



Viva La First Amendment –  
Using Aloha Spirit in Your Social Media Use

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# First Amendment

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- U.S. Supreme Court has ruled that *government* social media is subject to First Amendment
- First Amendment limits government actors – generally not applicable to *private* persons or entities



# Overview

WE'RE DOOMED

## Study: Social media probably can't be fixed

"The [structural] mechanism producing these problematic outcomes is really robust and hard to resolve."

JENNIFER OUELLETTE • AUG 13, 2025 9:32 AM • 283



# Why it Matters

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Risk Analysis and  
Slippery Slopes

*Deleting, Blocking,  
or Unjustified  
Disciplinary  
Actions*

Social Media Blurs  
(Public/Private  
Lines)

*Elected Official  
Using Personal  
Page for Public  
Purposes*






# Goal = Inoculation from Social Media Issues

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- Creating reasonable policies and best practices embracing the Aloha Spirit:
- The Aloha Spirit, deeply rooted in Hawaiian culture, is a way of life that embodies love, compassion, and harmony. It's more than just a greeting; it's a philosophy that encourages kindness, respect, and genuine connection with others. The Aloha Spirit promotes a mindful, harmonious way of living, emphasizing interconnectedness and the importance of caring for one another.
- But Run it by the Lawyer!



# Historical Legal Framework & Concepts

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*Note: Many legal concepts developed  
prior to the Social Media Age*



# Historical Legal Framework & Concepts

- The right to free speech is not absolute.
- *Cannot yell "fire" in a theatre*
- *Cannot incite violence*
- First Amendment allows the government to impose reasonable time, place, and manner restrictions on speech, as long as these restrictions are content-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication. *Spingola v. State*, 135 S.W.3d 330 (Tex. App.—Houston 2004).



# Traditional Forums vs. Non-Traditional

Regulations on speech in traditional and designated public forums are subject to **strict scrutiny review**—they must be tailored to serve a **compelling** state interest (e.g., sidewalks or libraries).

Limited public forums are places that the government has opened for public expression of particular kinds or by particular groups (e.g. public comment at meetings).  
*Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 344 (5th Cir. 2001)

## Restrictions Might Be Permissible (Non-Traditional Forum)

- Nonpublic forums are forums that are not open for public communication by tradition or designation. The government can restrict speech in a limited public forum or nonpublic forum as long as the restriction is (1) reasonable in light of the purpose served by the forum and (2) does not discriminate against speech on the basis of viewpoint. *Supra.*
- *Example: Public Comment Portion of Meetings (limited forum rules)*
- *Example: Polling Places - Government-Controlled Spaces for a Specific Purpose of Voting (non-public forum)*



# The Public Forum Doctrine

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- When it comes to exercising free speech on government premises, the courts have used the public forum doctrine to determine the extent of the speaker's right to expression on such property. In *Walker v. Texas Division, Sons of Confederate Veterans*, the U.S. Supreme Court determined that the speech sought by the nongovernment group, the Sons of Confederate Veterans, seeking to put the Confederate flag **on license plates (issued by the government)**, did not solely involve the private association but also included governmental speech. As such, Texas could refuse to issue the requested specialty plates.

## Now Have Four Recognized Forums

Based on *Walker*, the Supreme Court has now clearly recognized four categories of forums:

- Traditional (Sidewalks)
- Designated (Public Auditoriums)
- Limited (Public Comment Periods of Government Meeting)
- Nonpublic (Military Base)

# Balancing Tests

**Traditional forums**, including sidewalks and streets, have the greatest protection—the government must generally meet strict scrutiny to justify regulation of content-based speech. The **designated forum** is specifically created by the government’s decision to outline a premise and open it up for “all types of expressive activity” such as a public library—this forum receives the same protection as a traditional forum. **Limited forums** may be restricted to specific topics or even the class of individuals who may speak—*e.g.*, taxpayers within the jurisdiction. Finally, **nonpublic forums** are not open for public communication and usually involve internal operations where the government is not subject to a heightened review for free speech purposes.



# Can you have more than one forum at same time?



Regular agenda items could be treated as a nonpublic forum for the express purpose of the governing body conducting its work while public comments session is a limited public forum.



It is important to note that statutes like the Texas Open Meetings Act merely requires *access for the public*—there is no guarantee of participation.

*Went hold v. City of Farmers Branch*,  
No. 3:11-CV-0748-B, 2012 WL 467325,  
at 7 (N.D. Tex. 2012)

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- The expectations on the part of many in the public is that such public comment will be treated as a traditional public forum, but the reality is that these meetings are limited public forums. The courts are hesitant to allow disruptive, repetitious, or completely irrelevant topics that have nothing to do with the local government business in the context of a limited public forum.



