

# FREEDOM FROM RELIGION *foundation*

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SENT VIA U.S. MAIL & EMAIL:

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The Honorable Marco Rubio  
284 Russell Senate Office Building  
Washington, DC 20510

Re: Religious promotion on social media

Dear Senator Rubio:

I am writing on behalf of the Freedom From Religion Foundation (FFRF) regarding a constitutional violation occurring on your Twitter account, @MarcoRubio. We were contacted by several concerned citizens, including Floridians. FFRF is a national nonprofit organization with more than 29,000 members across the country, including more than 1,400 members in Florida, and a state chapter, the Central Florida Freethought Community. We protect the constitutional principle of separation between state and church, and educate the public on matters relating to nontheism.

We understand that you have been tweeting bible verses from @MarcoRubio to nearly three million followers. It appears that you began tweeting the bible in mid-May and have been doing so regularly ever since. This is not an errant bible verse or two, but more than 60 bible verses in three months. That's enough verses to tweet the entire Book of Jude. Twice. One of the most recent verses, tweeted during the eclipse, appears to suggest that the eclipse is the work of god, quoting Exodus 10:21.<sup>1</sup> (This passage describes the second to last plague the biblical god inflicts on Egypt, the final plague being the murder of every firstborn male, from infant to octogenarian, as told in Exodus 11 and 12.)

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. 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.**

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 title to a

<sup>1</sup> <https://twitter.com/marcorubio/status/899701353303478272>

social media page, you have intimately entwined your official position with the messages you send on that platform, 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.

**Tweets from the @MarcoRubio Twitter account are government speech.**

The Supreme Court recently described the power of social media sites: “[T]he 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 @MarcoRubio account has not been scrupulous or thorough in this regard. It regularly, indeed mostly, transmits 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.

As an initial matter, the fact that Twitter is a private company operating a service is nearly irrelevant. If a city council were to rent private space to hold meetings, their statements in those meetings—though in a private space—would still be government speech. The same is true of the @MarcoRubio account, for a variety of compelling reasons.

We are aware of your official press office account, @SenRubioPress, but the existence of this account does not alter the official nature of your @MarcoRubio account. The government is not confined to making official statements from only one platform. The tweets from President Trump’s @realDonaldTrump were held to be “official statements” despite the existence of several other official accounts, including @WhiteHouse and @POTUS.

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 County Board of Supervisors, et al*, No. 1:2016-cv-00932, (E.D. Va. 2017) available at <https://goo.gl/YejzS9>.

- The government official exercised plenary control over the social media page.
- The social media page allows public figures to interact with the public.
- Staff sometimes curated the social media account.
- The social media account will not revert to the government when the official leaves office, but stay with the official.
- Personal devices were exclusively used to post to the account.
- Indicators, such as an official title, appeared on the account.
- Many posts concerned official government work.
- Many posts promoted and invited attendance at events related to the officials' work as a government official.
- Posts included or relayed official statements from the official.

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 @MarcoRubio 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 @MarcoRubio, the bible tweets appear to be tied to your identity as a government actor and were facilitated by the apparent authority of that office. The tweets arise out of public, not personal, circumstances. The account is used to keep constituents informed of the activities of Marco Rubio the Senator, not Marco Rubio the private citizen and family man.

For instance, one press release consists of compilation of 10 tweets from @MarcoRubio.<sup>2</sup> Other press releases recount Twitter exchanges @MarcoRubio has had.<sup>3</sup> Some releases suggest that @MarcoRubio is a "personal account," but do so by encouraging constituents to follow the account for updates on official state visits. For instance, one such release reads in part:

Rubio began his trip in Japan, where he met with U.S. officials and foreign leaders in the region to discuss critical economic and security issues. In addition to following trip updates at [@MarcoRubio](#), Rubio's personal Twitter account, below are photos from today's activities. . .<sup>4</sup>

Subsequent tweets from @MarcoRubio clearly concerned official government work including:

- "Just finished meeting with #Japan Prime Minister [@AbeShinzo](#)" with a photo of that meeting.<sup>5</sup>
- Thanking serving U.S. Marines: "Always great to see the #USMC. Thank you for your service [@USembassymanila](#)."<sup>6</sup>

<sup>2</sup> <https://www.rubio.senate.gov/public/index.cfm/press-releases?ID=19DD3054-35E3-4270-9400-E9DB60D0D2C4>

<sup>3</sup> <https://www.rubio.senate.gov/public/index.cfm/press-releases?ID=DE730646-56BD-4CCC-858D-340C6A4B191A>

<sup>4</sup> <https://www.rubio.senate.gov/public/index.cfm/press-releases?ID=a9c6886e-4a40-483e-be83-ad703e3046fd>

