



Board of Directors Meeting

# Update on Social Media and the First Amendment

General Counsel's Report

Item 5D(a)

April 9, 2024

## Subject

Update on Social Media and the First Amendment

## Item # 5D(a)

## Purpose

U.S. Supreme Court Case – *Lindke v. Freed* on whether an official engaged in state action or functioned as a private citizen on social media



## United States Supreme Court



### *Lindke v. Freed*

- Analyzes whether an official engaged in state action or functioned as a private citizen when preventing someone from commenting on social media
- New test for what is private conduct versus what is state action on social media
- Controlling law on when public officials are “state actors” with regards to the First Amendment

## New Test



### *Lindke v. Freed*

- Speech on social media is attributable to the state only if the official:
  - (1) possessed actual authority to speak on the State's behalf
  - (2) purported to exercise that authority when speaking on social media

# Social Media Platforms

## Examples



## Facts



### *Lindke v. Freed*

- City Manager Facebook page
  - Private at first, converted to public page
  - Mix of posts on wide range of topics
    - Family and job as city manager
  - Constituent unhappy about city's response to pandemic
    - Comments critically on the city manager's Facebook page
- Comments deleted, then user blocked

## Lawsuit



### *Lindke v. Freed*

- Constituent sues for civil rights violations
  - Violating First Amendment rights



## Court's Framing



### *Lindke v. Freed*

- Only State action can give rise to liability, private actions cannot
- City manager still has First Amendment rights as a private citizen
- First Amendment protects public employee's rights to speak as a citizen addressing matters of public concern
- State action analysis fact intensive



## First Step New Test



### *Lindke v. Freed*

- Actual authority to speak on the state's behalf
- Conduct that is traceable to the government's power or authority
  - Written law or longstanding custom
- Making official announcements is part of the job
- Not to broad job descriptions

## Second Step New Test



### *Lindke v. Freed*

- Official purports to use authority when speaking on social media
- Speaking
  - in official capacity
  - to fulfill responsibilities pursuant to law
  - in furtherance of official responsibilities
- Versus speaking in own voice

Examples  
**does not purport  
to use authority**



## *Lindke v. Freed*

- 1) **Labels** such as “this is the personal page of \_\_\_\_\_”
- 2) **Disclaimer** such as “views expressed are strictly my own”
- 3) Repeating or sharing otherwise available information less likely to be purporting to exercise state action

Examples  
**does purport to  
use authority**



## *Lindke v. Freed*

- 1) **Ownership:** Account belongs to public agency or is passed down through an office
- 2) **Government staff** used to make social media posts
- 3) Post exclusively on personal page invoking governmental authority where information not otherwise available

## Social Media Functionality Matters



### Practical Takeaways

- Keep separate personal and public pages and marking them accordingly
- “Deleting” versus “Blocking”
  - Deleting – more narrow
  - Blocking – page-wide, which expands the examination on any post which a user might comment

