Issues High Court Is Weighing In Gov't Social Media Cases

By **Alyssa Howard** (December 13, 2023)

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Nearly every social media platform gives users a tool for dealing with antagonistic, angry or critical commenters: the block button. But when a public official presses that button on her personally created account, is she breaking the law?

The answer to that question, which holds significant consequences for officials at every level of government, has divided the courts and is now being considered by the U.S. Supreme Court.

In late October, the justices heard oral arguments in two cases, Lindke v. Freed and O'Connor-Ratcliff v. Garnier, seeking to resolve a circuit split on whether public officials who block commenters from their personally created accounts are acting "under color of" state law for purposes of Title 42 of the U.S. Code, Section 1983.

At least four circuits consider numerous factors, like the appearance and content of the account.[1] This standards-based approach could present challenges to public officials who use personal social media accounts. An official could post some work-related content on a personal account, but he has little way of knowing when a court would determine that his account has shifted into one that would fall within the scope of Section 1983.

By contrast, the U.S. Court of Appeals for the Sixth Circuit in Lindke articulated a bright-line "duty-or-authority test" in June 2022, which narrows the inquiry to whether a public official's social media activity was either in furtherance of governmental "duties" or depended on "state authority."

Petitioner Kevin Lindke posted comments on respondent James Freed's Facebook page that were critical of his handling of the COVID-19 pandemic as the town's city manager. In response, Freed deleted Lindke's comments and blocked him from posting further comments. In affirming the district court ruling, the Sixth Circuit held that, because Freed did not operate the page pursuant to his official duties and did not depend on state authority in doing so, he was not acting "under color of" law for purposes of Section 1983.

The Sixth Circuit found that the duty prong was not satisfied because "no state law, ordinance, or regulation compelled Freed to operate his Facebook page." The activity also did not depend on state authority because the page "did not belong to the office of city manager," and Freed did not "rely on government employees to maintain it."

The court eschewed other circuits' emphasis on an account's appearance, explaining that such questions "resemble the factors we consider in assessing when police officers are engaged in state action," which are only relevant in those cases because an officer's "appearance actually invokes state authority."

A month later, the U.S. Court of Appeals for the Ninth Circuit rejected that reasoning, finding instead that considerations of appearance and action were both relevant, in O'Connor-Ratcliff v. Garnier. The court found that two elected school board members who blocked two individuals were state actors where they "clothed their pages in the power and prestige of their offices and created and administered the pages to perform" official duties.

The significance of the circuit split, along with the challenge of adapting long-standing doctrine to the new realities of near-ubiquitous social media use by public officials, was evident when the Supreme Court heard Lindke and O'Connor-Ratcliff in October.

In analyzing the First Amendment implications of conduct on social media, the court is tasked with determining how canonical legal principles will fit into a shifting landscape driven by advances in technology. Justices grappled with what Justice Neil Gorsuch described as the "profusion of possible tests" for determining state action in the social media context. And, as they did so, some clarity began to emerge around the factors that appear most important to the justices.

In response to the Ninth Circuit petitioners' argument for the Sixth Circuit's "duty-or-authority" test, Justice Elena Kagan asked questions modeled on former President Donald Trump's 2021 challenge to the U.S. Court of Appeals for the Second Circuit's holding that he violated the First Amendment by blocking access to comments on his Twitter (now known as X) account.[2]

While the petitioners' counsel said that case presented "a harder question" because a government staffer helped run that account, Justice Kagan asked whether the former president would have been acting as a state official if "he gave every indication of writing his tweets himself" and received no staff help. Even in such circumstances, she noted, Trump "seems to be doing ... a lot of government on his Twitter account," and the platform "was an important part of how he wielded his authority."

Justices questioned counsel for Lindke on how much personal content would take an official's account out of the realm of state action. Justice Samuel Alito asked whether, under their test, the line would be at "like 1 percent, one-half of 1 percent" content related to official duties. Counsel responded that the test was qualitative and relating to "whether you've established [a forum] as a channel of communication."

That led Justice Brett Kavanaugh to express concern that "to define doing your job as talking about your job is really quite all-encompassing" because getting out and talking to people is "where they learn things to help them do their job[s] better."

The line-drawing concerns raised by Justices Alito and Kavanaugh may indicate their preference for a bright-line rule, like the one articulated by the Sixth Circuit, to create predictability for public officials.

Participating on behalf of the officials in both cases, the U.S. Department of Justice argued that the question comes down to whether the government owns the forum to which access is being denied. The justices were largely skeptical of this position, with Chief Justice John Roberts noting his surprise over the "emphasis on private property" and asking, "[I]n what sense is this really private property? ... [I]t's just the gathering of the protons or whatever they are."

Deeming the government's proposed test "archaic," Justice Kagan emphasized that "more and more of our government operates on social media" and framed the court's task in these cases as finding rules to meet an ever-changing world.

What those rules will ultimately look like remains uncertain, as the oral arguments produced no clear consensus around an appropriate test for state action. However, it seems likely that the court will choose from one of the existing tests used by the circuit courts that have

considered the issue.

On one end of the spectrum, the court may apply a duty-or-authority rule, which some justices seemed to favor for its clear-cut analysis. Under this test, officials would retain substantial latitude to post content related to their roles on personal social media accounts without risking a finding that they are state actors for purposes of the First Amendment.

This test would cabin liability for officials even when they publish frequent updates about their official responsibilities, as long as they aren't doing so pursuant to a public duty or by virtue of their governmental authority. Under this analysis, officials may even be able to associate their social media accounts with relevant government websites or email addresses, as Freed did, without being deemed state actors.

On the other hand, the court could embrace the multifactored "appearance and content" standard, which could create greater uncertainty for public officials on social media. Under this standard, officials with personally created social media accounts may need to tread carefully — perhaps by omitting official titles and updates regarding their government positions entirely — to avoid qualifying as state actors.

In other words, the fact that a public official initially created his Facebook account in college would not be an automatic bar to liability if that official's page had the appearance and content of engaging in government activity. By encouraging officials to separate their personal and public-duty-related communications, this standard could create more clarity for other users of social media about the nature of public employees' social media accounts.

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[1] This includes the Second, Fourth, Eighth, Ninth, and Eleventh Circuits. See Knight First Amend. Inst. v. Trump, 928 F.3d 226, 231, 234–36 (2d Cir. 2019), vacated as moot sub nom. Biden v. Knight First Amend. Inst., 141 S. Ct. 1220 (2021); Davison v. Randall, 912 F.3d 666, 680–81 (4th Cir. 2019); Campbell v. Reisch, 986 F.3d 822, 826–27 (8th Cir. 2021); Charudattan v. Darnell, 834 F. App'x 477, 482 (11th Cir. 2020) (per curiam).

[2] After President Trump left office, the Court vacated the Second Circuit's judgment and remanded for the court to dismiss the case as moot without addressing the merits. See Biden v. Knight First Amend. Inst., 141 S. Ct. 1220 (2021).