JOSEPH KANEFIELD is a partner at Snell & Wilmer in the firm's Special Litigation and Compliance group, where he helps individuals, organizations and government officials navigate the increasingly complex regulatory environment governing political activity. He advises clients on an array of issues including election law, campaign finance law, constitutional law, civil and appellate litigation, regulatory compliance, gaming law, licensure, state and local tax matters, and procurement. The author thanks Kylie Cochrane, a first-year law student at Arizona State University, for her research and assistance.

A Government Official Blocked Me on Social Media. Now What?

BY JOSEPH KANEFIELD

Back in the old days, communicating with government officials could be a challenging endeavor. Writing letters and waiting patiently for a response was common but slow. The modern social media era changed this, and people now get much of their news and information from websites and applications like X and Facebook.

Not surprisingly, many of the approximately 20 million state and local government employees have their own accounts on these platforms, which has allowed them to communicate with their constituents in a manner that their predecessors could only dream about. Sometimes they label their accounts as "official," and sometimes as "personal."

However, the line between the two can be blurred. It matters because if the account is official, then it is considered state action and must adhere to the restrictions of the First Amendment. In other words, those who read the official's social media enjoy First Amendment protections that restrict the official's ability to limit the viewer's access to their posts.

So what happens when the official deletes a viewer's comments or blocks the viewer entirely?

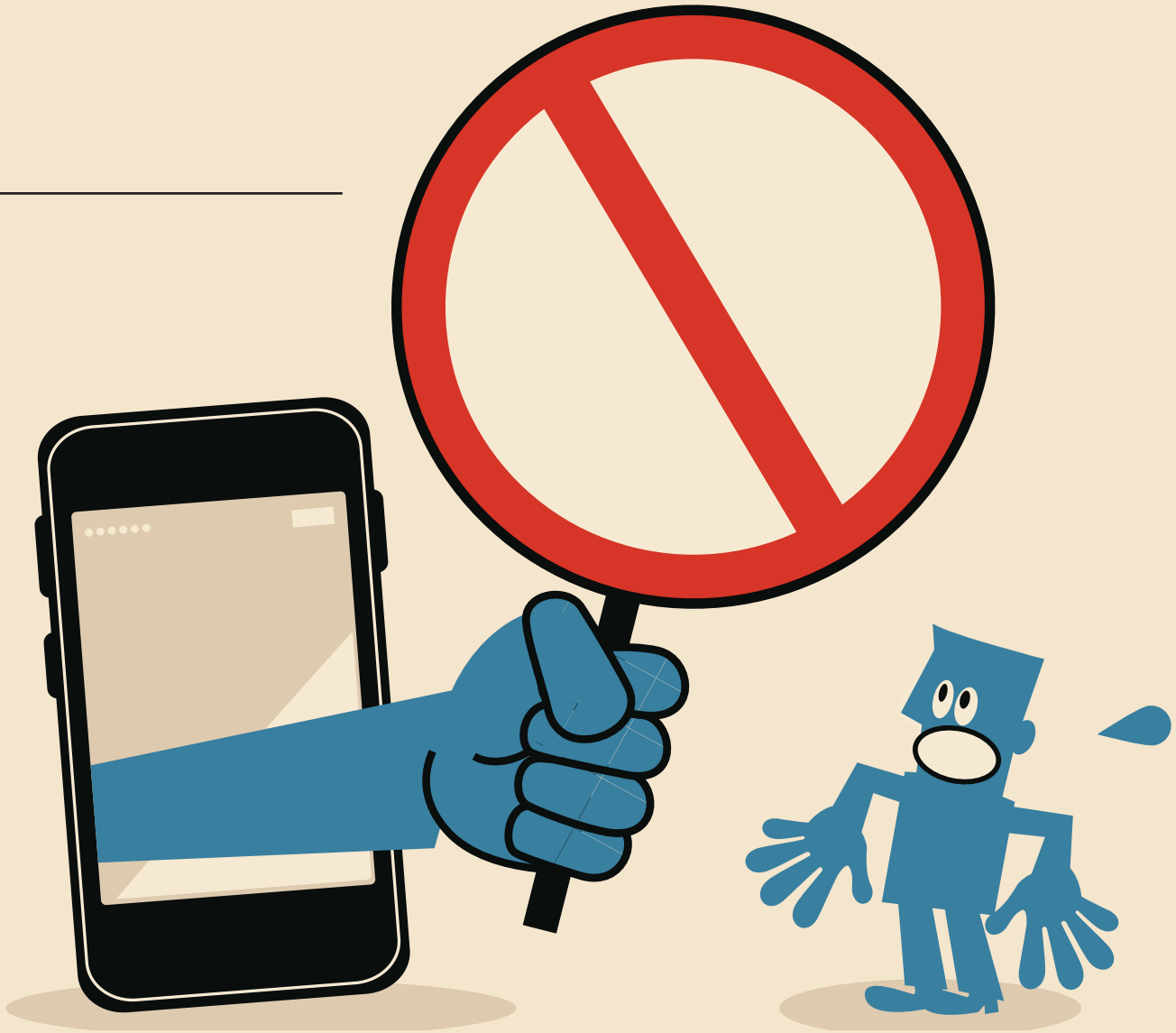
Such behavior occurs frequently and raises several questions:

