Supreme Court Clarifies Test for Whether Blocking Public from Officials' Social Media Accounts Violates First Amendment

June 6, 2024
Number 27

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The United States Supreme Court finally resolved a split between the circuits by articulating a new test which aims to preserve the right of public officials to remain private persons, even when they create content on social media which implicates their public persona. (*Lindke v. Freed* (2024) 601 U.S. 187.)

In August 2022, we posted a Client New Brief (CNB) entitled Ninth Circuit Holds Blocking Public from Officials' Social Media Accounts May Violate First Amendment. The CNB discussed the then-recent Ninth Circuit decision *Garnier v. O'Connor-Ratcliff* (9th Cir. 2022) 41 F.4th 1158, in which the Ninth Circuit Court of Appeals held that blocking members of the public from social media pages created by public officials and used for agency business communication, "under the color of law," may violate the First Amendment.

In June 2022, under similar factual circumstances, in *Lindke v. Freed* (6th Cir. 2022) 37 F.4th 1199, the Sixth Circuit Court of Appeals reached the opposite conclusion, holding that a public official was not acting as a government official, and did not violate the First Amendment, when he blocked a private citizen from his social media page.

On March 15, 2024, after a deeply fact specific analysis, Justice Amy Coney Barrett delivered the unanimous opinion of the United States Supreme Court in *Lindke*, providing lower courts with a new test to determine when speech is attributable to the State. In an opinion replete with colorful analogies, the Supreme Court did not address how the test would be applied to the facts of the case, nor did it treat social media as a distinct new forum. Instead, the Supreme Court relied upon established constitutional law principles of state action and public versus private forums to treat virtual spaces much like physical spaces with restrictions that should be tailored narrowly without regard to content. The Supreme Court remanded *Lindke* to the extent the lower court used a different test. Similarly, in a *per curiam* opinion, *O'Connor-Ratcliff*

v. Garnier (2024) 601 U.S. 205, the Supreme Court remanded that case to the extent the lower court there used a different test.

Background

James Freed and Kevin Lindke

"Can you allow city residents to have chickens?" asked a Port Huron, Michigan resident of James Freed on his Facebook page. James Freed, in his role as City Manager of Port Huron, replied. Unfortunately for Mr. Freed, questions such as this one were interspersed among photos of daddy daughter dances, home improvements, and beloved family dog, Winston on his Facebook profile page. Although Mr. Freed created his personal Facebook profile back in 2008, upon reaching Facebook's five thousand friends limit, he converted his profile to a "Public Page." This is this the type of page that is often used by public figures and celebrities. In 2014, when he became City Manager, Mr. Freed used a picture of himself dressed in a suit with a city lapel pin as his profile pictures. In the "About" section of his page, Mr. Freed included a link to the City of Huron's official website and included the city's general email address. He continued to make personal posts on his page.

Had Mr. Freed kept his private and public persona separate he would not have had a run in with Kevin Lindke, a concerned citizen of Port Huron, who found Mr. Freed's performance as City Manager "abysmal" and believed "the city deserved better." Mr. Lindke shared his opinion regarding Mr. Freed's performance as City Manager on the same Facebook page where other residents "liked" and "hearted" pictures of his daughter Lucy and dog Winston, or asked mundane questions about raising poultry in their backyard. When Mr. Freed posted a picture of himself picking up food during the Covid-19 pandemic, Mr. Lindke commented "while the residents were suffering, the city's leaders were eating at an expensive restaurant." Mr. Freed deleted Mr. Lindke's unwelcome comments at first, when Mr. Lindke persisted, Mr. Freed blocked him from his public Facebook page altogether. Mr. Lindke sued.

Mr. Lindke alleged violations of the First Amendment under section 1983 of title 42 United States Code (Section 1983), arguing that Mr. Freed's Facebook page constituted a public forum. To sort the personal from the official, the Sixth Circuit Court of Appeal relied on whether Mr. Freed used his page to perform an "actual or apparent duty of his office with real or perceived authority." Based on this test, the Sixth Circuit held that Mr. Freed did not violate the First Amendment rights of Mr. Lindke when he blocked him from his Facebook page.

