

Social Media, Content Moderation, and the Law

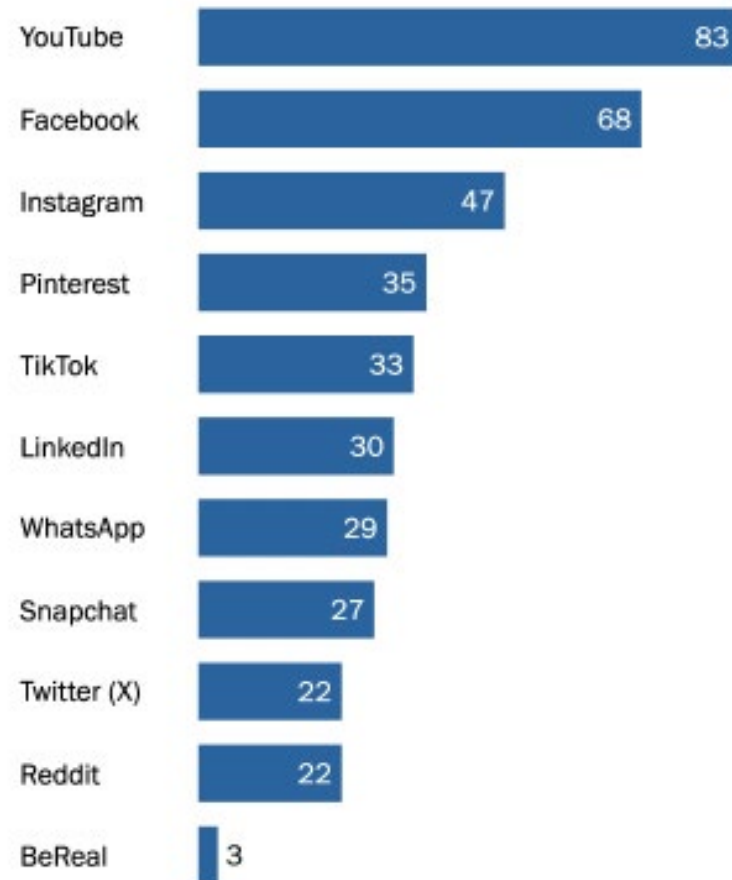
Kristi Nickodem

Robert W. Bradshaw Jr. Distinguished Term Assistant Professor of Public Law and Government

Public Law for the Public's Lawyers, 2024

Most U.S. adults use YouTube and Facebook; about half use Instagram

% of U.S. adults who say they *ever* use ...

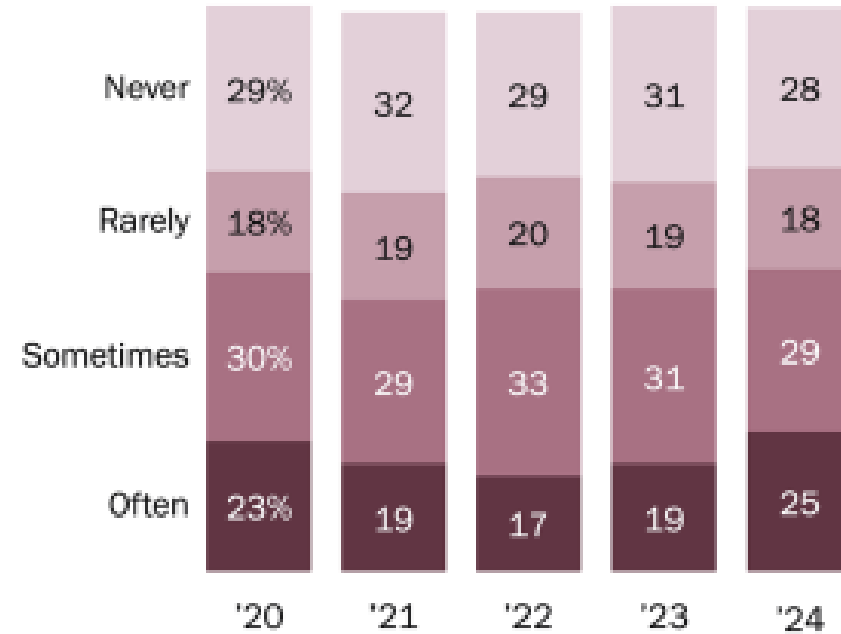


Note: Respondents who did not give an answer are not shown.
 Source: Survey of U.S. adults conducted May 19-Sept. 5, 2023.
 "Americans' Social Media Use"

PEW RESEARCH CENTER

News consumption on social media

% of U.S. adults who get news from social media ...



Note: Figures may not add up to 100% due to rounding.
 Respondents who do not use the internet did not receive this question; they are included with those who said "Never," along with those who do not say they get news from digital devices.

Source: Survey of U.S. adults conducted July 15-Aug. 4, 2024.

PEW RESEARCH CENTER

Upsides

 **Granville County Government**
April 4 at 9:34 AM · 🌐

High winds and low humidity will lead to increased fire danger today for Granville County and much of central North Carolina today (Thursday, April 4).
Avoid outdoor burning until conditions improve.

 **Increased Fire Danger Over the Northern and Western NC Piedmont Today**

Timing:
10 AM to 8 PM

Expected Conditions:
Wind: W 15-25 mph, gusts of 25-35 mph
Lowest Humidity: 25 to 30 percent

Actions to Take:
Avoid any outdoor burning
Do not casually discard cigarette butts and matches
Be careful with equipment that may cause sparks




US National Weather Service Raleigh NC
April 4 at 6:42 AM · 🌐

 **NCDOT** @NCDOT · Oct 29

NC towns & cities receive welcome news: a state transportation fund typically used for resurfacing streets can cover certain hurricane-recovery costs. #HeleneNC bit.ly/4f0NcE1




13 31 2K


 **NC Office of State Human Resources** · 4 days ago · 🌐

OSHR's Temporary Solutions Division and the [North Carolina Department of Adult Correction](#) are searching for a temporary pharmacist in Wake County. Apply to this employment opportunity by 5 p.m. on November 1.
<https://www.governmentjobs.com/.../pharmacist-temporary...>

NOW HIRING
THROUGH TEMPORARY SOLUTIONS

➤ **Pharmacist**
Part-Time in Wake County
Closing Nov. 1 at 5 p.m.

