



March 7, 2025

VIA EMAIL

Daniel McCay
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Salt Lake City, UT, 84114
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J. Stuart Adams
Utah Senate President
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Re: First Amendment Violation by Senator Daniel McCay

Dear Senator McCay and Senate President Adams:

I am Ian Prior, an attorney at America First Legal (“AFL”). AFL is a national, nonprofit organization working to promote the rule of law in the United States, prevent executive overreach, and ensure due process and equal protection for all Americans.

Senator McCay holds open his Facebook page to the public for comment and publishes content related to his official duties as a Utah State Senator. On or about April 2, 2023, following a comment made by Mr. Balkcom on Senator McCay’s Facebook page, he blocked Mr. Balkcom, thereby preventing Mr. Balkcom from following Senator McCay’s Facebook account, commenting on Senator McCay’s Facebook account, or simply viewing Senator McCay’s Facebook account.

By way of background, on April 2, 2023, Senator McCay shared a link to a YouTube video by @CGPGrey,¹ along with a statement, “A new video about STATE FLAGS by @GCPGrey!!! I CANNOT WAIT!!! GO UTAH!”²

The Facebook post is pictured below.



In the embedded video, the YouTube Channel “@CGPGrey” ranks state flags. By way of context, Senator Daniel McCay was the Senate sponsor of SB31, which created the

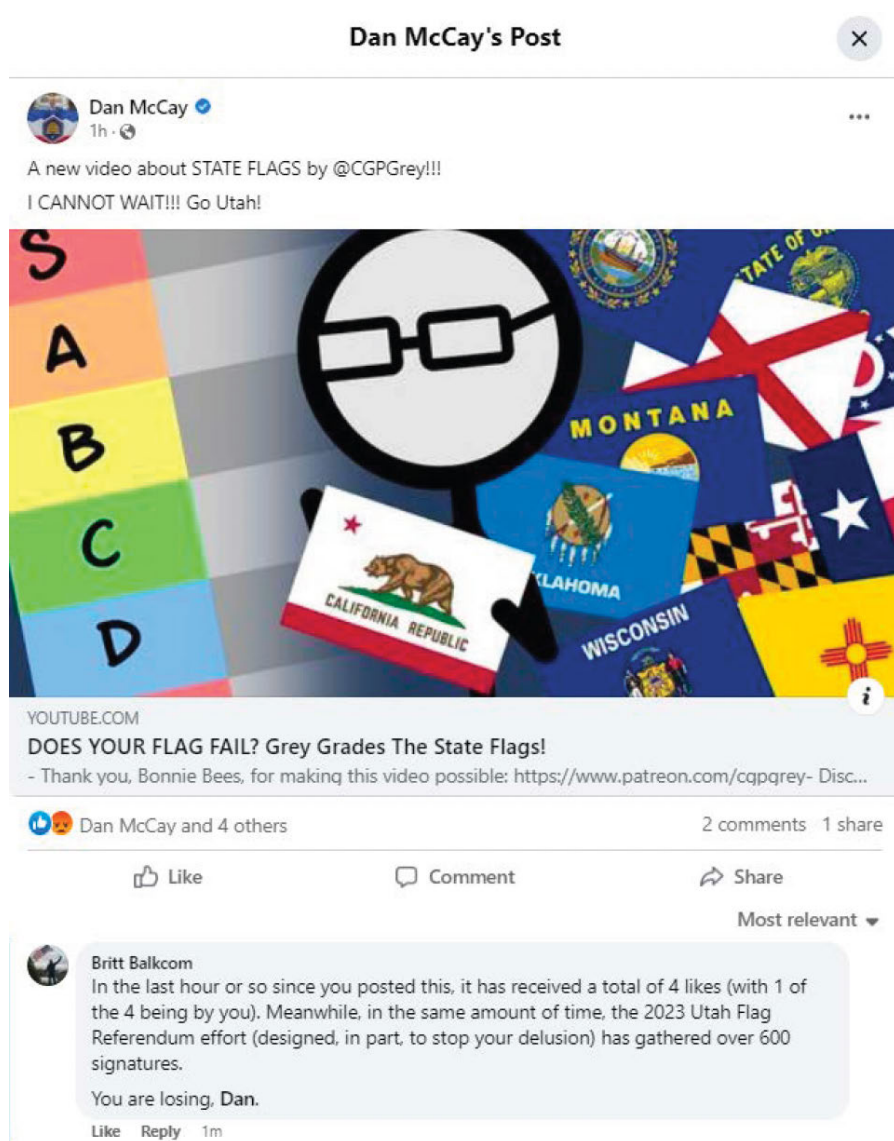
¹ Daniel McCay, *A new video about STATE FLAGS by @GCPGrey!!! I CANNOT WAIT!!! GO UTAH*, FACEBOOK, <https://perma.cc/MCH5-EUEA>.

