



TOWN BOARD WORK SESSION AGENDA

Wednesday, February 12, 2025 at 5:00 PM

MEETING LOCATION

1201 Broad Street, Meeting House, Milliken, CO 80543

Zoom Meeting Details

To Join via Zoom

<https://us02web.zoom.us/j/82545464848?pwd=bGlxekNFMtyRGVCek1OVtBla28xQT09>

Meeting ID: 825 4546 4848

Passcode: 362021

One tap mobile

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1. Discussion Topics

- a. Ehrlich Lake Pump Station Update
- b. Social Media Policy
- c. 5:45 P.M. - Interview for Housing Authority
- d. 6:00 P.M. - Interview for Housing Authority

ACCOMMODATION NOTICE

The Town of Milliken complies with Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973 guidelines. Ensuring the public's access to and participating in public meetings is a priority for the Town of Milliken. In the event you are in need of a reasonable accommodation in order to attend or participate in a public meeting conducted by the Town of Milliken, please contact the Town Clerk, Caree Rinebarger at (970) 660-5045 within 3 to 5 days before the scheduled meeting date in order to allow the Town to better accommodate your request.

NOTE

Headings in this agenda are for organizational purposes only. The board of trustees may take formal action on any matter reasonably related to any item listed under any section of this agenda. Town of Marble v. Darien, 181 P.3d 1148 (Colo. 2008); Benson v. McCormick, 578 P.2d 651 (1978).

Contact: Caree Rinebarger, Town Clerk (CRinebarger@town.milliken.co.us | 970-587-4331)

Agendas will be published no later than 24-hours prior to the meeting start time.

TOWN OF MILLIKEN SOCIAL MEDIA POLICY

BACKGROUND AND PURPOSE

The Town of Milliken (the "Town") has an overriding interest in deciding what is "spoken" on its behalf on Social Media. Under some circumstances, a Social Media account may become a public forum subject to First Amendment protections, and can be subject to both the Colorado Open Meetings Law, C.R.S. § 24-6-401, et seq., and the Colorado Open Records Act, C.R.S. § 24-6-200.1, et seq.. To address the fast-changing landscape of the Internet and the way citizens communicate and obtain information online, individuals sitting on Town boards and commissions may consider using social media tools to reach a broader audience. The Town encourages the use of social media to further the goals of these boards and commissions, where appropriate, but adopts this Policy to establish guidelines for the use of Social Media.

APPLICABILITY

This policy applies to all individuals, whether elected or appointed, sitting on Town boards, commissions or committees.

DEFINITIONS

- (a) "Board" means every Town board, commission, council and committee, whether statutory or advisory, including without limitation the Board of Trustees, the Planning Commission, the Milliken Economic Development Council, the Historic Preservation Advisory Board, the Board of Adjustment, the Open Space & Trails Advisory Board, the Sustainability Advisory Board and the Tree Board.
- (b) "Member" means an individual that sits on a Board.
- (c) "Public Account" means a Social Media account that is used for communicating with the public in relation to Town-related activities, duties, or goals.
- (d) "Personal Account" means a Social Media account that is used solely for personal communications.
- (e) "Social Media" means websites and services that focus on creating and fostering online social communities and connecting users from varying locations and interest areas, including without limitation social networks (Facebook, LinkedIn and Nextdoor), instant messaging (SMS), blogs, wikis and online collaboration (SoundCloud), microblogging (Twitter), status updates, online forums and discussion boards, chats, or groups (Google Groups, Reddit, Yahoo and Whirlpool), website link sharing, video conferencing, virtual worlds, location-based services, video on demand (VOD) and podcasting, geo-spatial tagging (Foursquare and Facebook Check In), and photo and video sharing (Flickr, Instagram, Snapchat and YouTube).

PERSONAL ACCOUNTS TO BE DISTINCT FROM PUBLIC ACCOUNTS

Personal Accounts and Public Accounts should be distinct and maintained separately. While a Member has a First Amendment right to maintain a Personal Account, Individual Members are **discouraged** from maintaining Public Accounts.

The following guidelines should be followed with respect to Member Personal Accounts:

- A Personal Account generally should not be used to discuss the business of the Board on which a Member serves.
- The name, title, tag, or link of a Personal Account should not include language that would indicate that the Member is acting in any official capacity when posting on that account.
- Personal Accounts should not be created using a Town provided email.
- Personal Accounts should include a statement that the account is a personal social media and, if the social media has different account settings, categorize the account as personal.
- Town staff should not be asked to make updates or changes to a Personal Account at any time.
- The Personal Account should not be accessed using the Town's WIFI.
- No resources of the Town (e.g., a Town owned computer or tablet) should be utilized in maintaining a personal account.
- Include a disclaimer that any views expressed on the social media are strictly your own and not those of the Board on which you serve, or of the Town.

A Personal Account that violates these provisions is at risk of being deemed a public forum, regardless of when such Personal Account was established and for what purpose.

Public Accounts, which are discouraged, may be established using the Member's Town email account (if one exists). The following guidelines should be followed with respect to Member Public Accounts:

- You may choose to include language that indicates the title of the Member, such as "Trustee" or "Board Member" and should include a link back to the Town's website.
- Be aware that you have no authority to speak for the Town or for the Board on which you serve. A statement to this effect should be included on the account.
- Avoid any comment that might suggest you have authority to speak for the Town or the Board on which you serve at all times.
- Follow one of the following alternative approaches:

- Fully disable the public's ability to interact through the social media, which is the recommended approach.
- If the public is allowed to interact through the social media, do not delete, filter, block, ban, or hide **any** persons or conversations, and do not change your approach if offensive or troubling comments are posted. Bear in mind that if you allow public interaction, you risk compromising your ability to participate in hearings on quasi-judicial matters just by maintaining a Public Account.

Failure to comply with this Section may expose both the Member and the Town to risks associated with First Amendment violations, including civil rights claims under section 1983 of title 42 of the United States Code, Fair Campaign Practices Act violation claims, and Open Meetings Law violation claims.

PROHIBITION ON CAMPAIGNING IN PUBLIC ACCOUNTS

The Fair Campaign Practices Act, C.R.S. § 1-45-101, et seq., prohibits Town resources from being used for political purposes. Members may not use Public Accounts as a tool for reelection or for any other election or campaign purpose. Members who wish to use Social Media for campaigning must establish separate Personal Accounts for that purpose and may not access those Personal Accounts through Town technology, including Town computers and Town-issued tablets.

LEGAL RISKS

Most Social Media sites require users to agree to terms of service, which can include such provisions as indemnity and defense clauses and applicable law and venue clauses. When a public agency creates an account on a Social Media site, it typically must agree not to sue the site or allow the site to be included in suits against the agency, and requires the account owner to pay the site's legal costs arising from such suits. Terms of service also often specify that the law of a particular state applies to all legal actions, and that state's law may be very different from Colorado law. "Venue," which means the place where any litigation must occur, may also be specified and be in a distant court. Because of these provisions, any Member violating the terms of service while using a Public Account exposes the Town to significant legal risks.

The provisions of this Policy are intended to help protect the Town and Members from such risks, and thus compliance with both this Policy and the terms of service of the Social Media platform is an essential obligation and duty of every Member. Members who are not prepared to comply with this Policy and the individual terms of service should not use Social Media while serving on a Board.

UNLAWFUL MEETINGS

Of particular concern for Members' use of Social Media is the risk of violating the Colorado Open Meetings Law. Under the Open Meetings Law, all public business must be conducted in public, and a meeting of more than two Members must be noticed and open to the public (and a meeting can be by electronic means, including Social Media). This may be true even where only two Members at a time are communicating directly if

the communication is then shared with another Member. The dynamic nature of Social Media and the sheer volume of posts may make it difficult to track who is involved in the discussion. As such, Members should not communicate about public business with other Members by Social Media commenting or messaging, whether or not such communication is public or private. While informal communication with constituents is generally acceptable when it does not relate to matters that may come before the Member in a quasi-judicial context, discussion of public business by Members could create an unlawful meeting.

COMMUNICATIONS ON PERSONAL ACCOUNTS

All interaction should be conducted in a respectful and professional manner. Posts to social media that include discriminatory remarks, harassment, threats of violence or similar inappropriate or unlawful conduct, and are intended to bully or disparage others or to harm the reputation of the Town are a violation of this Policy.

CONFIDENTIALITY

No Member may disclose on Social Media confidential or proprietary information acquired by way of his or her official position. This restriction applies whether the information is disclosed on Public Accounts or Personal Accounts, or by any other method.

PRESERVATION OF PUBLIC RECORDS

The following content must be delivered to the Town Clerk for retention in accordance with the Town's records retention policies:

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- All Content on a Public Account.

SECURITY OF PUBLIC ACCOUNTS

Members should use necessary care to maintain the security and integrity of Public Accounts to prevent the unauthorized access or posting of content. Account passwords should be changed regularly and immediately after the password or Social Media site accessed using the password has been, or is suspected of being, compromised. Passwords should not be shared with any other individual or entity.

DISCIPLINARY ACTION

Failure to follow this Policy exposes the Town and the individual Members to significant legal risks. Therefore, a Member's failure to follow this Policy may result in disciplinary action, including public censure or removal from the Board, as appropriate and permitted by law.

