Social Media, Public Officials and Free Speech

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As technology accelerates by the minute, the law struggles to keep up. But simply because social media did not exist in 1791 does not mean the First Amendment does not apply. Local governments — and local government officials — must be mindful when operating social media accounts, especially when the accounts provide citizens with a public forum to comment, reply to posts, or otherwise engage. This is true for official local government social media accounts and for personal accounts if the local official is posting as a public official rather than as a private citizen.

The U.S. Court of Appeals split

Until 2024, the U.S. Court of Appeals (which consists of 13 circuit courts) used different tests to determine whether a public official was acting in their official capacity when blocking users or deleting information on personal social media accounts used for official business — a critical test in determining whether the First Amendment applied in a particular circumstance. The Second, Fourth, and Ninth Circuits took similar approaches, focusing on the appearance of the public official's conduct on social media rather than applying a more objective test. In contrast, the Eighth Circuit focused on the "overall theme of [the] tweets." Finally, the Sixth Circuit adopted an analysis that differed. "Instead of examining a [social media] page's appearance or purpose," the court "focus[ed] on the actor's official duties and use of government resources or state employees."

Lindke v. Freed

In 2024, the U.S. Supreme Court issued its opinion in Lindke v. Freed, which resolved the split in circuit court decisions and identified a new test to determine whether an action by a public official constitutes a government action in the context of public forums such as social media or government websites.[1]

In that case, James Freed, the city manager of Port Huron, Michigan, maintained a Facebook account on which he posted about a wide range of topics, including his family and his job. Freed occasionally received unwelcome comments on his posts. In response, Freed would delete the comments and block those who made them. One of these

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commenters, Kevin Lindke, sued Freed for violating his right to free speech, arguing that Freed acted in his official capacity when he silenced his speech.

Under the Lindke decision, a public official's social media activity constitutes a government action only if the official possessed actual authority to speak on behalf of the government and purported to exercise that authority when they spoke on social media.

In analyzing the first part of the test, a public official's authority to speak on the government's behalf is not determined by whether the official acted as if they had authority to speak for the government, nor does it matter whether others thought the official had such authority. Rather, "the grant of actual authority must come from one of the sources mentioned in 42 U.S.C. § 1983: 'statute, ordinance, regulation, custom, or usage.'" If authority to act is not found, the analysis ends and the claim fails.

In analyzing the second part, whether the public official purported to exercise that authority when they spoke on social media, the test is objective, although the "appearance and function" of the social media activity are relevant.[2] Resolving this second step requires a post-by-post analysis. The individual must identify "specific posts" in which the public official purported to exercise authority to speak on the government's behalf. In analyzing this prong, however, the court reaffirmed the notion that public officials "have the right to speak about public affairs in their personal capacities," but posts from an account that clearly belongs to the government — such as a page labeled "City of Port Huron," as in the Lindke case — presumptively speak for the government.

Recent Seventh Circuit cases addressing social media and the First Amendment

In 2025, the Seventh Circuit in Krasno v. Mnookin[3] addressed conduct on the UW-Madison Instagram and Facebook accounts used to communicate official announcements, events and policies. The plaintiff, Madeline Krasno, claimed she earned the university's disapproval for calling attention to what she believed to be animal abuse in its primate testing facilities by commenting on the university's social media posts. In response, the university hid Krasno's comments on its social media posts and restricted Krasno's Instagram account, on the grounds that it was hiding "off-topic" comments. The circuit court determined that the university's comment threads were best characterized as limited public forums[4] and held that the off-topic comment restriction was unreasonable and unconstitutional, as it was not viewpoint neutral and discriminated against Krasno's anti-animal testing and pro-animal rights viewpoints.

The Seventh Circuit again addressed the potential for viewpoint discrimination in 2026, this time in the context of an official town website in the case of Schulte v. Leners.[5] In that case, Elizabeth Schulte sued Kenneth Leners, chair of the board of supervisors for the town of Cedar Lake in Barron County, after he deleted comments she and others posted on the town's website. The website allowed members of the public to comment without restrictions. Schulte disagreed with Leners' position on regulating recreational vehicles, and Leners deleted her comments and those of other critics, calling them "disrespectful." The town later eliminated the website's comment sections altogether.