² *Id.*

new Utah “Beehive” flag.³ Currently, the Facebook post has twenty-nine reactions and twenty-four comments.

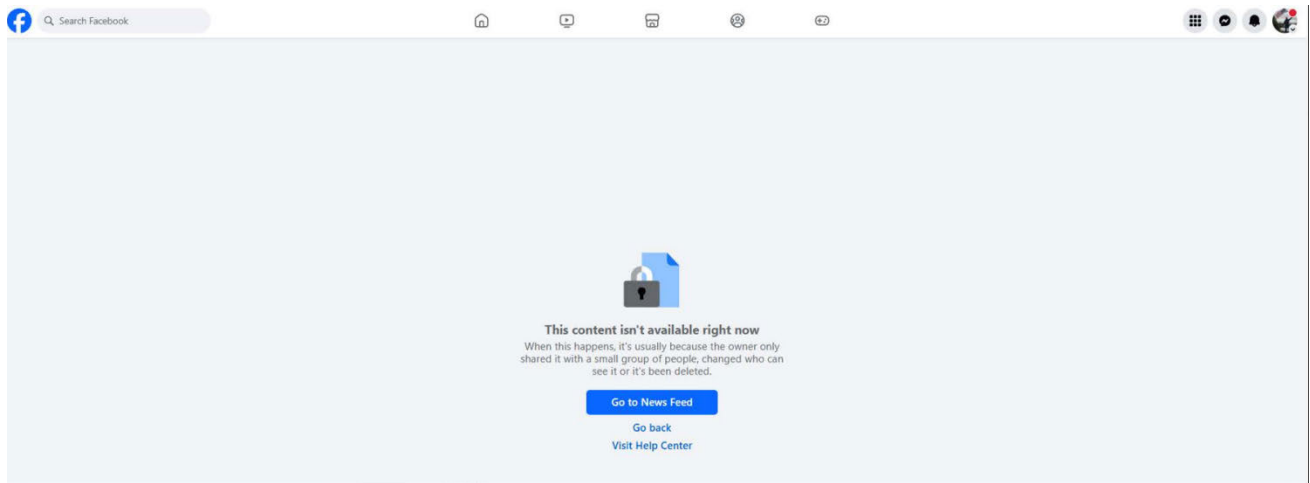
Mr. Balkcom responded to Senator McCay’s post by stating:

“In the last hour or so since you posted this, it has received a total of 4 likes (with 1 of the 4 being you). Meanwhile, in the same amount of time, the 2023 Utah Flag Referendum effort (designed, in part, to stop your delusion) has gathered over 600 signatures.... You are losing, Dan.”



³ Jay Evensen, *Opinion: New Utah Flag Poked the Beehive of Public Passion in Utah’s Capitol*, DESERT NEWS, <https://perma.cc/BQ86-27RN>.

Later that same day, April 2, 2023, Mr. Balkcom discovered that Senator Dan McCay’s Facebook account had blocked him.



Senator Dan McCay claims that this Facebook account is a “campaign account” and states that “comments that aren’t germane to the post will be hidden.”



