



Social Media Use for Public Officials

New legal standard from *Lindke v. Freed*

Julie Hamill, Attorney
Julie@calpolicycenter.org



Consult Your Own Lawyer

- This presentation is informational, and not legal advice.



The First Amendment

- Right to speak and receive information.
- Binds only the government.
- Private businesses and people engaged in “state action” can also be liable.
- 42 U.S.C. 1983 allows private citizens to sue the government for damages and fees when government deprives person of federal right.



Lindke v. Freed

- In the context of a public official using social media, when is there state action?
- A public official who prevents someone from commenting on the official's social media page engages in state action under §1983 only if the official both
 - (1) possessed **actual authority** to speak on the State's behalf on a particular matter, and
 - (2) purported to exercise that authority when speaking in the relevant social-media posts.



**CALIFORNIA
POLICY CENTER**



[This Photo](#) by Unknown Author is licensed under [CC BY-SA](#)



Bad Takes

- “Now I can sue every public official who blocks me on social media!”
- “Now I can block all my trolls on social media!”
- “Now we can prohibit elected officials from talking about an issue if they’re not explicitly authorized to do so!”



Lindke Facts

- Freed was city manager of Port Huron, Michigan.
- Blocked plaintiff Lindke and deleted Lindke's comments.
- Lindke sued under § 1983. Argued Freed's deleting unfavorable comments and blocking the people who made them was viewpoint discrimination.



***Lindke* Test Part 1: Actual Authority**

- Public official must have actual authority rooted in written law or longstanding custom to speak for the State.
- Freed's conduct not attributable to the State unless 'possessed of state authority' to post city updates and register citizen concerns.
- If State did not entrust Freed with these responsibilities, it cannot fairly be blamed for the way he discharged them.



Lindke Test Part 1: Bailiwick

- Censorship must be connected to speech on a matter within defendant public official's "bailiwick"
 - One's sphere of operations or particular area of interest
- Imagine Freed posted a list of local restaurants with health-code violations and deleted snarky comments made by other users.
 - If public health is not within the city manager's portfolio, then **neither the post nor the deletions would be traceable to Freed's state authority—because he had none.**
- For state action to exist, the State must be "responsible for the specific conduct of which the plaintiff complains."



***Lindke* Test Part 1: Sources of Authority**

- Statute, ordinance, regulation, custom, or usage.
- Custom and usage = “persistent practices of state officials” that are “so permanent and well settled” that they carry “the force of law.”
- A city manager like Freed would have actual authority to speak for the city in the following circumstances:
 - if written law like an ordinance empowered him to make official announcements.
 - in the absence of written law, if prior city managers have purported to speak on its behalf and have been recognized to have that authority for so long that the manager’s power to do so has become “permanent and well settled.”



***Lindke* Test Part 1: Sources of Authority**

- Grant of authority over particular subject matter may reasonably encompass authority to speak about it officially.
 - E.g., State law grants director of the department of transportation broad responsibility for the state highway system that, in context, includes authority to make official announcements on that subject.
 - But, courts can't rely on "excessively broad job descriptions" to conclude that a government employee is authorized to speak for the State.



***Lindke* Test Part 1: Why?**

- Public officials don't lose their First Amendment rights when elected.
- While public officials can act on behalf of the State, they are also private citizens with their own constitutional rights.
- Public officials have the right to speak about public affairs in their personal capacities.
- The Court remanded *Garnier* to determine whether school board trustees' conduct = state action.
 - If the Court intended to rule that every elected official has actual authority to act on behalf of the state, then it would have said so, instead of remanding *Garnier*.



***Lindke* Test Part 2: Purport to Exercise Authority to Speak on Behalf of State**

- A public official must purport to exercise authority to speak on the state's behalf in the relevant social-media posts.
- Speaking on behalf of the State or in your own voice?
- For state action, an official must not only have state authority—he must also purport to use it.



Lindke Test Part 2

- A public employee purports to speak on behalf of the State
 - while speaking in his official capacity OR
 - when he uses his speech to fulfill his responsibilities pursuant to state law.
- If the public employee does not use his speech in furtherance of his official responsibilities, he is speaking in his own voice.