- Does the official's social media account create a public forum under the First Amendment, entitling constituents to view and comment on the posts?
- What if the official blocks a follower entirely?
- Does it matter if the official solely created and managed the social media account?
- What about the public official's speech rights as a private citizen?
- Does it make a difference if the official is posting personal or work-related content or some combination thereof?

This was the subject of the U.S. Supreme Court's 2024 opinion in *Lindke v. Freed*,[1] which took on the task of sifting through conflicting lower court decisions on the issue of public officials and social media in an effort to create a uniform standard. Did the Court succeed? This article explores *Lindke* and offers guidance to public officials on how to navigate their use of social media.

The Murky Line Between State and Private Action

It all began back in 2008, when college student James Freed created a private Facebook account that he shared only with his "friends." After he neared the platform's



5,000-friend limit, he converted his profile to a public page, which enabled anyone to see and comment on his posts.[2]

In 2014, Freed was appointed city manager of Port Huron, Michigan, and he updated his Facebook profile to reflect this. He posted frequently, mostly about his personal life (i.e., photos of his daughter), but he also posted information related to his job (i.e., fire, water and housing issues).[3]

At times he solicited public feedback, which resulted in frequent comments—some nice, some not so nice. He often replied to comments and occasionally deleted those that he thought to be "derogatory" or "stupid."

One such commenter, Kevin Lindke, was unhappy with the city's approach to the pandemic and criticized its response as "abysmal." Lindke opined that "the city deserves better." Freed initially deleted Lindke's comments but then later blocked him.[4]

Lindke was none too pleased and sued Freed in federal court, alleging that he had violated his First Amendment rights. Lindke alleged Freed's Facebook page was a public forum and that Freed engaged in impermissible viewpoint discrimination by deleting unfavorable comments and blocking the people who made them. In the non-social media context, this would be akin to a city council allowing only favorable speakers to address the council at a public meeting.[5]

Freed insisted he acted in his private capacity and therefore exercised his own speech rights in deleting the comments. This would be akin to asking an obnoxious guest to leave your house party.

The district court sided with Freed, concluding that he managed his Facebook page in his private capacity and therefore there was no state action implicating the First Amendment.[6]

Conflicting Court Tests

The Supreme Court had to wrestle with lower court decisions that fashioned different tests to distinguish public and private speech in the social media context.

