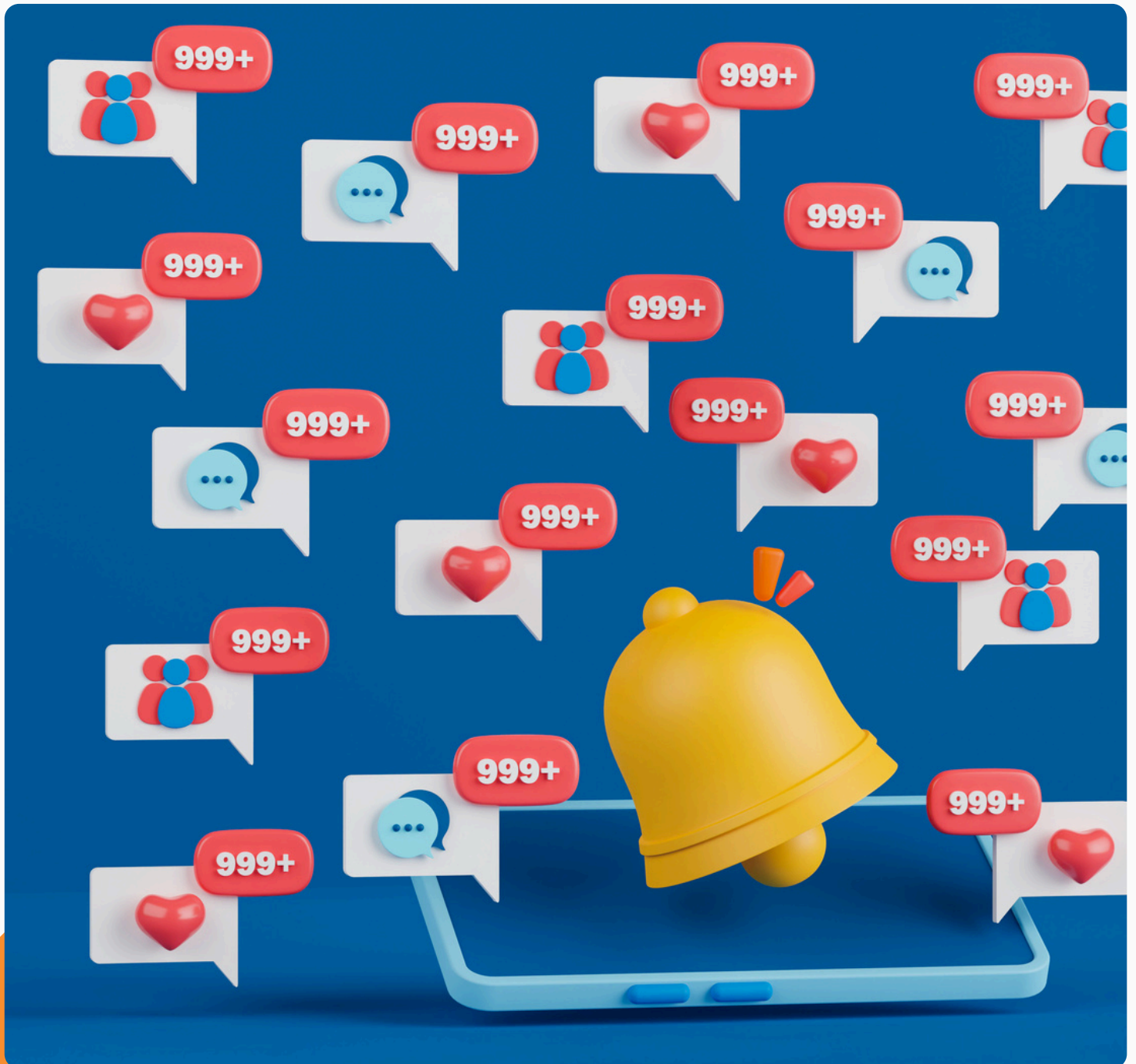


# Social Media & Government Officials' Accounts

What happens when private social media accounts of government officials and employees become public platforms.



