

STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 26-06

Moderation of Social-Media Accounts by Elected Officials

Question

May an elected official lawfully delete, hide, or otherwise restrict public access to negative or critical comments posted on an official social-media page maintained by the elected official in his or her governmental or official capacity, as distinguished from a personal social-media account?

Opinion

It depends. Although the question raises potential First Amendment concerns, a complete constitutional analysis would depend on specific facts and circumstances. A court analyzing this question would pay careful attention to the specific official involved, as well as the context surrounding the official's social-media moderation.

ANALYSIS

The request asks whether an elected official may lawfully delete, hide, or otherwise restrict public access to negative or critical comments posted on an "official" social-media page. The primary source of law at issue in this analysis is the First Amendment of the federal Constitution, which is "applicable to the States through the Fourteenth Amendment." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 766 (2018).

An elected official's deletion of a negative or critical comment posted on social media would raise potential First Amendment concerns. After all, the First Amendment's Free Speech Clause works to prohibit governmental abridgment of speech, *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 808 (2019), and our Nation's constitutional jurisprudence has long recognized that speech "is often provocative and challenging," *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). In fact, there is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," even when it may include "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). And as one court recently offered, "criticism of public officials lies at the very core of speech protected by the First Amendment." *Watson v. Boyd*, 119 F.4th 539, 550 (8th Cir. 2024) (cleaned up).¹

¹ While debate about matters of policy and politics sits squarely at the heart of the speech protected by the First Amendment, the Constitution does not recognize all speech as sacrosanct. Obscenity, defamation, fraud, incitement, and speech integral to criminal conduct fall outside the protection of the Free Speech Clause. See, e.g., *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (identifying these categories as "well-defined and narrowly limited classes

Like many issues assessed under the First Amendment, however, the question presented here does not lend itself to abstract examination. *Cf. Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 567 (1995) (noting that “the reaches of the First Amendment are ultimately defined by the facts it is held to embrace”). The scenario described in the question might rise to a level of constitutional infirmity and spark a claim for relief under 42 U.S.C. § 1983.² But it might not. A more definitive conclusion would require close consideration of the speech at issue, the official involved, and the surrounding context. We regret that we cannot offer a more direct answer to the question and provide more useful guidance, but the applicable law demands a qualified response.

No Violation Without State Action

“[T]he Free Speech Clause prohibits only *governmental* abridgment of speech.” *Halleck*, 587 U.S. at 808. Consistent with that limit, the Supreme Court of the United States applies a “state-action doctrine” to distinguish the government from individuals and private entities. *Id.* But unlike some instances of state action that are “easy to spot,” *Lindke v. Freed*, 601 U.S. 187, 195 (2024), the universe of social media presents unique analytical challenges. Indeed, “in the social media age, the lines between public and private have become increasingly blurred online.” Evelyn Douek & Genevieve Lakier, Comment, *Lochner.com?*, 138 Harv. L. Rev. 100, 131–32 (2024) (cleaned up). “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.” *Lindke*, 601 U.S. at 191.

Because the application of the Free Speech Clause to comment moderation is so contingent on specific facts, it can be difficult to determine whether an official’s moderation of posted comments runs afoul of the Constitution. After all, officials do not surrender *their* First Amendment rights when they secure public office. “On the contrary, the First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.” *Id.* at 196–97 (cleaned up). And “where the right exists, editorial control over speech and speakers on the public employee’s properties or platforms is part and parcel of it.” *Id.* at 197 (cleaned up). At bottom, “before being anything else, officials are people.” Eugene Volokh, Response, *Free Speech and Private Power*, 138 Harv. L. Rev. F. 43, 62 (2024) (cleaned up). And as people with both public and private lives, officials “wear two hats”—sometimes a governmental hat, sometimes an individual one. *Id.* at 64.

In the online space, then, and amid this blurring of public and private lives, a public official’s use of social media requires “a close look” to determine the line between private conduct and state action. *Lindke*, 601 U.S. at 197. That line ultimately “turns on substance, not labels.” *Id.* And under the test recently announced by the Supreme Court of the United States in *Lindke v. Freed*, a public official’s posts on social media are attributable to the State “only if the official (1)

of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942))). Similarly, no heightened First Amendment scrutiny applies to laws that limit children’s access to sexually explicit speech even if it falls outside the definition of obscenity. *Free Speech Coalition, Inc., v. Paxton*, 606 U.S. 461, 474 (2025).

² Section 1983 “is not itself a source of substantive rights”; rather, it simply provides “a method for vindicating federal rights elsewhere conferred.” *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

possessed actual authority to speak on the State’s behalf, and (2) purported to exercise that authority when he spoke on social media.” *Id.* at 191.

Although there is “apparent simplicity” in this test, Douek & Lakier, *supra*, at 150, the problem it seeks to address remains a complicated one. In fact, as one commentator has observed, while *Lindke* “established a clear two-part test,” it “simultaneously acknowledg[ed] the complexities inherent in analyzing social media cases.” Derek E. Bambauer, *The Jawboning Cases End with a Bang Disguised by a Whimper*, 2024 Cato Sup. Ct. Rev. 157, 167 (2023–2024).

To start, “[a]n act is not attributable to a State unless it is traceable to the State’s power or authority.” *Lindke*, 601 U.S. at 198. Indeed, “[p]rivate action—no matter how ‘official’ it looks—lacks the necessary lineage.” *Id.* And an official cannot simply “conjure” the power of the State through his or her own efforts—“the presence of state authority must be real, not a mirage.” *Id.* at 199.