 **NC Department of Adult Correction**
PROTECTION • INNOVATION
REHABILITATION

 **NORTH CAROLINA Office of State Human Resources**
Temporary Solutions

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.



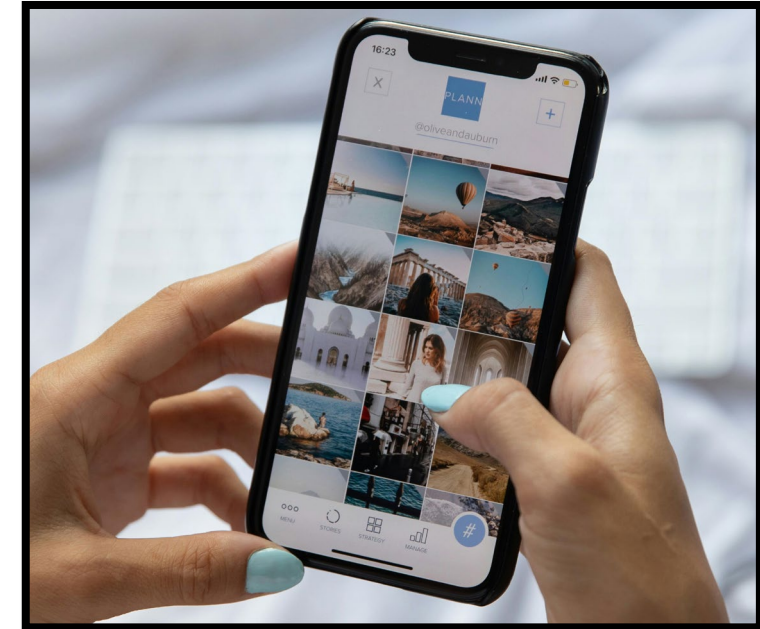
“Official” vs. “Personal” Accounts



Official Government



Individual Public Official



Personal

Hypothetical



Hypothetical



Bob sues Kelly in federal court, claiming the deletion of his comments and the blocking of his access to Kelly's page was a violation of his First Amendment rights.

Can Kelly be held personally liable for her actions?

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?



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



“Official” activity or
“personal” activity?

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

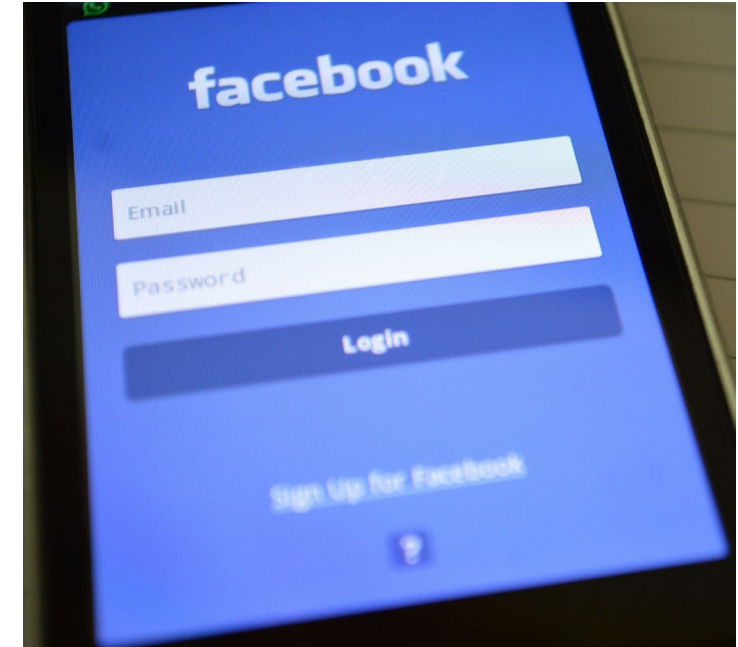
- Two school-board trustees deleted comments and blocked users who commented on their Facebook or Twitter posts.
- Identified themselves as government officials and used their official titles.
- Used SM accounts to communicate about school-district business and notify the public of board meetings.
-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



Ninth Circuit held trustees' social media use = official 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.



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

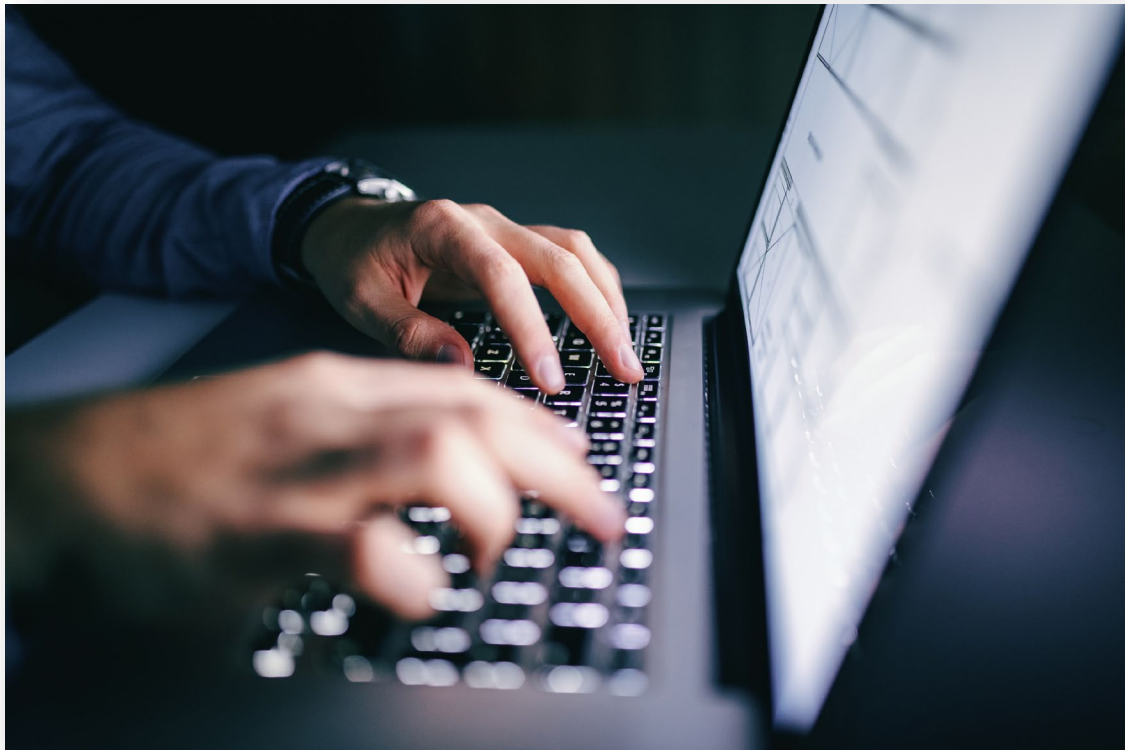
Based on a longstanding practice or custom, such that the authority to speak on behalf of the government has become “permanent and well settled.”