# Recent Case Law

*Lindke v. Freed*, 601 U.S. 187 (2024)

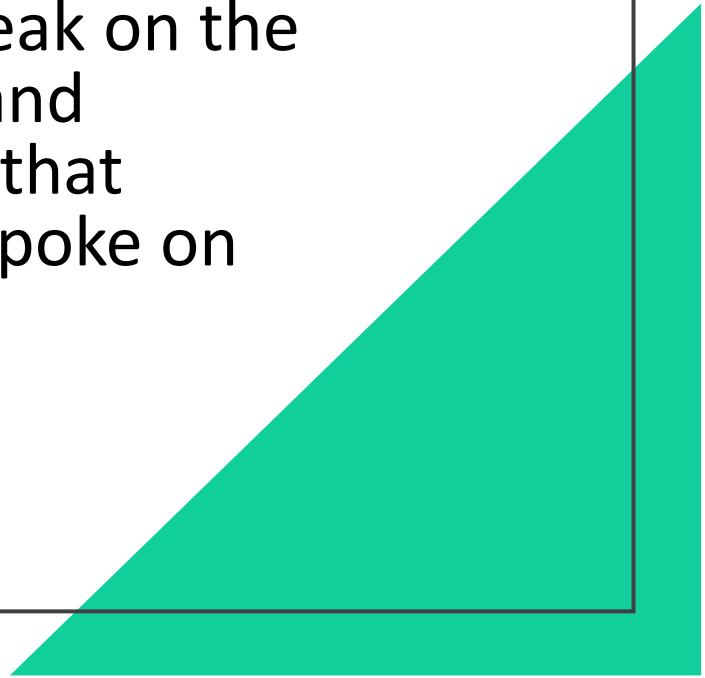
City Manager blocked an individual on the City Manager's Facebook page – a page he had created years before becoming the City Manager

Page mostly personal but identified him as the City Manager and he would occasionally post about the City and even answer questions about City business

Blocked individual sued claiming this Facebook page was a public forum

# Primary Holding of *Lindke* Case

When a government official posts about job-related topics on social media, this speech is attributable to the government only if the official possessed actual authority to speak on the government's behalf and purported to exercise that authority when they spoke on social media.



# Court Formulated Two-Prong Test



**ACTUAL AUTHORITY** – DID THE OFFICIAL  
HAVE LEGAL POWER TO SPEAK FOR THE CITY?



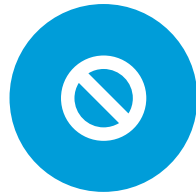
**PURPORTED EXERCISE** – DID THE OFFICIAL ACT  
AS IF THEY WERE EXERCISING THAT  
AUTHORITY?



# Key Takeaways

(If you are an official representative of the governmental entity)

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Do NOT comingle personal and public on social media



Do NOT use city seal/official title in personal posts



Do NOT discuss city business or announce city news on personal page



Courts increasingly are focused on who is posting and how they present the social media page

## *Davison v. Randall* (4<sup>th</sup> Cir. 2019)

- Loudoun County, VA Commissioner sued after she blocked people from her personal Facebook page
- Court found her page a public forum subject to First Amendment because:
  - She used it to inform constituents of county business
  - She used county staff to post on the page
  - The county promoted the page in its newsletter
  - Facebook page linked to county website

# Elected officials – private vs. government factors

## Private factors

- Government does not maintain site or moderate posts or comments
- Site would not revert back to government when official left office
- Official did not use staff to post on official's behalf
- Activities take place outside of normal working hours

## Government factors

- Official included title/position on the site
- Official's contact information listed on site
- Site linked to official government website
- Official conducted official business via site
- Official interacted with constituents on government business on site

# Best Practices



## Enact

Enact a social media use policy for members of the organization



## Explain

Explain to them that their personal social media activities, if tied to their governmental duties, could be a “public forum” subject to the First Amendment and could also implicate open records and meetings laws




## Practice

Best practice? Keep professional and personal activities separate (and campaigns, for that matter)



## Place

Place “Personal Page” notation on actual personal page and consider making it private



Social Media Policy  
+  
Terms of Use Policy

# Employee Usage Policy

## Establish

- Establish clear guidelines and boundaries for employee social media activities
  - Conduct on the employer's official social media sites
  - Conduct "on the job" or on employer equipment
  - Conduct outside of work that may impact employer

## Communicate

- Communicate whether social media use at work will be banned or minimal use allowed

# Avoid Overbroad Policies

*Liverman v. City of Petersburg*, 844 F.3d 400  
(4<sup>th</sup> Cir. 2016)

A Virginia police department's social media policy was found unconstitutionally overbroad because it bans employees from speaking on "matters of public concern."

