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Legal Sidebar

Lindke v. Freed and Government Officials' Use of Social Media

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The First Amendment's Free Speech Clause limits the government's ability to exclude constituents from public forums, both offline and online. In March 2024, the Supreme Court issued a ruling in *Lindke v. Freed* opining on when a government official's decision to block citizens from their social media accounts implicates the First Amendment. The case focuses on when an official should be treated as a government actor as opposed to a private actor. *Lindke* provides some guidance for public officials wondering when the Constitution restricts their ability to manage their online accounts, but it leaves open other questions relating to when a public official's account should be treated as a public forum. The decision also has broader implications for lawsuits alleging other types of constitutional violations.

Procedural History and Legal Background

The Supreme Court heard two cases appealed from different U.S. Courts of Appeals, referenced here according to their circuit numbers: *Lindke v. Freed*, an appeal from the Sixth Circuit, and *O'Connor-Ratcliff v. Garnier*, an appeal from the Ninth Circuit. Both cases involved local officials who had blocked constituents from their Facebook and Twitter accounts because of the constituents' negative or repetitive comments. (While Twitter has since been renamed "X," the officials had "Twitter" accounts at the time of the blocking and litigation.)

Government retaliation against constituents because of the content or viewpoint of their speech can violate the First Amendment. However, the First Amendment only applies to *government* action; private action usually does not trigger First Amendment protections. This limitation is known as the "state action" doctrine. The requirement to demonstrate state action is incorporated in 42 U.S.C. § 1983, a federal law that authorizes lawsuits against state or local officials who violate the Constitution. The *Lindke* and *Garnier* plaintiffs cited Section 1983 to bring their First Amendment claims. A critical issue in both cases was whether the public officials had acted in an official or private capacity when they blocked citizens.

The Supreme Court has said a public employee meets the state action requirement "while acting in his official capacity or while exercising his responsibilities pursuant to state law." This test can include individuals who purport to exercise government authority, such as a deputy sheriff who consistently referred to his government authority even when working at a private-sector job. The Supreme Court had not addressed government social media accounts—as the Court observed in *Lindke*, its state action cases

have largely considered "whether a nominally private person," not a state official, has engaged in state action. (Another case the Court heard this term, *Murthy v. Missouri*, arguably involved that type of state action question with allegations that the government coerced private actors into retaliating against others' speech.) A number of intermediate federal appeals courts had considered whether state action existed when public officials blocked constituents from social media accounts that the officials used for both personal and government activity. These courts sometimes took slightly different approaches to analyzing the issue, but most reviewed a few different factors, with a focus on how the account was being used. The Fourth Circuit, for instance, looked to "the totality of the circumstances" surrounding a county official's Facebook page to conclude that she had created and used the page "to further her [official] duties."

The Ninth Circuit took an arguably similar approach in *Garnier*. The case involved two school board trustees who had created Facebook and Twitter accounts while campaigning for office, and once in office, used the accounts to communicate with constituents about school board activity. The Ninth Circuit cited three factors to conclude the trustees' use of their social media pages qualified as state action: (1) in "appearance and content," the pages were "official channels of communication with the public" about school board work; (2) this presentation of the pages intentionally affected others' behavior; and (3) the trustees' posts "related directly to" their duties, and the specific blockings challenged in the case were "linked to events" arising out of the trustees' official status.

The Sixth Circuit used a different test to evaluate the state action issue in *Lindke*, saying other appeals courts had focused too much on a page's "appearance" rather than "the actor's official duties and use of government resources or state employees." In that case, a city manager named James Freed had converted his private Facebook profile into a public page before he held public office. Once he became city manager, Freed listed that title on his page but continued to post about his personal life in addition to city business. The Sixth Circuit held that Freed "operated his Facebook page in his personal capacity, not his official capacity." Although he used the page to communicate with constituents about city responsibilities, similarly to the trustees in *Garnier*, the Sixth Circuit ruled that Freed was not performing any duties of the office because no statute, ordinance, or regulation required him to operate a Facebook page. The Sixth Circuit also stressed that the page would not be passed along to the next city manager and that city resources were not regularly used to maintain the page.

The Supreme Court heard oral arguments in both cases on October 31, 2023, as discussed in a prior Legal Sidebar.

Supreme Court Opinion

Justice Barrett authored a unanimous opinion in *Lindke v. Freed* vacating the Sixth Circuit opinion and remanding the case after clarifying the standard that the lower courts should apply. The Court first emphasized that Freed's status as a state employee did not resolve the question, as the Court previously outlined in a long line of cases that government employees retain some First Amendment rights to speak in their private capacity even when they are sharing information related to their government employment. Instead, the Court said that "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."

