

Supreme Court Issues Guidance on Use of Social Media

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On March 15, 2024, the United States Supreme Court issued its much-anticipated decision in the case of [Lindke v. Freed](#) concerning public officials' use of social media and their ability to block, delete comments, or otherwise restrict individuals who interact with, or criticize, them on social media. In short, [Lindke](#) established that even on a public official's personal social media profile, a municipal official may engage in "governmental action," and therefore be subject to the First Amendment and other laws.

[Lindke](#) established a two-part test to determine whether an individual is acting in their official capacity on social media: (1) the official possesses actual authority to speak on the municipality's behalf; and (2) the municipal official purports to exercise that authority when posting on social media. Following [Lindke](#), when both of these conditions are met, a municipal official's personal social media profile may be considered a public forum to which access cannot be limited, for example, by deleting comments or blocking individuals' access. This case highlights the importance of ensuring that public officials and employees understand these complex issues and that public entities adopt or review current social media policies to address these important legal considerations.

Factual Background

This case arose when Mr. James Freed, a city manager in Michigan, first deleted from his Facebook page Mr. Kevin Lindke's critical statements and photographs concerning the city's response to COVID-19. Freed later blocked Lindke from accessing the page. Freed primarily used this Facebook page, the same page he used prior to becoming city manager, to post updates on his personal life. Notably, however, Freed also used the Facebook profile to post about his job and developments in the city, including information about construction projects, reports from city departments, surveys for public feedback, and updates about the COVID-19 pandemic.

Lindke sued Freed for violating the right to free speech, claiming that Freed's Facebook page was a "public forum" and that Freed could not treat critical posts any differently than favorable posts. Lindke claimed that Freed, by deleting his posts and blocking him, had engaged in "impermissible viewpoint discrimination."

Court's Decision

The Supreme Court concluded that the lower courts had used the wrong standard to analyze whether the Facebook profile was a public forum and remanded for analysis under the proper test, explaining that, in order to determine whether a public official's social media activity qualifies as government conduct, or "State action," the official must both (1) possess actual authority to speak on the government's behalf; and (2) purport to exercise that authority when speaking.

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1. *Actual Authority to Speak for the Municipality*

Having “actual authority” to speak on the government’s behalf means that by statute, local law or regulation, custom, or usage, a public official has the power to represent the public body, such as: (a) codified authority to make announcements for a public body; (b) a “permanent and well settled” ability to do so, even if unwritten; or (c) in the case of some high-ranking officials with broad responsibilities that “reasonably encompass authority to speak” officially, an implied authority. Where such authority exists, it may extend to the official’s public or personal social media account, even if not explicit. Actual authority to speak on a matter exists not when such authority could be a part of the official’s duties, but when the facts show it actually is.

2. *Exercise of that Authority When Speaking*

Even where a public official has actual authority to speak, they must purport to use that authority to engage in “State action” and implicate First Amendment concerns. In many circumstances, public officials are not prohibited from speaking as private citizens, and, as long as they are acting in their private capacities, their speech and regulation of speech will not be considered “State action” for purposes of the First Amendment. In trying to determine what action is “private,” the particular facts at issue must be closely examined. The Court found that a disclaimer or label that a social media account is personal, or merely sharing on social media information available elsewhere, could support a finding that the use was private; while the official may be engaging in private speech related to their public employment they are not purporting to act in that role. Conversely, a label that clearly identifies the account as belonging to a public body or individual in their official capacity, would support the finding that the account was “public.” The Court emphasized that categorizing the nature of posts and accounts for purposes of the First Amendment “is a fact-specific undertaking in which the post’s content and function are the most important considerations.”

Implications

The Supreme Court did not decide outright that Freed’s profile was a public forum, but it did clarify that public officials’ personal social media accounts can be public fora to which the First Amendment’s restrictions apply. Now that the Supreme Court has provided the two-step test and guidance described above, we anticipate that courts will have opportunities in the future to apply this standard in different circumstances given the significant increase in the use of social media by government entities and individuals in recent years.

Notably, the Court explained that deleting comments and blocking individuals require different analyses. Deleting content from a personal social media post stands in contrast, for example, to blocking access to a social media profile that may include both personal and official content.

This case underscores the need for public officials to be cautious when considering responses to critical or disruptive comments on all social media platforms, whether their “personal” accounts or on public pages. With the additional guidance provided by this Supreme Court case, municipalities may wish to adopt, or review and revise, social media policies to address these important legal issues.

Please contact your KP Law attorney at 617.556.0007 with any specific questions.

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