

FREEDOM FROM RELIGION *foundation*

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SENT VIA U.S. MAIL & EMAIL:

governor@governor.arkansas.gov
jr.davis@governor.arkansas.gov

Governor Asa Hutchinson
250 State Capitol Bldg.
Little Rock, AR 72201

Re: Religious promotion on social media

Dear Governor Hutchinson:

I am writing on behalf of the Freedom From Religion Foundation (FFRF) regarding a constitutional violations occurring on your official Facebook page (AsaForArkansas) and your official Twitter account, (@AsaHutchinson). We were contacted by several concerned Arkansans. FFRF is a national nonprofit organization with more than 30,000 members across the country, including Arkansas. We protect the constitutional principle of separation between state and church, and educate the public on matters relating to nontheism.

We understand that every Sunday, you post or tweet an image with a bible verse from your official, government Facebook page and Twitter account.

But it is not for the government in our secular republic to promote one religious book over others or to promote religion over nonreligion. Doing so violates the Establishment Clause of the Constitution.

Government officials cannot endorse religion, including by regularly publishing bible verses.

When it comes to violations of the Establishment Clause, i.e., the government endorsing religion, appearances matter. Government officials cannot *appear* to endorse Christianity. *See, e.g., Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 787 (1995) (Souter, J., concurring) (“Effects matter to the Establishment Clause, and one, principal way that we assess them is by asking whether the practice in question *creates the appearance* of endorsement to the reasonable observer.”) (emphasis added); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (invalidating practice that would have appeared to any reasonable observer to be “delivered with the approval of the school administration”). In this instance, by tying your government office title to two social media pages, you have intimately entwined your official position with the messages you send on those platforms, creating the appearance of official endorsement.

The Supreme Court has explained that “the prohibition against governmental endorsement of religion ‘preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*.” *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989). The goal is to ensure that the government does not “*appear*[] to take a position on questions of religious belief.” *Id.* at 594.

These posts very clearly endorse the bible and belief in the god of the bible over other religions and nonreligion. The official posts tell citizens of Arkansas:

- “For unto us a child is born, unto us a son is given: and the government shall be upon his shoulder: and his name shall be called Wonderful, Counsellor, The mighty God, The everlasting Father, The Prince of Peace. Isaiah 9:6” Dec. 18, 2016.
- “But you, O Lord, are a shield about me, my glory, and the lifter of my head. Psalm 3:3” Feb. 12, 2017.
- “Oh, taste and see that the Lord is god; blessed is the one who takes refuge in him. Psalm 34:8” Feb. 19, 2017.
- “Your word, Lord, is eternal; it stands firm in the heavens. Psalm 119:89” May 7, 2017.
- “Put your hope in God, for I will yet praise him, my Savior and my God. Psalm 43:5” July 2, 2017.
- “The name of the Lord is a strong tower; The righteous man runs into it and is save. Proverbs 18:10” July 20, 2017.
- “For I know the plans I have for you, declares the LORD, plans for welfare and not for evil to give you a future and a hope. Jer. 29:11”

In 2009, the Supreme Court held that government speech “must comport with the Establishment Clause.” *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009). In other words, government speech cannot endorse one religion over others or religion over nonreligion. Posts and tweets from these two accounts are certainly government speech.

Posts from the AsaForArkansas Facebook page and @AsaHutchinson Twitter account are government speech.

The Supreme Court recently described the power of social media sites: “the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to ‘become a town crier with a voice that resonates farther than it could from any soapbox.’” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (internal citations omitted).

Partly because of the power and influence of those accounts, the private social media accounts of people who assume government office can become accounts that speak for the government, unless these officers carefully distinguish their public and private roles. The AsaForArkansas Facebook page and @AsaHutchinson Twitter account have not been scrupulous or thorough in this regard. The accounts regularly, indeed mostly, transmit official statements and would be considered government speech. Citizens cannot be expected to discern the difference between an official government statement and a private statement when the source of those statements has not itself bothered to make the distinction clear.