In *Lindke*, the Sixth Circuit applied a test that distinguished personal conduct from official conduct on social media by asking whether the official was performing an actual or apparent duty of his office or if he

could not have behaved as he did "without the authority of his office." Applying this precedent, the court held that an official's activity is state action if state law requires an officeholder to maintain a social media account, the official uses state resources or government staff to run the account, or the account belongs to an office, rather than an individual officeholder.[7]

The Second and Ninth Circuit approach to this question focused less on the connection between the official's authority and the account, and more on whether the account's appearance and content look official. Thus, under this approach, it would be possible for a public official operating a private social media account to become state action if the official identifies themselves as such and the reader believes the account to be official.[8]

> Courts fashioned different tests to distinguish public and private speech in the social media context.

The Court granted certiorari to resolve the Circuit split about how to identify state action in the context of public officials using social media.[9]

When Speech Becomes State Action

Justice Barrett observed the challenge of determining when a public official's social media becomes state action because, "While public officials can act on behalf of the State, they are also private citizens with their own constitutional rights," which they do not relinquish when they become public officials.[10] Thus, determining when the official's social media posts cross the line can be a difficult endeavor.

After careful analysis of the question, the Court unanimously settled on the following test: "When a government official posts about job-related topics on social media … such speech is attributable to the State 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."[11] The Court noted that this determination "can require a close look," which involves a fact-intensive inquiry in which the post's content and function are the most important considerations.[12]

With regard to whether the official possesses the authority of the state, the Court emphasized that there must be a tie between the official's authority and "the gravamen of the plaintiff's complaint."[13] If the public official posts about a topic that is not within the official's bailiwick, then the State cannot be held responsible for the specific conduct at issue.[14]

As an example, the Court observed that if a city manager posted a list of local restaurants with health-code violations, then such conduct could not be traceable to any state authority if public health was not the city manager's responsibility.[15]

Importantly, while state law can explicitly authorize an official to speak on its be-

half, such authority also may exist in the absence of written law. The Court noted that Freed's social media could be state action if prior city managers had purported to speak for the city for such a long period of time that the manager's power to do so has become "permanent and well settled."[16] Thus, a deeper factual inquiry will be required on remand to determine in future cases whether there is a tradition of speaking for the state without express authority. Indeed, this could be the next frontier in future cases litigating this question.

The next inquiry is whether the official purported to use the state authority they possessed when making the social media post. The Court held that "if the public employee does not use his speech in furtherance of his official responsibilities, he is speaking in his own voice."[17] Here the Court noted that a label indicating the social media account is a "personal page" or disclaimer that "the views expressed are strictly my own," would entitle the account to a "heavy presumption" that all the posts are personal and rebuttable only with significant evidence indicating the post is official.[18]

In *Lindke*, the Court remanded the case back to the Sixth Circuit for further proceedings to apply the test fashioned by the Court.[19] The Court also vacated the Ninth Circuit's decision in *O'Connor-Ratcliff v. Garnier*[20] and remanded that case back to the Ninth Circuit to review it in a manner consistent with *Lindke*.

On remand, the district court must take a closer look at the facts surrounding Freed's social media posts to determine if he possessed actual authority to speak on the State's behalf, and if so, whether he purported to exercise that authority when he spoke on social media.

Tips for Public Officials Using Social Media

Although we will have to await the final determination in *Lindke* there are a few takeaways from the Court's opinion that public officials may want to consider with respect to their social media accounts to help avoid litigation on whether the account is state action or private conduct.

1. Keep it personal. In *Lindke*, the Court held, "An official cannot insulate government business from scrutiny by conducting it on a personal page"[21] but noted the "distinction between private conduct and state action turns on substance, not labels."[22] Thus, simply labeling the account "personal" may not cut it. If you want to help avoid any question about whether your social media account is personal, then simply keep the account personal. In other words, don't post about anything related to your official duties.

> If the public official posts about a topic not in their bailiwick, the State can't be held responsible.