*A look at the implications and guidance from the Supreme Court in the case of Lindke v. Freed.*

# Case Overview

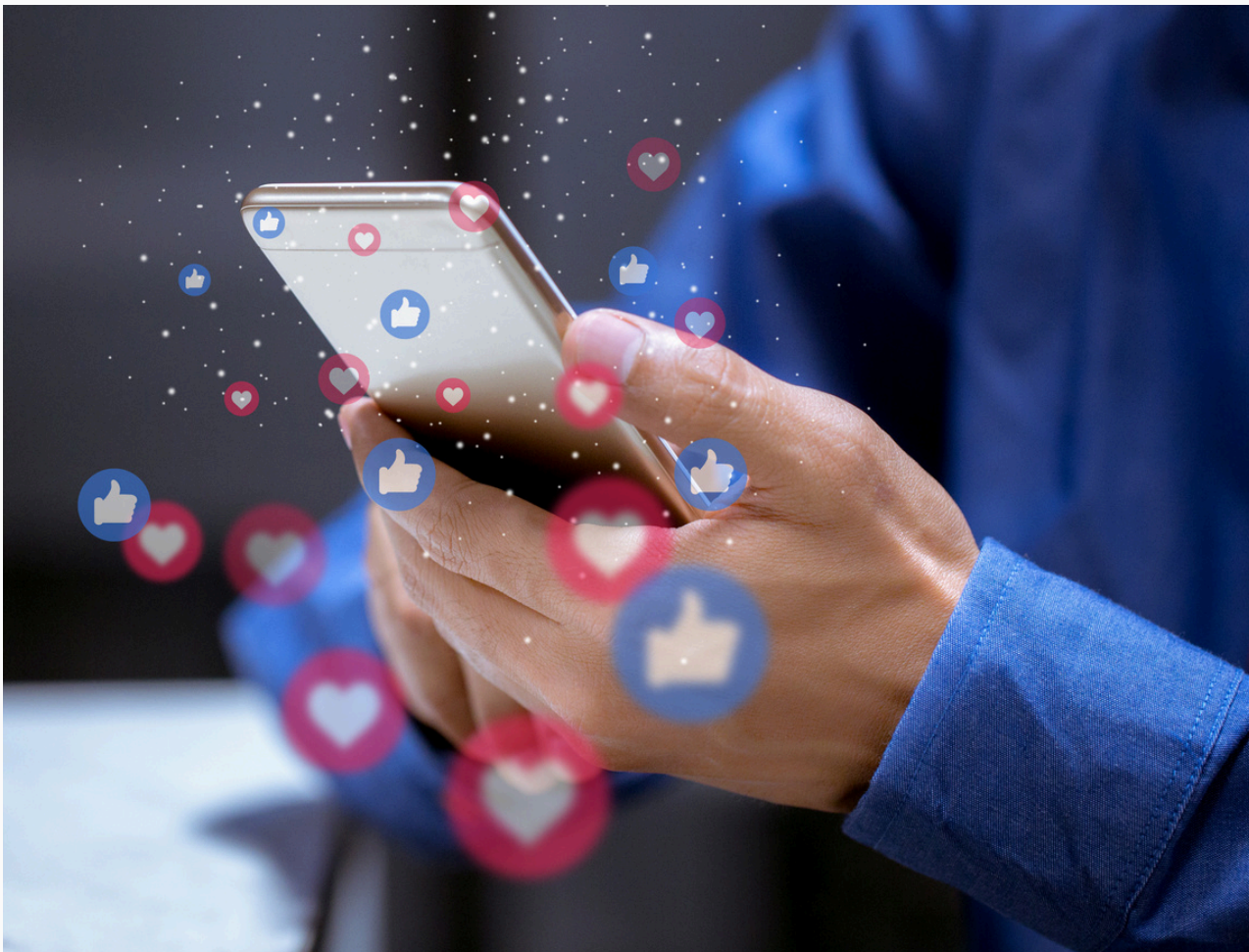
PREPARED BY  
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With the Supreme Court opining in *Lindke v. Freed*, it is crucial that you understand how this decision affects your local government officials. Read on to learn more about this case and how to keep issues from happening at your own public entity.

Summary: James Freed initially set up a private Facebook account but as it neared 5000 “friends” he made the account public. After becoming City Manager for Port Huron, Michigan, he also started posting work-related content and engaged with comments. When a user criticized the City’s pandemic response, Freed blocked him. The user sued Freed for violating his First Amendment rights, claiming Freed’s account page was a public forum. Courts disagreed. As public officials’ social media use blurs the line between private and official capacity, the Supreme Court overruled the lower courts to clarify and establish guidelines for when a public official’s private social media can be “fairly attributable” to the government.