Lindke Test Part 2: Example

- School board president makes announcement at school board meeting, and later makes the same announcement at a backyard barbeque with friends.
- The announcement at the school board meeting is state action taken in his official capacity as school board president.
- The announcement at the barbeque is private action taken in his personal capacity as a friend and neighbor.



***Lindke* Test Part 2: Freed's Mixed-Use Page**

- Freed's social media page contained a mix of personal posts and posts about city business, and was not labeled "official" or "personal."
- 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"), he would be entitled to a heavy (though rebuttable) presumption that all of the posts on his page were personal.



***Lindke* Test Part 2: Disclaimers and Labels Don't Insulate from Liability**

- Public officials can't insulate themselves from liability by posting government business on a page labeled "personal."
- E.g.: Official designates space on his "personal" page as the official channel for receiving comments on a proposed regulation. Because the power to conduct notice-and-comment rulemaking belongs exclusively to the State, its exercise is necessarily governmental.
- Similarly, a mayor engages in state action if he hosts a city council meeting online by streaming it only on his personal Facebook page.
- By contrast, a post that is compatible with either a "personal capacity" or "official capacity" designation is "personal" if it appears on a personal page."



***Lindke* Test Part 2: Content & Function**

- Posts on an ambiguous “mixed use” page like Freed’s require a fact-specific undertaking in which post’s content and function are the most important considerations.
- A mayor announcing ***exclusively*** on his Facebook page that an ordinance will no longer be enforced is a clear example of the mayor purporting to exercise state authority in a post.
- The post’s express invocation of state authority, its immediate legal effect, and the fact that the order is not available elsewhere make clear that the mayor is purporting to discharge an official duty.



***Lindke* Test Part 2: Repeating Information**

- If a mayor merely repeats or shares otherwise available information—for example, by linking to the parking announcement on the city’s webpage—it is far less likely that he is purporting to exercise the power of his office.
- Instead, it is much more likely that he is engaging in private speech related to his public employment or concerning information learned during that employment.



What Should Public Officials Do?

- Keep your social media accounts for public business and personal and professional business separate.
- Use labels and descriptions in your account names and bios.
- Have one designated account for communicating with the public about public business. This account should not be made private, and you should not block people from this account.



What Should Public Officials Do?

- For your personal account, mark it “personal account” and state in your bio where people can find your public official account (if you have one).
- Do not discuss city business on this account. **Don’t muddy the waters.**
- Family, friends, sports, personal interests are all fair game. When a personal account is clearly labeled as such, it’s entitled to a heavy presumption that all the posts there are personal. This account can be made private (and should, if you post your kids).



What Should Public Officials Do?

- For your professional account clearly label it as such, and explain in your bio where people can find official public business by tagging your public official account.



What Should Public Officials Do?

- **Don't** make exclusive announcements of public business from your social media account. If you do, there is a high likelihood you have satisfied the second part of the *Lindke* test: purporting to exercise authority to speak on the state's behalf.
- Exclusive announcements should be made through official channels. If social media is the official channel, then you cannot block members of the public from that channel.



What Should Public Officials Do?

- If you are an elected official and your agency policy expressly vests authority to speak on behalf of the agency in another person, then your communications are, arguably, not state action.
- One could argue that custom and practice give you actual authority to speak on behalf of the agency, but if (1) you are not making exclusive announcements, (2) you've stated in your bio that you are not authorized to speak on behalf of your agency, and (3) you clearly label your accounts and separate personal from government business, there is a lower likelihood of liability under Section 1983.



What Should Public Officials Do?

- Best practice, both for transparency and legal protection, is to keep your official public business account open to the public, and not to block people from it.
- Under *Lindke*, a public official could arguably discuss personal or professional business in a post and block people from responding to that specific post without liability, because there is not “actual authority to speak on the state’s behalf” on that matter. However, it’s not good practice, and when you muddy the waters by mixing personal and public business, you put yourself at greater risk.