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.

“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.

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

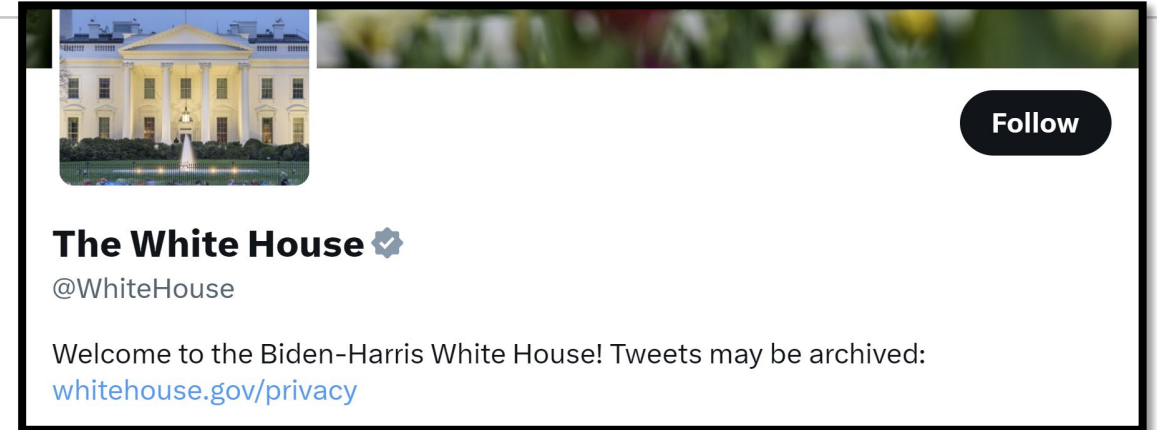
Careful **labels** or **disclaimers** may serve as strong evidence that a public official did not intend to speak on behalf of the government.

“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, 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

NC General Assembly
@NCLeg
News, happenings, and tidbits from the NC General Assembly
Raleigh, NC ncleg.gov Joined February 2018

Follow

Town of Boone North Carolina
12K followers · 63 following

TOWN OF BOONE'S OFFICIAL FACEBOOK PAGE

NCDOL
2.5K followers · 150 following

Posts About Photos Videos

Intro
Welcome to the N.C. Department of Labor's Facebook page. We strive to make North Carolina a safe and healthy place to live and work.

NCDOL
October 29 at 12:30 PM · 🌐
Not already a subscriber to NCDOL's bimonthly newsletter, "click the link below to sign up."
<https://lp.constantcontactpages.com/su/a8TTxTx>

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

Hypothetical



Step 1: Did Kelly have authority to speak on behalf of the state (on this subject)?

Step 2: Was Kelly purporting to exercise that authority when she made her post?

Deleting Bob's comment: Was Kelly purporting to exercise her authority to speak on behalf of the state when she wrote her post?

Blocking Bob from the page: Did Kelly purport to exercise her authority to speak on behalf of the state when she posted ANY post on her page?

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.”



Take a Cautious Approach

1. Officials should use a label/disclaimer on their personal accounts
2. If operating an “official” account for the state or a unit of local government, assume the First Amendment applies



For more on the new “state action” test:

Coates' Canons NC Local Government Law

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Categories

[General Local Government \(Miscellaneous\)](#), [Liability & Immunity](#)

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.