# What Happened

James Freed created a private Facebook page in 2008. He eventually made it public meaning anyone could view and comment on his posts. Though he chose “public figure” for his profile, the vast majority of his posts were about his wife, daughter, dog and what he was up to. Once he became City Manager for Port Huron, MI, in 2014, he updated his profile to include that he was “City Manager, Chief Administrative Office for the citizens of Port Huron, MI.”



While mainly posting about his personal life, Freed included a smattering of posts regarding communications from other officials in the City and other matters of public concern in the Port Huron. He also solicited and responded to comments on these topics. Occasionally he would delete comments that he deemed “derogatory” or “stupid.”



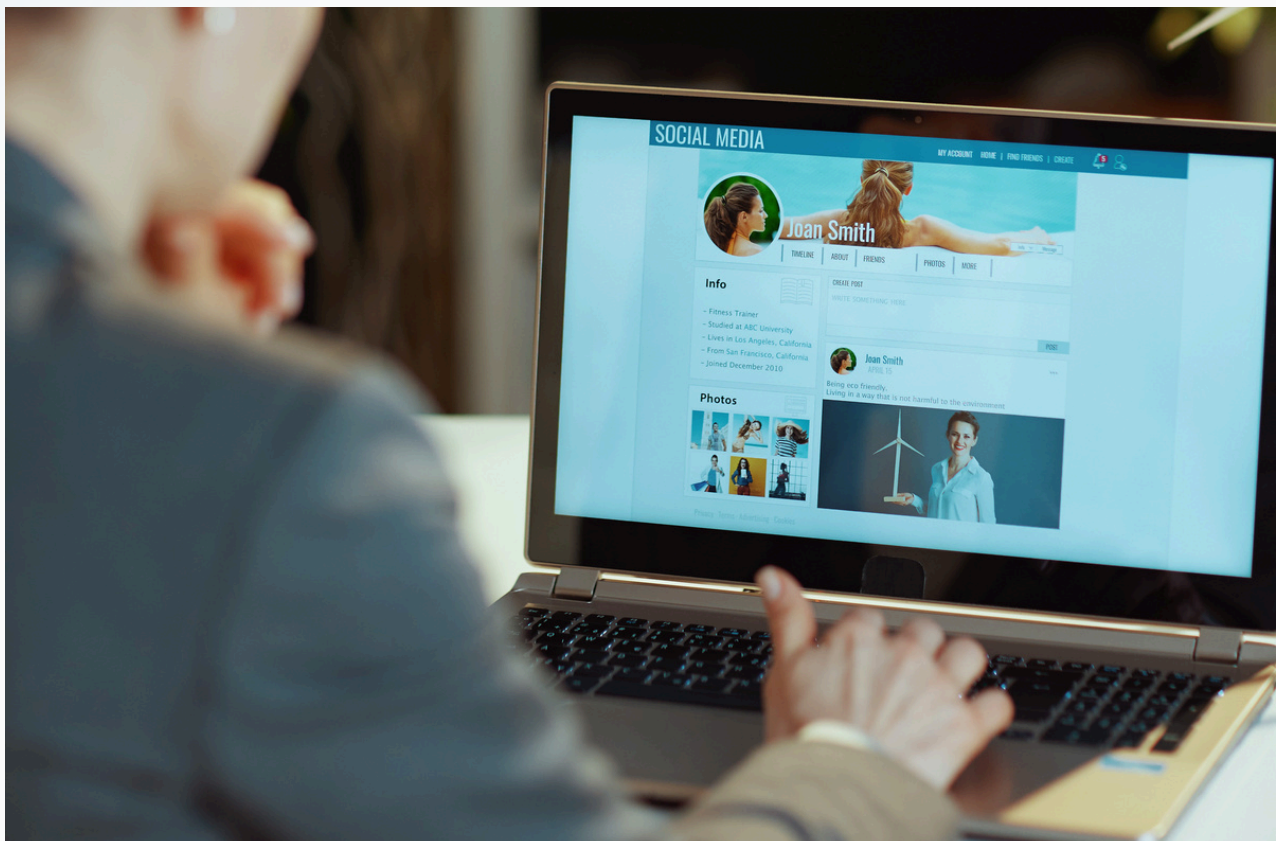
During the pandemic, Freed posted personal and work-related remarks on his site. Kevin Lindke began responding to these posts unabashedly expressing his disapproval of Port Huron's response to the pandemic. Freed responded by deleting the posts and eventually blocking Lindke altogether from posting anything on the site.

