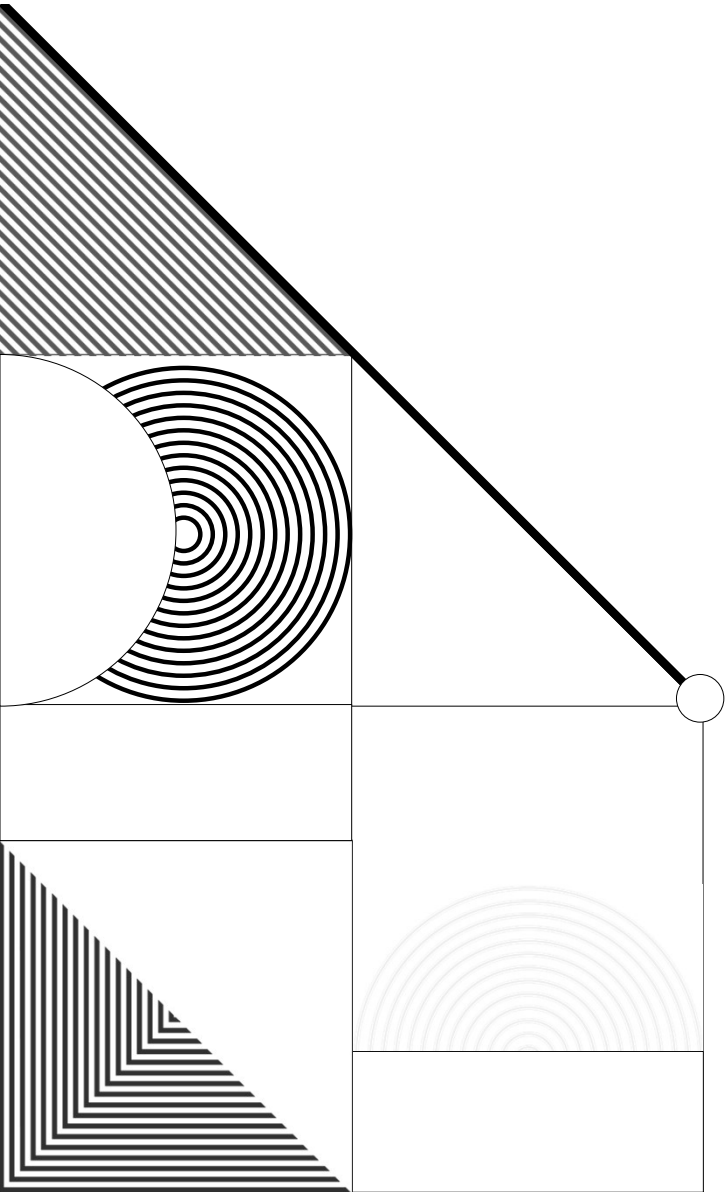


LINDKE V. FREED

SOCIAL MEDIA POLICY AND THE FIRST AMENDMENT

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Legislative Legal Services

Legislative Council
April 30, 2024



FACTS OF THE CASE

Who was James Freed?

Who was Kevin Lindke?

What is Facebook?