DISTRIBUTION

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Commented [MG1]: Changed to "Public Account" throughout to minimize any suggestion that content has the approval of the Town.

Most of the authority I have seen assumes that an account is set up by an individual and then evaluates whether the account has become a public forum by the way it is administered. What we are doing is establishing a public forum out of the gate in the form of Public Accounts. Yet we are also setting rules for accounts (Personal Accounts) that we hope will not become public forums.

I'm not sure this is a problem, but it makes me a bit nervous.

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- Include a disclaimer that any views expressed on the social media are strictly your own and not those of the Board on which you serve, or of the Town.

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- Be aware that you have no authority to speak for the Town or for the Board on which you serve. A statement to this effect should be included on the account.

Commented [MG2]:

I made some significant revisions here largely to take into account legal analysis prepared by the Office of Legislative Legal Services, Colorado General Assembly, in September 2024, which I will share.

Commented [MG3]: This makes it sound like an individual member can create an "Official Account." Do we want that to be true? Is there a need for such accounts?

So, for example, can a board member create his or her own Official Account with Facebook and then be responsible for deciding what is and is not appropriate to post?

Commented [CR4R3]: This happens a lot. A close personal one would be Michael Orcutt. He has a FaceBook account that states Michael Orcutt Trustee. We need policies in place let gives them guidance. Also, we all have told them both as PC and TB that they should not make comments and posts on behalf of their position or in an official capacity.

- Avoid any comment that might suggest you have authority to speak for the Town or the Board on which you serve at all times.
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MONITORING SPEECH AND ACCESS TO ACCOUNTS

Commented [MG5]: It might be important to address the town's liability for use of "Personal Accounts." We could say that such use is at the Member's own risk and that the Member alone is solely responsible for that use.

Commented [MG6R5]: I have so far opted not to make this change.

Commented [MG7]: We can use the word "mandatory," but we need to think about what it means. The board may have the authority to remove someone from a lesser board or commission, but removal of a board of trustees member is very different.

Commented [CR8R7]: ok

~~Access to all Official Accounts must be set to "public." Because Official Accounts are public fora for First Amendment purposes, no member of the public may be banned from accessing any Official Account. Comments for a post may be turned on or off. If comments are turned on, no member of the public may be prohibited from submitting a comment. However, comments may be removed based on the following criteria if carried out in a viewpoint-neutral manner: (i) Comments that are obscene, sexual in nature, or pornographic; (ii) Comments that are defamatory or constitute harassment; (iii) Comments that promote illegal activity; or (iv) Comments that violate the intellectual property rights of the Town or others. Removed comments must comply with the standards for preservation of records under the Colorado Open Records Act. Alternatively, comments for a post may be turned off (to use Social Media as a one-way communication tool). Comments may only be turned off for the entire public and may not be turned off for individuals, including individuals whose comments are repeatedly subject to removal.~~

UNLAWFUL MEETINGS

Of particular concern for Members' use of Social Media is the risk of violating the Colorado Open Meetings Law. Under the Open Meetings Law, all public business must be conducted in public, and a meeting of more than two Members must be noticed and open to the public (and a meeting can be by electronic means, including Social Media). This may be true even where only two Members at a time are communicating directly if the communication is then shared with another Member. The dynamic nature of Social Media and the sheer volume of posts may make it difficult to track who is involved in the discussion ~~and detect when the line has been crossed.~~ As such, Members should not communicate ~~in their official capacity about public business~~ with other Members by Social Media commenting or messaging, whether or not such communication is public or private. While informal communication with constituents is generally acceptable, ~~lengthy when it does not relate to matters that may come before the Member in a quasi-judicial context,~~ discussion of public business ~~in such a manner is risky, especially if it involves other~~ Members ~~could create an unlawful meeting.~~

COMMUNICATIONS ON PERSONAL ACCOUNTS

~~If a Member discusses Town business on a Personal Account, that Personal Account may be deemed an Official Account. Posts on Personal AccountsAll interaction should be conducted in a respectful and professional manner. Posts to social media that include discriminatory remarks, harassment, threats of violence or similar inappropriate or unlawful conduct, and are intended to bully, or disparage others or to harm the reputation of the Town may subject the Member to disciplinary action under are a violation of this Policy.~~

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Commented [MG9]: To my understanding, this is not automatic. You establish a public forum by allowing others to comment. So an account used solely to disseminate information need not be a public forum.

Also, once an account allows comments on one topic, it isn't clear to me that comments on other topics should be barred. And the idea of putting individual board members in the position of making these decisions for their own "Official Accounts" is a bit concerning.

We should discuss this paragraph and where it came from. Possibly it was drafted by someone who has more knowledge than I do in this area.

Commented [CR10R9]: This seems to be something that is interpreted differently depending on where you are. What happens if three Board Members respond OR some one acts in the capacity of the Board with they don't have authority. More and more municipalities are developing these types of policies in the hope to prevent a major mishap on Social Media. If someone has an account that says Bob Moody, Mayor of Milliken and starts making comments or posts on behalf of the Town or Town items, they should be public comments. No one elected or on a Board/Commission should be making comments regarding Town issues that are not public. If not how do we monitor if there are

Commented [MG11R9]: Part of this is covered elsewhere. However, removal or deletion of any comments is seldom risk free. My recommended approach, which follows the recommendation of the Office of Legislative Legal

Commented [MG12]: I don't want to suggest the possibility that the line can be crossed.

Commented [MG13]: This is a very good point and deserves to be highlighted if you want to highlight anything in this policy.

Commented [CR14R13]: OK

Commented [MG15]: Where is this established? It may be true, but I'd like to know where this is stated, e.g., in a statute or a case.

Commented [CR16R15]: I thought you told them this in our training. Any communication that includes daisy chain emails, or wagon wheel emails that include more than two members could be constituted as an open meeting which would

Commented [MG17R15]: I think the serial meeting is sufficiently addressed elsewhere.

PRESERVATION OF PUBLIC RECORDS

~~Content published on Social Media that relates to the conduct of government actions must be retained and managed by the Town in compliance with the Open Records Act. Members should be prepared to treat each comment, post, photo, and list of individuals connected to a Social Media site as an open record. Absent exigent circumstances permitting removal, content on an Official Account may not be deleted except in accordance with lawful record destruction policies. In any case, content shall not be deleted from an Official Account until preserved by the Town Clerk according to the records retention schedule. Content on Personal Accounts that relates to Town business must be treated in the same manner.~~

The following content must be delivered to the Town Clerk for retention in accordance with the Town's records retention policies:

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- All Content on a Public Account.

SECURITY OF OFFICIALPUBLIC ACCOUNTS

Members should use necessary care to maintain the security and integrity of ~~Official~~Public Accounts to prevent the unauthorized access or posting of content. Account passwords should be changed regularly and immediately after the password or Social Media site accessed using the password has been, or is suspected of being, compromised. Passwords should not be shared with any other individual or entity.

ENFORCEMENT DISCIPLINARY ACTION

Failure to follow this ~~policy~~Policy exposes the Town ~~and the individual Members~~ to significant legal risks. Therefore, a Member's failure to follow this Policy may result in disciplinary action, including public censure or removal from the Board, as appropriate and permitted by law.

DISTRIBUTION

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Commented [MG18]: I think this may be too sweeping.

Commented [CR19R18]: Suggestions?

Commented [MG20R18]: "managed by the Town" worried me a little. I opted for an approach that simply provides for record preservation.

I still need to determine whether "relates to the business of the Board" is sufficient.



CHAPTER 9

SOCIAL MEDIA USE BY ELECTED OFFICIALS

By: Tami A. Tanoue, CIRSA Executive Director &
Sam Light, CIRSA General Counsel

Social media engagement has become a regular part of life. Daily, we check our emails and texts, and then probably go on to check our favorite social media sites, such as Facebook, Instagram, Twitter, and others. Local governments and their constituents are also mutually interested in connecting via social media, whether to conveniently transact business or provide timely information about everything from street closures to street festivals. So it's no wonder that elected officials, too, have integrated social media into their public lives. But if you're an elected official, you should know that, because of the powers and responsibilities conferred on you by virtue of your position, your social media use has some legal dimensions that may not apply to the rest of us. This chapter explores a few of them.

Open Meetings Law

While Chapter 5 outlines the basics of the Colorado open meetings law (COML), it's worth examining more specifically how its requirements can extend to your social media use. Consider this scenario: You have a Facebook page for yourself under the category of "Politician." You post information about city happenings and resources, and welcome others to post there as well. One day, you post on a controversial topic that the council will be tackling at its next meeting, and two of your fellow councilmembers get wind. All three of you go back and forth posting about your respective views and how you intend to vote on the topic.

Is this a "meeting" within the meaning of the open meetings law? Well, it seems at least arguable that it is! Remember, a "meeting" under the law includes a gathering convened electronically to discuss public business. When there are three or more members of the local public body (or a quorum, whichever is less) participating in such a gathering, that can trigger the notice and "open to the public" requirements of the law. If triggered in this type of social media discussion, how do you comply with the 24-hour "timely" posting requirement in the COML when you're posting on Facebook? How do you meet the "open to the public" requirement? These are questions for which there are not clear answers, but you see the point...discussions of public business by the requisite number of governing

body members can certainly take place in an electronic forum, and then these questions (and others) may come into play.

