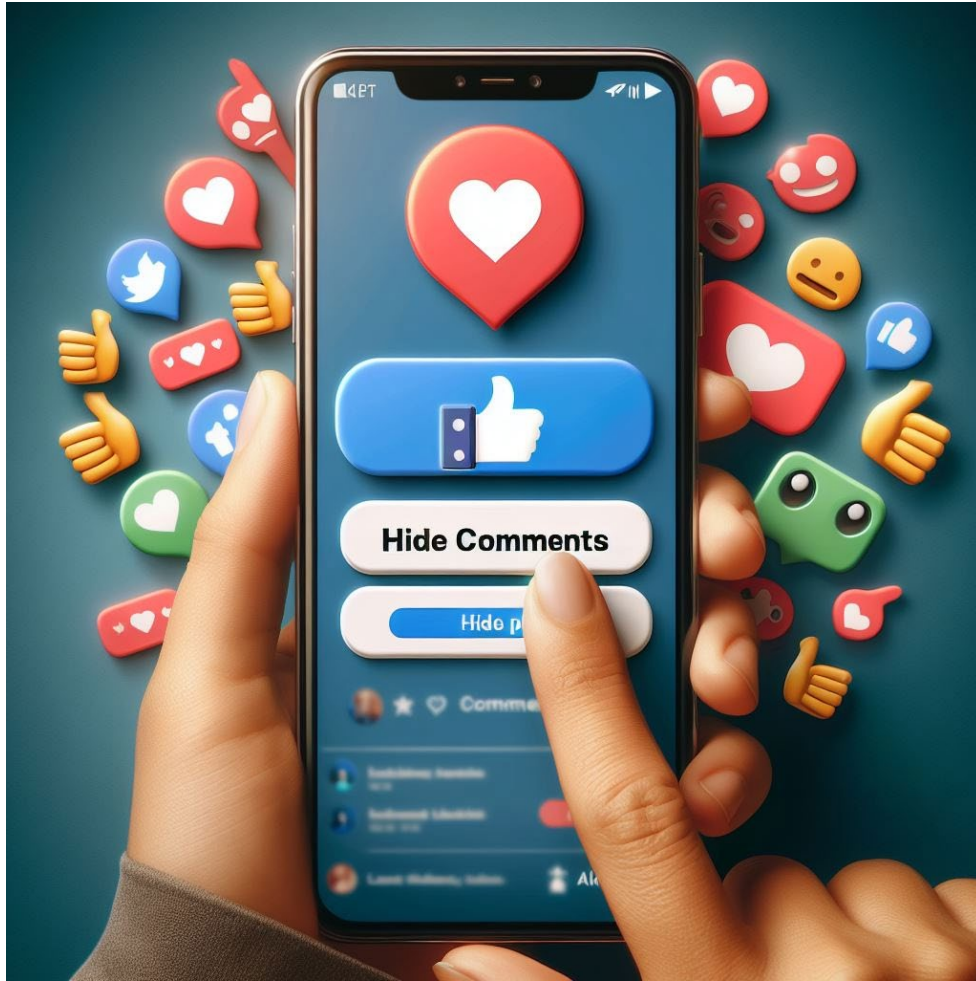
- **Deleting comments:**

- State action analysis only looks at post from which comments were deleted

- **Blocking user:**

- State action analysis looks to whether a public official engaged in state action when they made ANY post on the page

Hiding vs. Deleting Comments?



- For purposes of the First Amendment, there is no difference between hiding and deleting comments

Keep Personal and Official Separate!

“A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability.”



For more on the new “state action” test:

Coates' Canons NC Local Government Law

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When Can a Public Official Face Liability for Blocking Users or Deleting Comments on Social Media? The Supreme Court Sets a New Test in Lindke v. Freed.

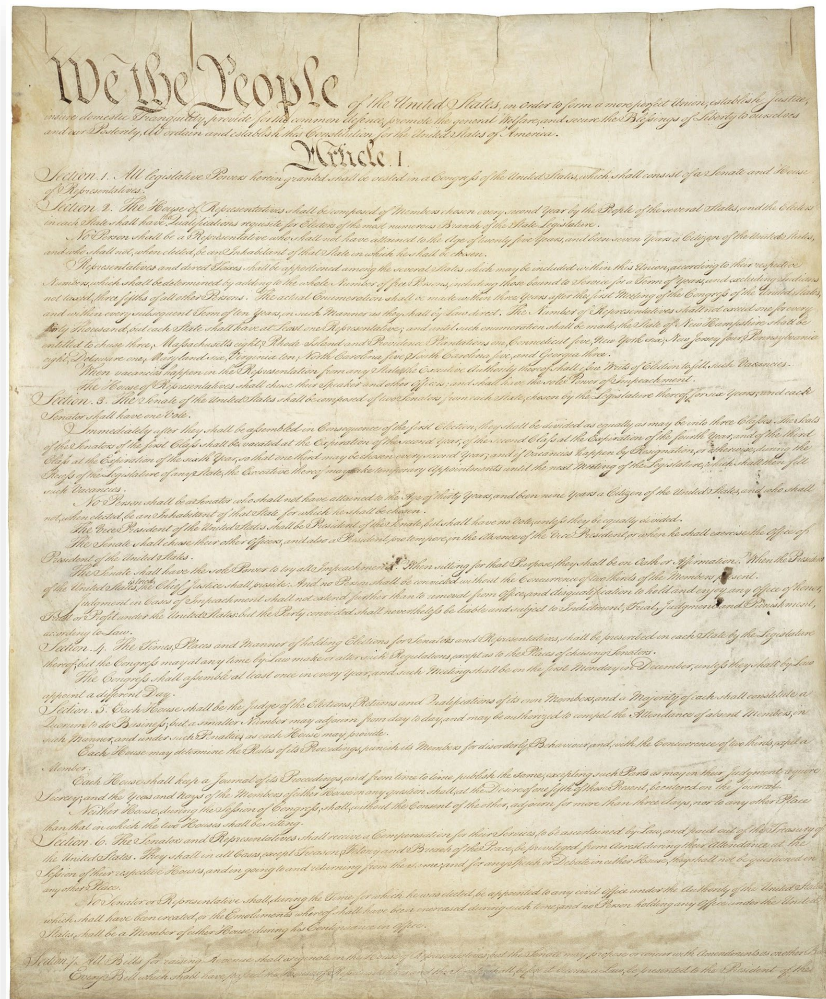
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For government officials, the line between official and personal social media pages may sometimes be blurry. Imagine a county commissioner or city council member who maintains a Facebook page that

