Board Use of Social Media: Supreme Court and Other Court Cases

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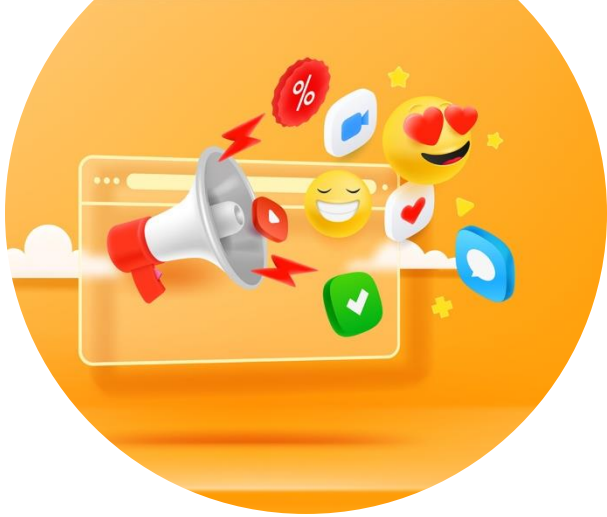
Board Members & Social Media Activity



Like anyone else, school board members may establish personal social media accounts to communicate with others. But issues can arise if they share information related to their school district in those accounts. May board members block access to critics based on their negative responses? Or would such action violate the First Amendment and expose them to liability? Learn more about the implications of two recent U.S. Supreme Court decisions on this topic.

First Amendment Protections

School board members have a right to express their own personal views on district issues, including the school budget and other propositions. However, school board members who wish to express their personal opinions about District issues must clearly distinguish their personal views from those of the board they represent.

- For example, when writing a letter to the editor of a newspaper in support of a voter proposition, school board members must be sure to explicitly state that the letter expresses their personal views. *Appeal of Wallace*, 46 Ed. Dept. Rep. 347 (2007).
- A District or Board may not use district funds, facilities or channels of communication to encourage voters to vote in support or against the school budget or any proposition. *See Appeal of Johnson*, 45 Ed. Dept. Rep. 469 (2006).
    - A district may communicate with the general public on a matter only "[t]o educate, to inform, to advocate or to promote voting on any issue may be undertaken, provided it is not to persuade nor to convey favoritism, partisanship, partiality, approval or disapproval by a State agency of any issue, worthy as it may be." *See Phillips v. Maurer*, 67 N.Y.2d 672,673 (1986).

Pre-*Lindke & O'Connor*

Paladino v. Seals-Nevergold, 2020 WL 5544342 (W.D.N.Y. 2020):

A Buffalo magazine published an article wherein local leaders, including Plaintiff, answered four questions relating to what they wanted for the year 2017. Petitioner, a member of the Board of Education, drafted responses to the four questions and included, allegedly on accident, disparaging comments about President Barack Obama and Michelle Obama. The draft responses were intended for Plaintiff's friends but were inadvertently sent to the magazine and subsequently published. After publication, the BOE called a special meeting and passed a resolution demanding that the petitioner resign or the BOE would file an application for his removal. The Plaintiff did not resign, and special counsel was hired. Amid this, Paladino published an article detailing negotiations with the teachers' union. The Commissioner subsequently removed Paladino from his position on the Board, finding that he had improperly disclosed confidential information from an executive session. The petitioner subsequently brought suit alleging, amongst other things, retaliation in violation of his First Amendment rights.

- The Second Circuit cited to earlier precedent which held that "the First Amendment bars state officials from stripping elected representatives of their office based on the political views of such representatives." *Velez v. Levy*, 401 D.3d 75 (2d Cir. 2005)
- However, in *Paladino*, the Board of Education had no legal authority to remove Paladino, and instead voiced its opinion while advocating for an outcome. Therefore, the Board members could not be liable for a First Amendment violation.

Pre-*Lindke & O'Connor*

***Blair v. Bethel School District*, 608 F.3d 540, 540 (9th Cir. 2010):**

Mr. Blair, former vice president of public-school board brought a § 1983 action against the district, superintendent, board president, and others, alleging he was removed as board vice president in retaliation for exercising his First Amendment rights to free speech. After Mr. Blair refused to extend the superintendent's contract or raise his pay, he made comments disparaging the superintendent to a local newspaper.