Constitutional Concerns

A scenario: You post about the upcoming agenda item on your Facebook page featured in the previous scenario. For some reason, the discussion on the post starts to go completely sideways, with lots of negative comments, including some hateful attacks from the citizen you defeated in the last election, and some uncalled-for memes and photos. You decide the hateful attacks aren't helpful to the discussion—keep it positive, people!—and so you “block” your prior campaign rival from posting and you start deleting some of the particularly disagreeable comments. A few days later you ultimately decide that the better part of valor is to just delete the whole darn post.

Did your act of “blocking” your rival raise free speech concerns? It may well have! Remember, the constitution provides strong protections for free speech and generally prohibits the government from censoring speech that occurs within those venues established for the open exchange of ideas on matters of public concern. These principles have raised the question of whether a public official's Facebook page or Twitter account is a public forum such that commenters cannot be blocked, or their comments removed, based on their content.

While the law in this area is still developing, a few courts have concluded that if a public official has a social media page or feed that essentially “walks and talks” like a governmental forum, then the medium is a public forum subject to the principles regulating free speech. So, for example, where an elected official designates the page as their official page as a member of an elected body, uses the page to communicate with constituents as an elected official about government events, and invites followers to use that page for discussion of any topics relating to the government, the official cannot block persons who post critical content. The takeaway? A social media site can be a great way to communicate with constituents but if that's how you use your accounts, don't block people from posting.

Also in the above scenario, if you've decided to delete the whole darn post: Are the post, and the comments, considered “public records” within the meaning of the Colorado Open Records Act (CORA)? Again, it seems at least arguable that they are! The term “public records” is defined to include “the correspondence of elected officials,” subject to certain exceptions. And public records are open for public inspection and copying. Your municipality has most likely adopted a records retention and destruction schedule that governs how long various documents, including electronic documents, must be maintained prior to destruction.

So, could someone request a copy of a post that was on your Facebook page under CORA? What if you deleted the post? Is there a record retention schedule that applied? Was that schedule violated when you deleted the post? More of those infernal questions for which there isn't a clear answer...but you see the point! If there's a chance that the posts are subject to CORA, then it might be smart to tolerate the replies you get on your post. Alternatively, make sure you have some reasonable and defensible posting rules in place so that everyone knows up front your expectations for your page.

Quasi-Judicial Rules of Engagement

A further word of caution on social media concerns your duties as a decision-maker in quasi-judicial matters. Consider this scenario: A site-specific land use application is scheduled to be considered by the planning commission on an upcoming agenda, with the commission's recommendation to be referred to the council for final action at a later date. You consider the proposed use to be an extremely controversial one. But you're worried that it's a bit "under the radar," what with summer vacations, holidays, and all. Of course, proper notice has been given by the planning department, but you're still concerned that the proposal may get a favorable recommendation from the commission without any citizen testimony. You decide to post this on your Facebook page: "Citizens, please read this IMPORTANT NOTICE! You need to know that the planning commission is going to be considering a proposal for _____ at its upcoming meeting on _____ at 7:00 p.m. As a councilmember, I am taking no position on the proposal at this time. But if you care about our community's future, then you will want to attend this very important hearing before the planning commission."

See any problems here? You've certainly stated that you're "taking no position" at this time, right? But it may appear to others, particularly the applicant, that you are opposed to the proposal and are trying to "gin up" opposition to it! Is that congruent with the "neutral decision-maker" role that you will need to take on once this quasi-judicial proposal goes up to the council? Could the applicant take the position that it looks like you made up your mind, without evidence, long before the council hearing, and therefore, you should be recused from participation?

"But, but, all I'm doing is making sure the public knows about this proposal," you protest. Well, do you do that with EVERY proposal that comes before the planning commission, or did you just happen to pick out this one for the Facebook spotlight? The essence of procedural "due process" rights that attach to a quasi-judicial matter is notice and a fair hearing before neutral, impartial decision-makers. With a post like this you can see how, even if your intentions may have been honorable, doubts can be cast on your impartiality and neutrality. Those doubts increase if your involvement goes beyond this scenario—say, for example, that you are also posting or responding to comments about the merits of the application.

When it comes to social media buzz around quasi-judicial matters, remember that due process requires you to be impartial and base your decision upon evidence presented at your public hearing. Remember also that defensible quasi-judicial decisions are about good process. As part of that process you will ultimately hear the case and have the power to make the decision—at the time that it's ripe for your body's decision! Avoid the temptation to leap into the social media fray, as that will protect your ability to serve as a quasi-judge, and protect your governing body's decision.

Some Suggestions

Social media use by elected officials implicates new and evolving legal issues, and this chapter only touches upon a few of them. The uncertainty is real! But you can avoid uncertainty and stay on solid ground if you follow these suggestions:

- Consider whether you really need to be on social media in your elected official capacity. If only 23 people “like” your page, it may not be worth the hassle. And keep in mind that only a fraction of those 23 people may even be seeing your posts.
- If you feel that the use of social media is a net plus and/or a service to your constituents, be extremely careful about what is posted! Stay away from discussions of items that will be or could be on your governing body’s agenda. There’s a time and place for discussion of those items, and it’s most likely not social media. Stick to public service announcements, photos and posts about things you did (“It was great to meet so many of you when I volunteered at City Cleanup Day last week”), upcoming events like “Town Halls,” re-posts of City newsletters, links to articles that tout your great city, and the like. If you’re careful about what you post, you’re not going to have to confront the uncertainties of COML, CORA, and other laws. If you stick with helpful but non-controversial posts, then there won’t be much of a need to delete posts.
- Be particularly careful to stay away from commenting on a pending quasi-judicial matter. This is where the stakes are highest! In a worst case scenario, an imprudent post could require your recusal from participating in the matter on the basis that you’ve revealed your non-neutrality, buttress someone’s constitutional claim, serve as a basis to attack the body’s decision, or all of the above.
- Check to make sure you created your page under the right category. “Politician” is more accurate than “Governmental Organization.” And don’t use the official city/town logo, to avoid any implication that yours is an “official” city/town page.

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MEMORANDUM

TO: Members of the Colorado General Assembly

FROM: Office of Legislative Legal Services

DATE: September 11, 2024

SUBJECT: Social Media Guidelines for Legislators after *Lindke v. Freed*¹

Guidelines

The following guidelines apply to social media that you use related to your legislative activities:

- 1) The safest approach for managing your social media to avoid the risk of litigation continues to be:
 - a) To disable the public's ability to interact through the social media; or
 - b) If the public is allowed to interact through the social media, to not delete, filter, block, ban, or hide any persons or conversations.
- 2) If you want to be able to delete comments or block or otherwise restrict a person's access to your social media, then:
 - a) Do not use state government resources, including state equipment or aides, interns, or other state employees, to administer or manage your social media;
 - b) Do not post matters that may appear to be discharging an official duty (for example, a chairperson announcing a committee hearing schedule or the Speaker or President announcing appointments to a committee);
 - c) Include a statement that the account is your personal social media and, if the social media has different account settings, categorize your account as personal;

¹ This memorandum supersedes prior social media memoranda issued by the OLLS.

- d) Include a disclaimer that any views expressed on the social media are strictly your own and not those of the House of Representatives or the Senate, as appropriate, or of the state; and
 - e) Clearly identify on the social media that no state government resources are being used related to the social media.
- 3) If you use the resources of state government to support your social media, then follow Guideline 1).

Background

Numerous public officials, including multiple Colorado legislators, who have blocked, banned, or otherwise restricted access to their social media accounts have been sued in federal court under 42 U.S.C. § 1983 (a §1983 action) for violating an individual's First Amendment rights. On March 15, 2024, the United States Supreme Court issued an opinion in the case of *Lindke v. Freed*² that reconciled conflicting appellate decisions in the 6th and 9th Circuit Courts of Appeals.³ The *Lindke* holding takes precedence over any conflicting state law and serves as the reference point for the guidance set forth in this memorandum with respect to whether there is state action sufficient to allege a violation under 42 U.S.C. §1983. If, based on *Lindke*, there is state action, then, depending on the circumstances, it is possible that a Court will find that a legislator violates a person's First Amendment rights when the legislator deletes the person's comment or blocks or otherwise restricts the person from participating in the interactive thread of the legislator's social media.

Basis for Guidelines

- 1. Under *Lindke v. Freed*, a public official must possess actual authority to speak on behalf of the state and purport to exercise that authority when speaking on social media in order for there to be state action sufficient for a claim of a First Amendment violation.**

In *Lindke*, the United States Supreme Court held that a state official may delete a comment or block individuals from the state official's social media if the state official did not engage in state action when operating the account or posting on the social media. In doing so, the

² 601 U.S. 187 (2024).

³ The federal Court of Appeals cases were *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158 (9th Cir. 2022) and *Lindke v. Freed*, 37 F. 4th 1199 (6th Cir. 2022).

Court recognized that public officials have a First Amendment right to speak as private individuals if the speech does not constitute state action by the official. This right includes the ability to speak about information related to or learned through public employment⁴ if the speech is not ordinarily within the scope of the state official's duties.⁵

A public official's social media activity is "state action" only if the public official: (1) possesses actual authority to speak on behalf of the state; and (2) purports to exercise that authority when speaking on social media.⁶ A court will look to the content and context of a social media post to determine if there is state action.