While it is true that campaign accounts may hide comments that are not germane to the post, Senator Dan McCay utilized his “campaign page” as an official government

account, therefore violating Utah’s Government Records Access and Management Act.⁴ A “record” includes “electronic data, or other documentary material regardless of physical form or characteristics: (i) that is prepared, owned, received, or retained by a governmental entity or subdivision; and (ii) where all of the information in the original is reproducible by photocopy or other mechanical or electronic means.”⁵

More importantly, Senator McCay’s action of blocking Mr. Balkcom from accessing his official government account is also a violation of Mr. Balkcom’s First Amendment rights, as articulated by the Supreme Court in *Lindke v. Freed*, 601 U.S. 187, 198 (2024). There, a city manager hid negative comments and eventually blocked the plaintiff for his critiques of the city’s COVID-19 response. *Id.* The Supreme Court held that the online speech of government officials is attributable to the government if the official had the actual authority to speak for the government and exercised that authority with the speech in question. *Id.* at 204.

Here, Senator McCay’s action is more evident of a constitutional violation than in *Lidke*. In *Lidke*, the city manager used the account for both personal and public posts, leading to a blurred line about the account’s purpose. *Id.* at 197. Senator McCay very evidently uses his Facebook account for official government action. For example, he provides weekly legislative session updates to his constituents.⁶ These videos begin with the title “Senator Dan McCay,”⁷ and utilize videos and images from the Utah State Capitol,⁸ including Senator McCay standing on the Utah Senate floor⁹ and in front of the Utah Senate Seal.¹⁰ This makes it clear to all viewers of his Facebook account that he has the actual authority to speak on behalf of the state of Utah. *Id.* at 188. Further, as mentioned above, Senator McCay was the Utah “Beehive” flag Senate sponsor.¹¹ His Facebook account is littered with posts proudly supporting the new Utah “Beehive Flag.” Users are able to repost, react, and reply to Senator McCay’s posts.

Thus, by allowing public interactions with the Facebook account, Senator McCay’s Facebook account is either a designated public forum or a limited public forum. *Erb v. Pueblo School District No. 60*, 2025 WL 509260, at *4 (D.Colo., 2025). However, it ultimately does not matter if Senator McCay’s Facebook account is a designated

⁴ Utah Code Annotated §63G-2.

⁵ Utah Code Annotated §63G-2-103(25)(a).

⁶ Daniel McCay, *Week 6 Update*, FACEBOOK, <https://perma.cc/Q6GE-H7PP>.

⁷ *Id.*

⁸ Daniel McCay, *Week 5 Update*, FACEBOOK, <https://perma.cc/QC3B-65HS>.

⁹ Daniel McCay, *2025 Legislative Session, Week 2 Update*, FACEBOOK, <https://perma.cc/7NG2-HQW7>.

¹⁰ Daniel McCay, *Week 5 Update*, FACEBOOK, <https://perma.cc/QC3B-65HS>.

¹¹ Jay Evensen, *Opinion: New Utah Flag Poked the Beehive of Public Passion in Utah’s Capitol*, DESERT NEWS, <https://perma.cc/BQ86-27RN>.

public forum or a limited public forum because the Senator cannot engage in viewpoint discrimination in either forum. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677–78 (1998). Here, Senator McCay blocked Mr. Balkcom because Mr. Balkcom was criticizing Senator McCay's new Utah "Beehive" flag, and he was citing referendums showing that the new flag was not popular with Utahns. It is abundantly clear that Senator McCay was motivated by this action to suppress views he disagreed with.

America First Legal, therefore, demands, on behalf of Mr. Britt Balkcom, that Senator Dan McCay cease and desist from blocking Mr. Britt Balkcom on Facebook and that Senator Dan McCay cease and desist from blocking users in violation of the First Amendment.

Sincerely,

/s/ Ian Prior

Senior Counselor

America First Legal Foundation