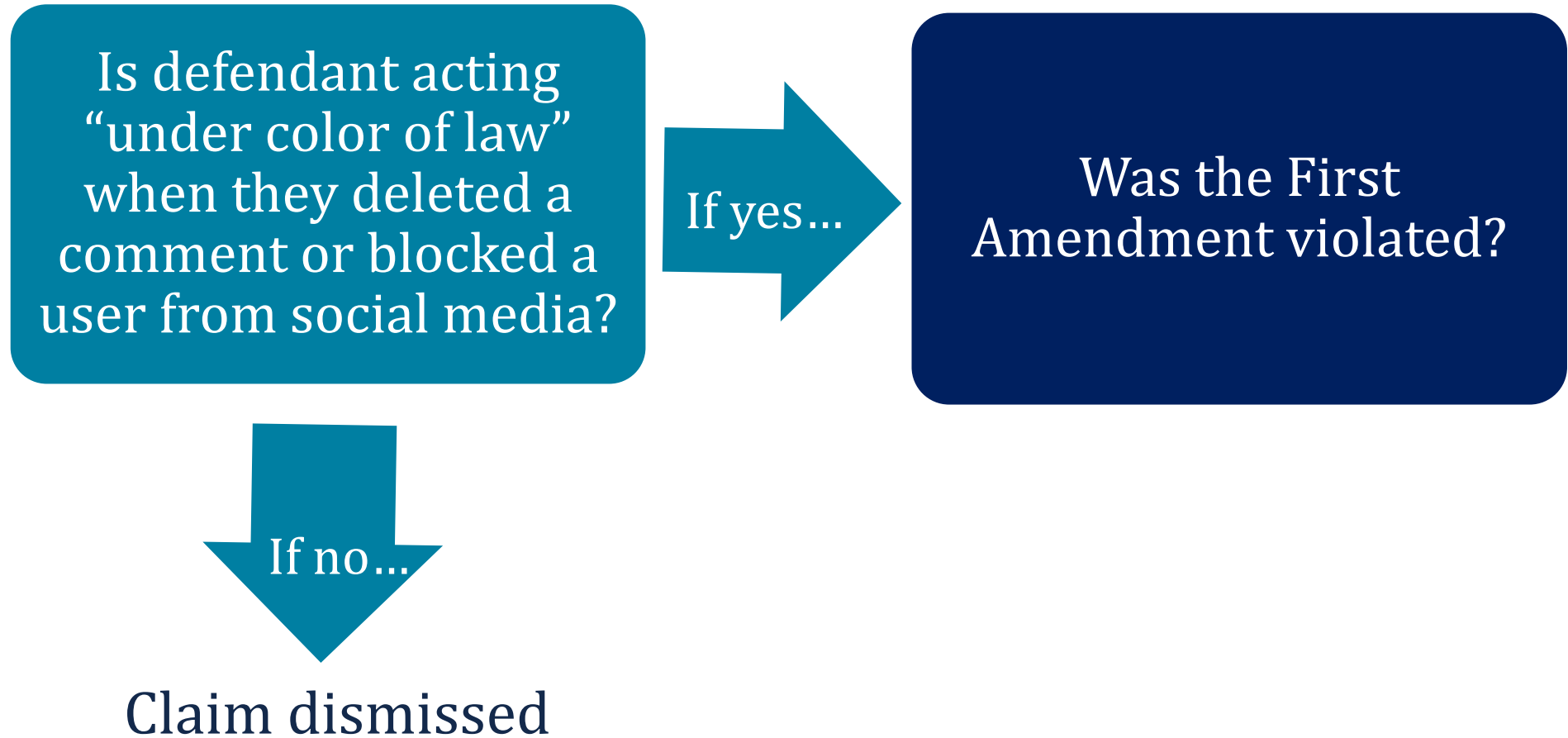
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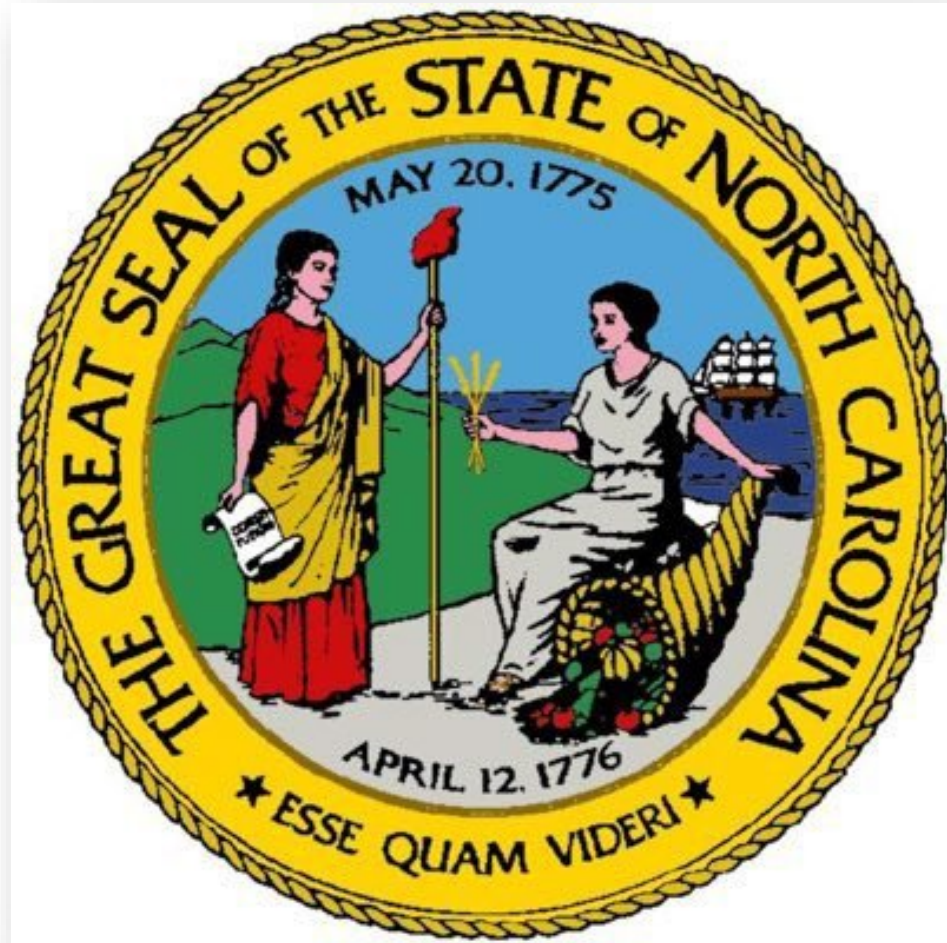
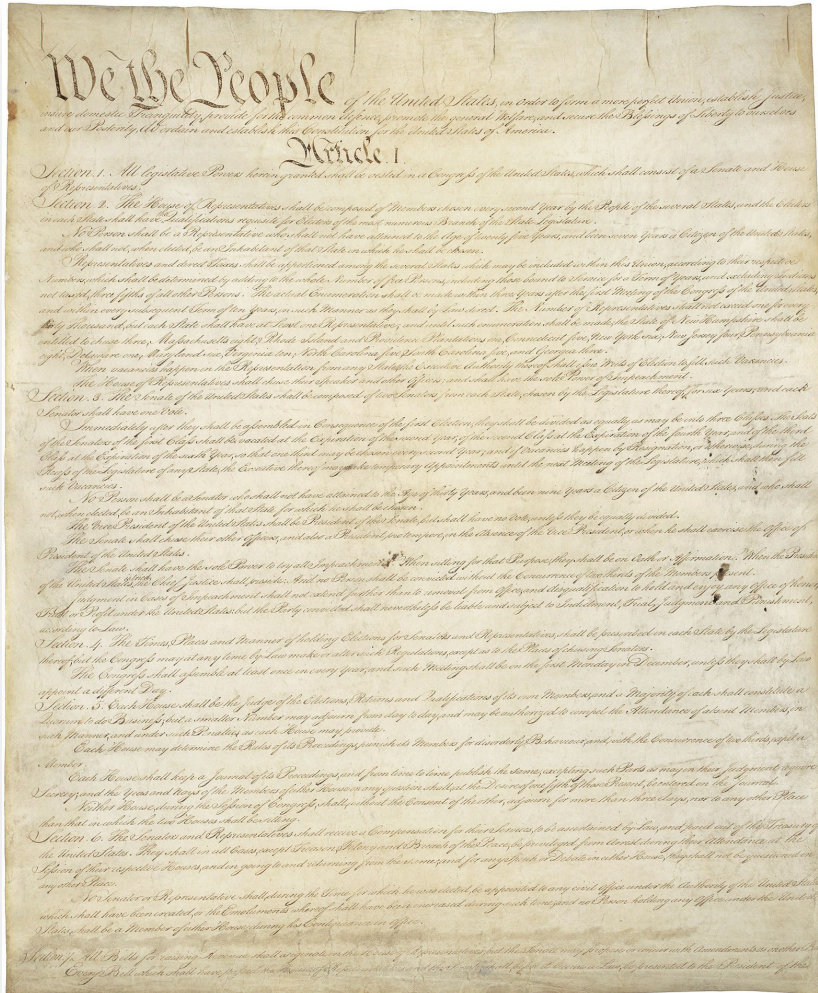
Author Name: [Kristi Nickodem](#)

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

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



Content Moderation on “Official” Social Media Accounts



What is never protected?