1.1. Actual authority to speak for the state required.

A public official has actual authority to speak on behalf of the state only when the post's contents are traceable to the state's power or authority.⁷ When challenged conduct entails functions and obligations that are in no way dependent on state authority, there is no state action because if the state did not entrust the public official with the duties that the social media post concerns, then the state cannot be fairly blamed for the way the duties are discharged.⁸ The state must be responsible for the specific content that is the subject of the complaint.⁹ The source of the public official's actual authority to exercise the state's power or authority through speech comes from either a state law or rule, either of which must be written and must authorize a public official to speak on the state's behalf, or custom and usage that is sufficiently persistent and well settled that it carries the force of law.¹⁰

1.2. Public official must purport to exercise state authority when using social media.

A public official purports to use the actual authority conveyed by a state law or rule or by custom and usage to speak for the state when the official is speaking in an official capacity or uses the speech to fulfil responsibilities pursuant to state law.¹¹ Moreover, "[i]f the public employee does not use his speech in furtherance of his official responsibilities, he is speaking

⁴ This case involved a City Manager and so the Court often referred to "public employment" in the opinion. This broad term presumably includes "public office."

⁵ *Lindke* at 197.

⁶ *Id.* at 198.

⁷ *Id.*

⁸ *Id.* at 198-199.

⁹ *Id.* at 199.

¹⁰ *Id.* at 200.

¹¹ *Id.* at 201.

in his own voice."¹² Repeating or sharing otherwise available information is likely to be considered engaging in private speech related to public employment or concerning information learned during that employment, in which case there is no state action by the public official. Additionally, a public official does not necessarily purport to exercise the official's authority when simply posting about a matter. Job-related information may be posted for personal reasons, such as promoting prospects for reelection or a general desire to raise public awareness about matters.

Indicia that a public official is acting under state authority includes use of an account that belongs to the state, not an individual, or that is passed down to whomever occupies a particular office.¹³ Additionally, a public official would be "hard-pressed to deny" state action when government resources are used to administer a social media page.¹⁴

The Court also noted that if a public official's account had been labeled as a personal account "(e.g., 'this is the personal page of James R. Freed')" or included a disclaimer "(e.g., 'the views expressed are strictly my own')," then the public official "would be entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal."¹⁵ In this way, the speech on the "personal" page is akin to speech at a backyard barbecue—in both instances a court can safely presume that the speech is personal.¹⁶

In closing, the Court also noted the difference between a public official deleting a person's comments versus a public official blocking a person from commenting again:

So far as deletion goes, the only relevant posts are those from which Lindke's comments were removed. Blocking, however, is a different story. Because blocking operated on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment. The bluntness of Facebook's blocking tool highlights the cost of a "mixed use" social-media account: If page-wide blocking is the only option, a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts. A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability.¹⁷

¹² *Id.*

¹³ *Id.* at 203.

¹⁴ *Id.* at 203.

¹⁵ *Id.* at 202.

¹⁶ *Id.*

¹⁷ *Id.* at 204.

2. Ways for a legislator to avoid state action when operating the legislator's social media based on *Lindke*.

2.1. Is the legislator authorized to speak for the state?

A legislator is a public official to whom the state-action test from *Lindke* applies. The first part of the test to determine whether there is state action sufficient to permit a First Amendment claim against a legislator is to ascertain whether the legislator has actual authority to speak on behalf of the state based on a written state law or rule or on a sufficiently persistent custom and usage.

In a Colorado lawsuit that preceded *Lindke*, a Colorado federal district court summed up a Congresswoman's official duties as follows: "Put simply, legislators legislate. Their state-created powers are to propose legislation and to vote—and little else."¹⁸ Even if this oversimplifies a legislator's job, it does accurately convey that a legislator's primary official responsibilities are to be part of a legislative body that enacts laws. Speech outside of that process, with a few possible exceptions described below for particular legislators, is not part of a legislator's official duties related to the legislative process. Moreover, there is no state law or rule that generally authorizes legislators to make statements outside of the official legislative process or to speak on behalf of the state. Nor is there a custom and usage that generally empowers or requires an individual legislator to speak on behalf of the state about the legislative process. A legislator cannot exercise a power that does not exist, and, therefore, it could be argued that the first part of the state-action test cannot be met.

In fact, state law provides that if a legislator maintains social media that is not supported by state resources and is not required by law to be created or maintained, then that social media is "private."¹⁹ Arguably, by enacting this statute, the General Assembly intended to convey that a legislator is not authorized to speak on behalf of the state on social media and to override any custom and usage to the contrary, if such custom and usage existed.

In some circumstances, however, it may appear that a legislator is using social media in furtherance of their official responsibilities. For example, committee chairs may appear to speak on behalf of the committee when they make announcements regarding the committee's schedule. Or the Speaker of the House or Senate President could appear to be discharging their official duties when they announce on their social media the appointment

¹⁸ *Buentello v. Boebert*, 545 F. Supp. 3d 912, 919 (D. Colo. 2021) (Order denying a motion for preliminary judgment related to a First Amendment claim for blocking on social media because plaintiff could not demonstrate Congresswomen's use of social media account constituted state action.)

¹⁹ § 24-18.3-101, C.R.S.

of members to a committee of reference. Accordingly, those legislators should avoid using their social media for those types of posts.

2.2. Is the legislator purporting to use actual authority to speak on behalf of the state?

The second part of the state-action test in this context is whether a legislator purports to exercise the authority to speak on behalf of the state when speaking on social media. To make clear that this is not the case, a legislator should label as "personal" any social media on which the legislator makes posts related to their legislative activities, *e.g.*, "This is the personal page of State Senator/State Representative X." To be consistent with this label, if a social media platform enables a user to designate the type of account being used, a legislator should identify an account on that social media platform as a "personal" account. Likewise, a legislator should include a disclaimer that the "views expressed are strictly my own and they are not those of the House of Representatives/Senate or the State."²⁰ By including this information on the social media, a legislator will create a heavy presumption that the social media is personal.

These labels and disclaimers may not provide the same level of protection for all legislators, though, particularly given a legislator's position of authority within the General Assembly and the information that the legislator posts on social media. In *Lindke*, the Supreme Court indicated that the context and content of particular posts may make it appear that a legislator is purporting to exercise official duties. Based on this principle and the examples included in the *Lindke* decision, even if committee chairs, the Speaker of the House, and the Senate President do not have actual authority to speak on behalf of the General Assembly, their social media posts regarding official business may purport to use state authority.

Therefore, as noted in section 2.1, they should avoid making announcements regarding their official duties, like committee meeting announcements or committee appointments, on their social media.

2.3. Use of state resources managing social media constitutes state action.²¹

A final element in determining whether a legislator's administration of social media could constitute state action is whether state resources are used. Specifically, the *Lindke* Court stated

²⁰ *Lindke*, *supra*, at 202.

²¹ The fact that a legislator uses state resources to manage their social media may, by itself, satisfy both parts of the *Lindke* state-action test. Accordingly, this circumstance is treated separately in this memorandum.

that a public official would be "hard-pressed to deny" state action when government resources are used to administer a social media page.²²

The legislative branch neither provides legislators with any social media nor directly pays for or provides financial compensation for any social media. However, a legislator may nonetheless use state resources related to their social media if the legislator:

- Has an intern, a state-paid aide, or partisan staff manage the social media on behalf of the legislator during working hours;
- Manages the social media through a state-issued iPad or laptop computer; or
- Uses the private "legnet" Wi-Fi network in the Capitol to manage the social media.

Infrequently using one of these state resources might be considered a de minimis use that does not change the character of your private social media, but it is impossible to quantify how much use would be considered acceptable. It is also possible that a court would consider the use of the private capitol Wi-Fi network only to always be a de minimis use of the state resources.

It is also unclear how a court would treat a legislator who once used the resources of state government to manage their social media but no longer does so at the time a §1983 action is filed. If a legislator previously used state resources to manage social media, then the safest approach is to create and use a new account. If this is not an acceptable option, then a legislator who wants to avoid state action should consider less restrictive actions, like deleting a comment, rather than blocking someone, the latter of which may put the whole account at issue and call into question whether state resources were used for some of the posts.

3. If a legislator uses state government resources to support the legislator's social media, then the legislator should manage the account to avoid a potential First Amendment lawsuit.

If a legislator uses state resources to support the legislator's social media, then there may be state action under *Lindke*. This means that if a legislator deletes a comment or blocks someone on the legislator's social media and the person files a § 1983 action alleging a First Amendment violation, a court might find that the legislator engaged in state action and proceed to the merits of the First Amendment claim. The United States Supreme Court did not reach the question of whether deleting a comment or blocking someone from social media violates the First Amendment. Prior to the *Lindke* decision, however, a number of lower courts found that the interactive thread of an elected official's social media constituted a public forum for speech under the First Amendment, and when the elected official deleted

²² *Lindke, supra*, at 203.

a comment or blocked a person who was critical of the official or the official's policy, the official committed viewpoint discrimination and violated the person's First Amendment rights.²³

Accordingly, the OLLS recommends that a legislator take a risk-management approach to managing this type of social media by:

- 1) Disabling the public's ability to interact through the social media; or
- 2) If the public is allowed to interact through the social media, not deleting, filtering, blocking, banning, or hiding any persons or conversations.