Michelle O'Connor-Ratcliff, T.J. Zane, and Christopher and Kimberly Garnier

Many miles away, in Poway, California, Michelle O'Connor-Ratcliff and T.J. Zane, members of the Board of Trustees for the Poway Unified School District, also blocked members of the public on their Facebook pages. Each had a private Facebook page which they used for posting personal content shared with their friends and family. They also created a public Facebook page while running for their respective positions. They did not post personal content on the public pages, but rather, they posted board meeting recaps, solicited applications for vacant positions, and provided public safety updates. Christopher and Kimberly Garnier were parents with children in the school district with a history of

litigation against and vocal criticism of the Board of Trustees. In 2015, the Garniers began posting on the Trustees' public and private Facebook pages. In one example, they made up to 225 identical replies to posts they did not like. Another time they made 42 separate posts about a single topic. At first, the Trustees used a "word filter" to reduce the Garniers' comments, but eventually the Trustees blocked the Garniers from their social media pages. The Garniers sued.

The Garniers also alleged violation of Section 1983 because the Trustees Facebook pages constituted a public forum. The Ninth Circuit agreed, using a nexus test to determine whether seemingly private conduct was sufficiently related to the performance of official duties to render the conduct "state action" and thus subject to the First Amendment and Section 1983.

Due to the different tests used by the Sixth Circuit and Ninth Circuit, the Supreme Court granted review of both cases in order to resolve the split.

Return To Established Constitutional Principles

Although "new," the Supreme Court's test articulated in *Lindke* focuses on state action in the context of virtual spaces while remaining grounded in established state-action doctrine.

Specifically, the state-action doctrine requires a plaintiff to show that the state actor:

(1) had actual authority to speak on behalf of the state on a particular matter, and

(2) purported to exercise that authority in the relevant posts.

The Supreme Court explained that the test's first prong is "grounded in the bedrock requirement that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." In order to meet this requirement, a plaintiff must show that the state actor had some authority to communicate with the public. The Supreme Court noted that the threshold inquiry is whether making announcements is actually part of the job that the state entrusted the official to do. If not, the first prong is not met. In the words of the Supreme Court: "To misuse power, one must possess it in the first place."

Regarding the second prong, the Supreme Court noted that "for social media activity to constitute state action an official must not only have state authority, he must also propose to use it." Put differently, "if the official does not speak in the furtherance of his official responsibilities, he speaks with his own voice." This is a fact-specific determination in which "posts' content and function are the most important considerations." The Supreme Court explained that "a post that expressly invokes state authority to make an announcement not available elsewhere is official, while a post that merely repeats or shares otherwise available information is more likely personal."

The second prong of the test targets posts, not pages, which is arguably the clearest direction provided in this case. Lower courts must analyze each post to determine whether it is public or private and creates a public forum. Because, as the Supreme Court noted, "technology matters to the state-action

analysis," the inquiry may require a post-by-post analysis to determine whether each post can be commented upon or restricted individually.

Takeaways

The twin Supreme Court cases of *Lindke* and *O'Connor-Ratcliff* ease the burden on public officials and provided them with some guidelines as to how they may avoid constitutional scrutiny when limiting public access to their social media pages. Public officials may be able to limit access by the public to private pages on which they only share personal content without any authority to speak for the state. While it remains to be seen how this case will be interpreted by the lower courts, some things are clear. For example, using an intern or an employee to make social media posts on a public official's behalf will most likely create a public post bringing with it constitutional protections for public access. On the other hand, rebroadcasting a board meeting on a personal Facebook page, in an unofficial capacity may not render that airing of the meeting a public forum, so long as it is officially broadcast elsewhere. Also notable is the capacity of the social media platforms to narrowly limit access, i.e., allow blocking of individual comments as opposed to blocking an individual from an entire page. Suffice it to say that social media platforms bring with them new and unique challenges for public officials. Considering current law, it is advisable for public officials to audit their social media presence and consult legal counsel before deleting comments or blocking members of the public.

If you have any questions about *Lindke v. Freed* or *O'Connor-Ratcliff v. Garnier*, please contact the authors of this Client News Brief or any attorney at one of our eight offices located statewide. You can also subscribe to our podcasts, follow us on Facebook, Twitter and LinkedIn or download our mobile app.

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