Schulte argued on appeal that the deletions violated her First Amendment right to free speech because Leners was selectively removing comments based on commenters' viewpoints. Leners argued that he should have qualified immunity because it was not clearly established in 2022 that First Amendment protections applied to a town website's comment section. The Seventh Circuit rejected this argument, explaining that the comment section was a public

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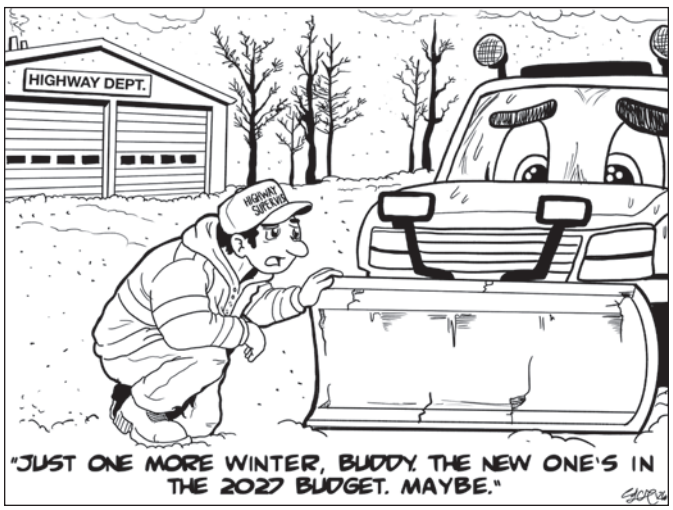
forum where private citizens were communicating, and the town had no policy controlling who could comment or what they could say.

The Seventh Circuit held that the First Amendment clearly prohibited Leners from selectively deleting comments because of their viewpoints. The court emphasized that the town could legally shut down the comment section altogether, but while it was open to public discussion, it could not discriminate against people simply because they disagreed with the town or its officials. The court therefore denied Leners qualified immunity and affirmed the district court's decision, allowing Schulte's claims to continue.

What does this mean for future official (and unofficial, public-official operated) social media accounts and websites?

In the wake of the Lindke decision, the bar appears to have been raised for establishing whether a social media account or website is a public forum, meaning that it will likely be more difficult for plaintiffs to prove that public officials' social media accounts are public forums. This is not to say, however, that social media accounts operated by public officials which appear to include both private posts (i.e., posts about their families, friends, interests, etc.) and public posts (i.e., posts about upcoming official meetings, activities that the official is conducting related to their office, etc.) are advisable.

Instead, counties may want to implement policies requiring government employees and officials to separate personal social media accounts from professional accounts and to clearly identify an official government account as such. And, if a government employee or official does operate a government social media account or website, counties may also want to implement policies prohibiting the official from engaging in content that discriminates against constituents' viewpoints, such as blocking individual constituents based on viewpoint disagreements or prohibiting particular individuals from commenting on the forum while allowing others to continue.



Conclusion

In light of the new Lindke test, only time will tell just how cautious municipalities and their officers will need to be in the operation of government social media accounts and websites. In the meantime, counties should work with their corporation counsel on policies to ensure a clear separation between personal and professional social media accounts. ■

Attolles Law, s.c. works on behalf of Wisconsin counties, school districts and other public entities across the state of Wisconsin. Its president & CEO, Andy Phillips, has served as outside general counsel for the Wisconsin Counties Association for more than 20 years.

1. Around the same time, the U.S. Supreme Court also heard the case of O'Connor-Ratcliff v. Garnier, 41 F.4th 1158 (2022), an appeal from the Ninth Circuit, which involved local officials who had allegedly blocked constituents from their Facebook and Twitter accounts or removed comments from an official government website because of the constituents' negative or repetitive comments.
2. "For example, if a government website links to an official's social media posts, it's likely that such posts exercised state authority." Lindke v. Freed, 114 F.4th 812, 818 (6th Cir. 2024).
3. The Seventh Circuit did not apply the Lindke test in Krasno.
4. Courts recognize that government may impose reasonable restrictions on speech in limited public forums such as certain social media accounts or public comment periods in official meetings, which is in contrast to the relatively few restrictions that government may place on speech in a traditional public forum such as a public park or sidewalk. See Perry Educ. Ass'n v. Perry Educators' Ass'n, 460 U.S. 37 (1983).
5. The Seventh Circuit did not apply the Lindke test in Schulte.