<sup>5</sup> <https://twitter.com/marcorubio/status/425499683914407936>

- Thanking the U.S. Navy: “Toured [@usnavy](#) USS Shiloh with [@SurfaceWarriors](#) & [@usforcesjapan](#). Thank you for your service.”<sup>7</sup>
- Thanking the U.S. Air Force: “Thank you [#USAF](#) for getting us over to visit the US Navy 7th Fleet at Yokosuka.”<sup>8</sup>
- “Just met with [#Japan](#) Vice-Minister for Foreign Affairs Nobuo Kishi about the unbreakable US-Japan alliance.”<sup>9</sup>
- “Met with [#Japan](#) defense minister Onodera to discuss the important US-Japan defense relationship.”<sup>10</sup>
- “Much gratitude from the people of the [#Philippines](#) for the generosity of the [#USA](#) in helping them recover from storm.”<sup>11</sup>
- “Thank you [@carolinekennedy](#) & [@usembassytokyo](#) for all of your help during my trip to [#Tokyo](#) [#Japan](#).”<sup>12</sup>
- Thanking constituents: “Great having lunch with Floridians serving in [@usnavy](#) in [#Japan](#).”<sup>13</sup>
- “Met with Admiral Yuki the Commandant of [#Japan](#) Coast Guard regarding Illegal Chinese intrusion on [#Senkaku](#) Islands.”<sup>14</sup>
- “Met with Minister Amari of [#Japan](#) to discuss trade with [#Florida](#) and [#USA](#).”<sup>15</sup>
- “Began our visit to [#Japan](#) meeting with American Chamber of Commerce.”<sup>16</sup>

All of these messages involve official government actions on matters of public concern. Based on the totality of these circumstances, most citizens, and likely any court, to examine the issue would consider tweets from [@MarcoRubio](#) 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 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).

Using the “US Senator for Florida” title, as the [@MarcoRubio](#) account does, also shows that these bible tweets do indeed originate from the government position. Moreover, the vast majority of the non-biblical tweets concern your official work: legislation, policy issues and briefings, thanking staff and constituents, foreign relations, and media appearances and events. The only recent non-biblical, non-official tweet appears to be your July 5<sup>th</sup> family photo.

Even if these tweets are from your personal phone and not sent out by staff, the use of government resources has never been a necessary factor in finding that a government practice violates the Establishment Clause. *See, e.g., McCollum v. Board of Education*, 333 U.S. 203, 234 (1948)

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<sup>6</sup> <https://twitter.com/marcorubio/status/426023488902529024>

<sup>7</sup> <https://twitter.com/marcorubio/status/425509601014841345>

<sup>8</sup> <https://twitter.com/marcorubio/status/425476675082526720>

<sup>9</sup> <https://twitter.com/marcorubio/status/425152096292581376>

<sup>10</sup> <https://twitter.com/marcorubio/status/425191182520418304>

<sup>11</sup> <https://twitter.com/marcorubio/status/426023297575186432>

<sup>12</sup> <https://twitter.com/marcorubio/status/425511680022310912>

<sup>13</sup> <https://twitter.com/marcorubio/status/425507399814758401>

<sup>14</sup> <https://twitter.com/marcorubio/status/425108681626497025>

<sup>15</sup> <https://twitter.com/marcorubio/status/425084142939037697>

<sup>16</sup> <https://twitter.com/marcorubio/status/425039012924248064>

(finding school release time program for bible study violated the Establishment Clause even though “any cost of this plan to the taxpayers is incalculable and negligible”). The Constitution prohibits official government acts of religious endorsement, regardless of whether there are resources attached.

### **Solutions**

Lawsuits to vindicate the rights of constituents regarding the social media accounts of government officials and the government have been successful. The ACLU has sued three cities in Indiana, Maine Governor Paul LePage, Kentucky Governor Matt Bevin, and Maryland Governor Larry Hogan over social media accounts. San Mateo, California was sued and settled. Honolulu forked over \$31,000 in attorneys’ fees for deleting comments from Facebook. San Diego also paid attorneys fees. And of course, the Knight First Amendment Institute at Columbia University has sued President Trump for blocking constituents.<sup>17</sup>

There are two basic solutions to this constitutional violation. The simplest solution is to stop tweeting bible verses or any other religious endorsements and delete those previously tweeted. If you cannot refrain from using social media to promote your personal religion, then all traces of the public office should be removed from the @MarcoRubio account, including the title “Senator,” which belongs to the office and We the People, not the person who temporarily occupies the office. Government staff should also not be accessing or tweeting from @MarcoRubio. Leave all your official business for the @SenRubioPress account and use @MarcoRubio for your personal thoughts, musings, family photographs, and prayers, and bible verses, if desired.