- The Ninth Circuit held: "we assume all of the Board members have a protected interest in speaking out and voting their conscience on the important issues they confront—issues like teachers' pay, curriculum policy, and allocation of education resources."
- The Court continued its rationale by quoting the First Circuit, "[v]oting by members of municipal boards, commissions, and authorities comes within the heartland of First Amendment doctrine, and the status of public officials' votes as constitutionally protected speech [is] established beyond peradventure of doubt …." *Stella v. Kelley*, 63 F.3d 71, 75 (1st Cir.1995).
- "While the impetus to remove Blair as Bethel School Board vice president undoubtedly stemmed from his contrarian advocacy against Siegel, the Board's action did not amount to retaliation in violation of the First Amendment."
- "[T]he First Amendment protects Blair's discordant speech as a general matter; it does not, however, immunize him from the political fallout of what he says." "[T]he First Amendment doesn't shield public figures from the give-and-take of the political process."

Pre-*Lindke & O'Connor*

Garcetti v. Ceballos, 547 U.S. 410 (2006):

- Deputy District Attorney reassigned, transferred and denied a promotion, after criticizing his employer in a memorandum.

- When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

- If a public employee speaks about a matter of public concern, the question becomes whether the government employer had an adequate justification for treating the employee differently from any other member of the general public.

Circuit Split

- The Supreme Court granted certiorari in *Lindke v. Freed* (6th Circuit) and *O'Connor-Ratcliff v. Garnier* (9th Circuit) **to resolve a circuit split about <u>how to identify state-action in the context of public officials using social media</u>.**

- The Supreme Court's analysis set forth in Lindke v. Freed now applies.

Lindke v. Freed, 601 U.S. 187 (2024)

- **Facts:**
  - Freed, created private Facebook account in 2008 and he later converted the page from private to "public."
  - In 2014, Freed was appointed City Manager of Port Huron, Michigan and subsequently updated his Facebook page to reflect newly appointed position.
  - Freed posted both personal and job-related posts on the Facebook page.
  - During COVID-19 pandemic, Freed posted about personal and job-related issues regarding the pandemic.
  - Another Facebook user, Lindke, responded to some posts expressing his displeasure with the city's approach to the pandemic.
  - Freed, initially **deleted** Lindke's comments and then ultimately **blocked** Lindke from accessing his Facebook page.

Freed **Lindke**

Lindke v. Freed, 601 U.S. 187 (2024)

- Procedural History
  - Lindke sued Freed under 42 U.S.C. § 1983, alleging that Freed had violated Lindke's First Amendment rights by blocking him from commenting on Freed's posts at all.
  - Lindke claimed he had a right to post on Freed's page because he considered it a public forum.
  - The United States District Court, E.D. Michigan, Southern Division determined that Lindke's claim failed because it found that Freed managed his Facebook page in his private capacity and only state action can give rise to liability under § 1983.
  - 6th Circuit Affirmed.
  - Supreme Court granted Certiorari

Lindke v. Freed, 601 U.S. 187 (2024)

- **Two Prong Test:**
  - A public official's social-media activity constitutes state action under §1983 only if the official:
    - (1) Possessed actual authority to speak on the State's behalf; and
    - (2) Purported to exercise that authority when they spoke on social media. *Lindke v. Freed at 198*.

    (The appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first step). *Lindke v. Freed at 198*.

Lindke v. Freed, 601 U.S. 187 (2024)

- **Prong 1: State Authority**
  - An act is not attributable to a State unless it is traceable to the State's power or authority. *Lindke v. Freed at 198*.
    - Private action – no matter how "official" it looks – lacks necessary lineage. *Lindke v. Freed at 198*.
  - For state action to exist, the State must be "responsible for the specific conduct of which the plaintiff complains." There must be a tie between the official's authority and "the gravamen of the plaintiff's complaint." *Lindke v. Freed at 198*.
  - Determining the scope of an official's power requires careful attention to relevant statute, ordinance, regulation, custom or usage. *Lindke v. Freed at 200*.
  - A State official speaking under State authority must have actual authority rooted in written law or longstanding custom to speak for the State. *Lindke v. Freed at 201.*
  - Apparent authority will not suffice, must be actual authority.

