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To Block (or Delete), or Not: A Public Official's and Public Employee's Guide to When They Can Block a Follower or Delete Comments on Their Social Media

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Abstract

The term "public officials" sweeps up a broad variety of individuals ranging from elected politicians to public school teachers to federal, state, and local government employees. When does a public official's use of social media rise to the level of "state action," consequently giving the public a right to post on the public official's social media or in the alternative giving a citizen the right to not be blocked from the public official's social media? In Lindke v. Freed, 601 U.S. ___(2024), the U.S. Supreme Court enunciated the following two-part test to help resolve the matter: Did the public official (1) possess actual authority to speak on the State's behalf, and (2) did the public official purport to exercise that authority when the public official spoke on social media?

I. Introduction

Visit practically any public space in the United States today, and it seems as if most, if not all, of the people in view are using a cell phone. Some may be communicating via text, others may be engaging in voice communication, while still others are utilizing one or more social media platforms. The purpose of this article is to provide guidance to the reader on if and when a public official (or public employee) can legally block another person from being able to see or comment on the public official's social media. In *Lindke v. Freed*, 601 U.S. ___ (2024), the United States Supreme Court addressed the issue of whether the First Amendment has been violated when a public official blocks a citizen from being able to comment on the public official's social media.

II. Background

A. Factual Background

There are approximately 20 million state and local government employees in the United States.[i] The *Lindke* case involved one of them, a public official named Mr. James Freed. James Freed's Facebook profile was created some time before 2008, while he was a college student, and it was initially set up as a private Facebook profile.[ii] Once Freed reached 5,000 friends, he converted his Facebook profile to a public page.[iii] Once a page is "public" anyone can see and comment on a person's posts.[iv] Facebook did not require Freed to satisfy any special criteria to convert his Facebook profile to a public page or to describe himself as a public figure.[v] In 2014, Freed was appointed as

Port Huron, Michigan's city manager, and changed his Facebook page to reflect his new job.[vi] Those changes included posting a photograph of himself in a suit with a city lapel pin, as well as adding his title, a link to the city's website, and the city's general email address.[vii] The Facebook page was operated by Freed himself and he posted, "prolifically (and primarily) about his personal life."[viii] However, Freed also posted information on his Facebook related to his job as city manager, including city construction projects, press releases, and even solicited feedback from the public in the form of a city survey.[ix] Comments were sometimes made by individuals viewing Freed's Facebook posts, some he replied to, some he deleted if he, "thought they were 'derogatory' or 'stupid.'"[x]

Kevin Lindke was unhappy with the city of Port Huron's approach to the COVID-19 pandemic, and expressed his unhappiness with comments on Freed's Facebook page.[xi] Freed deleted some of Lindke's initial comments, and subsequently blocked him, which had the effect of permitting Lindke to see Freed's posts, but removed Lindke's ability to comment on those posts.[xii]

B. Procedural Background

Lindke sued Freed alleging that when Freed blocked Lindke, it constituted a violation of Lindke's First Amendment rights.[xiii] Stated another way, Lindke was arguing that he had a "right" to post on Freed's Facebook as it was a public forum, and that Freed's act of blocking that ability to comment constituted impermissible viewpoint discrimination.[xiv]

1. Trial Court

Lindke's complaint before the trial court was specifically founded upon the claim that Freed's actions violated a federal statute, 42 U.S.C. §1983.[xv] The matter never made it to trial. The District Court granted Freed's pre-trial motion to dismiss Lindke's complaint.[xvi] The U.S. Supreme Court summarized the trial court's rationale as follows:

> Because only state action can give rise to liability under §1983, Lindke's claim depended on whether Freed acted in a "private" or "public" capacity. 563 F. Supp. 3d 704, 714 (ED Mich. 2021). The "prevailing personal quality of Freed's post[s]," the absence of "government involvement" with his account, and the lack of posts conducting official business led the court to conclude that Freed managed his Facebook page in his private capacity, so Lindke's claim failed. *Ibid.*[xvii]

Lindke appealed the dismissal of his lawsuit to the Sixth Circuit Court of Appeals.