Lindke responded by filing suit against Freed alleging that Freed violated his First Amendment rights by not allowing him to post on what he saw as a public forum. Freed countered by alleging that he operated the Facebook page as a private citizen rather than as the City Manager for Port Huron and therefore, his actions did not rise to the level of government action that is needed to state a claim for a First Amendment violation.

The U.S. District Court for the Eastern District of Michigan agreed with Freed and dismissed the suit. The U.S. Court of Appeals for the Sixth Circuit agreed. The case then made its way to the U.S. Supreme Court, in a unanimous decision, said hold on a minute. When determining when a public official violates a person's right to speak one must first determine whether the official's action can be "fairly attributable" to the government. In other words, before liability can be attached for an alleged violation of a constitutional right, it must be determined whether the government official was acting as a government official or a private citizen. How one decides what is "fairly attributable" to the government in a social media context was - as the Sixth Circuit put it - "somewhat murky."

As there was a difference of opinion on how to resolve this question amongst the circuits, the Supreme Court set out to provide some guidance. It held to hold Freed liable for a constitutional violation, Lidke must show that “Freed (1) had actual authority to speak on behalf of [Port Huron] on a particular matter, and (2) [Freed] purported to exercise that authority in [his] relevant posts.” It then sent the case back to Michigan to apply the facts of the case to the new standard.

Determining when a public employee or official acts as a public official or a private citizen when posting on social media can be a difficult question to parse. A person does not give up their First Amendment rights to speak about issues concerning the public simply because they get elected or become employed by the government. Mere status of the position is not determinative. A public employee has a right to speak about issues related to or learned through the job so long as the speech is not within the ordinary scope of employment. Determining that point itself can be a sticky issue and a topic not discussed here.



Determining who has the authority to speak for the entity and when can be a difficult task depending on the subject. Surely the fire chief has the authority to speak for the public entity on issues concerning the fire department but not the police department. The nature of the site is also an issue. Is the post made on a site belonging to the entity or the individual? Does the individual's site specifically state that the content is purely individual and not associated with entity? Is the employee speaking in his official capacity or to fulfill the obligations of his/her job?



Entities should make it clear by ordinance or otherwise who has the right to speak on what subject. Maintaining its own official site can help the entity manage what is said as officials and employees can fulfill an official duty or responsibility of communicating information on these sites rather than their own. Officials and employees should be encouraged to label their social media outlets as their own and separate from their role with the entity. As the Supreme Court noted in *Freed*, “A public official who fails to keep personal posts in a clearly designated personal account [ ] exposes himself to greater potential liability.”

# Best Practices

## **Create Boundaries**

When posting, make it clear if you're speaking in a personal or official capacity. Have a disclaimer on your page that says your opinions are your own. Even better, have an official public page or use your entity's public page for official announcements, not your private personal page.

## **Remember Their Rights**

As much as it can be hurtful to see negative commentary online, everyone has the right to their own opinions. If you're going to have an official public page, you need to remember that everyone has the ability to speak and you cannot stop them from doing so. If an inappropriate comment is made, you can absolutely have it removed from the page, but you cannot block the individual from having the right to respond to your official posts.

## **Plan Ahead**

The officials and employees should have the freedom to express themselves as individuals and manage their content and audience without jeopardizing themselves or their employer. Thus, careful planning is essential to mitigate risks. Ultimately, fostering a culture of responsible and respectful online communication can benefit both individuals and the organization as a whole.

## **Clear Policies**

One way to navigate this delicate balance is by establishing clear guidelines and policies regarding social media usage in the workplace. By providing employees with a framework that outlines acceptable behavior and communication practices, public entities can empower their staff to engage online while upholding the organization's values and reputation. Additionally, offering training sessions on social media best practices and privacy settings can help employees feel more confident in their online interactions.

# Sources

Lindke v. Freed, 601 U.S. 187 (2024)  
Lindke v. Freed, 37 F. 4th 1199 (2022)  
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