Lindke v. Freed, 601 U.S. 187 (2024)

- **Prong 2: Purport to exercise State Authority through Social Media**
  - Whether social-media activity constitutes state action, an official must not only possess state authority – **they must also purport to use it**. *Lindke v. Freed at 201 (emphasis added)*.
  - Generally, a public employee purports to speak on behalf of the State while speaking in their official capacity or when they use speech to fulfill their responsibilities pursuant to state law. *Lindke v. Freed at 201*.

Lindke v. Freed, 601 U.S. 187 (2024)

- Examples of Factors used to determine whether state official purports to exercise state authority through social media:
  - If public official does not use speech in furtherance of their official responsibilities, they are speaking in their own voice. *Lindke v. Freed at 201*.
  - Analyzing posts content and function. *Lindke v. Freed at 203*.
  - Whether the information shared is already publicly available. *Lindke v. Freed at 203*.
  - Whether state official uses government/state staff to make a post. *Lindke v. Freed at 203*.

Lindke v. Freed, 601 U.S. 187 (2024)

- Noted difference between Deleting Comments and Blocking Commentor:
  - **Deleting Comments** = posts where comments are specifically deleted. *Lindke v. Freed at 204*.
  - **Blocking Commentor** = by blocking a commentor, public official is potentially blocking user from entire webpage therefore a court would have to consider whether public official engaged in state action with respect to any post, not just the ones where unwanted commentor replied. *Lindke v. Freed at 204*.
  - *Public officials who fail to keep personal posts in a clearly designated personal account exposes themselves to greater potential liability. *Lindke v. Freed at 204*.*

Lindke v. Freed, 601 U.S. 187 (2024)

- Holding:
  - "A public official who prevents someone from commenting on the official's social-media page engages in state action under 42 U.S.C. § 1983 only if that official both (1) possessed actual authority to speak on the State's behalf on a particular matter, and (2) purported to exercise that authority when speaking in relevant social-media posts."
  - Vacate and remand.

Lindke v. Freed, 601 U.S. 187 (2024)

- Key Points
  - The distinction between private conduct and state action turns on substance, not labels: Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights. Categorizing conduct requires a close look. *Linkde v. Freed at 197*.
  - State-action doctrine demands a fact-intensive inquiry. *Linkde v. Freed at 197*.
  - A public official's social-media activity constitutes state action under §1983 only if the official:
    - (1) Possessed actual authority to speak on the State's behalf; and
    - (2) Purported to exercise that authority when they spoke on social media. *Lindke v. Freed at 198*.

Remand to the Sixth Circuit

- On August 21, 2024, the Sixth Circuit remanded the matter back to District Court to permit Lindke to further develop the record in support of his claims.
- The Sixth Circuit noted that beyond whether Freed's posts constitute state action, the District Court must decide what kind of forum social-media accounts are, what level of scrutiny do decisions to delete comments or block individuals receive, and whether public employees are entitled to qualified immunity.
  - Specific posts in which Freed allegedly exercised authority to speak on the state's behalf
  - Whether Lindke's claim for declaratory and injunctive relief is moot as Freed deactivated his Facebook page. Burden is on Freed to establish mootness as he deleted his own account.
- Sixth Circuit clarified that the Supreme Court's new test requires a post-by-post inquiry.
- Actual authority to speak on behalf of State may exist in the absence of written law and may depend on custom or usage.
  - Example: imagine that three successive fire marshals have issued statements designating certain days on which residents are prohibited from outdoor burning. Even if no written law authorizes the fire marshals to issue these statements, the fact that they have consistently done so might be evidence that the fire marshal's office has that authority via custom and usage. If the next fire marshal issued a burn ban via social media, that would count as state action.

