



Developments in Constitutional Law: Public Officials' Social Media Activity

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The First Amendment to the U.S. Constitution and Article I, Section 3 of the Wisconsin Constitution prohibit government actors, including public officials acting in an official capacity, from abridging the freedom of speech.¹ Recent court decisions grapple with how to apply those constitutional guarantees to public officials' social media activity. This issue brief summarizes the current state of this rapidly evolving area of law.

THRESHOLD QUESTION: WHEN DOES THE FIRST AMENDMENT APPLY?

Courts have addressed a critical threshold question in cases challenging public officials' social media activity: Does the First Amendment apply? In other words, was the elected official acting in an official capacity, and therefore under the "color of law," with respect to the social media post in question? If the answer is no, the First Amendment does not apply, because the First Amendment only limits restrictions imposed by the government.

In a 2024 decision, *Lindke v. Freed*, the U.S. Supreme Court announced a two-part test for determining whether the First Amendment applies to actions, such as deleting comments, taken by public officials on social media. Under the new test, a public official's social media activity can be challenged under the First Amendment if both of the following apply: (1) the official possessed actual authority to speak on the government's behalf with respect to the relevant post or thread; and (2) the official purported to exercise that authority in the post or thread. The Court further clarified that the social media activity must be "connected to speech on a matter within [a public official's] bailiwick."²

STANDARD IF THE FIRST AMENDMENT APPLIES

Public Forum Analysis

Lower courts have generally applied public forum analysis to evaluate cases challenging public officials' social media activity on First Amendment grounds. Under public forum analysis, the level of government regulation allowed under the First Amendment depends, in part, on the context in which constitutionally protected³ speech occurs. Courts have generally identified three types of forums in which speech might occur: (1) a traditional public forum; (2) a designated public forum; and (3) a nonpublic forum.⁴ In some cases, courts have identified a fourth type: a limited public forum.

A "traditional" public forum, such as a public park or sidewalk, has "immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of ... communicating thoughts between citizens."⁵ In a traditional public forum, any government restriction of constitutionally protected speech must meet a strict standard: the restriction must be content neutral, be narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communicating.⁶

A "designated" public forum is a location or channel for communication that the government intentionally opens for expressive activity.⁷ Government regulation of speech in a designated public forum generally must satisfy the same strict standard that applies in a traditional public forum.

A "nonpublic" forum is a setting in which public speech is not traditionally invited, nor has the government expressed any intention of inviting speech.⁸ Courts uphold government regulation of speech in a nonpublic forum if the regulation is both reasonable and neutral as to the speaker's viewpoint.

Finally, a “limited” public forum is a forum that the government opens for use by limited groups or for certain subjects. In some cases, the U.S. Supreme Court has characterized a limited public forum as a subtype of designated public forum. In other cases, the Court has characterized a limited public forum as an independent forum type for which government regulation of speech is upheld if it is both reasonable and viewpoint-neutral.

Application to Public Officials’ Social Media Activity

The U.S. Supreme Court has not yet addressed the application of public forum analysis to public officials’ social media activity.⁹ However, a recent decision by the U.S. Court of Appeals for the Seventh Circuit applied public forum analysis in a case challenging the government’s social media activity. The Seventh Circuit decision provides precedential authority in Wisconsin.

In the Seventh Circuit decision, *Krasno v. Mnookin*, the court held that comment threads on the University of Wisconsin-Madison’s Facebook and Instagram pages constitute a limited public forum for which any deletion of comments must be both reasonable and neutral as to the commenter’s viewpoint. Reviewing UW-Madison’s approach of utilizing keyword filters to delete comments that are “off topic,” the court concluded that the keyword filters resulted in the deletion of comments based on viewpoint.¹⁰ Thus, the court held that UW-Madison’s policy was unconstitutional as applied to certain commenters, specifically to commenters whose posts were deleted as a result of keyword filters relating to animal testing.

SUMMARY OF THE CURRENT STATE OF THE LAW

The U.S. Supreme Court’s decision in *Lindke v. Freed* provides some guidance to public officials regarding whether deleting comments relating to a given social media post might be subject to a First Amendment challenge. The test under *Lindke* is based on the nature of an individual thread or post.¹¹ A post that falls outside the bounds of the *Lindke* test appears to be protected from a First Amendment challenge, even if the post is made on an “official” social media account. Conversely, actions relating to a post that falls within the test’s bounds may be subject to challenge, even if the post appears on a purportedly “private” account.

Under the recent Seventh Circuit decision in *Krasno v. Mnookin*, if the First Amendment applies to a public official’s social media post, the public official might be allowed to delete comments in the comment thread if the deletions are both reasonable and viewpoint-neutral. A public official might minimize legal risk by establishing clear, viewpoint-neutral policies regarding the scope of comments allowed in comment threads. Such policies should also be implemented in a viewpoint-neutral manner, without utilizing keyword filters that may exclude a group with a particular viewpoint.

¹ U.S. Const. amend. I (“Congress shall make no law ... abridging the freedom of speech”); Wis. Const. art. I, s. 3 (“Every person may freely speak ... on all subjects ... and no laws shall be passed to restrain or abridge the liberty of speech ...”).

² *Lindke v. Freed*, 601 U.S. 187, 191 and 199 (2024).

³ A few narrow categories of speech are not protected by the First Amendment, including “fighting words,” “true threats,” and speech that is likely to cause imminent lawless action. [See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *State v. Perkins*, 2001 WI 46.]

⁴ *Minn. Voters All. v. Mansky*, 585 U.S. 1, 11 (2018).

⁵ *HAGUE v. CIO*, 307 U.S. 496 (1939).

⁶ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

⁷ *Surita v. Hyde*, 665 F.3d 860, 869 (7th Cir. 2011).

⁸ See *Cornelius v. NAACP*, 473 U.S. 788 (1985).

⁹ Majority and dissenting opinions in a 2017 decision, *Packingham v. North Carolina*, did not directly address that question but provided commentary that may provide some insight for future cases. The majority opinion, written by Justice Kennedy, compared today’s social media platforms to traditional public forums such as streets and parks, as both are “the most important places ... for the exchange of views.” In a dissenting opinion, Justice Alito cautioned against equating social media with traditional public forums, suggesting that the Court may be more likely to view elected officials’ social media pages as designated or nonpublic forums in future cases. [*Packingham v. North Carolina*, 582 U.S. 98, 104 (2017).]

¹⁰ *Krasno v. Mnookin*, 148 F.4th 465, 485 (7th Cir. 2025). In a 2024 decision, *PETA v. Tabak*, the U.S. Court of Appeals for the D.C. Circuit similarly held that the National Institutes of Health had violated the First Amendment by deleting certain “off-topic” comments from its Facebook and Instagram pages, specifically by using keyword filters that flagged comments by certain groups for deletion. [*PETA v. Tabak*, 109 F.4th 627 (D.C. Cir. 2024).]

¹¹ In decisions issued prior to *Lindke*, some lower courts had instead evaluated the First Amendment’s application based on the nature of a whole social media page or account. See, e.g., *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021); *Knight First Amendment Institute v. Trump*, 928 F.3d 226 (2nd Cir. 2019) (later vacated on mootness grounds).