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Supreme Court Adopts New Test to Determine When a Public Official's Social Media Use Constitutes State Action For First Amendment Purposes

On March 15, 2024, in *Lindke* v. *Freed*, the United States Supreme Court addressed when a public official's use of social media constitutes state action for purposes of triggering protections under the First Amendment.[1] In a unanimous decision, the Court held that a public official's censorship of critical comments on the official's social media page only constitutes state action for First Amendment purposes if the official both (1) possessed actual authority to speak on the State's behalf and (2) purported to exercise that authority.[2] The Court emphasized that this is a post-by-post, fact-specific inquiry, particularly when applied to accounts that are used for both personal and official purposes and the distinction between personal and public posts is often unclear.[3] In so holding, the Court curtailed public officials' ability to block people from commenting on their social media pages if the blocking operates on a page-wide basis, because if a single post on a social media page falls under the category of state action, a public official may not prevent individuals from commenting or viewing the post.

I. Factual and Procedural Background

James Freed, City Manager of Port Huron, Michigan, maintained a Facebook account on which he made both personal posts and posts related to his position. Freed created his Facebook page before he was elected as City Manager, but, after he was elected, he used it for a combination of personal posts and posts related to official City business. For example, Freed's Facebook page included photos of his family, posts about city improvement updates related to his role as City Manager, and posts soliciting feedback about city matters from the public, such as sharing a survey about housing.[4] Freed interacted with commenters on his page and occasionally deleted comments critical of him or the City's actions that he thought were "derogatory" or "stupid."[5] One such commenter, Kevin Lindke, responded to Freed's posts about the Covid-19 pandemic, criticizing the city's response and Freed's actions as City Manager. Freed deleted Lindke's comments and, ultimately, blocked him from the Facebook page.[6]

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[1] 601 U.S. 187 (2024).

[2] *Id*. at 191.

[3] *Id*. at 197.

[4] *Id*. at 192.

[5] *Id*.

[6] *Id*. at 193.

Lindke sued Freed under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Michigan, claiming that Freed's actions violated his First Amendment rights and constituted impermissible viewpoint discrimination.[7] Lindke claimed that Freed's Facebook page was a public forum and that Freed's deletion of unfavorable comments and blocking of commenters constituted state action[8] sufficient to trigger First Amendment protections.[9]

The District Court granted summary judgment to Freed, finding that Freed's Facebook page was predominantly private and therefore did not constitute state action.[10] The court reasoned that "the prevailing personal quality of Freed's post[s], lack of formal policy pronouncements, and absence of evidence that [his Facebook page] was a tool for official governance" all contributed to its private nature.[11]

The Sixth Circuit affirmed, finding that Freed's actions could not fairly be attributed to the state.[12] In reaching its conclusion, the Sixth Circuit asked whether Freed, as a public 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."[13] The court found that, since state law did not require Freed to maintain his Facebook page and Freed did not use official state resources or government staff to maintain it, the account's activities did not constitute state action giving rise to First Amendment protections.[14]

A month later, the U.S. Court of Appeals for the Ninth Circuit addressed a similar issue in *Garnier* v. *O'Connor-Ratcliff* — a case concerning two school board members who blocked two parents and deleted their comments from the board members' Facebook and Twitter (now X) pages.[15] Like Freed, the two board members maintained public social media accounts before assuming office and continued to use them after being elected to post board related content.[16] The Ninth Circuit found that, "although not required by their official position," there was a sufficiently "close nexus between the [board members'] use of their social media pages and their official position" to constitute state action and thus concluded that the school board members' actions constituted a violation of the parents' First Amendment rights.[17] The Ninth Circuit noted that it followed an approach consistent with that of the Second, Fourth, and Eighth Circuits that focuses on the account's appearance and purpose (i.e., "how the official describes and uses the account" and how others "regard and treat the account").[18] That approach was unlike that taken by the Sixth Circuit in *Lindke* that "focus[ed] on the actor's official duties and use of government resources or state employees."[19]

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[7] *Lindke* v. *Freed*, 563 F. Supp. 3d 704, 707 (E.D. Mich. 2021).

[8] 42 U.S.C. § 1983 only creates liability for First Amendment claims based on actions that are attributable to the State. *Id*. at 709 (citing *West* v. *Atkins*, 487 U.S. 42, 48 (1988)).

[9] *Id*. at 707.

[10] *Id*. at 714.

[11] *Id*.

[12] *Lindke* v. *Freed*, 37 F.4th 1199, 1207 (6th Cir. 2022).

[13] *Id*. at 1203 (quoting *Waters* v. *City of Morristown*, 242 F.3d 353, 359 (6th Cir. 2001)) (internal quotations omitted).

[14] *Id*. at 1203–05.

[15] 41 F.4th 1158 (9th Cir. 2022).

[16] *Id*. at 1164.

[17] *Id*. at 1170, 1177.

