Public Law Update – US Supreme Court Rules on Whether Actions Taken by Public Officials on Social Media Violates First Amendment

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Public officials, like many Americans, use social media to communicate. The First Amendment of the United States Constitution prohibits governments and public officials from abridging a person's freedom of speech. The issue that courts have been grappling with is determining when a public official uses their social media account as a private citizen and when are they using their social media account as a public official subject to the First Amendment.

In *Lindke v. Freed*, the Supreme Court created a rule to determine whether an action taken by a public official on social media infringes upon the First Amendment rights of constituents. In *Lindke*, a City Manager in Port Huron, Michigan maintained a Facebook account where he posted about a wide range of topics, including his personal life and his job. A member of the public sued the City Manager for violating the First Amendment after the City Manager deleted his comments and eventually blocked his profile from interacting with the City Manager's posts.

The Supreme Court ruled that a public official is liable for First Amendment violations only if the official both (1) possessed actual authority to speak on behalf of the government on a particular matter; and (2) tried to exercise that authority in their social media.

The first factor in the court's analysis addresses the authority, if any, with which a public official posts to social media. The court did not determine whether posting public announcements to social media *could* fit within the official's job description but instead asked whether making such announcements is *actually* part of the public official's job. Courts are instructed to consider the statute, ordinance, regulation, or past practices that authorize the public official to speak for the public agency. The Supreme Court noted if an official has authority to speak for a public agency, they have the authority to do so on social media unless a law bars them from doing so. In order to determine the second factor of the test, the official must purport to be using their authority in the disputed social media posts.

The Court implemented a fact-specific analysis to determine if the public official's social media post was done for the purpose of exercising government authority. The Supreme Court has instructed

courts to consider the content of the relevant posts (those that the public official deleted Plaintiffs' comments from) and the general use of the social media page. The Supreme Court noted 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 Court also noted that the technology used by the social media site was important, distinguishing between Facebook which has a blocking tool that operates on a page-wide basis and more narrow social media tools, such as those on Twitter, which allow social media users to block a person from commenting on their posts but still allows the blocked person to view the official's posts. As the Court put it, "[i]f page-wide blocking is the only option, a public official *might be unable* to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts."

The Supreme Court did not decide whether the Port Huron City Manager violated the First Amendment, but remanded the case to a lower court to apply the new rule it created. In another opinion, the court remanded *Garnier v. O'Connor-Ratcliff* to the Ninth Circuit for reconsideration under the new *Lindke* standard. The *Garnier* case involved two school board trustees who created Facebook pages to promote their campaigns before their election and continued to post school board-related content after their election. Their Facebook pages described them as government officials and they blocked two local constituents from their Facebook pages after they began posting lengthy and repetitive comments to their posts.

Suggestions for Public Officials

- Public officials should label their social media accounts as personal or on behalf of the public agency and if they are social media accounts on behalf of the public agency, public officials should make sure that they have authority from the public agency to post.
- Public officials should not post personal news to their official accounts and vice versa. The Supreme Court makes it clear that public officials who label their social media accounts as personal are entitled to a strong presumption that their posts to that account are personal. Purely personal social media accounts are not subject to the First Amendment constraints and thus, third party comments may be blocked or deleted.
- If a public official makes an announcement about their position as a public official on their personal social media account, they should provide a link to an official government platform on which the same materials are available. Doing so will create a presumption that the social media post was not created in an official capacity.

- If a government agency decides they would like to engage with their constituents through social media, the agency should create an official page where posts can be published. If this page is specific to an elected official, like a city manager, this account should be maintained by the government agency, so it can be transferred from one public official to another, to demonstrate the official capacity of the account. Government agencies should also develop social media policies to identify who has authority to post on the various social media accounts and to ensure public officials comply with the First Amendment.

Attorneys at Burke regularly advise clients on legal matters related to compliance with the First Amendment and have drafted social media policies for clients.