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).

Blocking Users and Deleting Comments

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)?

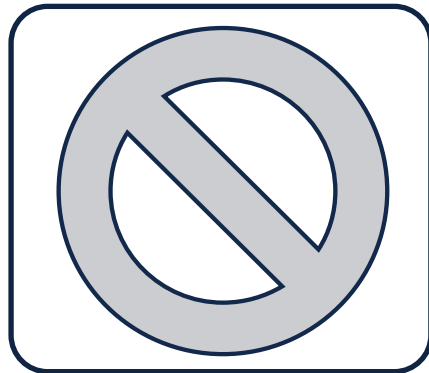


Davison v. Randall, 912 F.3d 666 (4th Cir. 2019)



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.

Forum Analysis

- Used when courts assess the constitutionality of restrictions on speech on government property.
- Standard of judicial review depends on the category of “forum” at issue.



Type of Forum Determines Government Regulation of Speech



Traditional Public Forum

- Traditionally open to all types of expression



Designated Public Forum

- Government intentionally opens a forum for broad expressive activity by the public



Limited Public Forum

- Government only allows expressive activity on certain topics or by certain groups of people—selective access



Nonpublic Forum

- All other types of public property that are not open for public expression

Forum Analysis

Government has less leeway to regulate public expression

Government has greater leeway to regulate public expression

Traditional
Public Forums

Limited Public
Forums

Designated
Public Forums

Nonpublic
Forums

A Forum Can Have Multiple Parts

Public Meeting



Facebook Account



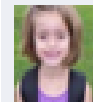
Catawba County, North Carolina

Public Health brings flu immunization to 2500 students after cases increase in schools.

In early February, after flu cases in school spiked in late January, Public Health worked with all three local school systems to offer flu vaccines free of charge to children enrolled in pre-kindergarten through twelfth grade.

<http://www.catawbacountync.gov/events/schoolflu.pdf>
www.catawbacountync.gov

Monday at 9:04am · Like · Comment · Share



April Williams Seems like it would have been nice to have offered the shots before the spike in flu. By the time they were given, my child already had the flu and missed 3 days of school.

Monday at 9:38am · Like

Write a comment...

What Type of Forum is a Comment Section on an “Official” Social Media Account?

Most likely a **designated or limited public forum**

- Depends on parameters set by the government/public official for interaction and comments



Designated Public Forums

- Open forum with no limitations on what people can say
- Deleting a comment or blocking a user based on content of speech is presumed to be unconstitutional



Limited Public Forums

Government communicated a **clear intent** to open the social media page only for expression regarding a limited set of topics.



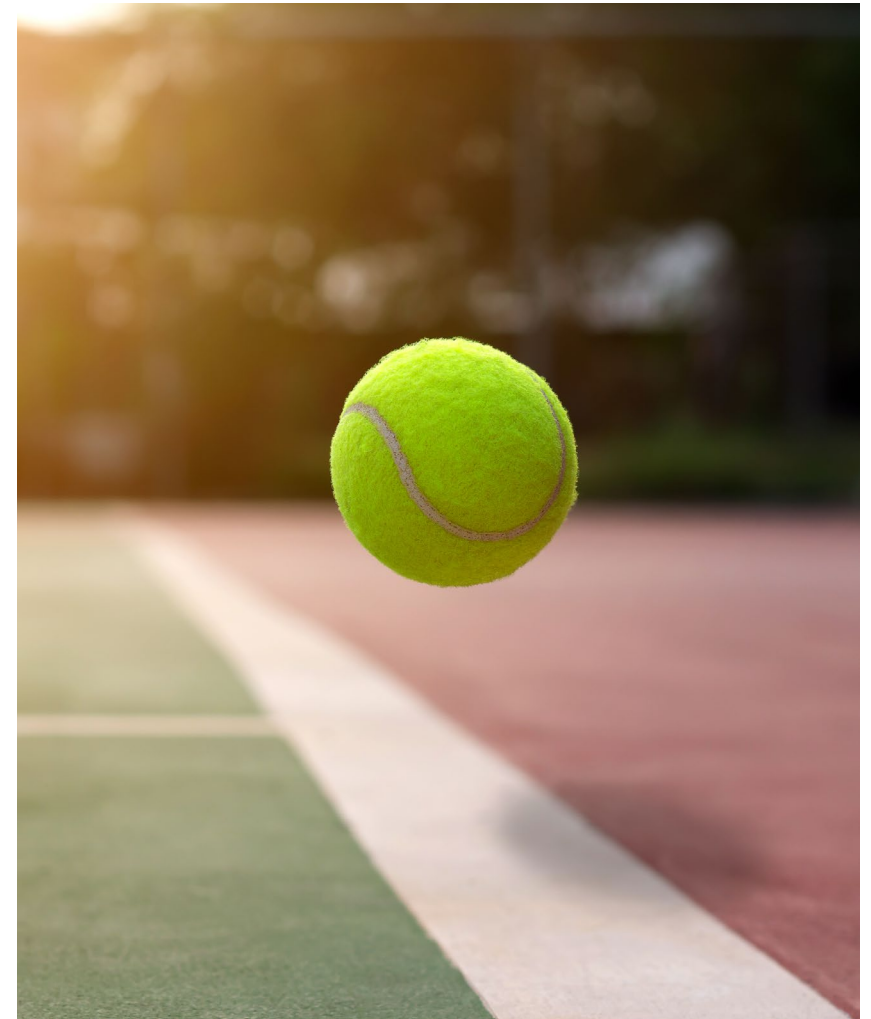
Restrictions on speech are permissible if they are:

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

What does it mean to be “reasonable”?

