Supreme Court Provides Further Guidance on Public Officials First Amendment Rights on Social Media

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A pair of new Supreme Court decisions provides further guidance about when a public official can be held liable under the First Amendment for blocking constituents on social media.

In the first case (Lindke v. Freed), James Freed, the city manager of Port Huron, Michigan, used his personal Facebook page to post about his personal life, and to engage with his constituents regarding Port Huron. Freed posted about the COVID-19 pandemic on this page, sharing both his personal experiences and updates on Port Huron's official pandemic response. Kevin Lindke objected to Freed's handling of the pandemic, frequently leaving critical comments under Freed's posts. Freed ultimately blocked Lindke from leaving these comments. Lindke sued, alleging that Freed violated his First Amendment rights by removing his ability to speak on the Facebook page of a public official. Lower courts held that Freed was acting in his personal capacity when blocking Lindke; therefore, Freed did not violate Lindke's First Amendment rights.

In the second case (O'Connor-Ratcliff v. Garnier), Michelle O'Connor-Ratcliff and T.J. Zane, members of a public school district board, used Facebook pages that classified them as government officials to share school district related content and seek feedback from constituents. The Garniers, parents in the school district, repeatedly replied to these posts with critical comments. Eventually, O'Connor-Ratcliff and Zane blocked the Garniers from their pages. The Garniers sued, alleging, like Lindke, that their First Amendment rights were violated by not being able to speak on the Facebook page of a public official. The Ninth Circuit ruled in favor of the Garniers, holding that a close nexus existed between

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O'Connor-Ratcliff's and Zane's use of Facebook and their official positions. The Supreme Court heard appeals on both cases.

In two unanimous opinions, the Supreme Court held that a public official only violates the First Amendment rights of a constituent by blocking them on social media when the official: (1) had actual authority to speak on the government's behalf on a particular matter; and (2) purported to exercise that authority by posting on social media.

In its decisions, the Court explained that a government official has authority to speak on the government's behalf when written law or longstanding custom gives them such authority. If a government official's job description does not include making government statements, the official cannot violate anyone's First Amendment rights by blocking them on social media. These determinations are typically fact-intensive. As such, courts will examine the content and function of the posts to determine whether the government official is actually speaking on the government's behalf, or if they are speaking in their personal capacity. The Court remanded the two cases back to the lower courts to apply this test.

Takeaways: If public officials use social media as part of their job description or as a longstanding custom, then they are more likely to violate the First Amendment if they block critical constituents (or their comments) on social media. A government official is less likely to violate the First Amendment if the official blocks constituents from a strictly personal social media account, which they do not use to comment on their official duties. For any question you have regarding whether this recent decision impacts any of your or your organization's activities, please contact **Ryan Cummings** (716.848.1665) or **Aaron Saykin** (716.848.1345) of our **Media and First Amendment Practice**, or **Jeffrey Swiatek** (716.848.1449) of our **Municipal Practice**.

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