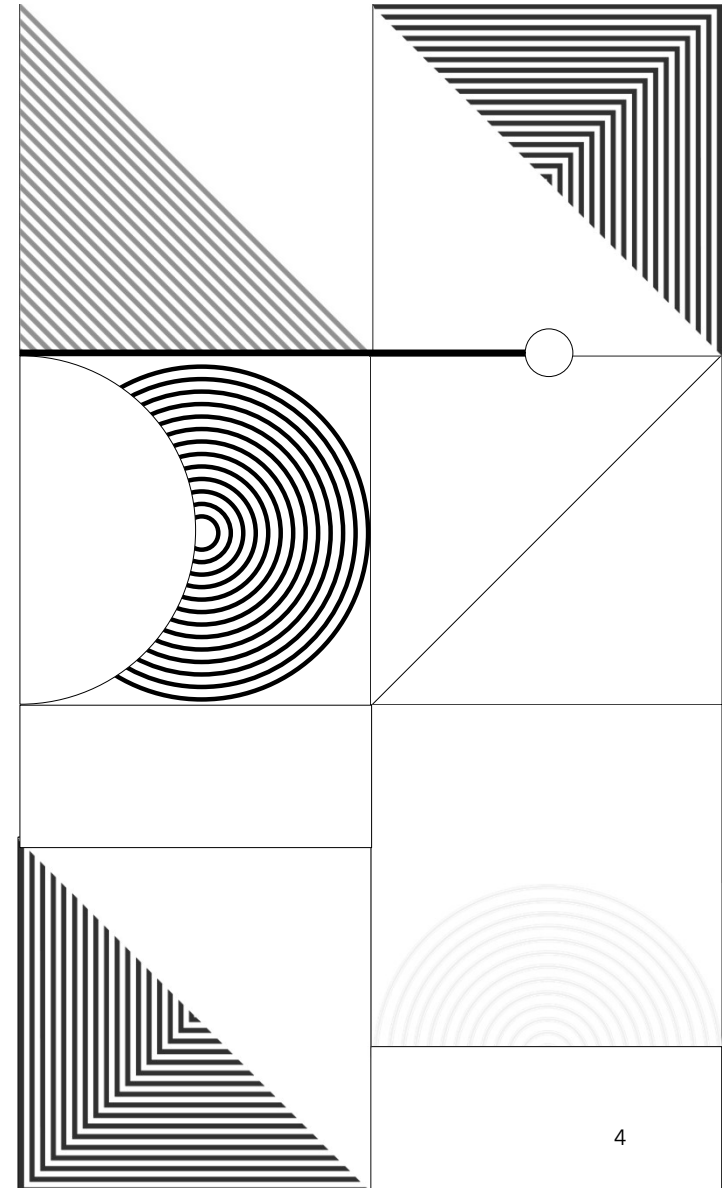
An abstract geometric design on the left side of the page. It features a grid of squares and rectangles. The top-left square contains a pattern of concentric semi-circles. The middle-left square is empty. The bottom-left square contains a pattern of concentric semi-circles. The middle-right square contains a pattern of diagonal lines. The bottom-right square contains a pattern of diagonal lines. A horizontal line with a small circle at its right end extends from the top-left square towards the right. A diagonal line extends from the top-right corner of the middle-right square towards the right.

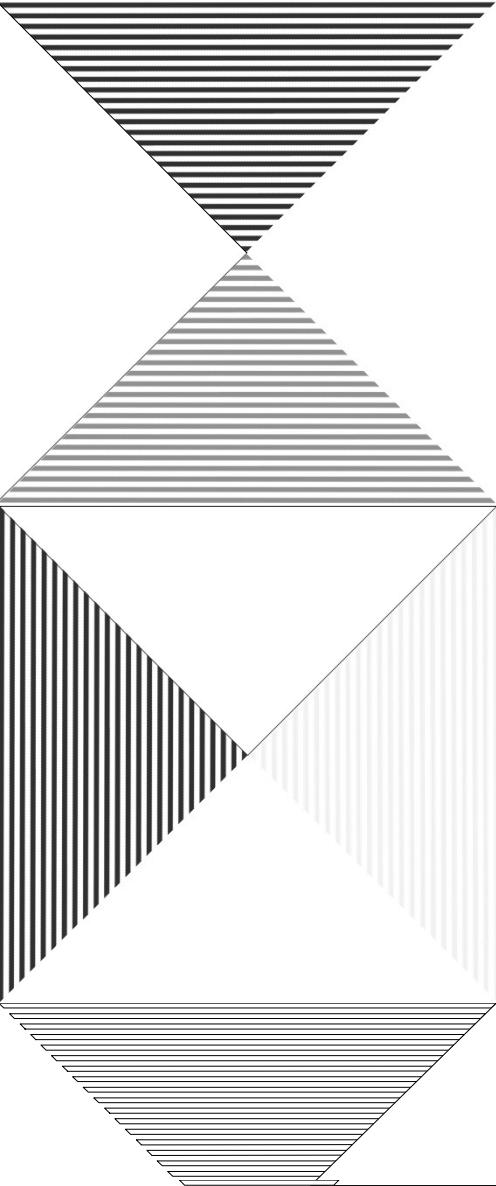
**"FOR SOCIAL MEDIA
ACTIVITY TO
CONSTITUTE STATE
ACTION, AN OFFICIAL
MUST NOT ONLY HAVE
THE AUTHORITY, HE
MUST ALSO PURPORT
TO USE IT."**

THE TWO-PART TEST

An official must

- (1) Possess actual authority to speak on the State's behalf on a particular matter; and
- (2) Purport to exercise that authority when speaking in the relevant social media posts