Restrictions must:

- Be capable of clear interpretation and application and
- Support a *legitimate* government objective



Minnesota Voters Alliance v. Mansky, 585 U.S. 1 (2018)

- Political apparel ban—stated that a “political badge, political button, or other political insignia may not be worn at or about the polling place.”
- *“It is ‘self-evident’ that an indeterminate prohibition carries with it [t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation.”*



Content Restrictions vs. Viewpoint Restrictions

CONTENT-BASED

Only comments about our agency/jurisdiction/officials allowed

VIEWPOINT-BASED

Only *positive* comments about our agency/jurisdiction/officials allowed

Comment Policy

- Must be clear and visible to people visiting page/account.
- Consider a disclaimer: “Please note that [government entity] does not endorse the comments or opinions provided by visitors to this site.”
- Consider **viewpoint-neutral** restrictions:
 - Requiring comments to be related to matters within the authority or jurisdiction of your governmental entity.
 - Requiring comments to be related to the subject matter of the underlying post.
 - Prohibiting links to external sites.
 - Prohibiting comments that threaten violence or advocate for engaging in other illegal activity.
 - Prohibiting duplicate comments posted repeatedly within a short period of time.

Robinson v. Hunt County, Texas, 921 F.3d 440 (5th Cir. 2019)

- The Hunt County Sheriff Office posted a social media policy stating that “inappropriate” comments would be deleted.
- Page said “We welcome your input and POSITIVE comments regarding the Hunt County Sheriff's Office.... We encourage you to submit comments, but please note that this is NOT a public forum.”
- Plaintiff left negative comments, which were then deleted.



Robinson v. Hunt County, Texas, 921 F.3d 440 (5th Cir. 2019)

Court reversed dismissal of claims against the county:

“Official censorship based on a state actor’s subjective judgment that the content of protected speech is offensive or inappropriate is viewpoint discrimination.”



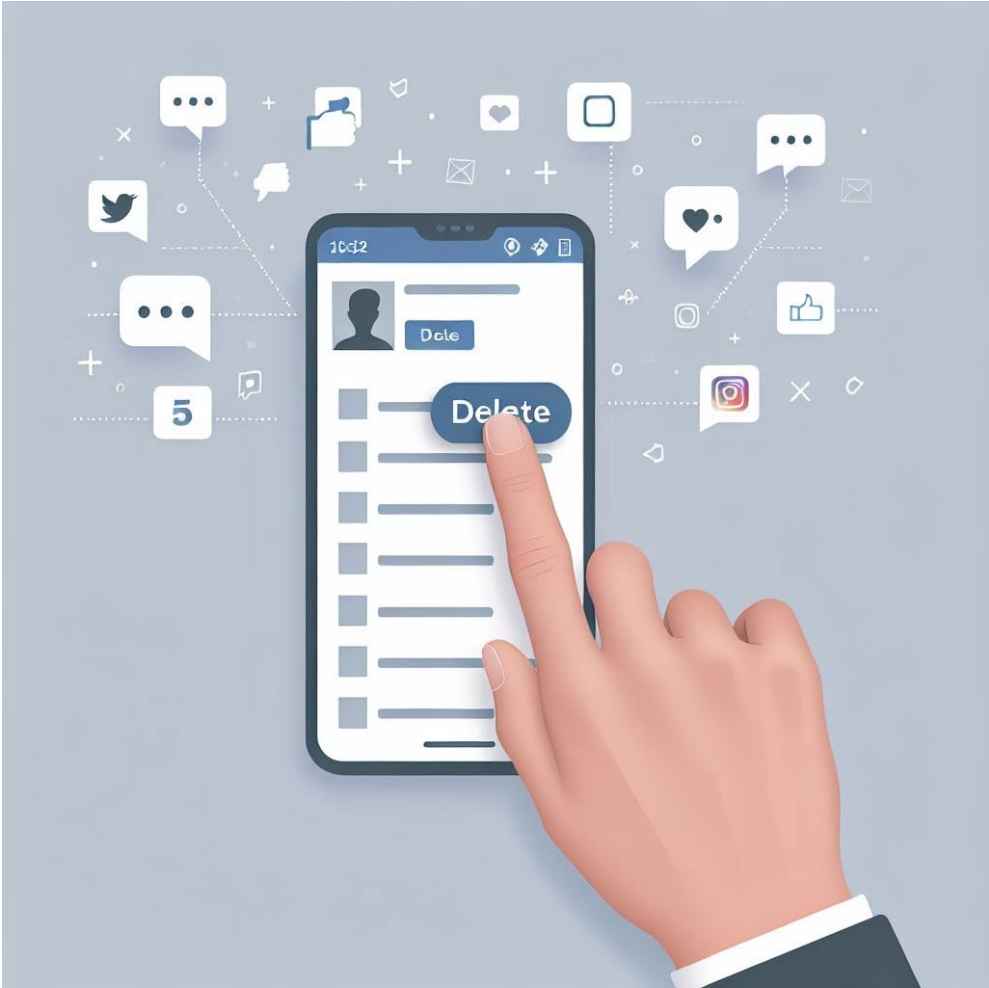
PETA v. TAMU, Case No. 18-cv-01547 (S.D. Tex.)

- Texas A&M used the expanded profanity filter option to include words like "PETA," "lab," and "cruel"
- Judge refused to toss case of viewpoint discrimination based on "content filtering"

Settled out of court: Texas A&M paid \$75,000 and removed all settings blocking/filtering critical comments



Hiding vs. Deleting Comments?



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?

Published: 09/26/22

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Author Name: [Kristi Nickodem](#)

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

[Home](#) / [General Local Government \(Miscellaneous\)](#) / Misinformation and Threats on Social Media in the Wake of Hurricane Helene: How Local Governments Can Respond

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[General Local Government \(Miscellaneous\)](#)

Misinformation and Threats on Social Media in the Wake of Hurricane Helene: How Local Governments Can Respond

Published: 10/16/24

 Print

Author Name: [Kristi Nickodem](#)

Misinformation about western North Carolina has spread rapidly in the wake of Hurricane Helene. As the New York Times [reported](#) last week, this surge of online misinformation has included false statements about the hurricane and the government's response, [calls for militias](#) to form against FEMA, and [threats of](#)

How does the First Amendment apply to misinformation?

Are threats of violence or incitement to violence protected?

Can individuals face legal consequences for what they say on social media?

