



May 22, 2023

VIA EMAIL

Dear Members of the General Assembly,

As you proceed into your term and engage your constituents in a variety of forums, ambiguities may arise surrounding the limits and boundaries of free speech in both physical and digital public spaces. The American Civil Liberties Union of Delaware (ACLU-DE) receives complaints from people across the state after being blocked from posting, tweeting, or commenting on social media sites maintained by our state's public officials. Such actions may violate the right of free speech under the First Amendment to the United States Constitution if they are based on the content of the messages being blocked. It is with this in mind – and per the recent ruling in *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019) – that we wished to provide you with a brief guideline to maintaining your own First Amendment rights and those of your constituents and maintain healthy boundaries between government, campaign, and personal social media forums.

Constitutional Concerns

Under the First Amendment, government officials may not discriminate against speech or speakers based on viewpoints expressed in a public forum. A **public forum** is any physical public space (public streets, sidewalks, parks, etc.) or *any social media account* that is 1) intentionally opened, 2) by a government official, 3) who uses the account as an official vehicle for governance and which 4) has interactive features which are accessible to the public. **Elements of official social media accounts may include:**

- informing the public about legislative activity
- soliciting input from the public about legislative issues
- allowing members of the public to post and/or comment
- using government resources (e.g., staff, computers) in connection with the account
- including your legislative title in the title of the account or homepage
- being categorized as a 'government' or 'government official' page
- featuring government insignia or photos of government settings on the homepage
- listing the legislator's official contact information
- having the web address of the legislative body or your official page on the government site
- directing posts to your constituents, the electorate at large, or the general public
- posting on behalf of the legislature or a segment thereof, OR
- posting content that tends toward matters related to your legislative office.

Guiding Principles

1. **Any limits on who can follow you or what your followers can post must be *viewpoint-neutral*.**
 - Public officials may *not* block people from the account or otherwise censor comments

because the users' comments are **critical of the official** or because the official otherwise disagrees with the **viewpoint** expressed.¹

- Public officials may restrict comments that are **not protected by the First Amendment or Article 1, Section 5 of the Delaware Constitution**, including posts that make a true and immediate threat of physical harm, incite others to imminently violate the law, contain statements previously found by a court of law to be defamatory, or are obscene as narrowly defined by the U.S. Supreme Court. But these are limited categorical exemptions, and most types of speech that may be crude or offensive to some readers do not fall within these exemptions. Moreover, a free speech problem would arise if an official allowed some speech that falls into one of these categories because the official agrees with the viewpoint expressed but prevents other speech within such categories when the official disagrees with the viewpoint expressed.² Put simply, officials must neutrally and consistently enforce their policies, without giving special preference to certain individuals or viewpoints.³
- If a social media page was created specifically to discuss only a certain issue or category of issues (e.g., schools), officials are allowed to restrict off-topic comments. But, if comments on a government site praising an official or government agency on particular subjects are allowed, comments criticizing the official or agency on such topics cannot be restricted.

2. If you wish to limit what your followers can post, you should have a transparent social media policy.

- **A clear and accessible policy** can help you make good decisions when confronted with these issues and reassure constituents and the general public that decisions are not being made erroneously.
- **A policy should provide clear notice of any limits you intend to enforce in the forum.** Any rules should be consistent with the guidance above. Describe your rules with specificity so that users have sufficient notice of what types of speech are and are not permissible on the site.
- **Explain in the policy how you will address violations.** Include in the policy a means for people to contest an assertion that they have run afoul of the rules. Think carefully before imposing restrictions on individual followers, and when you determine some action is warranted, consider responding in a measured way. For instance, the policy could provide a warning for an initial infraction, then removal or hiding of individual posts, followed by the

¹ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”).

² See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992) (while speech falling within categories such as true threats and obscenity may be proscribed, the government may not differentially regulate speech within these categories based upon hostility or favoritism towards the viewpoints that accompany such speech).

³ Courts have not yet clarified whether or when officials may impose other content-based restrictions on social media. Depending on the type of forum that has been created, other content-based restrictions are likely problematic, but, even if such restrictions are allowed, they must be applied equally to those who express viewpoints supported by or supportive of the official and those who offer criticism or disagreement.

temporary restriction on access (e.g., three days) if problems recur, all before resorting to longer-term blocking for repeated and serious infractions.

3. Enforce your social media policy consistently, in accordance with due process and viewpoint-neutrality.

- As noted above, the first step to ensuring due process and viewpoint-neutrality is to **make your policy publicly available and to enforce it consistently**.
- **Provide a point of contact** for individuals who have been blocked or otherwise censored to request an explanation as to the basis for such actions and information about how individuals can contest any blocking or removal/hiding of comments.
- In addition, due process is served by **proactively giving notice** to users whom you block or otherwise censor. Such notice can provide the policy you believe the user has violated, a copy of the content you believe violated the policy, an explanation of measures you will take in response, and an explanation of how the user can challenge your determination.

4. Social media accounts may qualify as public forums subject to free speech protections even if they share some personal or campaign-related content.

There is not yet a single legal test for determining when an interactive social media site is used for government business and thus subject to constitutional protections. Courts have looked at a variety of factors, including:

- **How the account is used.** If you use your account to ask for government policy input or share information about government services or meetings, it is more likely to be a public forum. This is true regardless of whether the account is designated as an official account by the public employee.⁴
- **Whether government resources are used in connection with the account.** If government staff help you to administer your account (for example, editing or drafting content, monitoring analytics, or interacting with users), or if you use your account to carry out official duties, it is more likely to be a public forum.
- **How the account is presented.** An account is more likely to be a public forum if it links to official websites, lists public office addresses and phone numbers, displays government symbols, or highlights that the account belongs to a public official.

Remember, an account need not meet all the above characteristics to be subject to free speech protections.

Please note that *you do not have to have a social media account that allows interaction*. One option is to not create a public forum, either by not having a social media account or by disabling the interactive capabilities of the account, thereby rendering it a place where members of the public are not allowed to comment. ***If you choose to have a social media account with interactive elements, we strongly recommend that you create and post publicly on the page a viewpoint-neutral policy that informs users that the account is consistently enforced according to clear procedures (e.g., no***

⁴ See, e.g., Texas Attorney General Ken Paxton Agrees to Stop Blocking People on Twitter, Ending Lawsuit Over First Amendment (Texas Tribune, July 12, 2021), <https://www.texastribune.org/2021/07/12/paxton-twitter-lawsuit-blocked>.



threats, incitements to violence, profanity, slurs, spam/commercial links, or any word/character limits). This sets clear and unambiguous standards about what is and is not permitted in your official forum and establishes clear enforcement policies by which you can both ensure and provide consistent enforcement.

The ACLU of Delaware hopes you will commit yourself and your office to the ethical use of social media in alignment with the First Amendment rights of Delawareans. Regardless of political, social, or religious perspective, all Delawareans have the right to communicate with their elected officials in public forums without fear of censorship or reprisal. We welcome partnership with your office in maintaining these standards and would be glad to provide additional recommendations or clarification concerning the practical, ethical, and legally-sound use of social media as an elected official. Thank you for your time and consideration to this matter.

Respectfully,

A handwritten signature in black ink that reads "Javonne Rich". The signature is written in a cursive, flowing style.

Javonne Rich
Policy & Advocacy Director
ACLU of Delaware