



SCSBA 2025 ANNUAL CONVENTION
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“Board Members Use of Their Personal Social Media Accounts To Post About District Business and Affairs – Can They Block Critical Comments and Users”

Presented By:
Dave Duff
Duff Freeman Seibert, LLC
www.dfs-lawfirm.com
(803) 790-0603

First Amendment

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

(applies to the States and their agencies and political subdivisions)

STATE ACTION

The First Amendment free speech protection is only binding on the government.

For a violation to occur, there must be state, not private, action.



How is “state action” determined in the context of public officials using social media?

FIRST AMENDMENT FORA

- Traditional Public Forums
 - Streets, sidewalks, and parks
- Limited (or Designated) Public Forums
 - Government has purposefully opened to the public for expressive conduct

VIEWPOINT DISCRIMINATION

- ◆ Is prohibited by the First Amendment all types of public forums
- ◆ Viewpoint discrimination occurs when the government or a government official takes action to suppress a particular point of view



TWO CONFLICTING CIRCUIT COURT CASES

Lindke v. Freed (Sixth Circuit 2022)

speech by a city manager on a private social media was not state action and did not create a public forum such that official could block users or delete critical comments related to the speech

TWO CONFLICTING CIRCUIT COURT CASES

O'Conner-Ratcliff v. Garnier (Ninth Circuit 2022)

Two school board members violated the First Amend. rights of two parents when they deleted and hid their comments and blocked parents from further posting on board members social media pages

FACTS OF O'CONNOR-RATCLIFF V. GARNIER

- Michelle O'Connor and T.J. Zane were elected to the Poway Unified School Board, north of San Diego, in 2014
- Both had created public Facebook accounts during their campaigns, which they converted into platforms for information about their board service and the school district
- O'Connor-Ratcliff did the same with her Twitter account

FACTS OF O'CONNOR-RATCLIFF V. GARNIER

- On those accounts, the two identified themselves as board members and frequently posted about district matters, such as school achievement, open positions, LCAP, online surveys, and recaps of school board meetings
- They both at times used the word “official” to describe their sites, though the social media pages were not in any way operated by the school district

O'Connor-Ratcliff - Facts Cont'd

- Christopher and Kimberly Garnier, parents who were critical of the school board and district operations, routinely posted repetitive, lengthy comments on the members' social media pages
- In one instance, Christopher posted 226 identical and critical replies to O'Connor-Ratcliff's Twitter account in 10 minutes
- In another instance, Christopher left 42 identical replies on O'Connor-Ratcliff's Facebook page

O'Connor-Ratcliff - Facts Cont'd

- Frustrated with the repetitive nature of the comments, the board members simply began deleting or hiding the comments and when they became tired of monitoring and deleting comments, they just blocked the Garniers altogether
- The Garniers sued O'Connor-Ratcliff and Zane personally, alleging they had violated the Garniers' First Amendment rights.

Lower Court Rulings In *Garnier*

- The District Court and the Ninth Circuit agreed with the Garniers, finding that because the board members represented a public entity and had invited the public to engage on school district and board matters on their social media accounts, they had created constitutionally-protected public forums



THE U.S. SUPREME COURT DECISIONS

- In a unanimous March 15, 2024, opinion in the *Lindke* case, written by Justice Amy Coney Barrett, the High Court held that public officials can be held liable when they block their critics only if they have the authority to speak on behalf of the state and are actually exercising that power
- Only then are they engaged in “state action”

THE U.S. SUPREME COURT DECISIONS

- Justice Barrett’s opinion makes it clear that public officials do not relinquish their First Amendment rights to speak when they become public officials: “while public officials can act on behalf of the state, they are also private citizens with their own constitutional rights.”

SUPREME COURT OPINION (CONT'D)

- Two-part test for when officials' social media posts meet the definition of official communication that constitutes state action (and thus whether blocking a critic's posts violates that user's First Amend. rights)
- First, the official must have "actual authority" to speak on behalf of the state
 - * the appearance of a public official's personal social media page will not be the determining factor for state action, even when such pages use words like "official"

SUPREME COURT OPINION (CONT'D)

*“private action - no matter how ‘official’ it looks - lacks the necessary lineage”

* “the inquiry is not whether making official announcements *could* fit within the [board member’s official responsibilities]; it is whether making official announcements is *actually* part of the [role or responsibilities] that the state entrusted the official to do [or carry out]”

SUPREME COURT OPINION (CONT'D)

- Second prong of the test - the official must purport to use that authority in a particular social media post
- “If the public [official] does not use [his/her] speech in furtherance of his[/her] official responsibilities, he[/she] is speaking in their own voice.”

SUPREME COURT OPINION (CONT'D)

- Illustration from the “offline world”: school board chair announces at a school board meeting that the board has lifted pandemic-era restrictions on public schools. The next evening, at a backyard barbeque with friends whose children attend public schools, he shares that the board has lifted the pandemic-era restrictions. The former is state action taken in the chair’s official capacity as the board chair; the latter is private action taken in his personal capacity as a friend and neighbor. While the substance of the announcement is the same, the context- an official meeting versus a private event - differs.

TAKE-AWAYS

- The new *Lindke/Garnier* two-part test will shield many posts and actions by public officials from First Amendment liability
- Include a disclaimer that you are not posting on behalf of the district or board and not intending to create a public forum for school district affairs
- But be careful with mixed-use accounts, even with disclaimers

TAKE-AWAYS

- Turn off any site comments features altogether
- If worried still, avoid engaging on social media in discussions on matters concerning district business

Thank You

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