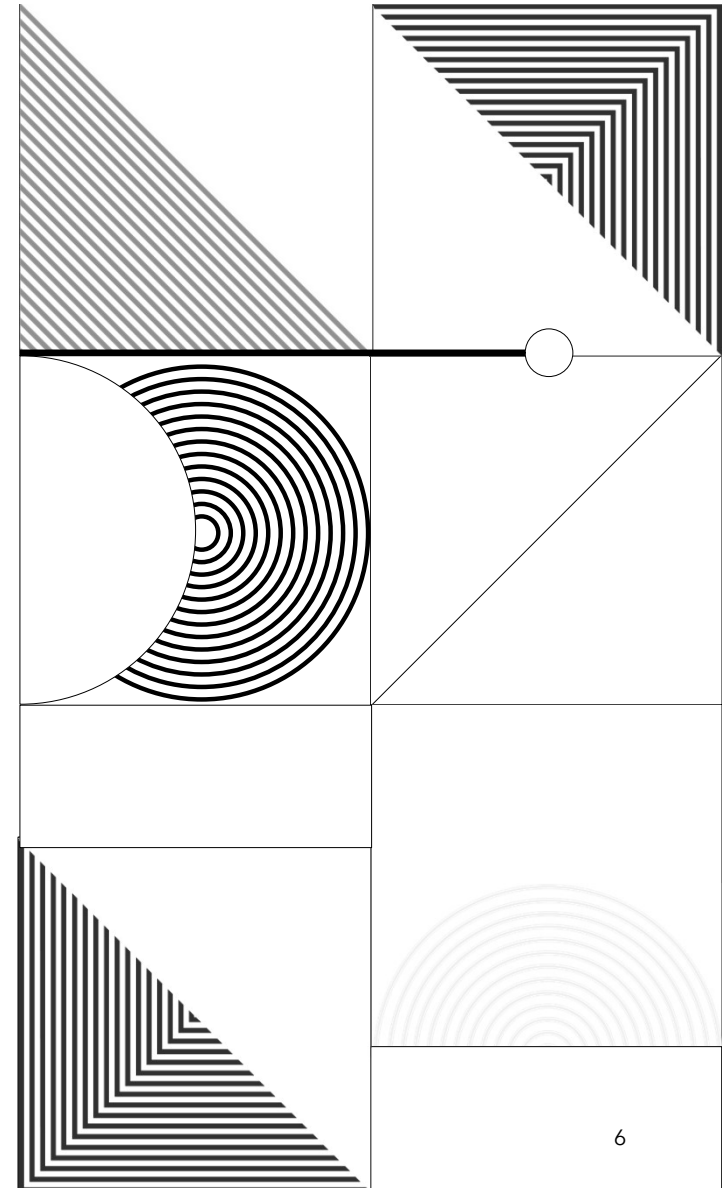
PART ONE: WHERE DOES ACTUAL AUTHORITY COME FROM?

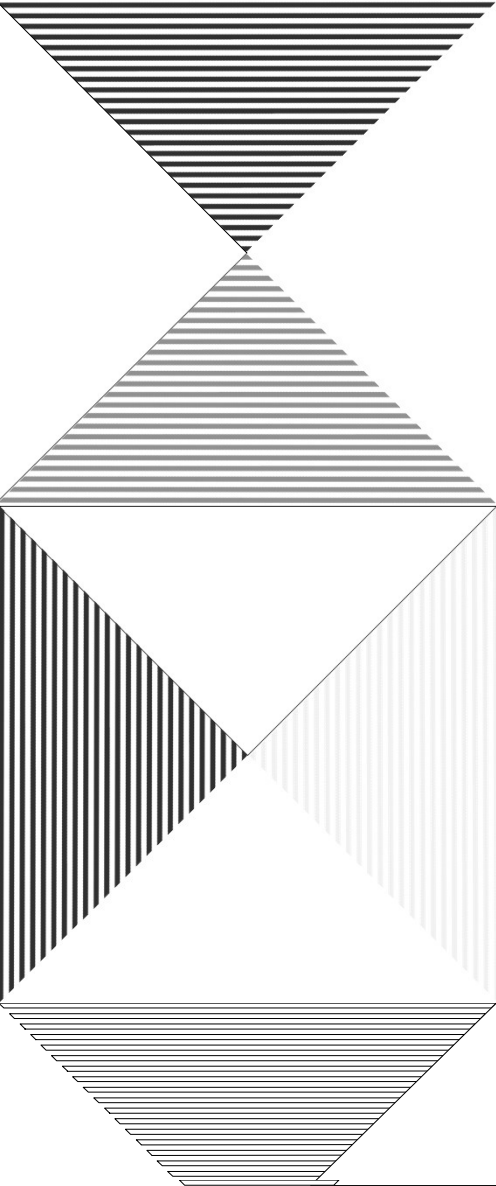
- “Statute, ordinance, regulation, custom, or usage”
- “Fairly attributable to the state”
 - There must be “some” authority to communicate with residents on behalf of the state.
- Status as a state employee is not determinative
 - “State officials have private lives and their own constitutional rights” – including the right to “exercise editorial control over speech and speakers on their personal platforms”