Under the first option, a legislator arguably avoids creating a public forum. If there is no public forum in which the public is permitted to speak, there is no First Amendment right to speak, and therefore, no First Amendment rights are violated. The second option avoids any action that could be construed as viewpoint discrimination that violates a person's First Amendment rights.

A legislator should not use a filter to limit the content on the social media because a filter may block a person and the person may then claim viewpoint discrimination based on the automated exclusion. Conversely, a legislator may mute a person from the legislator's social media view so long as doing so doesn't restrict that person's access to the account's interactive thread. If an aide, intern, or other staff manages a social media account on a legislator's behalf, that person should likewise follow this advice.

4. Legislators should not rely on House Bill 23-1306 as a basis for restricting access to social media that the legislator uses related to legislative activities.

In 2023, the General Assembly enacted House Bill 23-1306 to establish the rights of state and local elected officials to regulate the use of their social media by the public when the social media is not supported by the resources of the state.²⁴ The law generally provides similar rights and protections for elected officials as set forth in *Lindke* and also distinguishes between private social media and public social media. Like *Lindke*, the statute establishes First Amendment rights of public officials to express their views when not acting for the state.

²³ See e.g. *Davison v. Randall*, 912 F.3d 666, 687 (4th Cir. 2019); See also, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019), *vacated as moot sub nom. Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1220-21, 209 L. Ed. 2d 519 (2021).

²⁴ https://leg.colorado.gov/sites/default/files/2023a_1306_signed.pdf

Section 24-18.3-101 (3), Colorado Revised Statutes, relates to state elected officials, including legislators, and reads as follows:

A state elected official may permanently or temporarily restrict or bar an individual from using the private social media that is administered by a state elected official or their designee for any reason, including bullying, harassment, or intimidation, in the state elected official's sole discretion.

For purposes of this provision, "private social media" is defined to mean "social media that is not supported by the resources of the state government and is not required by state law, ordinance, or regulation to be created or maintained by a state elected official." This section is similar to the standard in *Lindke* for determining state action because, as in *Lindke*, the statute distinguishes private social media from public social media by focusing on whether there is a law requiring the government official to speak and whether the government official uses government resources when managing the social media. But the test established in *Lindke* is not quite the same, and while section 24-18.3-101 (3) is presumed to be constitutional,²⁵ the statute would not be binding on a federal court for purposes of applying the state-action test. Accordingly, the OLLS recommends that legislators not rely on section 24-18.3-101 (3) as a basis for restricting or barring an individual from the legislator's social media.

5. Even after the *Lindke* decision, the safest approach for social media use related to legislative activities is for the legislator to manage the social media to avoid a potential First Amendment lawsuit.

There are several factors that suggest that a legislator who posts about legislative activity on the legislator's social media may want to take a conservative approach to managing their social media, even after the *Lindke* decision. First, the Court did not create a clear test that insulates legislators from liability, and there have been no decisions applying the *Lindke* decision to a state legislator. A second, related point is that, even if there is no state action in operating and maintaining social media, if a legislator posts about legislative matters and deletes a comment or blocks someone, there is still a risk that the legislator could be sued. While the legislator may ultimately prevail in getting the matter dismissed or otherwise favorably resolved, this type of lawsuit can be time-consuming and expensive. Moreover, if the basis of the lawsuit is that a legislator blocks a person, instead of deleting a comment, the scope of the inquiry may be broader and thus prolong the disposition of the case. Third, the Committee on Legal Services is permitted, but not required, to retain counsel to defend

²⁵ *Colo. Ass'n of Pub. Emps. v. Bd. of Regents of Univ. of Colo.*, 804 P.2d 138, 142 (Colo. 1990).

a legislator who has been sued.²⁶ Accordingly, from a risk-management perspective, the safest policy for a legislator to manage social media that includes posts related to legislative activities continues to be:

- 1) To disable the public's ability to interact through the social media; or
- 2) If the public is allowed to interact through the social media, to not delete, filter, block, ban, or hide any persons or conversations.

²⁶ § 2-3-1001, C.R.S.

Lindke v. Freed

Supreme Court of the United States

October 31, 2023, Argued; March 15, 2024, Decided

No. 22-611.

Reporter

601 U.S. 187 *; 144 S. Ct. 756 **; 218 L. Ed. 2d 121 ***; 2024 U.S. LEXIS 1214 ****; 30 Fla. L. Weekly Fed. S 75

KEVIN LINDKE, PETITIONER v. JAMES R. FREED

Notice: The pagination of this document is subject to change pending release of the final published version.

Subsequent History: On remand at, Remanded by Lindke v. Freed, 2024 U.S. App. LEXIS 21110 (6th Cir. Mich., Aug. 21, 2024)

Prior History: [****1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Lindke v. Freed, 37 F.4th 1199, 2022 U.S. App. LEXIS 17593, 2022 FED App. 138P (6th Cir.), 2022 WL 2297875 (6th Cir. Mich., June 27, 2022)

Disposition: 37 F. 4th 1199, vacated and remanded.

Syllabus

[*187] [**760] [***126] James Freed, like countless other Americans, created a private Facebook profile sometime before 2008. He eventually converted his profile to a public “page,” meaning that *anyone* could see and comment on his posts. In 2014, Freed updated his Facebook page to reflect that he was appointed city manager of Port Huron, Michigan, describing himself as “Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI.” Freed continued to operate his Facebook page himself and continued to post prolifically (and primarily) about his personal life. Freed also posted information related to his job, such as highlighting communications from other city officials and soliciting feedback from the public on issues of concern. Freed often responded to comments on his posts, including those left by city residents with inquiries about community matters. He occasionally deleted comments that he considered “derogatory” or “stupid.”

After the COVID-19 pandemic began, Freed posted about it. Some posts were personal, and some contained information related to [****2] his job. Facebook user Kevin Lindke commented on some of Freed’s posts, unequivocally expressing his displeasure with the city’s approach to the pandemic. Initially, Freed deleted Lindke’s comments; ultimately, he blocked him from commenting at all. Lindke sued Freed under 42 U. S. C. §1983, alleging that Freed had violated his First Amendment rights. As Lindke saw it, he had the right to comment on Freed’s Facebook page because it was a public forum. The District Court determined that because Freed managed his Facebook page in his private capacity, and because only state action can give rise to liability under §1983, Lindke’s claim failed. The Sixth Circuit affirmed.

Held: 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. Pp. 5-15.

(a) Section 1983 provides a cause of action against “[e]very person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State*” deprives someone of a federal constitutional or [*188] statutory right. (Emphasis [****3] added.) Section 1983’s “under color of” text makes clear that it is a provision designed as a protection against acts attributable to a State, not those of a private person. In the run-of-the-mill case, state action is easy to spot. Courts do not ordinarily pause to consider whether §1983 applies to the actions of police officers, public schools, or prison officials. Sometimes, however, the line between private conduct and state action is difficult to draw. In *Griffin v. Maryland*, 378 U. S. 130, 84 S. Ct. 1770, 12 L. Ed. 2d 754, for example, it was the source of the power, not the identity of the employer, which

controlled in the case of a deputized sheriff who was [***127] held to have engaged in state action while employed by a privately owned amusement park. Since *Griffin*, most state-action precedents have grappled with whether a nominally private person engaged in state action, but this [**761] case requires analyzing whether a *state official* engaged in state action or functioned as a private citizen.

Freed's status as a state employee is not determinative. The distinction between private conduct and state action turns on substance, not labels: Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights—including the [****4] First Amendment right to speak about their jobs and exercise editorial control over speech and speakers on their personal platforms. Here, if Freed acted in his private capacity when he blocked Lindke and deleted his comments, he did not violate Lindke's First Amendment rights—instead, he exercised his own. Pp. 5-8.

(b) In the case of a public official using social media, a close look is definitely necessary to categorize conduct. In cases analogous to this one, precedent articulates principles to distinguish between personal and official communication in the social-media context. 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. The appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first. Pp. 8-15.

(1) The test's first prong is grounded in the bedrock requirement that "the conduct allegedly causing the deprivation of a federal right be *fairly attributable to the State*." *Lugar v. Edmondson Oil Co.*, 457 U. S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (emphasis added). Lindke's focus on appearance skips over this critical [****5] step. Unless Freed was "possessed of state authority" to post city updates and register citizen concerns, *Griffin*, 378 U. S., at 135, 84 S. Ct. 1770, 12 L. Ed. 2d 754, his conduct is not attributable to the State. Importantly, Lindke must show more than that Freed had *some* authority to communicate with residents on behalf of Port Huron. The alleged censorship must be connected to speech on a matter within Freed's bailiwick. There [**189] must be a tie between the official's authority and "the gravamen of the plaintiff's complaint." *Blum v. Yaretsky*, 457 U. S. 991,

1003, 102 S. Ct. 2777, 73 L. Ed. 2d 534.

To misuse power, one must possess it in the first place, and §1983 lists the potential sources: "statute, ordinance, regulation, custom, or usage." Determining the scope of an official's power requires careful attention to the relevant source of that power and what authority it reasonably encompasses. The threshold inquiry to establish state action is not whether making official announcements *could* fit within a job description but whether making such announcements is *actually* part of the job that the State entrusted the official to do. Pp. 9-12.