O'Connor-Ratcliff v. Garnier, 601 U.S. 205 (2024)

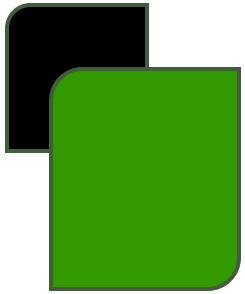
- Facts:
  - Two District Trustees used personal public Facebook pages to promote their own campaigns for election to District's Board of Trustees.
  - Following successful campaigns, the two Trustees continued to use public Facebook page to post District related content.
  - Mr. & Mrs. Garnier are parents who criticized the Board of Trustees by posting lengthy and repetitive comments on the two Trustee's social media posts.
  - Two Trustees initially deleted comments and blocked parents all together.
  - Parents sued the two Trustees alleging violation of First Amendment Rights under 42. U.S.C. § 1983.

O'Connor-Ratcliff v. Garnier, 601 U.S. 205 (2024)

- Holding
  - Because the approach that the 9th Circuit applied was different from the one the Supreme Court elaborated in *Lindke v. Freed*, 601 U.S. 187 (2024), Supreme Court vacated the lower court's judgment and remanded the case back to the 9th Circuit for further proceedings.

O'Connor-Ratcliff v. Garnier, 601 U.S. 205 (2024)

- Key Point
  - Supreme Court emphasized that to determine whether a state official was acting under state authority via social media post required more than the "appearance and content" of the official's page.
    - Therefore, Supreme Court vacated and remanded case directing the 9th Circuit to apply the Supreme Court's standard set forth in *Lindke v. Freed*.



Applying the *Lindke* Test

Landscape Post-*Lindke* & *O'Connor*

- In February, 2024 the Denver Public Schools paid a $25,000 settlement following a lawsuit alleging the violation of a Parent's First Amendment right to free speech when the Board Vice President deleted posts from his Facebook Page.
- A parent commented on the Vice President's public Facebook page inquiring as to an unredacted investigative report pertaining to allegations of sexual assault made against the Vice President. The Board Member subsequently deleted the comments and blocked the Parent's access to his Facebook Page.
- The Board Member did not seek re-election, though it is unknown if it is related to the lawsuit.

Applying the *Lindke* Test

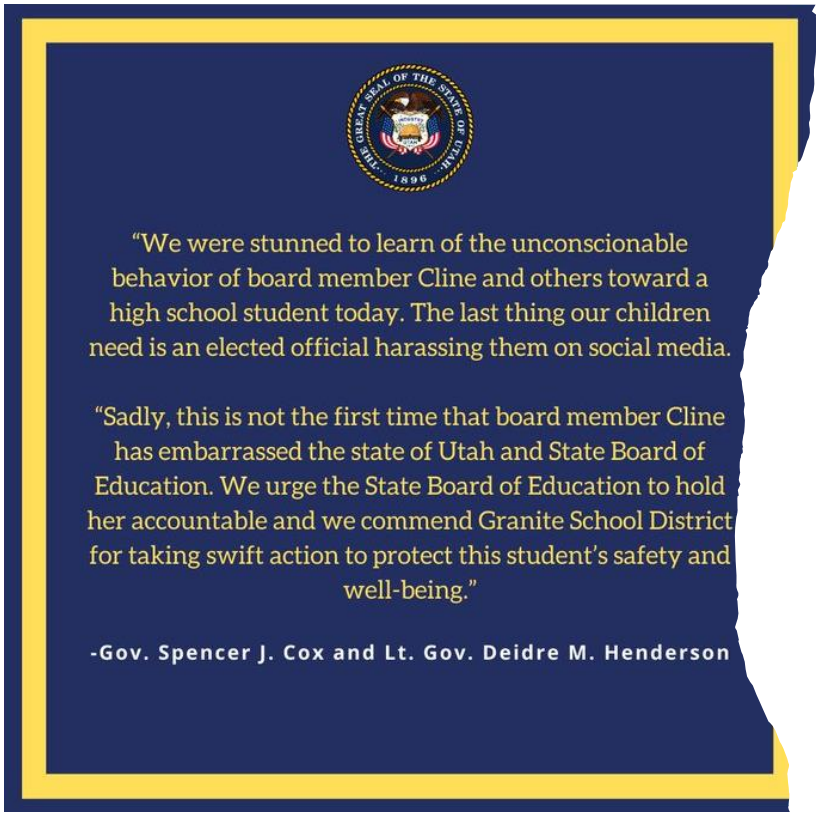
***Chase v. Morgan*, U.S. District Ct. for the Eastern District of Tennessee, Case No. 1:24-cv-265, 2025 U.S. Dist. LEXIS 56300 (2025):**

- The Defendant Morgan, an elected Judge of the Juvenile Court, posted about the conduct of juvenile court proceedings , public events and policies of the Juvenile Court. The social media site posting was determined by the court not to constitute state action under the first prong of the *Lindke Test* because it wasn't shown that "he was possessed of state authority to post on these topics pursuant to his duties."