2. **Label your account personal.** As noted above, a label alone may not be enough. However, the Court did say in *Lindke* that if the official's account is labeled as their "personal page" or includes a disclaimer such as "the views expressed are strictly my own," the public official will be entitled to a heavy (though rebuttable) presumption that all the posts on the official's page are personal.[23] Thus, if your account is intended to be personal, label and disclaim it as such.
3. **Stay off topic.** If you still insist on posting about public matters on your personal page, then only post about matters outside your official duties. As noted, the Court observed in *Lindke* that if the public official posts about a topic that is *not* within their bailiwick, then the State cannot be held responsible for the specific conduct at issue.[24]
4. **Keep official business on official accounts.** The city manager in *Lindke* invited scrutiny of his social media account by mixing personal posts with those related to his job. Thus, the more you post about your job, even if informational only, the more likely someone will interpret the posts as official and raise First Amendment issues. To guard against this, only post office-related information to your official account and treat the account as a public forum. That means no deleting comments or blocking users.
5. **Refrain from using personal accounts for any public business.** Even with a personal account, you may on occasion be tempted to use the account for official purposes, albeit on a limited basis. For example, the Court referenced a hypothetical where an official designates space on his nominally personal page as the official channel for receiving comments on a proposed regulation. In this hypothetical, the post arguably becomes public because the power to conduct notice-and-comment rulemaking is a governmental function.[25] Thus, as noted above, consider keeping any official-related subject matter outside of personal social media accounts.

> Social media has brought public officials closer to the public than ever—and that can be a good thing.

6. **Don't use public resources – ever.** In addition to raising questions about whether the social media account involves state action when personal and official related topics are posted, Arizona law prohibits the use of public resources for private purposes.[26] Thus, public resources should be used only for official public accounts, which in turn should not block users or delete comments.
7. **Deleting comments is better than blocking followers**. Justice Barrett observed that the nature of the technology matters to the state-action analysis.[27] Thus, when a public official deletes a user's comment, the speech issue relates only to that particular post. But if the official blocks the user, the user is prevented from viewing all the official's posts. This exposes the official to greater potential liability. The bottom line is that if you insist on mixing personal and official matters in your social media postings, deleting comments directed at personal posts is less risky than blocking the person from viewing all postings.

The Ninth Circuit aptly observed in *Garnier*, "Today, social media websites like Facebook and Twitter [now referred to as X] are, for many, '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.'"[28] Despite the First Amendment issues discussed here, it's beyond debate that the internet and social media have brought public officials closer to the public than ever before—and that can be a good thing.

Growing pains aside, with the help of the courts, we are getting close to striking the right balance between public conduct and private action. Until then, the key takeaway is to keep personal and public accounts separate to help remove any doubt.

endnotes

1. 601 U.S. 187 (2024).
2. *Id.* at 191.
3. *Id.* at 191-93.
4. *Id.* at 192-93.
5. *Id.* at 193.
6. *Id.*
7. *Lindke v. Freed*, 37 F.4th 1199, 1203 (6th Cir. 2022) (citing *Waters v. City of Morristown*, 242 F.3d 353, 359 (6th Cir. 2001)).
8. *Lindke*, 601 U.S. at 194.
9. *Id.*
10. *Id.* at 196.
11. *Id.* at 191.
12. *Id.* at 197.
13. *Id.* at 199 (citing *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982)).
14. *Id.*
15. *Id.*
16. *Id.* at 200 (citing *Adickes v. S. H. Kress & Co.*, 3 U.S. 144, 168 (1970)).
17. *Id.* at 201.
18. *Id.* at 202.
19. *Id.* at 204.
20. 601 U.S. 205, 208 (2024).
21. *Lindke*, 601 U.S. at 202 n.2.
22. *Id.* at 197.
23. *Id.* at 202.
24. *Id.* at 199.
25. *Id.* at 202 n.2.
26. Ariz. Auditor Gen., Fraud Prevention Alert–Protecting Public Money, Alert No. 13-01 (Nov. 1, 2013), https://tinyurl.com/44nsdmyb.
27. *Lindke*, 601 U.S. at 204.
28. *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1162 (9th Cir. 2022) (citing *Packingham v. North Carolina*, 582 U.S. 98, 99 (2017)).