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 mentions 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

List of bible tweets:

1. <https://twitter.com/marcorubio/status/899972912249286657>
2. <https://twitter.com/marcorubio/status/899702120286441473>
3. <https://twitter.com/marcorubio/status/899701353303478272>
4. <https://twitter.com/marcorubio/status/899672120137064448>
5. <https://twitter.com/marcorubio/status/898864943763570688>
6. <https://twitter.com/marcorubio/status/898542049003175937>
7. <https://twitter.com/marcorubio/status/898161121101840384>
8. <https://twitter.com/marcorubio/status/897808934286831617>
9. <https://twitter.com/marcorubio/status/897042466066530305>
10. <https://twitter.com/marcorubio/status/896002614042664960>

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<sup>17</sup> See generally,

[http://www.slate.com/articles/technology/future\\_tense/2017/06/trump\\_isn\\_t\\_the\\_only\\_politician\\_blocking\\_constituents\\_on\\_twitter.html](http://www.slate.com/articles/technology/future_tense/2017/06/trump_isn_t_the_only_politician_blocking_constituents_on_twitter.html).

11. <https://twitter.com/marcorubio/status/896000025599279104>
12. <https://twitter.com/marcorubio/status/895635751634731008>
13. <https://twitter.com/marcorubio/status/892344594205220865>
14. <https://twitter.com/marcorubio/status/891638901017899008>
15. <https://twitter.com/marcorubio/status/890539628679364608>
16. <https://twitter.com/marcorubio/status/890165760856870913>
17. <https://twitter.com/marcorubio/status/889451873291214848>
18. <https://twitter.com/marcorubio/status/887980818924097536>
19. <https://twitter.com/marcorubio/status/887612635088384000>
20. <https://twitter.com/marcorubio/status/887259471885500416>
21. <https://twitter.com/marcorubio/status/886883361297498112>
22. <https://twitter.com/marcorubio/status/886581944338849793>
23. <https://twitter.com/marcorubio/status/886190005563129857>
24. <https://twitter.com/marcorubio/status/885803447819407362>
25. <https://twitter.com/marcorubio/status/885455567850020864>
26. <https://twitter.com/marcorubio/status/885087669700767744>
27. <https://twitter.com/marcorubio/status/884713627596599296>
28. <https://twitter.com/marcorubio/status/884366330815799296>
29. <https://twitter.com/marcorubio/status/884029161672769537>
30. <https://twitter.com/marcorubio/status/882576190237814784>
31. <https://twitter.com/marcorubio/status/880760288580075520>
32. <https://twitter.com/marcorubio/status/880366384063983616>
33. <https://twitter.com/marcorubio/status/880006026031923200>
34. <https://twitter.com/marcorubio/status/879643629203197952>
35. <https://twitter.com/marcorubio/status/879305094172471296>
36. <https://twitter.com/marcorubio/status/877831644014661632>
37. <https://twitter.com/marcorubio/status/877462320657702912>
38. <https://twitter.com/marcorubio/status/877102790518071296>
39. <https://twitter.com/marcorubio/status/877102790518071296>
40. <https://twitter.com/marcorubio/status/876398566582956032>
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43. <https://twitter.com/marcorubio/status/874938641247645697>
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45. <https://twitter.com/marcorubio/status/874569211905024000>
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47. <https://twitter.com/marcorubio/status/873134701598326784>
48. <https://twitter.com/marcorubio/status/872755008520966148>
49. <https://twitter.com/marcorubio/status/872392616654057472>
50. <https://twitter.com/marcorubio/status/872029457451806723>
51. <https://twitter.com/marcorubio/status/871670386328457216>
52. <https://twitter.com/marcorubio/status/870242986285711360>
53. <https://twitter.com/marcorubio/status/870242099450462208>
54. <https://twitter.com/marcorubio/status/869859936439644160>
55. <https://twitter.com/marcorubio/status/869517337728307200>
56. <https://twitter.com/marcorubio/status/868061451696472068>
57. <https://twitter.com/marcorubio/status/867680410578198528>
58. <https://twitter.com/marcorubio/status/867317333731139584>
59. <https://twitter.com/marcorubio/status/865540001034940422>
60. <https://twitter.com/marcorubio/status/865157776644767746>
61. <https://twitter.com/marcorubio/status/864791698911768577>
62. <https://twitter.com/marcorubio/status/864790563190706177>
63. <https://twitter.com/marcorubio/status/864431888726753280>
64. <https://twitter.com/marcorubio/status/864432517088133120>