Ask the Experts

Public Officials May Not Block Commenters from Official Social Media Accounts and Posts

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Social media sites have become an essential tool for anyone who wishes to share with their friends and others information regarding birthdays, anniversaries, vacations and, perhaps, the latest news regarding their job. Of course, over the last several years local government officials, including special district officials, have realized that social media platforms also make communication with constituents extremely convenient. But sharing information about one's job is slightly different for public officials. When public officials write about their role in government, it raises First Amendment issues, including whether the author of the social media site must allow anyone to comment on issues related to their public job. So, special district officials must be cognizant of whether they are creating a social media site that conveys First Amendment rights to members of the public, who can then comment on the social media site with relative impunity. In the past, in California, it was difficult for public officials

to differentiate their personal social media, from which they could exclude anyone, from their official social media, which conferred First Amendment rights on anyone visiting their social media sites.

However, after the recent ruling in the United States Supreme Court, Lindke v. Freed, 601 U.S. 187 (2024), officials now have clearer direction as to how to keep their social media sites "personal" and not expose their social media sites to a First Amendment challenge. Mr. Freed was the City Manager of Port Huron, Michigan. Freed maintained a personal Facebook page and posted about his personal life and his job. Once the COVID-19 pandemic began, Freed also posted both personal and job-related information about COVID-19. Mr. Lindke opposed the city's position on COVID–19 and unequivocally expressed his displeasure on Freed's Facebook page. Freed, first, deleted some of Lindke's comments and then banned him from the Facebook page. Lindke sued alleging that he had a First Amendment right to comment on Freed's Facebook page. Ultimately, the Supreme Court articulated a rule to follow but sent the matter back to the lower courts to determine whether Lindke truly had a right to comment on Freed's Facebook page.

The Court determined that officials' social media accounts will be considered personal, and not subject to the First Amendment claims of others, unless the official (1) possesses actual authority to speak on the agency's behalf ("state action"), and (2) purports to exercise that authority when the public official posts on social media.

The Supreme Court reasoned that public officials themselves have the "First Amendment right to speak about their jobs and exercise editorial control over speech and speakers on their personal platforms." However, this is not the case for social media activities that are considered state action. Determining whether a public official's social media activity constitutes state action, which prevents blocking specific comments or commenters, is a "fact-intensive inquiry." But, if the official does not possess actual authority to speak on behalf of the agency, the appearance or function of the social media account will not matter.

To create a presumption of "personal use," the Court suggests a social media account carry a label (i.e., "this is the personal page of [public official]") or a disclaimer (i.e., "the views expressed are strictly my own") but the presumption is not irrebuttable. Below, are two "Key Takeaways" that officials should consider when posting on their personal social media accounts to avoid the risk of liability if they decide to block a comment or commenter:

- Avoid State Action. For a post to be state action, the official must have actual authority to speak on behalf of the public agency through statute, ordinance, regulation, custom, or usage. To qualify as "custom" or "usage," the official's social media use on behalf of the public agency must be "permanent and well settled" and that authority must extend to the type of speech in question;
- Emphasize Personal Use. The Court will look at several factors such as: biography description ("personal page" v. "official page"), page maintenance ("individual" v. "public agency"), the type of posts ("repetition of readily available information" v. "public announcement unavailable anywhere else").

Officials should discuss the use of their social media accounts with legal counsel to determine if it is "official" or "personal." If a social media account is "personal" then a public official can decide which comments are allowed on the site and who can be banned from the site. However, if the social media account is "official" then a public official must be cognizant of the First Amendment rights of anyone who visits their social media site.

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