THE TWO-PART TEST

An official must

- (1) Possess actual authority to speak on the State's behalf on a particular matter; and
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PART TWO: WHAT ARE THE INDICA OF USE OF STATE AUTHORITY?

“Fact specific inquiry in which posts’ content and function are the most important considerations.”

- Label (“this is the personal page of James Freed”) or disclaimer (“the views expressed are strictly my own”)
- Express invocation of state authority, immediate legal effect
- Information is not available elsewhere
- Use of government staff to make content

THE 'MIXED USE' TANGLE

Under *Lindke* a social media page can be used for both personal and official business:

- "A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability."

Deleting comments v. blocking individuals:

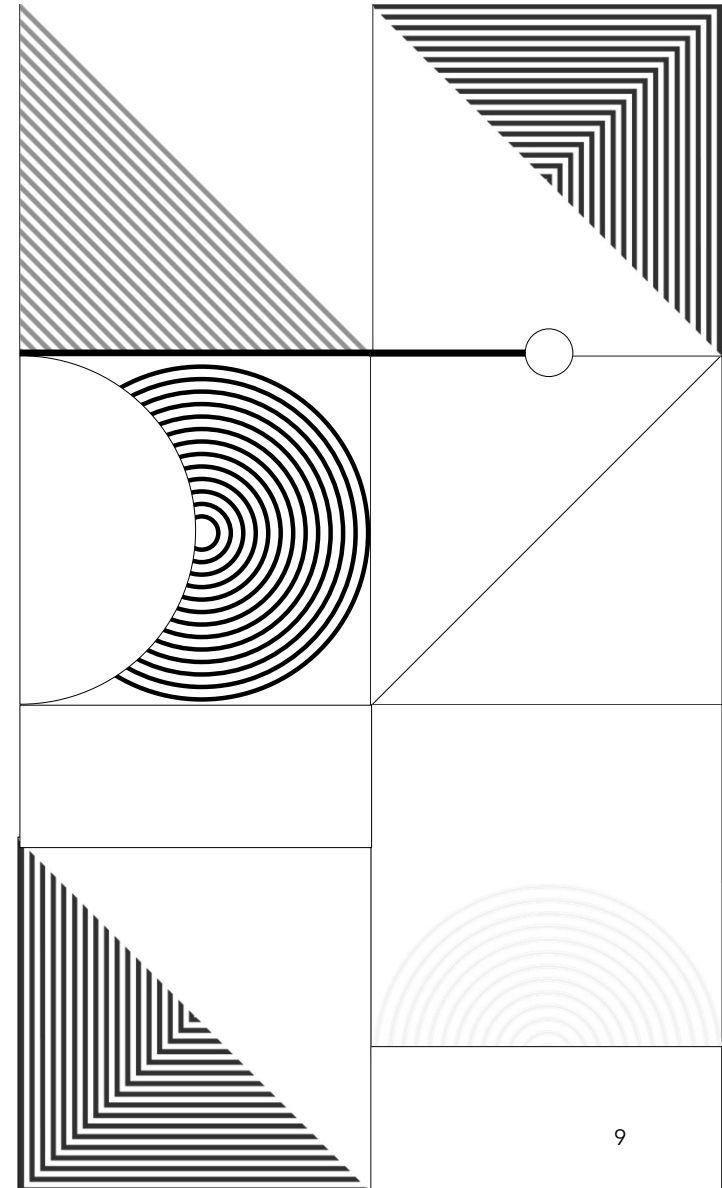
- If the action is deletion, "the only relevant posts are those from which Lindke's comments were removed."
- "Because blocking operated on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment."

SO, WHERE'S THE TROUBLE?

