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Supreme Court Issues First Decision in a Series of Social Media Cases Affecting the Public Sector

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On March 15, 2024, the United States Supreme Court issued a much-awaited decision on two cases that now create guardrails on when government officials can and cannot block private citizens from social media accounts. Those cases, *Lindke v. Freed*, and *O'Connor-Ratcliff v. Garnier*, involved instances where aggrieved plaintiffs filed suit against public officials under 42 U.S.C. Section 1983, which prohibits government actors from acting "under color of state law" to deprive individuals of rights guaranteed by the U.S. Constitution. Given the split of opinion between the two appellate courts that heard these cases, the U.S. Supreme Court considered the cases together.

In *Lindke v. Freed*, Port Huron, Michigan's City Manager James Freed was sued for removing negative comments made by Kevin Lindke, a resident who had criticized the city's handling of the COVID-19 pandemic on Freed's Facebook page, from accessing his Facebook page, and blocking him **[1]**. Lindke claimed he had a free speech right to comment on Freed's Facebook page because it was a public forum. When he launched it in 2008, Freed's account was private, but when he began nearing Facebook's 5,000-friend limit in 2014, he converted his profile to a public page that could be seen and commented on by anyone, using the Facebook page designation of "public figure." When he was appointed City Manager, his page identified him as "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI." He often posted family photos, Bible verses, and home improvement projects, and also posted work-related information about topics such as leaf

Supreme Court Issues First Decision in a Series of Social Media Cases Affecting the Public Sector

pickup, the pandemic, and how to contact various city departments for assistance. He deleted comments he considered "stupid" or "derogatory".

The trial court that initially heard Lindke's case determined that Freed was not acting "under color of law", and that he did not operate the page pursuant to his official duties. The Sixth Circuit Court of Appeals (which includes Ohio, Michigan, Kentucky and Tennessee) affirmed, holding that a public official's social media activity constitutes state action if (1) state law requires the officeholder to maintain a social-media account, (2) the public official uses state resources or government staff to run the account, or (3) the account belongs to an office, rather than to an individual officeholder. It further held that these situations make an official's social media activity "fairly attributable" to the state, and that Freed's actions here were not that, as there was no law requiring him to operate a Facebook page in connection with his duties and there was no public staff operating it. In other words, the profile didn't belong to the city manager's office.

In the companion case *O'Connor-Ratcliff v. Garnier*, two local parents were blocked from the Facebook pages of two school board members who had created public Facebook pages during their campaigns, after those parents posted multiple negative comments. After they won their seats, the board members continued to use their public pages to comment on board-related activity and to solicit constituent feedback. The pages were created using Facebook's designation of "government official". According to court filings, the plaintiffs engaged on the school board members' social media accounts with frequency, often with "repetitious and non-responsive comments and replies" to the officials' Facebook posts or Tweets. It was reported that on one occasion, the father posted the same comment on 42 different posts of one of the candidates and posted the same reply on 226 of her Tweets.

The parents claimed the board members' act of blocking them from "public spaces" amounted to state action. The trial court agreed with the plaintiffs, noting the officials' social media pages were "swathed in the trappings of [their public] office[s]", who identified themselves as board members and government officials, and listed the school district's email address on their page. The Ninth Circuit Court of Appeals held that because "they clothed their pages in the authority of their offices and used their pages to communicate about their official duties," there was a "close nexus between the Trustees' use of their social media pages and their official positions." It agreed with the trial court in concluding that the school board members had acted under color of state law when they used their pages as public forums and blocked the Garniers.

On review by the Supreme Court, Justice Amy Coney Barrett, writing for a unanimous court in Lindke, noted that Freed's status as a state employee was not determinative. The Court instead explained that "[t]he 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

Supreme Court Issues First Decision in a Series of Social Media Cases Affecting the Public Sector

constitutional rights -- including the First Amendment right to speak about their jobs and exercise editorial control over speech and speakers on their personal platforms." The Supreme Court instructed lower courts**[2]** to ask whether an official:

(1) possessed actual authority to speak on the government's behalf on a particular matter, and

(2) purported to exercise that authority when speaking on social media.

Notably, while the appearance and function of the social media account are relevant at the second step, they cannot make up for a lack of state authority at the first prong of the test. If both inquiries are satisfied, an official cannot block a person from commenting, even from a personal account.

Justice Barrett noted that while a social media profile's appearance and function are relevant for one prong of the new test, it is also critical to determine whether the public official had actual power to speak for the government. She noted that while Mr. Lindke "imagines that Freed can conjure the power of the state through his own efforts[,] the presence of state authority must be real, not a mirage… To misuse power, one must possess it in the first place…. **The threshold inquiry to establish state action is not whether making official announcements could fit within a job description but whether making such announcements is actually part of the job that the State entrusted the official to do**."

In effect, *Lindke* guides public officials who have social media accounts to eliminate ambiguity by designating accounts that are not intended to be public, stating: "[I]f Freed's account had carried a label –e.g., 'this is the personal page of James R. Freed'–he would be entitled to a heavy presumption that all of his posts were personal…but Freed's page was not designated either 'personal' or 'official.'" The Court suggested that more clarity in labeling the account might have avoided the need for the fact-specific review.

Decisions are still pending on cases heard by the Supreme Court last month, as to whether states may prohibit private companies like Facebook and X from removing or banning content of campaigners or public officials, or whether doing so constitutes that these laws amount to a violation of these companies' First Amendment right of editorial discretion.

[1] In this instance, blocking meant Lindke could see Freed's posts but could no longer post comments. The Court did not ultimately address the effect of blocking a user page-wide.

[2] The Court vacated the O'Connor appellate decision, sending it back to the Ninth Circuit to apply this new standard to come to a determination.