(2) For social-media activity to constitute state action, an official must not only have state authority, he must also purport to use it. If the official [***128] does not speak in furtherance [****6] of his official responsibilities, he speaks with his own voice. Here, if Freed's account had carried a label—*e.g.*, "this is the personal page of James R. Freed"—he would be entitled to a heavy presumption that all of his posts were personal, but Freed's page was not designated either "personal" or "official." The ambiguity surrounding Freed's page requires a fact-specific undertaking in which posts' content and function are the most important considerations. A post that expressly invokes state authority to make an announcement not available elsewhere is official, while a post that merely repeats or shares otherwise available information is [**762] more likely personal. Lest any official lose the right to speak about public affairs in his personal capacity, the plaintiff must show that the official purports to exercise state authority in specific posts. The nature of the social-media technology matters to this analysis. For example, because Facebook's blocking tool operates on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment. Pp. 12-15.

37 F. 4th 1199, vacated and remanded.

Counsel: Allon Kedem argued the cause for petitioner.

Victoria R. Ferres argued the cause for respondent.

Masha G. Hansford argued the cause for United States, as amicus curiae.

Judges: Barrett, J., delivered the opinion [****7] for a unanimous Court.

Opinion by: BARRETT

Opinion

[*190] JUSTICE BARRETT delivered the opinion of the Court.

Like millions of Americans, James Freed maintained a Facebook account on which he posted about a wide range of topics, including his family and his job. Like most of those Americans, Freed occasionally received unwelcome comments on his posts. In response, Freed took a step familiar to Facebook users: He deleted the comments and blocked those who made them.

For most people with a Facebook account, that would have been the end of it. But Kevin Lindke, one of the unwelcome [*191] commenters, sued Freed for violating his right to free speech. Because the First Amendment binds only the government, this claim is a nonstarter if Freed posted as a private citizen. Freed, however, is not only a private citizen but also the city manager of Port Huron, Michigan—and while Freed insists that his Facebook account was strictly personal, Lindke argues that Freed acted in his official capacity when he silenced Lindke’s speech.

When a government official posts about job-related topics on social media, it can be difficult to tell whether the speech is official or private. We hold that such speech is attributable to the State only if the official [****8] (1) possessed actual authority to speak on the State’s behalf, and (2) purported to exercise that authority when he spoke on social media.

[**763] I

A

Sometime before 2008, while he was a college student, James Freed created a private Facebook profile that he shared only with “friends.” In Facebook lingo, “friends” are not necessarily confidants or even real-life acquaintances. Users become [***129] “friends” when one accepts a “friend request” from another; after that, the two can generally see and comment on one another’s posts and photos. When Freed, an avid Facebook user, began nearing the platform’s 5,000-friend limit, he converted his profile to a public “page.” This meant that *anyone* could see and comment on his posts. Freed chose “public figure” for his page’s category, “James Freed” for its title, and

“JamesRFreed1” as his username. Facebook did not require Freed to satisfy any special criteria either to convert his Facebook profile to a public page or to describe himself as a public figure.

In 2014, Freed was appointed city manager of Port Huron, Michigan, and he updated his Facebook page to reflect the new job. For his profile picture, Freed chose a photo of himself in a suit with a city lapel [****9] pin. In the “About” section, [*192] Freed added his title, a link to the city’s website, and the city’s general email address. He described himself as “Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI.”

As before his appointment, Freed operated his Facebook page himself. And, as before his appointment, Freed posted prolifically (and primarily) about his personal life. He uploaded hundreds of photos of his daughter. He shared about outings like the Daddy Daughter Dance, dinner with his wife, and a family nature walk. He posted Bible verses, updates on home-improvement projects, and pictures of his dog, Winston.

Freed also posted information related to his job. He described mundane activities, like visiting local high schools, as well as splashier ones, like starting reconstruction of the city’s boat launch. He shared news about the city’s efforts to streamline leaf pickup and stabilize water intake from a local river. He highlighted communications from other city officials, like a press release from the fire chief and an annual financial report from the finance department. On occasion, Freed solicited feedback from the public—for [****10] instance, he once posted a link to a city survey about housing and encouraged his audience to complete it.

Freed’s readers frequently commented on his posts, sometimes with reactions (for example, “Good job it takes skills” on a picture of his sleeping daughter) and sometimes with questions (for example, “Can you allow city residents to have chickens?”). Freed often replied to the comments, including by answering inquiries from city residents. (City residents can have chickens and should “call the Planning Dept for details.”) He occasionally deleted comments that he thought were “derogatory” or “stupid.”

After the COVID-19 pandemic began, Freed posted about that. Some posts were personal, like pictures of his family spending time at home and outdoors to “[s]tay safe” and “[s]ave lives.” Some contained general information, like case counts and weekly hospitalization numbers. Others related [*193] to Freed’s job, like a

description of the city's hiring freeze and a screenshot of a press release about a relief package that he helped prepare.

Enter Kevin Lindke. Unhappy with the city's approach to the pandemic, Lindke visited Freed's page and said so. For example, in response to one of Freed's [****11] posts, Lindke commented that [***130] the city's pandemic [**764] response was "abysmal" and that "the city deserves better." When Freed posted a photo of himself and the mayor picking up takeout from a local restaurant, Lindke complained that while "residents [we]re suffering," the city's leaders were eating at an expensive restaurant "instead of out talking to the community." Initially, Freed deleted Lindke's comments; ultimately, he blocked him. Once blocked, Lindke could see Freed's posts but could no longer comment on them.

B

Lindke sued Freed under 42 U. S. C. §1983, alleging that Freed had violated his First Amendment rights. As Lindke saw it, he had the right to comment on Freed's Facebook page, which he characterized as a public forum. Freed, Lindke claimed, had engaged in impermissible viewpoint discrimination by deleting unfavorable comments and blocking the people who made them.

The District Court granted summary judgment to Freed. Because only state action can give rise to liability under §1983, Lindke's claim depended on whether Freed acted in a "private" or "public" capacity. 563 F. Supp. 3d 704, 714 (ED Mich. 2021). The "prevailing personal quality of Freed's post[s]," the absence of "government involvement" with his account, and the lack of posts conducting official [****12] business led the court to conclude that Freed managed his Facebook page in his private capacity, so Lindke's claim failed. *Ibid*.

The Sixth Circuit affirmed. It noted that "the caselaw is murky as to when a state official acts personally and when he acts officially" for purposes of §1983. 37 F. 4th 1199, 1202 [**194] (2022). To sort the personal from the official, that court "asks whether the official is 'performing an actual or apparent duty of his office,' or if he could not have behaved as he did 'without the authority of his office.'" *Id.*, at 1203 (quoting *Waters v. Morristown*, 242 F. 3d 353, 359 (CA6 2001)). Applying this precedent to the social-media context, the Sixth Circuit held that an official's activity is state action if the "text of state law requires an officeholder to maintain a social-media account," the official "use[s] . . . state

resources" or "government staff" to run the account, or the "accoun[t] belong[s] to an office, rather than an individual officeholder." 37 F. 4th, at 1203-1204. These situations, the Sixth Circuit explained, make an official's social-media activity "fairly attributable" to the State. *Id.*, at 1204 (quoting *Lugar v. Edmondson Oil Co.*, 457 U. S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)). And it concluded that Freed's activity was not.

The Sixth Circuit's approach to state action in the social-media context differs from that of the Second and Ninth Circuits, [****13] which focus less on the connection between the official's authority and the account and more on whether the account's appearance and content look official. See, e.g., *Garnier v. O'Connor-Ratcliff*, 41 F. 4th 1158, 1170-1171 (CA9 2022); *Knight First Amdt. Inst. at Columbia Univ. v. Trump*, 928 F. 3d 226, 236 (CA2 2019), vacated as moot *sub nom. Biden v. Knight First Amdt. Inst. at Columbia Univ.*, 593 U. S. ___, 141 S. Ct. 1220, 209 L. Ed. 2d 519 (2021). We granted certiorari. 598 U. S. ___, 143 S. Ct. 1780, 215 L. Ed. 2d 669 (2023).

II

Section 1983 provides a cause of [***131] action against "[e]very person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State*" deprives someone of a federal constitutional or statutory right. (Emphasis added.) As its text makes clear, this provision protects against acts attributable to a State, not [**765] those of a private person. This limit tracks that of the Fourteenth Amendment, which obligates *States* to honor the constitutional rights that §1983 protects. §1 ("No *State* shall . . . nor shall any *State* deprive" [**195] (emphasis added)); see also *Lugar*, 457 U. S., at 929, 102 S. Ct. 2744, 73 L. Ed. 2d 482 ("[T]he statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical"). The need for governmental action is also explicit in the Free Speech Clause, the guarantee that Lindke invokes in this case. Amdt. 1 ("*Congress* shall make no law . . . abridging the freedom of speech . . ." (emphasis added)); see also *Manhattan Community Access Corp. v. Halleck*, 587 U. S. 802, 808, 139 S. Ct. 1921, 204 L. Ed. 2d 405 (2019) ("[T]he Free Speech Clause prohibits only *governmental* abridgment of speech," not "*private* abridgment of speech"). [****14] In short, the state-action requirement is both well established and reinforced by multiple sources.¹

¹ Because local governments are subdivisions of the State,

In the run-of-the-mill case, state action is easy to spot. Courts do not ordinarily pause to consider whether §1983 applies to the actions of police officers, public schools, or prison officials. See, e.g., *Graham v. Connor*, 490 U. S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (police officers); *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, 504-505, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) (public schools); *Estelle v. Gamble*, 429 U. S. 97, 98, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) (prison officials). And, absent some very unusual facts, no one would credit a child's assertion of free speech rights against a parent, or a plaintiff's complaint that a nosy neighbor unlawfully searched his garage.

