

**VIA EMAIL**

Tony Gillette  
Council Member, Ward 1  
11110 Johnson Dr.  
Shawnee, KS 66203  
[tgillette@cityofshawnee.org](mailto:tgillette@cityofshawnee.org); [tonygillette4shawnee@gmail.com](mailto:tonygillette4shawnee@gmail.com)

September 6, 2024

*Re: Constitutional implications for removal of comments or blocking users on public official Facebook page.*

Councilman Gillette:

We write concerning reports from Shawnee residents who had their comments on your “Tony Gillette for Shawnee” Facebook page<sup>1</sup> deleted or their access to the page otherwise restricted. This letter seeks to inform you about the status of free speech law regarding public officials’ social media accounts and the ways in which you may be violating your constituents’ rights to free speech and to petition the government under the First Amendment and section 11 of the Kansas Constitution’s Bill of Rights.

The “Tony Gillette for Shawnee” page qualifies as a page created and maintained in your official capacity as a Shawnee City Councilmember. Thus, under recent Supreme Court rulings, any restrictions on speech on that page are state actions subject to federal law and the Constitution. By removing comments or preventing members of the public from accessing your page, you risk legal liability in a civil suit that may result in an injunction and money damages.<sup>2</sup>

**A. The “Tony Gillette for Shawnee” Facebook page operates in an official capacity, and deletion of comments and blocking of users from that page are unconstitutional.**

According to the Supreme Court, when a public official restricts who may comment or what citizens may say on the official’s social media, the official’s actions are “state actions” if two conditions are met. The first is that the official possessed actual authority to speak on the State’s behalf. The second condition is that the public official intended to exercise that authority by posting on social media.<sup>3</sup> If these two criteria are met, a public official who removes comments, blocks certain users, or locks comment sections violates the commenters’ First and Fourteenth Amendment rights to free speech and

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<sup>1</sup> *Tony Gillette for Shawnee*, Facebook, <https://www.facebook.com/tonygillette4shawnee>.

<sup>2</sup> See 42 U.S.C. § 1983.

<sup>3</sup> *Lindke v. Freed*, 601 U.S. 187, 198 (2024).



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equal protection.<sup>4</sup>

As a City Councilmember for Shawnee, you are a public official authorized to speak on the City’s behalf and to implement City communications policies.<sup>5</sup> The “Tony Gillette for Shawnee” Facebook page is not a personal social media account, but rather a channel for you to speak “in furtherance of [your] official responsibilities” as a Councilmember.<sup>6</sup> The page includes a link to your official website, announcements regarding your votes, City programs and events, and interactions between you and the public regarding the City’s public services. The fact that you also maintain a separate personal Facebook profile suggests that you differentiate between an official page and an exclusively personal account. But, even if the “Tony Gillette for Shawnee” page were used for both official and personal use, blocking members of the public from commenting on it could still violate those members’ First Amendment rights.<sup>7</sup>

**B. Comments on official posts from “Tony Gillette for Shawnee” are protected under the First and Fourteenth Amendments.**

The Supreme Court has made clear that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>8</sup> The Court has also stated that “cyberspace” and “social media in particular” represent “the most important places” for free speech.<sup>9</sup>

A government official who creates an interactive social media platform for discussing official issues may create a “public forum”: a government-created space that is open for expressive activity by the public.<sup>10</sup> The “Tony Gillette for Shawnee” page’s open comments section, its “intro” section listing your office and official contact information, your posts addressing the entire Shawnee community, your interactions with constituents in the comments section about City services and issues, and your separate personal Facebook account are all indications that the page is a public forum.<sup>11</sup>

In a public forum like as the “Tony Gillette for Shawnee” page, the First Amendment forbids a government official such as yourself from

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<sup>4</sup> See *id.* at 204; *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 101 (1972).

<sup>5</sup> See *Councilmember Role*, City of Shawnee, [https://www.cityofshawnee.org/Government/City\\_Government/councilmember\\_role](https://www.cityofshawnee.org/Government/City_Government/councilmember_role); City of Shawnee Policy Statement No. PS-70 (2016), <https://cityofshawnee.civicweb.net/filepro/documents/109/?preview=4518>.

<sup>6</sup> *Lindke*, 601 U.S. at 201, 202, 204.

<sup>7</sup> *Id.* at 204.

<sup>8</sup> *Mosley*, 408 U.S. at 95.

<sup>9</sup> *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017).

<sup>10</sup> *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237-38 (2d Cir. 2019), *vacated as moot sub nom. Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S.Ct. 1220 (2021); *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992).

<sup>11</sup> *Cf. Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019).



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removing comments based on their content.<sup>12</sup> Even if the page is not considered a public forum, any action you take to silence or block constituents based on their viewpoint would also be unconstitutional.<sup>13</sup>

Treating constituents unequally based on their different viewpoints may also violate the Fourteenth Amendment’s Equal Protection Clause.<sup>14</sup> It is unconstitutional for a public official, regardless of forum type, to allow compliments from some while restricting criticism from others.<sup>15</sup>

\* \* \*

We commend you for maintaining a page that provides updates to the public and creates a forum for listening and responding to their concerns. However, the Constitution and the Kansas Bill of Rights<sup>16</sup> require that this forum be equally available to all Shawnee residents, even if you find their speech objectionable.

To avoid any potential constitutional violations, we strongly urge you to: (1) stop deleting comments; (2) restore deleted comments that do not violate Facebook’s terms of use; (3) stop restricting comments on your posts, and (4) unblock any users whose comments did not violate Facebook’s terms of use.

We sincerely hope that you end this practice of silencing members of the public, and that you recommit to governmental use of social media that is accessible to all of Shawnee.

Sincerely,

Kunyu Ching  
Staff Attorney

Monica Bennett  
Legal Director  
ACLU of Kansas

<sup>12</sup> *Mosley*, 408 U.S. at 96; *see also Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 811 (2019); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995). This is not to say that you or your social media team must suffer abuses that would violate Facebook’s terms of use; rather, those terms can be used to regulate speech on government Facebook pages by Facebook.

<sup>13</sup> *Mosley*, 408 U.S. at 96; *Rosenberger*, 515 U.S. at 828-29; *Cornelius*, 473 U.S. at 806.

<sup>14</sup> *Mosley*, 408 U.S. at 96; *Schmidt v. Seidel*, No. 2:23-cv-00101-NDF, 2023 U.S. Dist. LEXIS 240601, at \*10 (D. Wyo. Aug. 31, 2023).

<sup>15</sup> *See Gilmore v. Beveridge*, No. 2:22-cv-02032-HLT, 2023 U.S. Dist. LEXIS 107582, at \*17 (D. Kan. June 21, 2023).

<sup>16</sup> *See State v. Russell*, 227 Kan. 897, 899 (1980) (holding that the First Amendment and Section 11 of the Kansas Constitution “are generally considered coextensive”).