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M E M O R A N D U M April 24, 2024

SUBJECT: Impact of *Lindke v. Freed* on the Legislative Council Social Media Policy (Work Order No. 33-LS1589)

TO: Senator Elvi Gray-Jackson
Chair, Legislative Council
Attn: Jeff Stepp

FROM: Emily Nauman
Director

You requested our office update the Legislative Council Social Media Policy (Policy) following the United States Supreme Court's recent decision in *Lindke v. Freed*.[1] *Lindke* is the Court's first opinion directly addressing government officials deleting comments and blocking users on social media. To aid in understanding the suggested changes to the Policy suggested by our office, this memorandum discusses the holding in *Lindke* and how the decision impacts the Policy.

The Court in *Lindke* found that a public official's social media activity constitutes state action only if the official (1) possessed actual authority to speak on the state's behalf, and (2) purported to exercise that authority when the official spoke on social media. The Court reiterated that whether or not blocking a person or deleting a comment from one's social media account constitutes state action remains a fact-specific undertaking, in which the content and function of the post or account are the most important considerations.

1. Lindke v. Freed

A. State Action

To understand the Court's holding in *Lindke*, some context is helpful. The contest in *Lindke* arose when James Freed, the city manager of Port Huron, Michigan, deleted comments of and ultimately blocked Kevin Lindke from his Facebook page. Freed's Facebook page contained both personal posts and posts related to his role as city manager.

[1] *Lindke v. Freed*, 601 U.S. ---, 2024 WL 1120880 (Mar. 15, 2024).

The Court analyzed the claim under 42 U.S.C. 1983[2] and the free speech rights of the First Amendment.

The Court first explained that only *state action* can violate free speech rights; if a government official blocking a user or deleting a user's comments is state action, then the blocking or deleting potentially violates the user's free speech rights.[3]

Next, the Court set out the test for determining whether actions taken by a public official is a state action. The test to determine whether a public official's activity on social media is state action evaluates whether "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."[4] Both parts of this test apply to legislators.

B. Authority to Speak for the State

To constitute state action, first, a legislator must have possessed actual authority to speak on the State's behalf. The appearance of a legislator's social media presence alone, no matter how official it seems, is not enough to establish that a legislator's online speech is state action. The legislator must possess *actual authority* to speak for the state. The *Lindke* opinion did not address specifically when, or if, a *legislator* has the authority to speak for a state. However, the Court explained that sources of a government official's power to speak for the state include "statute, ordinance, regulation, custom, or usage."[5] For instance, the Court recognized that an ordinance empowering a city manager to make official announcements and a government official making announcements about a program the official is charged with overseeing are examples of authority to speak for the state.[6] Ultimately, a government official's speech is potentially state action if "making official announcements is *actually* part of the job that the State entrusted the official to do."[7]

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[2] Section 1983 provides a cause of action against every person "who under color of any statute, ordinance, regulation, custom, or usage, of any State" deprives someone of a federal constitutional or statutory right.

[3] *Id.* at *5.

[4] *Lindke*, 2024 WL 1120880 at *7.

[5] *Id.* at *8 (quoting 42 U.S.C. § 1983).

[6] *Id.*

[7] *Id.* (emphasis in original). Further, simply because an official has the authority to speak for the state generally, the Court must also find that the official had authority to do so on social media. *Id*. at *11.

C. Exercise of State Authority

If a court concludes that a legislator is authorized to speak on behalf of the state under the first part of the test, the court will proceed to conduct a fact-specific inquiry based on the context of the legislator's speech to determine whether the speech on social media "purported to exercise that authority" under the second part of the test.[8] The Court noted, "if the public employee does not use his speech in furtherance of his official responsibilities, he is speaking in his own voice."[9] For this portion of the test, a court will focus on the *context* of the speech to determine whether a state actor purported to exercise state authority.

The *Lindke* opinion provides specific examples of actions that weigh for and against concluding that a government official's social media activity purports to exercise state authority. These examples may help a legislator weigh the risk of specific activity on social media. For example, a legislator who has included a label or disclaimer identifying their page as personal "would be entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal."[10] The legislator's sole control of the account and the information shared on the account being available elsewhere might also weigh against a finding that a state authority was exercised in the speech.[11] On the other hand, facts that support a finding that the legislator purported to exercise authority to speak on behalf of the state include classifying the social media account as official, the account belonging to the state, the account passing from one legislator to another based on district, the use of legislative staff to post on the account, and online speech invoking statutory authority, describing legal effects, or posting official information that is unavailable from other media.[12] Considering which, if any, of these facts apply to a legislator's social media activity may help the legislator evaluate the risk associated with blocking a user on their social media account.

D. *Mixed Use: Analysis Based on Activity*

Importantly, the opinion recognized that a single government official social media account may include some posts that are state action while other posts are not.[13] The Court thus warned that because blocking functions on some social media platforms are broad and may prevent someone from interacting with the entire account, mixing

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[8] *Id.* at *7.

[9] *Id*. at *12.

[10] *Id.* at *9.

[11] *Id.* at *9 - *10.

[12] *Id.*

[13] *Id.* at *10.

personal and official activity on a single social media account may lead "to greater potential liability" if the official ultimately blocks a user from the account.[14]

2. The Legislative Council Social Media Policy

The *Lindke* decision makes it less likely, than understood at the time the Policy was initially adopted, that a court would find a legislator blocking a user or deleting a post to be an infringement of free speech rights. The draft Policy has been updated to reflect the *Lindke* holding and to help prevent a legislator from taking state action on their social media accounts. However, the ultimate recommendations of the draft Policy—to close social media accounts for commenting and other interaction—and the assumption of litigation risk were not changed in the update by this office—they remain the lowest-risk suggestions and advice. How *Lindke* changes the recommendations and assumptions of risk in the Policy are decisions which should be considered by Legislative Council.

If you would like further guidance as you continue to determine whether or if to update the recommendations or assumption of risk in the Policy, please let me know.

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[14] *Id.*