Be careful  
not to  
discriminate  
in enforcing  
social media  
policy

- Louisiana court overturned termination of a reporter, finding that TV station employer inconsistently applied its social media policy – the employer had terminated one employee for negative Facebook posts about a viewer, but did not discipline a co-worker for similar Facebook posts - *Redford v. KTBS, LLC*, 2015 WL 5708218 (W.D. La. 2015)
- TAKE HOME TIP: Zero tolerance policies are difficult to enforce. **Be careful of unequal enforcement.**

# Campaign “like” = political speech

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Deputies reinstated after sheriff fired them for “liking” his opponent’s Facebook campaign page - *Bland v. Roberts*, 730 F.3d 368 (4<sup>th</sup> Cir. 2013)

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A “like” can be speech, and political speech is protected.



# Employee Training

Employee training is important, particularly because technology changes so quickly



**TAKE HOME TIP:** Have employees sign an acknowledgment that they (1) read the policy and (2) received training. This may help protect the organization to show documentation of training.

# Terms of Use and Rules of Decorum

An increasingly common conundrum for local governments is how to reasonably inject public comment without disrupting or undermining decorum. Use of rules of decorum (or terms of use for online activities) are increasingly under attack for restrictions on “disparaging” others, including criticism of the elected officials.





## Terms of Use for the Public

- Entities must not moderate public comments without publishing an acceptable use policy that informs users about the types of content allowed and the steps taken to ensure compliance.
- Rules for moderation must be neutral and consistent
- Removal of critical speech is legally risky

# Sample Standard Terms of Use Intro

Every social media account shall have terms of use. **These terms of use outline the expectations for posting behaviors from visitors on to the account and allow for the department to moderate as needed. If a given social media platform does not allow for sharing the terms of use with a visitor (i.e.: include the terms of use on the social media site), departments shall have the terms of use written up for documentation and distribution purposes.**



# Sample Prohibited Items

Solicitation of commerce, advertising or other promotional announcements are not permitted.

Using profane language or posting any comments or information that could be considered abusive dialogue is prohibited and posts containing such language shall be removed.

Comments must not be in support of or opposition to political campaigns or ballot measures; Postings for electoral campaign purposes will not be published and shall be removed.

Content will be removed that promotes, fosters, or perpetuates discrimination on the basis of race, creed, color, age, religion, gender, marital status, status with regard to public assistance, national origin, physical or mental disability or sexual orientation;

# Sample Prohibited Items

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Sexual content or links to sexual content is not permitted.

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Content advocating conduct or encouragement of illegal activity is not permitted.

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Posted content must be relevant to City and the subject matter of the specific social media account page.

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Users are encouraged to not provide personally identifiable information within their posts.

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Content attacking an individual's or group's character will be removed.