Denying an individual the opportunity to voice an opinion in a public forum

- Viewpoint discrimination

Preventing an individual from viewing government information





RECOMMENDATIONS

Do not open your social media account to comments or other interactions with the public

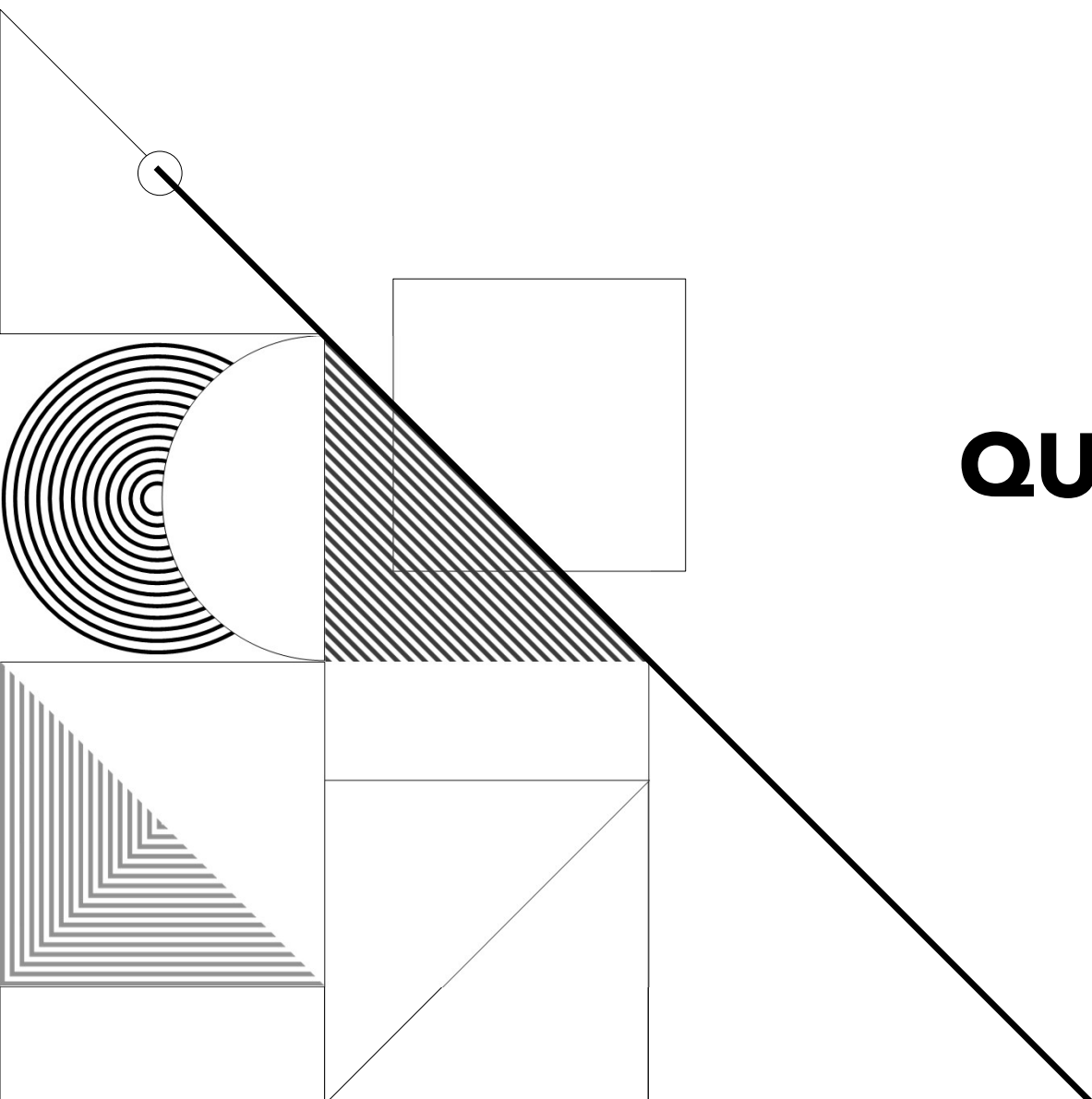
- Do not create a public forum

If you choose to open your account to comments, do not block access and do not delete comments

If you delete comments or block a person, do not prevent the person from viewing official announcements

If you choose to block a person or delete comments, decrease the chances that your action will be found a state action by:

- Including a label (“this is a personal page”) or disclaimer (“the views expressed are strictly my own; I do not speak on behalf of the Legislature”)
- Do not invoke the authority of the state
- Be sure information you post is available elsewhere
- Do not use staff to make content



QUESTIONS?

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