

U.S. Supreme Court Establishes New Test for Determining When a Public Official’s Social Media Activities Constitute State Action

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The United States Supreme Court has established a new, two-part test for determining whether a public official violates the First Amendment when the official blocks or deletes comments on the public official’s social media account. In this pair of unanimous decisions, the Court brought clarity to the question of when such action by the public official constitutes “state action” which could create liability under 42 U.S.C. §1983.

Resolving that question requires a fact-intensive analysis. The Court stated that if the public official: (1) possessed actual authority to speak on the state or local government’s behalf on a particular matter, and (2) purported to exercise that authority when speaking in the relevant social media posts, the official may be liable under §1983 for a violation of the commenter’s rights under the First Amendment of the United States Constitution.

In the lead case of *Lindke v. Freed*, Freed—the City Manager and Chief Administrative officer of Port Huron, MI—maintained a publicly-accessible Facebook page. Primarily, Freed posted about personal matters. However, Freed also posted about matters related to his job. During the COVID-19 pandemic, Freed posted about his own family’s activities as well as public health data and information relating to the City’s pandemic response. Lindke began posting numerous comments on Freed’s Facebook page which were critical of the City’s response. Freed initially deleted Lindke’s comments before blocking him altogether. Lindke sued under §1983, claiming a violation of his First Amendment rights.

As the Court emphasized, public officials maintain their own constitutional rights to speak as citizens on matters of public concern, as long as that speech is not ordinarily within the scope of their own duties. Therefore, it was not enough that Freed was a public official and that his posts often concerned City affairs. Instead, as the Court explained, the official must first have had actual authority—derived from state or local law, or custom—to act in the relevant manner. As to Freed, this meant the authority to “post city updates and register citizen concerns.”

The official also must have purported to use that authority. The Court offered the example of a school board president who announced at a school board meeting that pandemic restrictions were being lifted, and then shared that information again the following day at a barbecue. The former would constitute state action, while the latter private activity despite the substance being the same. The official, in other words, has the right to choose whether their actual authority is being invoked. The Court noted as well that a public official “does not necessarily purport to exercise his authority simply by posting about a matter within it,” as he might, for example, have acted out of a desire to “raise public awareness” or “promote his prospects for reelection.”

Further, the Court emphasized that a designation of the relevant social media page as either public or private would—while not being conclusive—entitle the speaker to a rebuttable presumption that the posts were personal. Finally, the Court cautioned that a page-wide block (as opposed to

individual comment deletion) exposes a public official to greater potential liability if personal posts are mixed with non-personal posts on a single page.