Does a local government have to allow comments on its social media posts?

Could a local government allow comments on some social media posts, but not others?

Can a local government delete its own posts?

What if someone makes false, damaging statements about a specific government official or employee?

Public Records Requirements May Apply

“made or received...in connection with the transaction of public business by any agency of North Carolina government”

- G.S. 132-1(a)

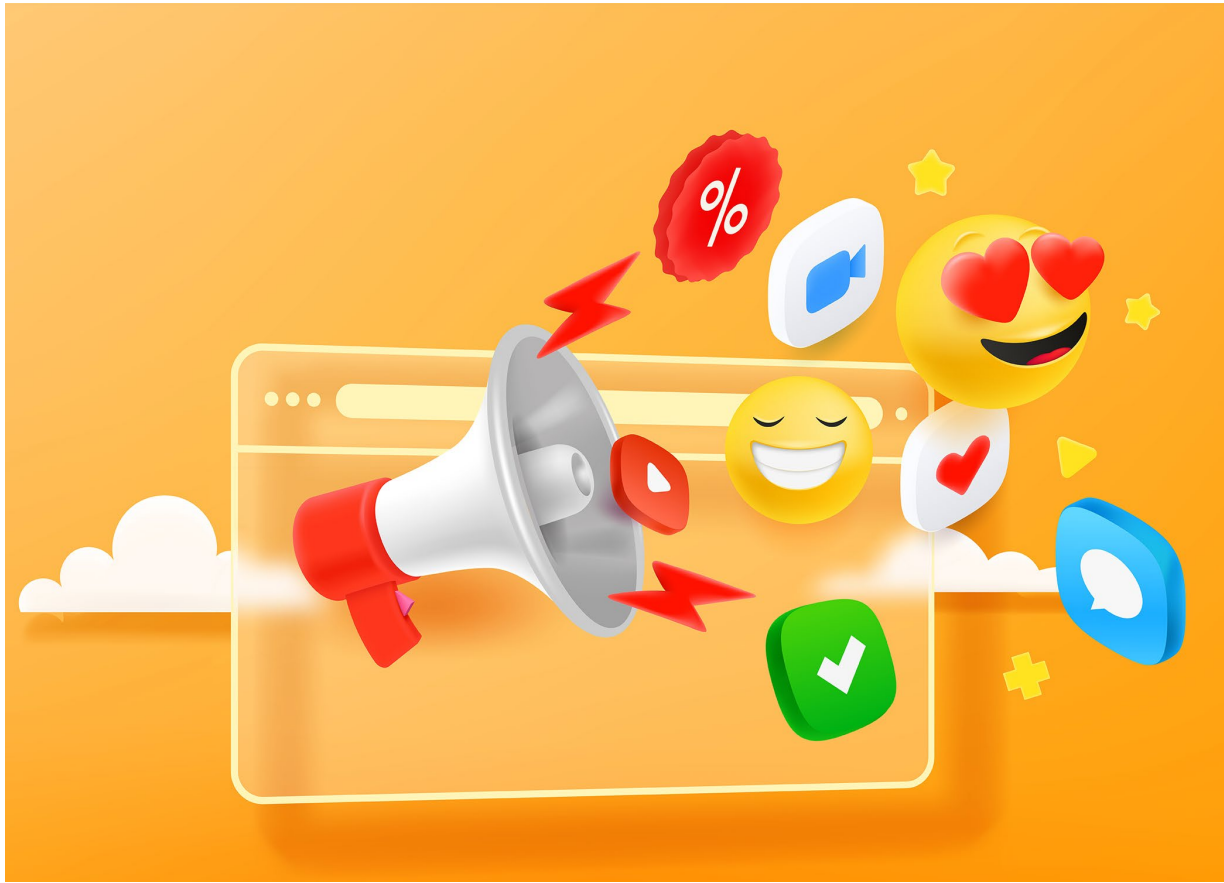


How To Retain the Public Record

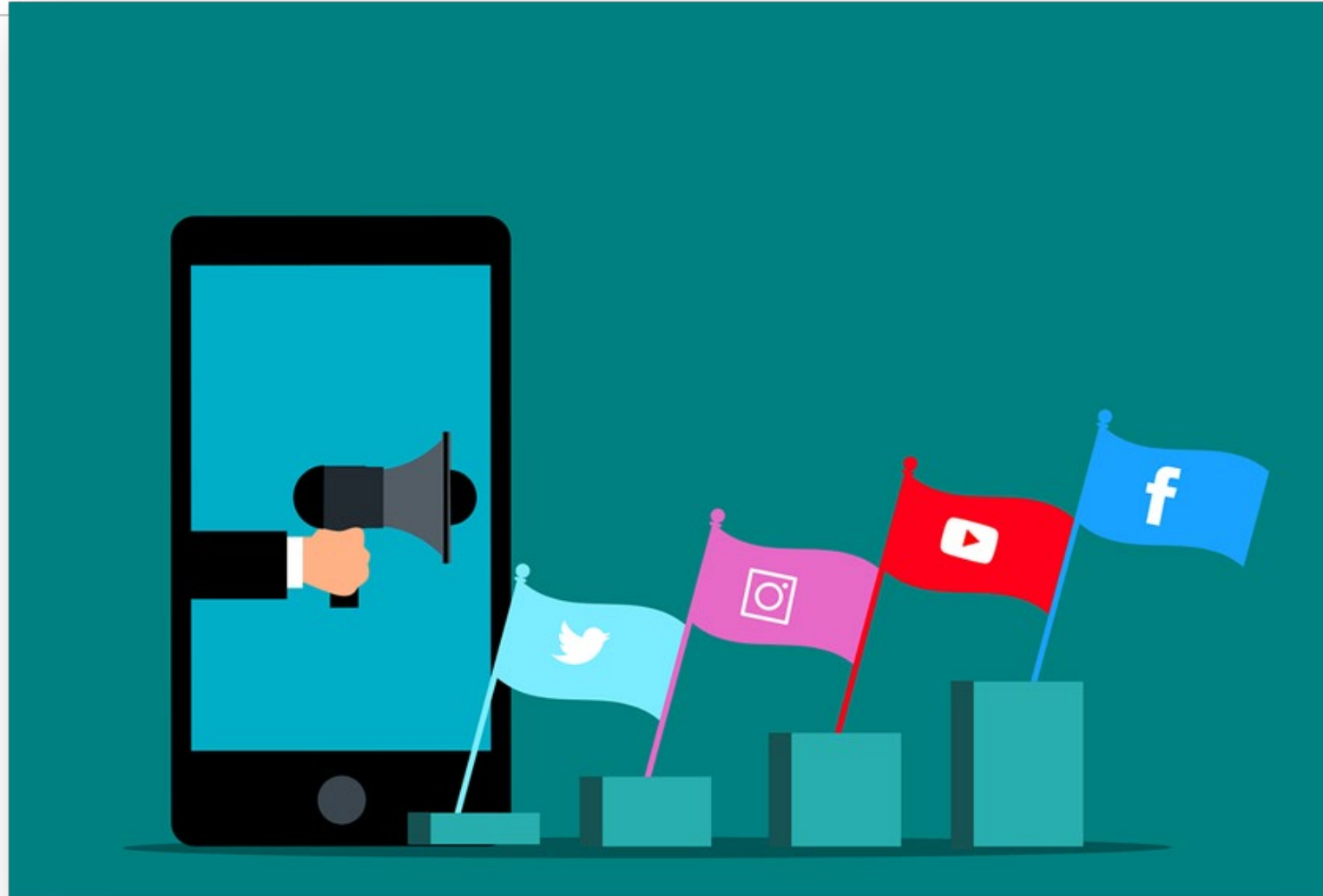
- Archiving services
- Download features on social media platforms
- Print with time/date stamps
- Create an alternative official copy (log, etc)