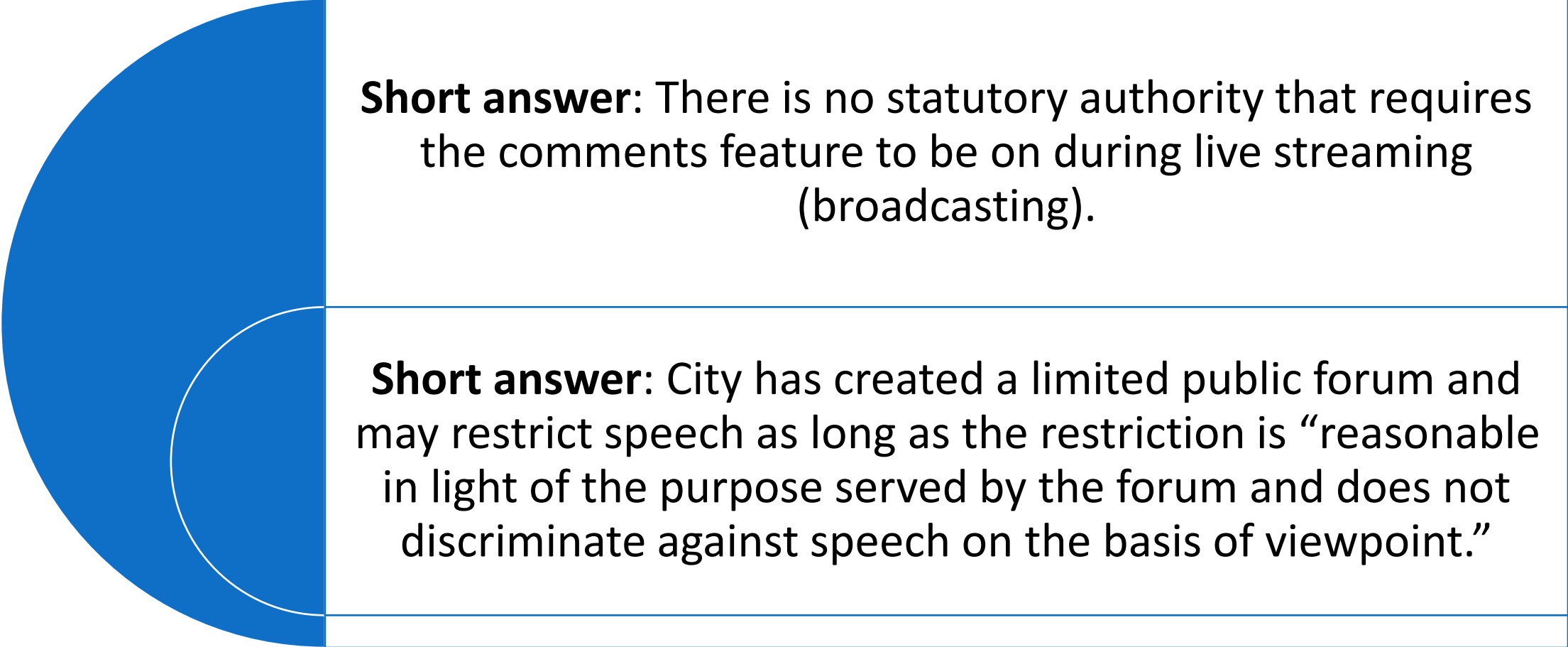
# The Comments Section



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- What is the authority of the City to shut off comments while live streaming a City Council or other public meeting?
- What is the authority of the City to completely disable comments on official Facebook pages or other social media sites?

# The Comments Section



**Short answer:** There is no statutory authority that requires the comments feature to be on during live streaming (broadcasting).

**Short answer:** City has created a limited public forum and may restrict speech as long as the restriction is “reasonable in light of the purpose served by the forum and does not discriminate against speech on the basis of viewpoint.”



# Broadcast Meetings

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- A Texas City is not required to broadcast its meeting if has a population under 50,000
- The Texas Open Meetings Act (TOMA) differentiates broadcasting from videoconferencing in a meeting
- There is no statutory guidance related to “comments” during the broadcasting of a meeting
- Absent guidance, the City may adopt reasonable rules for broadcasting its meetings

# Social Media Comments

A determination of the type of forum created by the City with its social media pages is needed



Two broad categories:

Traditional and  
designated public  
forums

Limited public forums  
and nonpublic  
forums

# Traditional and Designated Public Forums



Traditional public forums are places such as sidewalks, streets, and parks



Designated public forums are places that the government has designated for the same use as traditional



Regulations on speech are subject to strict scrutiny review – they must be narrowly tailored to serve a compelling state interest

# Limited and Nonpublic Forums



LIMITED PUBLIC FORUMS ARE PLACES THE GOVERNMENT HAS OPENED FOR PUBLIC EXPRESSION OF PARTICULAR KINDS OR BY PARTICULAR GROUPS



NONPUBLIC FORUMS ARE NOT OPEN FOR PUBLIC COMMUNICATION BY TRADITION OR DESIGNATION



GOVERNMENT MAY RESTRICT SPEECH AS LONG AS THE RESTRICTION IS REASONABLE IN LIGHT OF THE PURPOSE SERVED AND DOES NOT DISCRIMINATE ON THE BASIS OF VIEWPOINT


# Social Media Sites and Pages

- If only public comments are allowed and no other access or right to publish is permitted, a court would likely find the City has created a limited public forum
- A blanket policy to disable the comments section would likely be found “reasonable” as it applies to all persons
- City must exercise caution in changing its policy as frequent changes could be construed as an impermissible attempt to regulate speech





# First Amendment Auditors



First Amendment auditors are people who record their interactions with public officials and employees to test the government's respect for free speech. They often target government buildings, equipment, access control points, and online presence. The recordings or screenshots are then published and cast in a negative light.

# Recap

- Social media initiatives by cities and officials are often “official speech” subject to the First Amendment
- *Lindke Case* provides guideposts to stay out of trouble in this arena
- Set reasonable, neutral, and enforceable rules *prior* to moderating user comments
- Keep personal/public lines separate





## Conclusion

In short, inject the Aloha Spirit into your social media use to navigate the online world while promoting your city and remaining constitutional

Questions?

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