Moreover, litigants asserting a grievance connected to an official’s social-media moderation “must show more than that [an official] had *some* authority to communicate.” *Id.* “The alleged censorship must be connected to speech on a matter within [the official’s] bailiwick.” *Id.* Or put another way, “there must be a tie between the official’s authority and the gravamen of the plaintiff’s complaint.” *Id.* (cleaned up).

This inquiry is therefore far from a general one. And as *Lindke* explained in the context of an action brought under 42 U.S.C. § 1983, “[d]etermining the scope of an official’s power requires *careful attention* to the relevant statute, ordinance, regulation, custom, or usage” pertaining to the official. *Id.* at 200 (emphasis added). Rather than asking “whether making official announcements *could* fit within the job description,” the dispositive inquiry concerns “whether making official announcements is *actually* part of the job that the State entrusted the official to do.” *Id.* at 201. For example, “most, if not all, courts considering this question have concluded legislators—as opposed to executive branch members—individually lack ‘actual authority to speak on the State’s behalf,’ and thus, their social media activity is not conducted under color of law.” *Freeman v. Epps*, No. 24-cv-01215-MDB, 2025 WL 2948598, at *6 (D. Colo. Sept. 19, 2025) (quoting *Lindke*, 601 U.S. at 198).

Importantly, although the “appearance and function of . . . social-media activity are relevant at the second step” of *Lindke*’s test, they “cannot make up for a lack of state authority at the first.” *Lindke*, 601 U.S. at 198. Indeed, the first prong of *Lindke*’s test poses a “threshold” consideration for state action. *Id.* at 201. In fact, as commentators have observed, *Lindke* “made clear that, no matter how official a social media account may appear to be, or how much of the content of the public official’s posts relates to her job, the First Amendment does not necessarily protect a citizen’s right to access or speak on that official’s account.” Douek & Lakier, *supra*, at 150.

Of course, even if *Lindke*’s threshold consideration of “actual authority” is satisfied, there is no state action unless the official has purported to exercise that authority. *Lindke*, 601 U.S. at 201. Here, too, the law requires careful consideration. Unpacking this question can be a “fact-

specific undertaking.” *Id.* at 203. And “it is crucial for the plaintiff to show that the official is purporting to exercise state authority in specific posts.” *Id.*³

As all this illustrates, the inquiry teed up by the request thus requires careful consideration of the official involved and the context surrounding that official’s social-media moderation. But beyond the question of state action, which *Lindke*’s test informs, underlying details also would remain crucial to evaluating the substantive merits of any asserted First Amendment grievance.

Beyond State Action

The existence of state action is one thing; a violation of the Constitution is another. Indeed, as the Sixth Circuit noted on remand from the decision in *Lindke*, “a host of other First Amendment issues remain” even when state action is implicated in social-media moderation. *Lindke v. Freed*, 114 F.4th 812, 821 (6th Cir. 2024). Determining the existence of state action is therefore but a starting point for identifying a constitutional violation.

As suggested above, moreover, just as the question of state action demands careful consideration of facts and context, so too does any ultimate assessment of whether a First Amendment violation has occurred. In fact, when courts have considered cases involving social-media moderation, they have wrestled with issues ranging from what reasons and technological mechanisms triggered comment moderation⁴ to how (and under what conditions) moderated comments were originally posted.⁵

In the end, then, the type of question at issue here cannot be answered in a vacuum. The constitutional calculus must instead be driven by specific facts and circumstances—the nature of the speech itself, the context surrounding its initial publication, and the context surrounding its moderation. Accordingly, even if we were to assume that a given official satisfied *Lindke*’s test

³ Here, the request broadly speaks to a situation where an “official” *page* is maintained by an elected official “in his or her governmental or official capacity.” Given the general descriptors within the request—including the reference that the “official” page is “distinguished from a personal social media account”—it is certainly possible that the question presented envisions a set of facts that would satisfy *Lindke*’s second prong. And as the Sixth Circuit noted on remand from the decision in *Lindke*, an account may “presumptively” speak for the government under certain facts. *Lindke v. Freed*, 114 F.4th 812, 819 (6th Cir. 2024) (noting that when officials may only access pages because of their office, it can be “obvious that posts from such accounts will *almost always* be state action” (emphasis added)). But a complete analysis technically could only flow from considering specific facts and circumstances. “Context is everything” under the second prong. *Id.*

Of course, even if we were to assume that the request speaks to a situation where an elected official purported to exercise governmental authority (and that activity was linked to the social-media moderation at issue), that would not compel a conclusion that state action was involved. Again, as threshold matter, *Lindke*’s test for state action demands that the official “possessed *actual authority* to speak on the State’s behalf.” *Lindke*, 601 U.S. at 198 (emphasis added).

⁴ See, e.g., *People for the Ethical Treatment of Animals v. Tabak*, 109 F.4th 627, 638 (D.C. Cir. 2024) (examining how keyword filters applied).

⁵ See, e.g., *Krasno v. Mnookin*, 148 F.4th 465, 480, 484 (7th Cir. 2025) (discussing how the applicable comment threads operated and considering the policy and practice surrounding them).

for state action, no clear conclusions could be reached. Only specific facts could shape a concrete response to the generic scenario described.

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As broadly phrased, the scenario described in the request may under appropriate circumstances raise a serious constitutional question under the First Amendment. But to reach any definitive conclusion, courts and litigants addressing the issue would need to navigate a series of complex factual and legal considerations. Specific details related to the official involved, as well as the context surrounding the official's moderation, would remain paramount.

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