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MEMORANDUM

TO: Members of the Colorado General Assembly

FROM: Office of Legislative Legal Services

DATE: September __, 2024

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

DRAFT

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

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[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 employment[4] 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

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[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]

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[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

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[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

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[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.

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[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

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[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.