Board Member Social Media Comments

- A Montana school board member was under fire by the community for several comments uploaded to "X," in which the Board member replied to a post regarding the upcoming election.
- The community was outraged, concerned with the board member's views on individuals with disabilities.
- The board member refused to step down from his position, however, the School's Board of Trustees stated: "While we may not share similar opinions to trustee Dickey, we are confined to what we can do on this board and that is to separate ourselves."

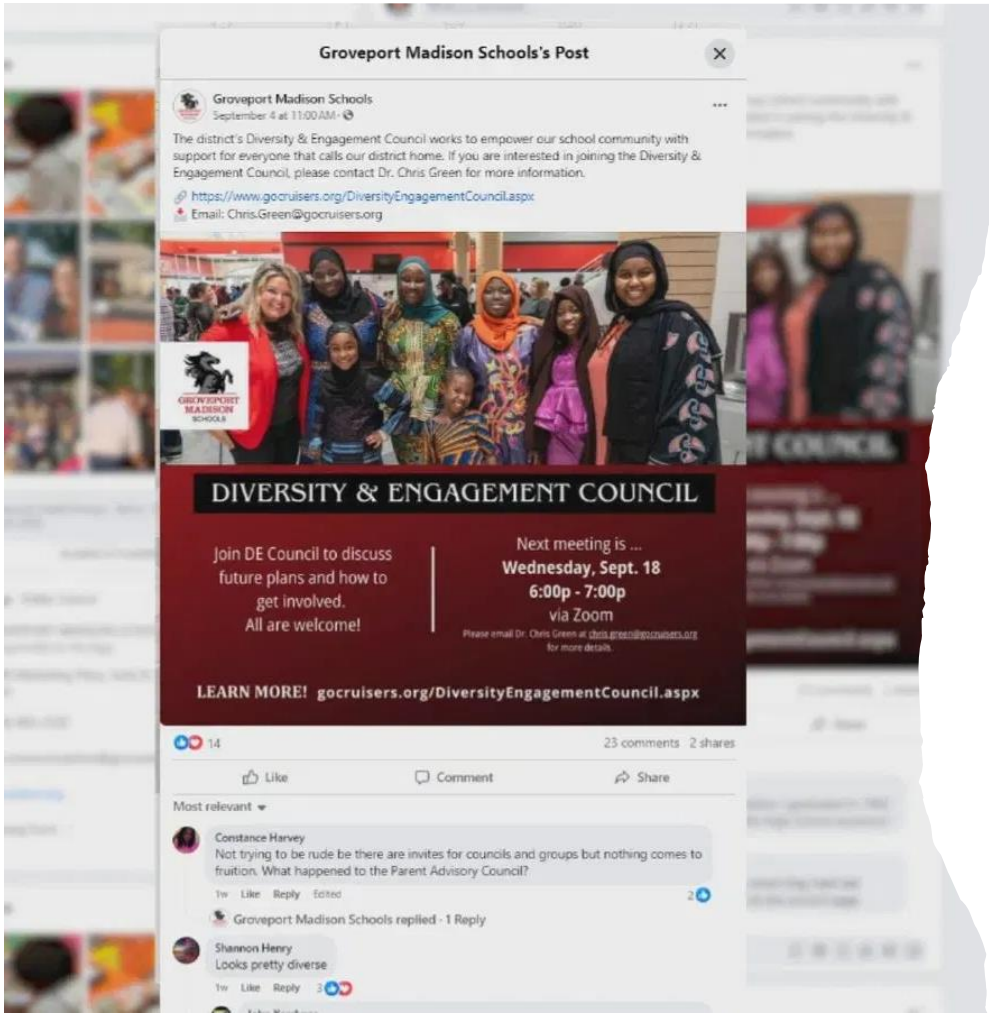
Board Member Social Media Comments



- A member of the Utah State Board of Education posted a photo on Facebook of a high school basketball player stating "Girls' basketball…"
- The post was interpreted as wrongly implying the player was transgender. The Board Member has refuted such statements, posting that she "never claimed the student was a boy."
- The now deleted post led to outrage from the Community, the School District and the Governor.
- In response to the public outrage, the Board member posted: "We live in strange times when it is normal to pause and wonder if people are what they say they are because of the push to normalize transgenderism in our society."
- Ms. Cline has a history of making controversial social media posts and comments. In 2021, Ms. Cline was reprimanded for posting an image depicting a pride flag on display at a church facility, stating "the world is too much with us[.]" Ms. Cline was issued a reprimand. Recently, she accused teachers of being "complicit in the grooming of children."
- In 2023, Ms. Cline was cleared of any wrongdoing pertaining to several posts, however, the Board has not released any information as to an investigation into the Girls' basketball post. Several online petitions have sought her removal.

Board Member Social Media Comments

- A School Board Member in Ohio responded to the District's post spotlighting the District's Diversity and Engagement Council, stating "as long as diversity is one color, we are rocking it!"
- A complaint was made to the NAACP who attended and spoke at a subsequent Board meeting. The NAACP is asking for a public apology be issued.
- The Board has yet to address the member's comments.
- When asked for a comment, Mr. Kershner stated: ""I know my soul, I know my heart. It doesn't bother me[.]"



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Groveport Madison Schools
Sep 4 ·

Adrienne Hood
John Kershner looking at your comment I'm guessing you'd prefer the type of "diversity" that's in the picture of you and the rest of the Groveport School Board. Your comments are unbecoming as a SCHOOL board member! Furthermore, with the history of Groveport you are giving the impression that you're not a fan of inclusion. If we'd go back and look at MANY years of Groveport's pictures it would be a sea of whitness, would you STILL have this kind of response? Would it even be a topic of discussion? It's been over 20 years since I pulled my children from this district and i... See more