Sometimes, however, the line between private conduct and state action is difficult to draw. *Griffin v. Maryland* is a good example. 378 U. S. 130, 84 S. Ct. 1770, 12 L. Ed. 2d 754 (1964). There, we held that a security guard at a privately owned amusement park engaged in state action when he enforced the park's policy of segregation against black protesters. *Id.*, at 132-135, 84 S. Ct. 1770, 12 L. Ed. 2d 754. Though employed by the park, the guard had been "deputized [*196] as a sheriff of Montgomery County" and possessed "the same power and authority" as any other deputy sheriff. *Id.*, at 132, 84 S. Ct. 1770, 12 L. Ed. 2d 754, and n. 1. The State had therefore allowed its power to be exercised by someone in the private sector. And the source of the power, not the identity of the employer, [****15] controlled.

By and large, our state-action precedents have grappled with variations of the question posed in *Griffin*: whether a nominally private person has engaged in state action for purposes [****132] of §1983. See, e.g., *Marsh v. Alabama*, 326 U. S. 501, 502-503, 66 S. Ct. 276, 90 L. Ed. 265 (1946) (company town); *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 146-147, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) (restaurant); *Flagg Bros., Inc. v. Brooks*, 436 U. S. 149, 151-152, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978) (warehouse company). Today's case, by contrast, requires us to analyze whether a *state official* engaged in state action or functioned as a private citizen. This Court has had little occasion to consider how the state-action requirement applies in this

circumstance.

[**766] The question is difficult, especially in a case involving a state or local official who routinely interacts with the public. Such officials may look like they are always on the clock, making it tempting to characterize every encounter as part of the job. But the state-action doctrine avoids such broad-brush assumptions—for good reason. While public officials can act on behalf of the State, they are also private citizens with their own constitutional rights. By excluding from liability "acts of officers in the ambit of their personal pursuits," *Screws v. United States*, 325 U. S. 91, 111, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945) (plurality opinion), the state-action requirement "protects a robust sphere of individual liberty" for those who serve as public officials or [****16] employees, *Halleck*, 587 U. S., at 808, 139 S. Ct. 1921, 204 L. Ed. 2d 405.

The dispute between Lindke and Freed illustrates this dynamic. Freed did not relinquish his First Amendment rights when he became city manager. On the contrary, "the First Amendment protects a public employee's right, in certain [*197] circumstances, to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 547 U. S. 410, 417, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). This right includes the ability to speak about "information related to or learned through public employment," so long as the speech is not "itself ordinarily within the scope of [the] employee's duties." *Lane v. Franks*, 573 U. S. 228, 236, 240, 134 S. Ct. 2369, 189 L. Ed. 2d 312 (2014). Where the right exists, "editorial control over speech and speakers on [the public employee's] properties or platforms" is part and parcel of it. *Halleck*, 587 U. S., at 816, 139 S. Ct. 1921, 204 L. Ed. 2d 405. Thus, if Freed acted in his private capacity when he blocked Lindke and deleted his comments, he did not violate Lindke's First Amendment rights—instead, he exercised his own.

So Lindke cannot hang his hat on Freed's status as a state employee. The distinction between private conduct and state action turns on substance, not labels: Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights. Categorizing conduct, therefore, can require a close look.

III

A close look is definitely necessary in the context [****17] of a public official using social media. There are approximately 20 million state and local government employees across the Nation, with an

actions taken under color of a local government's law, custom, or usage count as "state" action for purposes of §1983. See *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690-691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). And when a state or municipal employee violates a federal right while acting "under color of law," he can be sued in an individual capacity, as Freed was here.

extraordinarily wide range of job descriptions—from Governors, mayors, and police chiefs to teachers, healthcare professionals, and transportation workers. Many use social media for personal communication, official communication, or both—and the line between the two is **[***133]** often blurred. Moreover, social media involves a variety of different and rapidly changing platforms, each with distinct features for speaking, viewing, and removing speech. The Court has frequently emphasized that the state-action doctrine demands a fact-intensive inquiry. See, e.g., *Reitman v. Mulkey*, 387 U. S. 369, 378, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967); *Gilmore v. Montgomery*, 417 U. S. 556, 574, 94 S. Ct. 2416, 41 L. Ed. 2d 304 (1974). We repeat that caution here.

[*198] That said, our precedent articulates principles that govern cases analogous to this one. **For the reasons we explain below, 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.** The appearance and function of the social-media activity are relevant at the second step, but they **[**767]** cannot make up for **[****18]** a lack of state authority at the first.

A

The first prong of this test is grounded in the bedrock requirement that “the conduct allegedly causing the deprivation of a federal right be *fairly attributable to the State*.” *Lugar*, 457 U. S., at 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (emphasis added). An act is not attributable to a State unless it is traceable to the State’s power or authority. Private action—no matter how “official” it looks—lacks the necessary lineage.

This rule runs through our cases. *Griffin* stresses that the security guard was “possessed of state authority” and “purport[ed] to act under that authority.” 378 U. S., at 135, 84 S. Ct. 1770, 12 L. Ed. 2d 754. *West v. Atkins* states that the “traditional definition” of state action “requires that the defendant . . . have exercised power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’” 487 U. S. 42, 49, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) (quoting *United States v. Classic*, 313 U. S. 299, 326, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941)). *Lugar* emphasizes that state action exists only when “the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority.” 457 U. S., at 939, 102 S. Ct. 2744, 73 L. Ed. 2d 482; see also, e.g., *Edmonson v. Leesville Concrete*

Co., 500 U. S. 614, 620, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991) (describing state action as the “exercise of a right or privilege having its source in state authority”); *Screws*, 325 U. S., at 111, 65 S. Ct. 1031, 89 L. Ed. 1495 (plurality opinion) (police-officer defendants “were authorized to make **[****19]** an arrest and to take such steps as were necessary to make the arrest effective”). By contrast, when the challenged conduct “entail[s] functions and obligations in **[*199]** no way dependent on state authority,” state action does not exist. *Polk County v. Dodson*, 454 U. S. 312, 318-319, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981) (no state action because criminal defense “is essentially a private function . . . for which state office and authority are not needed”); see also *Jackson v. Metropolitan Edison Co.*, 419 U. S. 345, 358-359, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974).

Lindke’s focus on appearance skips over this crucial step. He insists that Freed’s social-media activity constitutes state action because Freed’s Facebook page looks and functions **[***134]** like an outlet for city updates and citizen concerns. But Freed’s conduct is not attributable to the State unless he was “possessed of state authority” to post city updates and register citizen concerns. *Griffin*, 378 U. S., at 135, 84 S. Ct. 1770, 12 L. Ed. 2d 754. If the State did not entrust Freed with these responsibilities, it cannot “fairly be blamed” for the way he discharged them. *Lugar*, 457 U. S., at 936, 102 S. Ct. 2744, 73 L. Ed. 2d 482. Lindke imagines that Freed can conjure the power of the State through his own efforts. Yet the presence of state authority must be real, not a mirage.

Importantly, Lindke must show more than that Freed had *some* authority to communicate with residents on behalf of Port Huron. The alleged censorship must be connected **[****20]** to speech on a matter within Freed’s bailiwick. For example, imagine that 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 portfolio of the city manager, 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.” *Blum v. Yaretsky*, 457 U. S. 991, 1004, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982) (emphasis **[**768]** deleted). There must be a tie between the official’s authority and “the gravamen of the plaintiff’s complaint.” *Id.*, at 1003, 102 S. Ct. 2777, 73 L. Ed. 2d 534.

To be clear, the “[m]isuse of power, possessed by virtue

of state law,” constitutes state action. *Classic*, 313 U. S., at 326, 61 S. Ct. 1031, 85 L. Ed. 1368 (emphasis added); see also, e.g., *Screws*, 325 U. S., at 110, 65 S. Ct. 1031, 89 L. Ed. 1495 (plurality opinion) (state action where “the power which [*200] [state officers] were authorized to exercise was misused”). While the state-action doctrine requires that the State have granted an official the type of authority that he used to violate rights—e.g., the power to arrest—it encompasses cases where his “particular action”—e.g., an arrest made with excessive force—violated state or federal law. *Griffin*, 378 U. S., at 135, 84 S. Ct. 1770, 12 L. Ed. 2d 754; see also *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U. S. 278, 287-288, 33 S. Ct. 312, 57 L. Ed. 510 (1913) (the Fourteenth Amendment encompasses “abuse by a state officer . . . of the powers possessed”). Every §1983 suit alleges a misuse of power, because no state actor has the authority to deprive someone of a federal right. To misuse power, however, one must possess it in the first place.