[18] *Id*. at 1173, 1176–77.

[19] *Id*. at 1176–77 (citing *Lindke*, 37 F.4th at 1206).

The Supreme Court granted *certiorari* in both cases seeking to resolve the circuit split.

II. The Supreme Court Decisions

In a unanimous decision authored by Justice Barrett, the Supreme Court adopted a new test in *Lindke* to determine when a public official's use of social media constitutes state action for First Amendment purposes. The Court's new, two-part test provides that a public official who prevents users from commenting on the official's social media page engages in state action if the official (1) possessed actual authority to speak on the State's behalf on a particular matter and (2) purported to exercise that authority.[20] If a specific post satisfies the Court's state-action test, the public official may not delete comments or block users from that particular post. The Court vacated the Sixth Circuit's judgment and remanded the case for further proceedings consistent with this new test.[21]

In *Lindke*, the Court emphasized that sometimes, such as in the social media context, the distinction between state action and private conduct is difficult and "turns on substance, not labels."[22] As such, "[p]rivate parties can act with the authority of the State, and state officials have private lives and their own constitutional rights" to speak as a private citizen "addressing matters of public concern."[23] The Court noted that it previously addressed whether a private person has engaged in state action, but has had little opportunity, until now, to address whether a public official has acted in the official's private capacity.[24]

On remand, under the first prong of the new test, Lindke must show that Port Huron entrusted Freed with actual authority to update and communicate with citizens on its behalf.[25] Additionally, Lindke must show that the posts at issue relate to a matter within the ambit of Freed's duties as City Manager.[26] The Court noted that mere perception that a public official is representing the state is insufficient absent an actual grant of authority, which can be derived from written law (e.g., statutes, ordinances) or well-settled custom.[27]

Under the second prong of the new test, Lindke must show that Freed purported to speak in his official capacity when he posted the messages at issue. Under the new test, this is a context-specific inquiry — the same post may constitute state action when posted on a public page but not on a private one.[28] In a case like Freed's, involving an "ambiguous," "mixed use" social media page with both personal and official posts, the context is "hazier" and requires a post-by-post, fact-specific inquiry "in which the post's content and function are the most important considerations."[29] The Court cautioned that even a post related to a matter within the official's authority will not always be considered as a post made in the exercise of that authority.[30] For instance, the Court noted that an official

[20] *Lindke*, 601 U.S. at 198.

[21] *Id*. at 204.

[22] *Id*. at 197.

[23] *Id*. at 196–97 (quoting *Garcetti* v. *Ceballos*, 547 U.S. 410, 417 (2006)).

[24] *Id*. at 196.

[25] *Id*. at 199.

[26] *Id*.

[27] *Id*. at 199–201.

[28] *Id*. at 201–02. The Court noted however, that while helpful, page labels and disclaimers are not dispositive.

[29] *Id*. at 202–03.

[30] *Id*. at 203.

may post job-related information for several non-official reasons such as "a desire to raise public awareness to promoting his prospects for reelection."[31]

Additionally, the Court cautioned that the analysis depends on the "nature of the technology."[32] Since First Amendment protection only applies to official posts, a public official may prevent users from commenting on personal posts — either by deleting their comments or blocking them from accessing the post. However, a public official may only do this on posts that do not constitute a state action. While permissible deletion operates on a post-by-post basis, allowing a public official to target personal posts only, some blocking features operate on a page-wide basis, blocking the user from commenting on all posts. Therefore, a single post satisfying the Court's state-action test can render a public official's entire page subject to First Amendment claims, significantly limiting an official's ability to block anyone from viewing or commenting on his or her page.

In a brief and unsigned unanimous opinion in *O'Connor-Ratcliff*, the Court vacated and remanded the case to the Ninth Circuit to apply the new test set forth in *Lindke*.[33]

III. Implications

Increasingly, social media sites and virtual platforms have become the new "public square," making regulation of speech on those platforms all the more important. The decision in *Lindke* provided much needed guidance on when posts on social media sites constitute state action for First Amendment purposes. *Lindke* is notable, as it appears to significantly expand public officials' potential liability for any mixed-purpose account. The Court in *Lindke* distinguished between deleting comments and blocking other users entirely. While deletion allows public officials to target personal posts only (which is permissible), some blocking features limit users from commenting or even seeing all posts. Therefore, in a mixed use account, a public official may not block users from personal posts if the blocking also precludes the users from accessing even a single post made in his or her official capacity.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg (Partner) at 212.701.3120 or jkurtzberg@cahill.com; Philip Golodetz (Associate) at 212.701.3256 or pgolodetz@cahill.com; or Chana Tauber (Law Clerk) at 212.701.3520 or ctauber@cahill.com; or email publications@cahill.com.

[31] *Id*.

[32] *Id*. at 204.

[33] *See O'Connor-Ratcliff* v. *Garnier*, 601 U.S. 205 (2024).

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