5d Like Reply 1

Comment as Kathryn...

Shannon Henry
Looks pretty diverse

1w Like Reply 3

John Kershner
Shannon Henry Yes! You nailed it, as long as diversity is one color, we are rocking it!

1w Like Reply 4

6:48

Groveport Madison Schools
Sep 4 ·

5d Like Reply 1

John Kershner
Adrienne Hoodnope not at all. Inclusion is inclusion, I would like real inclusion. I am paying attention.and we are not doing it well.

5d Like Reply

Adrienne Hood
John Kershner so what would that inclusion look like?

5d Like Reply

John Kershner
Adrienne Hood You won't hear me ask publicly to vote for someone based on their skin color or support such things. Or to make special rules for our students based on race/skin color. I don't believe or make statements that I want students who look like me. All these things are happening, do you support that? That has all happened on this board in the 9 months I have been on it so far. SMH.

5d Like Reply

Adrienne Hood

Comment as Kathryn...

Board Member Social Media Comments

- In Pennsylvania, a Board Member accused Vice-President Kamala Harris of engaging in a sex act. The Community has called for the board member's resignation.
- The Superintendent & Board President issued a statement citing the inappropriate language, poor judgment, and need for time to process the situation.
- During a recent board meeting, the Board refused to address the post and recessed until a later date.

Recommendations

- Identify posts as personal or provide disclaimers.
  - In *Lindke*, the Supreme Court noted that had Freed's account indicated markers on his post, "he would be entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal." For example, "this is the personal page of James R. Freed" or a disclaimer "the views expressed are strictly my own[.]"
- NYSSBA has published a "Social Media Reference Guide" for Board Members answering Frequently Asked Questions.
- Recommendations Include:
  - Board members may respond to remarks so long as they indicate they are not speaking on behalf of the Board.
  - "Freedom of speech does not mean freedom from consequences."
  - Board members should not solicit feedback on social media, rather, encourage community members to contact the District. Provide appropriate channels of communication for the community.
  - Districts should maintain a social media policy addressing "appropriate etiquette" of board members.

QUESTIONS?

Thank You

The information in this presentation is intended as general background information.
It is not to be considered as legal advice.
Laws can change often, and information may become outdated.