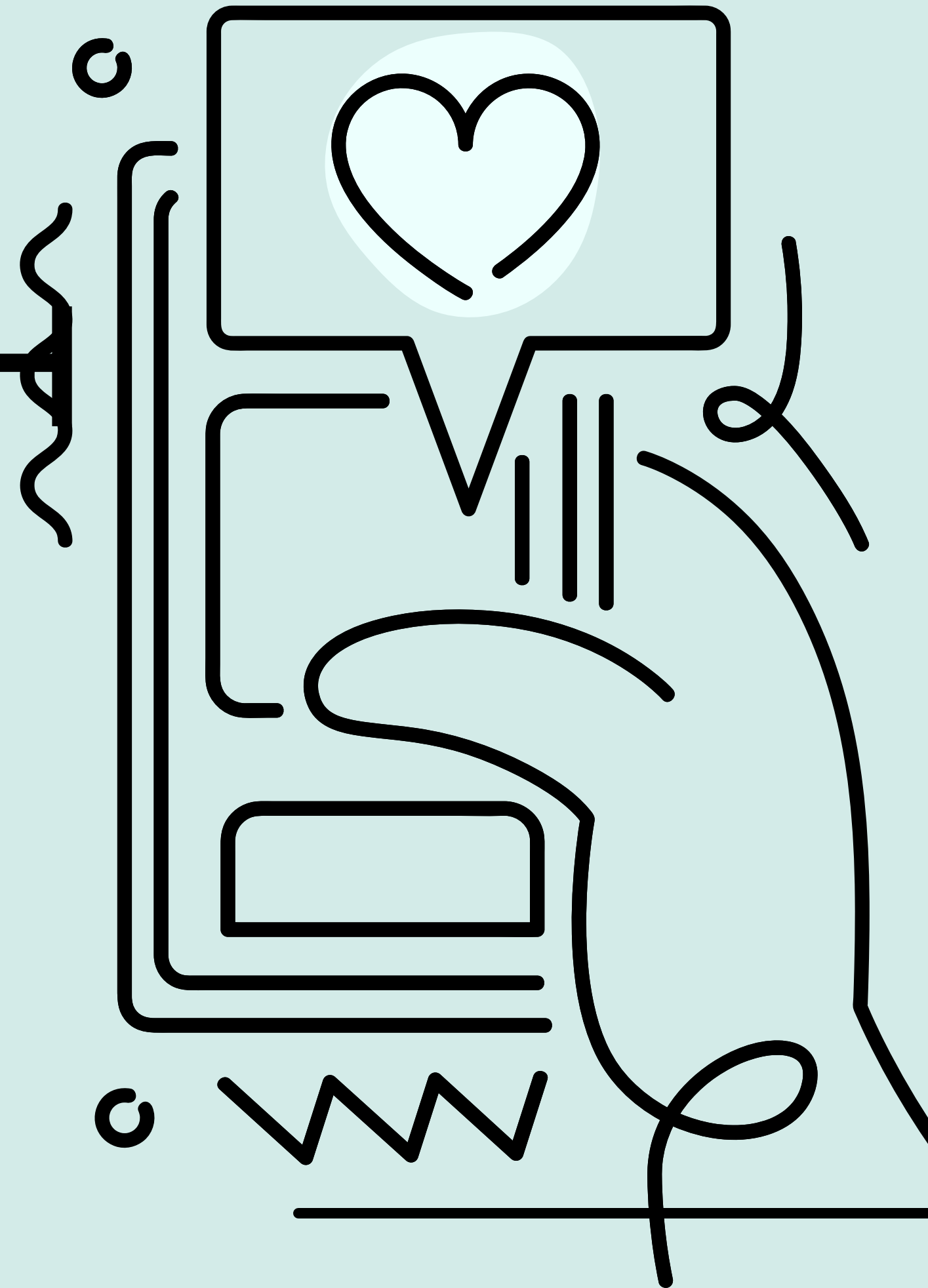


CONNECTING WITH CONSTITUENTS

First Amendment Friendly Social Media
for Local Government + Elected Officials

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IN THE HEADLINES

The U.S. Supreme Court, in March 2024, articulated a new test for determining whether an elected or other public official's use of social media constitutes state action that is subject to First Amendment scrutiny.

The first inquiry under the new two part test “is not whether making official announcements *could* fit within the job description; it is whether making official announcements is *actually* part of the job that the State entrusted the official to do,” Justice Amy Coney Barrett wrote in the court's opinion.