What rules apply to “personal” social media accounts?



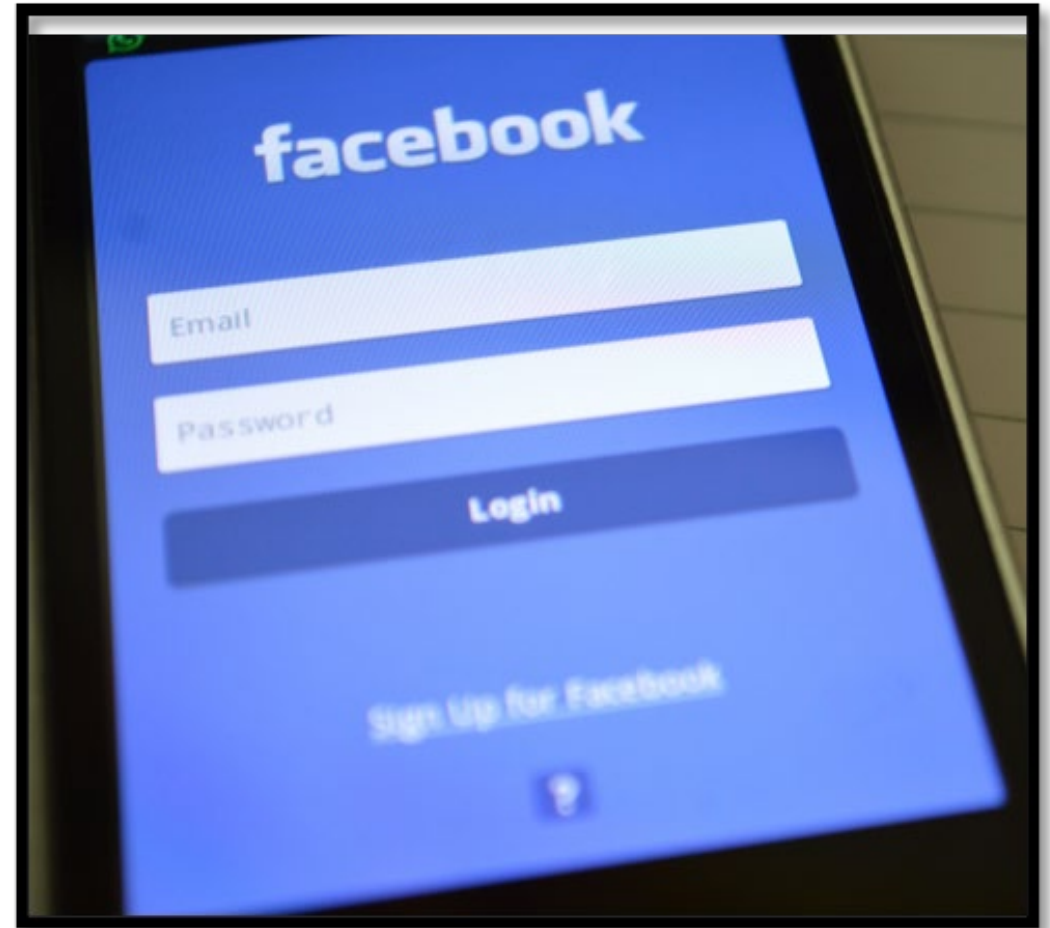
Depends on the Content of the Communication



Hypothetical

A mayor livestreams a city council meeting from her personal Facebook page.

Does the First Amendment potentially limit her from deleting comments on that livestream/post?



Campaign Activity vs. Official Business

When does a
campaign account
become an
“official” account?



Campbell v. Reisch, 986 F.3d 822 (8th Cir. 2021)

- Missouri State Rep. Cheri Reisch blocked Mike Campbell from her Twitter account after Campbell retweeted a tweet that was critical of Reisch.
- Reisch created the account the day she announced her candidacy and used it for campaigning.

Eighth Circuit held that Rep. Reisch did not violate the First Amendment when she blocked Campbell. Why?



***Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021)**

“[T]he mere fact of Reisch's election did not magically alter the account's character, nor did it evolve into something different. A private account can turn into a governmental one if it becomes an organ of official business, but that is not what happened here. The overall theme of Reisch's tweets—that's she's the right person for the job—largely remained the same after her electoral victory.... In short, we think Reisch's Twitter account is more akin to a campaign newsletter than to anything else, and so it's Reisch's prerogative to select her audience and present her page as she sees fit.”

**Is this analysis
about “campaign
accounts”
different after
Lindke v. Freed?**



Take a Cautious Approach

If a campaign account is used to discuss or post about official business after election, act as though First Amendment applies and treat it as an “official” account.



Final Takeaways

Who has authority to speak on behalf of your governmental entity via social media?

Keep personal and official accounts separate (and clearly label personal accounts as personal)

Think of comment sections on official pages like a public comment period

Questions?

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