With respect to the first prong, the Court held that Freed's blocking would be state action if he had actual government authority "to post city updates and register citizen concerns," and if the alleged censorship was "connected to speech on a matter within Freed's bailiwick." In contrast to the Sixth Circuit's ruling on this issue, the Court cited the text of Section 1983 to hold that state authority could come not only from written law like statutes or ordinances, but also from custom or usage—that is, well-settled and persistent practices. The Court said that in some contexts, official power to speak about a subject might also be implied from a general grant of authority over that subject. The Court emphasized, however, that

the mere appearance of authority would not suffice with respect to this first prong. Private action not traceable to state authority cannot qualify as state action "no matter how 'official' it looks."

The Court said the appearance of authority could be relevant to the second prong of the inquiry: whether public officials are purporting to speak in their official capacity or to further official responsibilities. The Court indicated this would be "a fact-specific undertaking in which the post's content and function are the most important considerations." While the Court did not rule on whether Freed had acted in an official or private capacity, it did suggest some factors that might be relevant to future analyses. For instance, it stated that if "Freed's account carried a label (e.g., 'this is the personal page of James R. Freed') or a disclaimer (e.g., 'the views expressed are strictly my own')," that would create a "heavy" presumption that his posts were personal. Other factors might make it more likely the official was exercising official power, including if any given post expressly invoked state authority, appeared to have "immediate legal effect," used government resources (including having staff make the post), or was the only place information or an order was available. The Court also clarified that the nature of the official's action might alter the scope of an inquiry. If a court is investigating the deletion of a single comment, it will have to look at the nature of the specific post being remarked upon. In contrast, if a citizen is blocked from viewing an entire account, the court has to consider the nature of any and all posts that the citizen wanted to interact with on the account.

In *Garnier*, the Supreme Court similarly vacated the Ninth Circuit's opinion and remanded the case for the lower court to apply the new approach it announced in *Lindke*.

Considerations for Congress

Although the Supreme Court's opinion in *Lindke* did not finally resolve the cases before it, the Court did outline various factors that can aid lower courts—and public officials—in determining when a social media account is subject to First Amendment limitations. The need to demonstrate actual governmental authority provides one limiting factor on the reach of state action under the First Amendment. State action is not present unless the official was exercising authority to communicate with citizens about "a matter within [the official's] bailiwick." Thus, public officials may look to their official duties to determine whether they are constrained by the First Amendment. The fact that authority may sometimes be implied from a written duty or from well-settled custom could make this inquiry more complicated, though. Another signpost that may be helpful for public officials is that while the Court generally said that the state action inquiry should be fact-specific, it also said a page-wide label or disclaimer that an account is for personal use can carry significant weight. Accordingly, public officials who want to use social media accounts in their personal capacities might consider adding a "personal views"-type label or disclaimer. Nonetheless, the Court was clear that such a disclaimer would not insulate any posts that did in fact carry out official business, such as if a social media page is designated "as the official channel for receiving comments on a proposed regulation" or is used as the sole location to stream a public meeting.

The Court's explanation of the proper state action inquiry will be relevant for plaintiffs whose claims rely on other constitutional provisions as well, such as the Fourth Amendment's protections against unreasonable searches and seizures and the Fourteenth Amendment's equal protection clause. Some federal appeals court opinions had previously said that state action could be shown by *apparent* authority in addition to actual authority (though these statements may have been dicta, and some scholars have disagreed with this approach). *Lindke* clarifies that some actual government authority must exist at the first step of the inquiry, and an individual exercising private functions that do not depend on government authority may not be a state actor. At the same time, state action can also include the misuse of the type of authority a state official has been granted, and can include someone who is "purport[ing]" to act under government authority but is acting outside the scope of the authority granted.

The state action inquiry is merely a preliminary question in a constitutional analysis. Even if a court concludes that a public official managing a social media account did act in an official capacity and is therefore subject to the First Amendment, the court still has to determine whether the public official actually violated the First Amendment. In this inquiry, a court may ask whether the public official created a public forum by intentionally opening the page for public discourse. If the government has created an online forum, it still might be able to clearly state limits on the scope of allowed discourse at the outset without violating the First Amendment. Previously announced social media policies can therefore be relevant in these cases. Even in such a "limited" public forum, however, the government may not engage in viewpoint discrimination and bar citizens because of their ideology or perspective. Thus, when social media accounts qualify as a public forum and public officials are speaking in an official capacity, courts have said public officials will violate the First Amendment when they bar speech because they find it offensive or merely disagree with it. As discussed in an earlier Legal Sidebar, a number of cases have litigated how these principles apply in the context of social media accounts. Some open questions considered in lower courts include whether the "interactive" portions of social media might be viewed differently than other aspects of the account, as well as the relevance of social media companies' private policies that may limit the use of the account. *Lindke* did not address these questions, and it is possible the Supreme Court may receive appeals in the future asking them to consider these issues.

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