

The First Amendment and Social Media



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FOREWORD FROM THE GENERAL COUNSEL

Nowadays, many cities and towns use Facebook pages to connect and communicate with the citizens. But, as with anything else, there are things for cities and towns to know before using Facebook (or any type of social media). Unfortunately, because the use of Facebook has grown so quickly, there are many questions about how cities and towns can manage these pages without violating someone's First Amendment right to free speech.

Unfortunately, there is no Supreme Court case to answer all the questions facing cities and towns operating a Facebook page, but this guide and sample policy will help understand how cities and towns can use their Facebook pages (or any type of social media) without violating someone's rights. When cities and towns know what speech is protected, what speech is unprotected, and what actions can be taken on Facebook, cities and towns will know better how to avoid lawsuits. While uncertainty will remain, the guidance below will help make wise choices for your city, your town, 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. 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.¹ 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 social media page. So long as the social media platform (e.g., Facebook, Twitter, YouTube, etc.) provides a mechanism for prohibiting all comments, a municipality may choose to do so.

While the United States Supreme Court has yet to weigh in, many of the lower courts which 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.² This remains true even if municipal officials find an individual's views unfair, objectionable or offensive.³

A municipality may, however, impose subject matter (or "content-based") limitations on what may be discussed on its social media page.⁴ For example, the model policy provided below

¹ 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).

² 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.

³ 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").

⁴ 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.

limits the Facebook 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.⁵

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.⁶ 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."⁷ 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 provided below. 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 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.⁸ Child pornography is content that depicts or appears to depict sexual performance and involves a minor.⁹
- *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.¹⁰

⁵ See, e.g., *Green v. Nocchiero*, 676 F.3d 748, 753-54 (8th Cir. 2012).

⁶ 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)).

⁷ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

⁸ *Miller v. California*, 413 U.S. 14 (1973).

⁹ *New York v. Ferber*, 458 U.S. 747 (1982).

¹⁰ *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002).

Likewise, a municipality may remove comments that call for “imminent” lawless action *and* are “likely to incite or produce such action.”¹¹ Patently unrealistic threats and rhetorical support for lawless action more generally would not qualify as true threats or unprotected incitement.¹²

- *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.”¹³ 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.¹⁴ 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 provided below 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 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.

Limitations 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

¹¹ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

¹² *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).

¹³ *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).

¹⁴ *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.”).

comprehensive guidance for public officials and municipal employees who operate official 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 vary, so issues may arise that are not covered by these documents for which further First Amendment analysis is required. For example, the attached model policy is geared toward a municipality's Facebook page, and it may not be entirely suitable for Twitter, Instagram or other platforms. Furthermore, as Facebook continues to change its own policies and terms of service, new issues may arise that raise First Amendment questions for municipal actors.
- Application of these principles to any particular user-generated content on 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, constitutionally sound principles may, of course, be implemented and applied in unsound, even unconstitutional, ways.¹⁵
- This guidance and model policy focus on what third-party-generated content may be removed from a public official's 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 *their own* officials, employees and agencies may post using official social media accounts. When speaking for the municipality, officials and employees may be subject to additional restrictions that would not be permissible in limiting the comments of members of the public who are speaking on their own behalf.
- Likewise, the analysis in this document does not apply to the use of social media by municipal officials solely in their private capacity. The First Amendment does not limit officials' actions on their genuinely personal accounts.

¹⁵ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-84 (1992).

SAMPLE Municipal Facebook Comments Policy

We welcome you 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:

1. 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.
2. Comments will not be removed, deleted or hidden because of the speaker’s point of view or opinion.
3. 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.
4. 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.
5. 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.]
6. 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.
7. a. If you post a comment 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 challenge 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 the next business 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.