Courts have not shied away from declaring that accounts that some politicians believe to be private are in fact official government accounts. The Ninth Circuit Court of Appeals recently noted that the President’s Twitter feed is composed of “official statements by the President of the United States” and we see no legal reason to treat your Twitter feed differently. *See Hawai’i v. Trump*, Case No. 17-15589 at *48–49, n. 14 (9th Cir. June 12, 2017).

In a recent decision involving a similar social media page, a federal court found that a government official had been acting under the color of law by maintaining the page and blocking citizens from that page and that doing so violated the First Amendment. *See Davison v. Loudoun Cty. Bd. of Supervisors*, No. 1:16CV932 (JCC/IDD), 2017 WL 3158389, at *8 (E.D. Va. July 25, 2017). The social media account was considered to be official despite the fact that the official’s enumerated duties did not include social media, that it would remain with the official after leaving office, and that much of the activity took place outside normal working hours.

We believe all of this can be said of the AsaForArkansas Facebook page and @AsaHutchinson Twitter account, too. These facts led the court to answer “a novel legal question: when is a social media account maintained by a public official considered ‘governmental’ in nature, and thus subject to constitutional constraints?” in the affirmative and hold that the account was maintained under color of law. In other words, the social media account had a “sufficiently close nexus” with the government to be fairly treated as that of the government itself. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

In the case of the AsaForArkansas Facebook page and @AsaHutchinson Twitter account, the bible posts appear to be tied to your identity as a government actor and were facilitated by the apparent authority of that office. The posts and tweets arise out of public, not personal, circumstances. The account is used to keep constituents informed of the activities of Asa Hutchinson the Governor, not Asa Hutchinson the private citizen.

For instance, on the profile picture on the Facebook page is your official portrait, a headshot with the Arkansas state flag in the background.¹ The page lists the official Governor of Arkansas website under contact info. The first line of your biography on the page reads, “Asa Hutchinson was sworn in as the 46th Governor of Arkansas in January 2015, and immediately set in motion his plan . . .” The page categorizes itself as representing a “Government Official.” All three of the events listed on the events section are political, including your inauguration.² Every video on the page touts your official work as Governor, including some direct messages from you with the title “Governor of Arkansas” used as an identifier both by yourself and with onscreen text.³ Facebook has also verified this page.

Most importantly, the official Governor of Arkansas website links to the AsaForArkansas Facebook page and the @AsaHutchinson Twitter account—the tweets are even embedded on the government page.⁴

Based on the totality of these circumstances, most citizens, and likely any court, to examine the issue would consider posts on the @AsaForArkansas Facebook page and tweets from the @AsaHutchinson Twitter account to be done with the official imprimatur of the government.

In the context of government speech, if a government official is making official statements, the official is not speaking as a citizen for the purpose of First Amendment free speech protection. The Supreme Court has been explicit on this point: “We hold that when public employees make

¹ Compare <https://www.facebook.com/pg/asaforarkansas> with <https://governor.arkansas.gov/press-shop> (and then click on the text reading “Download the Official Portrait of Governor Hutchinson.”)

² <https://www.facebook.com/pg/asaforarkansas/events/>

³ <https://www.facebook.com/pg/asaforarkansas/videos/>

⁴ <https://governor.arkansas.gov/governor-hutchinson>

statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

Solution

Of course, we have no issue with people reading and discussing the bible. The road to atheism is littered with bibles that have been read cover to cover.

The simplest solution is to stop posting and tweeting bible verses or any other religious endorsements and to delete those previously disseminated. If you cannot refrain from using social media to promote your personal religion, then you should open other, personal social media accounts for your personal thoughts, musings, prayers, and bible verses and leave all your official business for the accounts mentioned above.

If the law and your oath to uphold the Constitution are not sufficient to convince you to stop, perhaps you might consider reading Matthew 6:5-6, in which Jesus condemns public prayer as hypocrisy in his Sermon on the Mount. None of Jesus’s supposed words mention Twitter—perhaps he wasn’t that prescient—but the condemnation of public piety is reasonably clear.

Sincerely,



Andrew L. Seidel
Constitutional Attorney
Director of Strategic Response