Where does the power come from? Section 1983 lists the potential sources: “statute, ordinance, regulation, custom, or usage.” Statutes, ordinances, and regulations refer to written law through which a State can authorize an official to speak on its behalf. “Custom” and “usage” encompass “persistent practices of state officials” that are “so permanent and well settled” that they carry “the force of law.” *Adickes*, 398 U. S., at 167-168, 90 S. Ct. 1598, 26 L. Ed. 2d 142. So a city manager like Freed would be authorized to speak for the city if written law like an ordinance empowered him to make official announcements. He would also have that authority even in the absence of written law if, for instance, prior city managers have purported to speak on its behalf and have been recognized to have that [*135] authority for so long that the manager’s power to do so has become “permanent and well settled.” *Id.*, at 168, 90 S. Ct. 1598, 26 L. Ed. 2d 142. And if an official has authority to speak for the State, he may have the authority to do so on social media even if the law does not make that explicit.

Determining [****22] the scope of an official’s power requires careful attention to the relevant statute, ordinance, regulation, custom, or usage. In some cases, a grant of authority over particular subject matter may reasonably encompass authority to speak about it officially. For example, state law might [*201] grant a high-ranking official like the director of the state department of transportation broad responsibility for the state highway system that, in context, includes authority to make official announcements on that subject. At the

same time, courts must not rely on “excessively broad job descriptions” to conclude that a government employee is authorized to speak for the State. *Kennedy v. Bremerton School Dist.*, 597 U. S. 507, 529, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (2022) (quoting *Garcetti*, 547 U. S., at 424, 126 S. Ct. 1951, 164 L. Ed. 2d 689). The inquiry is not whether making official announcements *could* fit within the job description; it is whether making official announcements is *actually* part of the job that the State entrusted the official to do.

In sum, a defendant like Freed must have actual authority rooted in written law or longstanding custom to speak for the State. That authority must extend to speech of the sort that caused the alleged rights deprivation. If the plaintiff cannot make this threshold showing of authority, he cannot establish [****23] state action.

[**769] B

For social-media activity to constitute state action, an official must not only have state authority—he must also purport to use it. *Griffin*, 378 U. S., at 135, 84 S. Ct. 1770, 12 L. Ed. 2d 754. State officials have a choice about the capacity in which they choose to speak. “[G]enerally, 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.” *West*, 487 U. S., at 50, 108 S. Ct. 2250, 101 L. Ed. 2d 40. If the public employee does not use his speech in furtherance of his official responsibilities, he is speaking in his own voice.

Consider a hypothetical from the offline world. A school board president announces at a school board meeting that the board has lifted pandemic-era restrictions on public schools. The next evening, at a backyard barbecue with friends whose children attend public schools, he shares that the board has lifted the pandemic-era restrictions. The former is state action taken in his official capacity as school board president; [*202] the latter is private action taken in his personal capacity as a friend and neighbor. While the substance of the announcement is the same, the context—an official meeting versus a private event—differs. He invoked his [****24] official authority only when he acted as school board president.

The context of Freed’s speech is hazier than that of the hypothetical school board president. Had Freed’s account carried a label (e.g., “this is [*136] 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 not irrebuttable) presumption that all of the posts on his page were personal. Markers like these give speech the benefit of clear context: Just as we can safely presume that speech at a backyard barbeque is personal, we can safely presume that speech on a “personal” page is personal (absent significant evidence indicating that a post is official).² Conversely, context can make clear that a social-media account purports to speak for the government—for instance, when an account belongs to a political subdivision (e.g., a “City of Port Huron” Facebook page) or is passed down to whomever occupies a particular office (e.g., an “@PHuronCityMgr” Instagram account). Freed’s page, however, was not designated either “personal” or “official,” raising the prospect that it was “mixed use”—a place where he made some posts in his personal capacity [****25] and others in his capacity as city manager.

[*203] Categorizing posts that appear on an ambiguous page like Freed’s is a fact-specific undertaking in which the post’s content and function are the most important considerations. In some circumstances, the post’s content and function might make the plaintiff’s argument a slam dunk. Take a mayor who makes the following announcement exclusively on his Facebook page: “Pursuant to Municipal Ordinance 22.1, I am temporarily suspending enforcement of alternate-side parking rules.” The post’s express invocation of state authority, its immediate legal effect, [**770] and the fact that the order is not available elsewhere make clear that the mayor is purporting to discharge an official duty. If, by contrast, the 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 “relate[d] to his public employment” or “concern[ing] information learned during that employment.” *Lane*, 573 U. S., at 238, 134 S. Ct. 2369, 189 L. Ed. 312.

Hard-to-classify cases require awareness that an official does not [****26] necessarily purport to exercise his authority simply by posting about a matter within it. He might post job-related information for any number of personal reasons, from a desire to raise public awareness to promoting his prospects for reelection. Moreover, many public officials possess a broad portfolio of governmental authority that includes routine interaction with the public, and it may not be easy to discern a boundary between their public and private lives. Yet these officials too have the right to speak about public affairs in their personal [***137] capacities. See, e.g., *id.*, at 235-236, 134 S. Ct. 2369, 189 L. Ed. 312. Lest any official lose that right, it is crucial for the plaintiff to show that the official is purporting to exercise state authority in specific posts. And when there is doubt, additional factors might cast light—for example, an official who uses government staff to make a post will be hard pressed to deny that he was conducting government business.

[*204] One last point: The nature of the technology matters to the state-action analysis. Freed performed two actions to which Lindke objected: He deleted Lindke’s comments and blocked him from commenting again. So far as deletion goes, the only relevant posts are those from [****27] which Lindke’s comments were removed. Blocking, however, is a different story. Because blocking operated on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment. The bluntness of Facebook’s blocking tool highlights the cost of a “mixed use” social-media account: If page-wide blocking is the only option, a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts.³ A public official who fails to keep personal posts in a clearly designated personal account

² An official cannot insulate government business from scrutiny by conducting it on a personal page. The Solicitor General offers the particularly clear example of an official who designates space on his nominally 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 would engage in state action if he hosted 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.

³ On some platforms, a blocked user might be unable even to see the blocker’s posts. See, e.g., *Garnier v. O’Connor-Ratcliff*, 41 F. 4th, 1158, 1164 (CA9 2022) (noting that “on Twitter, once a user has been ‘blocked,’ the individual can neither interact with nor view the blocker’s Twitter feed”); *Knight First Amdt. Inst. at Columbia Univ. v. Trump*, 928 F. 3d 226, 231 (CA2 2019) (noting that a blocked user is unable to see, reply to, retweet, or like the blocker’s tweets).

therefore exposes himself to greater potential liability.

The state-action doctrine requires Lindke to show that Freed (1) had actual authority to speak on behalf of the State on a particular matter, and (2) purported to exercise that authority in the relevant posts. To the extent that this test differs from the one applied by the Sixth Circuit, we vacate its judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

End of Document

C.R.S. 29-34-101

Statutes current through all 2024 legislation

***Colorado Revised Statutes Annotated > Title 29. Government - Local (§§ 29-1-101 — 29-35-405)
> Immigration Status - Cooperation with Federal Officials (Arts. 29 — 35) > Article 34 Social
Media Civility (§ 29-34-101)***

29-34-101. Bullying, harassment, and intimidation - local elected official - social media - legislative declaration - definitions.

(1)

(a) The general assembly finds and declares that the private social media administered by a local elected official or designee is a private account and does not create a public forum;

(b) A local elected official has no duty to create or maintain private social media and no state law, ordinance, or regulation compels creation or maintenance of private social media by a local elected official; and

(c) Therefore, the general assembly determines that it is appropriate to acknowledge in law that a local elected official or designee has discretion to restrict or remove a user of private social media that is administered by the local elected official or designee for any reason, including bullying, harassment, or intimidation of other users of the private social media administered by the local elected official or designee.

(2) As used in this section, unless the context otherwise requires:

(a) "Bullying" means intending to coerce or cause any physical, mental, or emotional harm to any individual by written expression, an electronic act or gesture, or a pattern of behavior.

(b) "Harassment" means:

(I) Directly or indirectly initiating communication with an individual or directing language toward another individual, anonymously or otherwise, by data network, instant message, computer, computer network, computer system, or any other interactive electronic medium in a manner intended to alarm or cause substantial emotional distress or threaten bodily injury or property damage; or

(II) Making any obscene comment, suggestion, request, or proposal by computer, computer network, computer system, or any other electronic medium.

(c) "Intimidation" means directly or indirectly inflicting or threatening the infliction of any injury, damage, harm, or loss upon an individual.

(d) "Local elected official" means an individual serving in an elected position in the state who is not a state elected official, as defined in section 24-18.3-101 (2)(g).

(e) "Obscene" means a patently offensive description of sexual acts or solicitation to commit sexual acts.

(f) "Private social media" means social media that is not supported by the resources of a local government and is not required by state or local law, ordinance, or regulation to be created or maintained by a local elected official.

(g) "Social media" means any electronic medium, including an interactive computer service, telephone network, or data network that allows users to create, share, and view user-generated content including videos, still photographs, blogs, video blogs, podcasts, instant messages, electronic mail, or internet website profiles.

(3) A local elected official may permanently or temporarily restrict or bar an individual from using the private social media that is administered by the local elected official or their designee for any reason, including bullying, harassment, or intimidation, in the local elected official's sole discretion.

(4) This section is not intended to infringe upon any right guaranteed to any individual by the first amendment to the United States constitution or section 10 of article II of the Colorado constitution or to prevent the expression of any religious, political, or philosophical views.

History

Source: L. 2023:Entire article added,(HB 23-1306), ch. 378, p. 2269, § 2, effective June 5.

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