What Rules Apply to “Official” Accounts or “Official” Posts?



Once the government creates a forum for speech by members of the public, the First Amendment limits how the government can interfere with that speech.

What is NEVER protected by the First Amendment?

True
threats of
violence



“An *objectively* threatening statement communicated by a party which possesses the *subjective* intent to threaten a listener or identifiable group.”

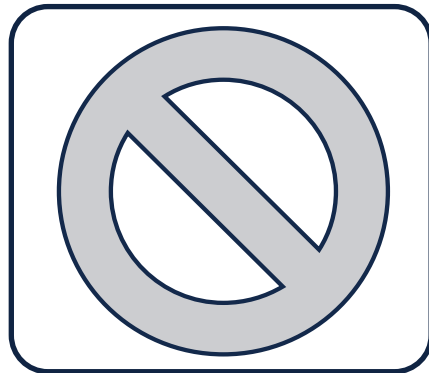
State v. Taylor, 379 N.C. 589 (2021).

Davison v. Randall, 912 F.3d 666 (4th Cir. 2019)



Interactive portions of a government-operated social media page constitute a public forum for First Amendment purposes.

- Includes any area of the page in which the public can post comments, reply to posts, and “like” comments and posts.



Blocking a user based on critical comments was unconstitutional viewpoint discrimination.

Content Restrictions vs. Viewpoint Restrictions

CONTENT-BASED

Only comments about
our
jurisdiction/officials
allowed

VIEWPOINT-BASED

Only *positive* comments about
our jurisdiction/officials
allowed

Limited Public Forums

- Did the government communicate a clear intent to open the social media page only for expression regarding certain subjects?
- May strengthen the case for a court to treat a social media page as a *limited* public forum by initially setting out **clear rules** about the subject matter that can be posted on the page.

Restrictions are permissible if they are:

- not based on **viewpoint** and
- **reasonable** in light of the purpose served by the forum.

Robinson v. Hunt County, 921 F. 3d 440 (2019)

- The Hunt County Sheriff Office posted a social media policy stating that “inappropriate” comments would be deleted.
- Ms. Robinson (citizen) posted a comment stating that “degrading or insulting police officers is not illegal, and in fact has been ruled time and time again, by multiple US courts as protected First Amendment speech,” and “just because you consider a comment to be ‘inappropriate’ doesn’t give you the legal right to delete it and/or ban a private citizen from commenting on this TAX PAYER funded social media site.”



***Robinson v. Hunt County*, 921 F. 3d 440 (2019)**

5th Circuit ruled in her favor:

“Robinson contends that the defendants’ actions constitute viewpoint discrimination regardless of whether they were motivated by her criticism of the Sheriff’s Office or a determination that her comment was otherwise ‘inappropriate.’ We agree.

‘It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.’...Official censorship based on a state actor’s subjective judgment that the content of protected speech is offensive or inappropriate is viewpoint discrimination.”

For more on public forum doctrine and comment policies:

Coates' Canons NC Local Government Law

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Can Local Government Officials Block Their Critics on Social Media?

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Local governments and local government officials are increasingly using social media as a way to engage with the public. As anyone who has scrolled through Facebook or Twitter lately can attest, comment

Blocking Users or Deleting Comments on Social Media

Depends on where activity is occurring

- Posted on a private citizen's **own** page?
- Posted on a government employee or official's **personal** page or via a direct message to the official or employee's **personal** account?
- Posted to a government agency's page (or the "**official**" page of a government official)?



Take a Cautious Approach

- Keep your personal accounts personal
- Use a label/disclaimer on your personal account
- If operating an “official” account for your department, assume the First Amendment applies



More Takeaways

- Think of social media comment sections like a public comment period at a public meeting—what speech would be allowed?
- Consider a policy that states all comments must be related to items within the authority or jurisdiction of your governmental entity.
 - If you delete commentary that is not related to your entity’s jurisdiction or authority, you must delete *all* such commentary, not just the items that you disagree with.
- Disable comments immediately upon posting?
- If you don’t want negative public comments, don’t use social media!

Questions?

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