“SUPREME COURT SETS RULES FOR OFFICIALS WHO CAN BLOCK SOCIAL MEDIA CRITICS”

“SUPREME COURT RULES OFFICIALS CAN BLOCK SOMEONE FROM THEIR social media feed if posting is not part of the person's official job duties”

SOMETIMES BE SUED FOR BLOCKING CRITICS ON SOCIAL MEDIA”

Sources: The Washington Post, Associated Press, Axios

BACKGROUND: LINDKE V. FREED

Freed, City Manager of Port Huron, MI, operated a “mixed use” Facebook page, where he made posts in his personal capacity and others in his capacity as city manager, including posts about the city’s response to the COVID-19 pandemic.

Lindke, a Port Huron resident, posted several comments critical of the city’s pandemic response. The city manager initially deleted some of those responses, but eventually blocked Lindke from making future comments on Freed’s page.

Lindke sued Freed, alleging that Freed had violated Lindke’s First Amendment rights by deleting unfavorable comments and blocking people who made them.



RULING: LINDKE V. FREED

The First Amendment prohibits only government abridgement of speech, not private abridgement of speech. Therefore, a successful First Amendment claim must be premised upon some “state action.”

THE TWO PART TEST

In *Lindke v. Freed* 144 S.Ct. 756 (2024), the Supreme Court articulated a new two-part test for determining the existence of state action as follows:

“When a government official posts about job related topics on social media . . . such speech is attributable to the State only if 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.”

The source of authority to speak may come from written law such as a statute, ordinance or regulation, but it may also come from custom or usage. Further, determination of state action demands a fact-intensive inquiry.

DELETING V. BLOCKING

In *Lindke v. Freed* the Court identified a **legally-significant difference between deleting comments and blocking users.**

- When comments are deleted, the only posts that are relevant to the state action inquiry are the posts from which comments were deleted.
 - In other words, **the court examines only the posts that were the subject of the deleted comments** to determine whether the state action test has been satisfied. The court does not look at all posts on the account at issue.
- However, because blocking operates on a page-wide basis, when a user is blocked, the court must consider whether any post on the page met the state action test.
 - As a result, **a “mixed use” social media account exposes a public official to greater potential liability.**
 - With a mixed use account, a public official may be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts.



FIRST AMENDMENT- FRIENDLY TIPS

Elected officials should maintain separate social media accounts for personal use, for political campaigns, and for elected/official position.

Localities should examine/create social media policies for employees and officials, in consultation with city/town attorney.



First Amendment case law generally -- including on the topic of social media -- is constantly evolving. Therefore:

- Stay abreast of developments and prioritize implementation of policies to mitigate risk of liability.
- Utilize social media privacy settings for your personal accounts to limit access.
- **For individual accounts used to post about official matters** –
 - Include a disclaimer such as:
“This is the personal page of (insert name). The views expressed are strictly my own.”
 - Establish a clear comments policy that may limit the subject matter of comments, but not the views expressed.
 - Do not block users.

PAUSE + CONSIDER

01. KEEP IT PERSONAL

If you want your social media account to remain “personal,” don’t use it for official purposes.

Mixed-use pages subject you to greater potential liability.

02. THICKEN YOUR SKIN

Do not block users or delete comments just because they criticize you or you disagree.

Consider “hiding” comments to slow the spread of disinformation while you consult your city/town attorney.

03. BE THE CALM

Do not post offensive or inflammatory content.

Enragement may equal engagement, but if you fan the flame eventually you’ll get burned.

04. BE TRANSPARENT

If you moderate comments on your account be transparent about your policy for doing so.

Publicly post your social media policy and notify users if you determine they have violated your policies.

BEYOND LEGAL PROTECTIONS: CULTIVATE THE CULTURE YOU WANT

Social media presents challenges to civil discourse and the dissemination of accurate information every day.

But as government officials, we are in a powerful position to weight the scales on our own pages (both personal and professional) away from outrage and toward collaboration, transparency, and our own humanity.



HOW TO CULTIVATE A CONSTRUCTIVE ONLINE CULTURE



Adopt a consistent tone in your posts and comments.

Make it fun, informative, and conversational. Poke fun at yourself, never others.

Be accurate, transparent, and let your commitment to your constituents shine.



Engage with civil and constructive comments. Ignore the trolls.

Not every comment needs a response. Resist the urge to comment on every criticism.

Respond to negative comments politely and only if they assert information that is factually incorrect.



Take every opportunity to remind your followers of your own humanity.

Social media depersonalizes by its very nature. Fight that, not your followers.

Own your mistakes. Apologize when it's called for. It makes you relatable and fosters empathy and grace.

GET IN TOUCH



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