2. Appellate Court

The Sixth Circuit Court of Appeals also found in Freed's favor, initially observing that the caselaw is unclear on when a state official is acting personally and when the state official is acting officially for purposes of 42 U.S.C. §1983.[xviii] The U.S. Supreme Court noted that the test used by the appellate court was to ask if the official was, "performing an actual or apparent duty of his office," or if the official could not have behaved as he did "without the authority of his office."[xix] Applying this test, the court determined that a state official's use of social media would constitute state action if:

1. The text of state law requires an officeholder to maintain a social media account; or
2. If the state resources or state employees were used to operate the account; or
3. The account belongs to the political office, as opposed to the individual.[xx]

Using this test, the appellate court determined that Freed's actions regarding his social media, specifically his Facebook page, was not attributable to the state, and therefore was not state action.[xxi] Lindke appealed this decision to the U.S. Supreme Court.

III. Legal Analysis

For a violation of the law to arise, the public official complained about must be engaging in "state action" and not acting as a private person.[xxii] When the person acting is a police officer, a public school employee, or a prison official, state action is easy to spot.[xxiii] The issue before court in *Lindke* was whether the state official in question – here Freed – engaged in state action or was acting as a private citizen.[xxiv] The analysis is complex because public officials are also private citizens with their own constitutional rights.[xxv]

IV. Discussion

A. The Test

In the *Lindke* decision, the U.S. Supreme Court provided a "bright line" test for determining whether a public official's use of social media constitutes state action, which is as follows:

> A public official's social-media activity constitutes state action under §1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media.[xxvi]

It is important to note the conjunction of "and" in this test. The court in *Lindke* was very clear that if the plaintiff cannot make the initial showing of possession of actual authority, then the analysis stops.[xxvii]

1. First Prong – Attributable to the State?

Did the official possess <u>actual authority</u> to speak on the State's behalf? For a public official's act to be attributable to the State, it must trace back to the State's power or authority.[xxviii] The *Lindke* court cites *Lugar v. Edmondson Oil Co., Inc.* 457 U.S. 922, 939 (1982), for the position that, "state action exists only when the 'claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority.'"[xxix] Conversely, when conduct entails functions and obligations that are in no way dependent on state authority, state action does not exist.[xxx]

The court notes that pursuant to §1983, actual authority can emanate from two places: the written law or some longstanding custom to speak for the State.[xxxi] Written laws can be a statute, an ordinance, or a regulation where a State has authorized an official to speak on behalf of the State.[xxxii] Custom or usage would be, "'persistent practices of state officials' that are 'so permanent and well settled' that they carry 'the force of law.'"[xxxiii]

Applying these principles, if a public board (hospital, school, university) has in their bylaws or in some other policy that the chairperson is the designated person who will speak on behalf of the board to the press or respond to press inquiries, that would constitute actual authority and the first prong of the test would be satisfied.

2. Second Prong – Purport to Exercise Authority?

When discussing the intention of the public official to use their authority, the *Lindke* court cites *West v. Atkins*, 487 U.S. 42, 50 (1988) for the proposition that, "'[G]enerally, a public employee' purports to speak on behalf of the State while speaking 'in his official capacity or' when he uses his speech to fulfill 'his responsibilities pursuant to state law.'"[xxxiv] The court amplifies this position by stating that, "…it is crucial for the plaintiff to show that the official is purporting to exercise state authority in specific posts."[xxxv] The court uses the following hypothetical to illustrate the second prong of the test:

> Consider a hypothetical from the offline world. A school board president announces at a school board meeting that the board has lifted pandemic-era restrictions on public schools. The next evening, at a backyard barbecue with friends whose children attend public schools, he shares that the board has lifted the pandemic-era restrictions. The former is state action taken in his official capacity as school board president; the latter is private action taken in his personal capacity as a friend and neighbor. While the substance of the announcement is the same, the context—an official meeting versus a private event—differs. He invoked his official authority only when he acted as school board president.[xxxvi]

The court in *Lindke* also noted good criteria across a spectrum that would help provide clear context for public employees using social media. On the personal capacity side of the scale, labeling a page as "personal" or having a disclaimer such as "the viewed expressed here are my own" would lead to a heavy presumption that the posts were personal.[xxxvii] At the other end of the spectrum, having an account that belongs to the political entity ("City of Clarksville" Facebook page) or that is passed from one office holder to the next ("@ClarksvilleMayor" Instagram account) make it clear that the social-media account is purporting to speak for the government entity.[xxxviii]

a. Fact specific inquiry

If there are no clear markers such as those set out above, the *Lindke* court stated that a social media post's content and function are going to be the most important

considerations when determining whether or not the post was an exercise of authority.[xxxix]

(i) Express invocation of authority

Statements that expressly invoke authority would be a discharge of official duty and an intent to exercise authority could be inferred. [xl] Examples of this might include a county judge issuing a burn ban, or a county sheriff implementing a curfew after a natural disaster.

