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PERSPECTIVE

The two-prong test to distinguish official versus private speech in the social media context

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The Supreme Court in *Lindke v. Freed*, 2024 DJDAR 2378 (March 15, 2024), faced the question whether a public official engaged in state action or private conduct when he deleted a user's comments and blocked the user from commenting again on the official's Facebook page. Only state action can be challenged as unconstitutional under Section 1983 of the federal Civil Rights Act. And in *Lindke*, the Supreme Court held unanimously that a public official's social media activity constitutes state action "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."

When James Freed was appointed city manager of Port Huron, Michigan, he began using his pre-existing personal Facebook page to post information related to his job. Kevin Lindke, a local resident, commented on some of Freed's posts to express dissatisfaction with the city's approach to the COVID-19 pandemic. Freed deleted Lindke's comments and blocked Lindke from commenting again. Lindke sued Freed under 42 U.S.C. 1983 for violating his First Amendment rights.

Both the First Amendment and Section 1983 apply only to "acts attributable to a State, not those of a private person." In most cases, "state action is easy to spot." But in other cases, the line is harder to draw. For example, the court had on multiple occasions grappled with the question of whether a "nominally private person" engaged in state action.

Lindke v. Freed presented a new question, one unique to the social media age—whether a public official engaged in state action by deleting comments and blocking a user from his social media account. The Supreme Court has long held that the state-action doctrine requires "a fact-intensive inquiry." Here, the mixed-use nature of Freed's Facebook page, which blended personal communications and official business, presented a novel factual complexity. Just looking at Freed's status as a state employee was not enough. As the court put it, "if Freed acted in his private capacity when he blocked Lindke and deleted his comments, he did not violate Lindke's First Amendment rights—instead, he exercised his own."

The court announced a two-prong test to distinguish between official speech and private speech in the social-media context: "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."

Under the first prong, Freed had to have had *actual* authority to communicate information—the State must have entrusted Freed with the responsibility of posting information about "a matter within Freed's bailiwick" on his Facebook page. If a "statute, ordinance, regulation, custom, or usage" authorized Freed to speak for the State, the court explained, "he may have

the authority to do so on social media even if the law does not make that explicit."

Under the second prong, Freed had to have purported to use that state authority. Freed's Facebook page was not designated as "personal" or "official." On such a mixed-use page, whether certain posts were made in Freed's personal or official capacity would depend on a fact-specific inquiry into the "content and function" of each post. For example, a post that expressly invokes state authority to make an announcement not available elsewhere is different from a post that merely repeats or shares information already available elsewhere. Given the added complication for officials whose duties may include "routine interaction with the public," the court emphasized that the burden is on a plaintiff "to show that the official is purporting to exercise state authority in specific posts."

The court concluded with an admonition that the "nature of the technology matters to the state-action analysis." Take Facebook for example. Freed's deletion of Lindke's comments requires an inquiry into only the posts on which Lindke commented. But blocking Lindke from commenting *at all* on the page requires consideration of "any post on which Lindke wished to comment." By contrast, blocked users on some social media platforms—like X—"might be unable even to see the blocker's posts." Thus, the court warned, a public official "exposes himself to greater potential liability" by using a mixed-use account.

Interestingly, the court vacated the Sixth Circuit's judgment only "[t]o the extent [the court's new] test differs from the one applied by the Sixth Circuit." This appears to delegate to the lower court the unusual task on remand of making a threshold determination whether their own judgment has been vacated. And only if they answer that question in the affirmative will they need to apply the court's new test.

Even as the court recognized the fact-specific nature of applying the state-action doctrine in the social media context, and even as it advised public officials to use separate personal and official accounts, it did not consider another wrinkle for officials who insist on using mixed-use Facebook accounts—an account owner has broad control over comments on a post-by-post basis, so he can prevent (1) *everyone* from commenting on *all* posts, (2) *some* people from commenting on all posts, (3) everyone from commenting on some posts, and (4) *some* people from commenting on *some* posts.

Although the court may not rule in this specific space of social media state action for some time, it is poised to provide more clarity generally as to how the First Amendment interacts with social media platforms and their users in *NetChoice v. Paxton* and *Moody v. NetChoice*, which involve state laws that seek to regulate content moderation by social media platforms like Facebook and X.

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