(ii) Re-posting otherwise available information

If a public official is merely repeating or sharing otherwise available information, it is far less likely that this is an exercise of official authority.[xli] Examples could include city council agenda's, notice of meeting times and locations, information about local fundraisers, information about non-governmental local events such as festivals or parades. In instances such as these, it is more likely that the public official is engaging in private speech related to his employment.[xlii]

(iii) Use of government staff

Use of government employees to maintain a public official's social media would be a strong indicator that the public official was exercising official authority with their social media posts.[xliii]

IV. Conclusion

In its unanimous decision, the U.S. Supreme Court established a two-part bright line test and remanded the case back to the Sixth Circuit Court of Appeals for further proceedings consistent with their ruling in *Lindke.* Use of social media is ubiquitous in society now. Best practice for public official and public employees would be to maintain a bright line between their personal and professional social media accounts. In the event that there is no such distinction, the test articulated by the U.S. Supreme Court to determine whether or not the individual's usage of social media rose to the level of state action will be determined by a two-part test. First, did the person possess actual authority to speak on the State's behalf, and second, did the official purport to exercise that authority when he or she spoke on social media. If the answer is "no" to either part of the test, then the public official is acting in their private capacity and may delete comments or block a person on the public official's social media. As a word of caution, the inquiry as to whether step one or step two of the test have been passed will be a very fact-intensive review. If the public official or public employee in question does not have two separate social media accounts, it is highly recommended that they use a disclaimer indicating that the social media in question is a personal account.

REFERENCES

[i] *Lindke v.* Freed, 601 U.S. _____ (2024), No. 22-611, slip. Op. at 8.
[ii] *Id.* at 2.
[iii] *Id.* at 2.
[iv] *Id.* at 2.
[v] *Id.* at 2.
[vi] *Id.* at 2.

[vii] *Id.* at 2.
[viii] *Id*. at 2; These posts included photos of his daughter, as well as dinner with his wife, Bible verses, and pictures of his dog.
[ix] *Id.* at 3.
[x] *Id.* at 3.
[xi] *Id.* at 3. Comments included that the, "city's pandemic response was 'abysmal' and that, 'the city deserves better.'"
[xii] *Id*. at 4.
[xiii] *Id.* at 4.
[xiv] *Id.* at 4.
[xv] *Id.* at 4.
[xvi] *Id.* at 4.
[xvii] *Id.* at 4.
[xviii] *Id.* at 4.
[xix] *Id.* at 4; citing *Lindke v. Freed*, 37 F. 4th 1199, 1202, 1203 (2022) quoting *Waters v. Morristown*, 242 F. 3d 353, 359 (CA6 2001).
[xx] *Id.* at 4-5.
[xxi] *Id.* at 5.
[xxii] *Id*. at 5. "Section 1983 provides a cause of action against "[e]very person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State"* deprives someone of a federal constitutional or statutory right. (Emphasis added). *Id.* at 5.; "This limits tracks that of the Fourteenth Amendment, which obligates *States* to honor the constitutional rights that §1983 protects. §1 ("No *State* shall…nor shall any *State* deprive…" (emphasis added)). *Id*. at 5.; "Amdt. 1 ("*Congress* shall make no law…abridging freedom of speech…" (emphasis added)). *Id*. at 5.
[xxiii] *Id.* at 6.
[xxiv] *Id.* at 7.
[xxv] *Id.* at 7.
[xxvi] *Id*. at 8.
[xxvii] *Id.* at 12.
[xxviii] *Id*. at 9.
[xxix] *Id.* at 9.
[xxx] *Id.* at 9.
[xxxi] *Id.* at 12.
[xxxii] *Id.* at 11.
[xxxiii] *Id.* at 11.
[xxxiv] *Id.* at 12.
[xxxv] *Id.* at 14.
[xxxvi] *Id.* at 12.
[xxxvii] *Id.* at 13.
[xxxviii] *Id.* at 13.
[xxxix] *Id.* at 13.
[xl] *Id.* at 14.
[xli] *Id.* at 14.
[xlii] *Id.* at 14.
[xliii] *Id.* at 14.