Issue Brief

Social Media Account Usage by Public Officials

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Overview

The growth of social media usage has presented a host of difficult free speech issues for public officials. Recently, multiple courts have weighed in on how public officials' use of social media platforms can impact First Amendment rights for individuals. These court cases provide some factors that courts will consider when hearing challenges but do not provide clear guidance as to what exactly public officials can or cannot do without violating citizens' First Amendment rights.

Public officials are limited in their authority to prohibit First Amendment-protected speech, which can include "speech" on the Internet, such as social media comments. Beyond outright prohibiting speech, the government is also barred from unduly restricting the freedom of speech. This includes public officials, as, whenever they act in an official capacity or in the exercise of their official responsibilities, they are considered as engaging in a state action, which affords constitutional protections to citizens they interact with, online or in person.

Whenever a public official's social media usage is challenged on constitutional grounds, a reviewing court must determine whether that public official was engaging in an activity that constitutes a state action. This determination is only the first step of analysis, as, even if the court finds that the public official acted in an official capacity, the court must also find that the public official violated the First Amendment through his actions. In such cases, a court reviewing the matter might consider if the public official established a public forum by deliberately making his social media post or page accessible for public discussion. If the public official is found to have created a public forum, it is still within the government's rights to define explicit boundaries on the range of permissible dialogue. Nevertheless, despite the government's authority to set restrictions on the public forum and the dialogue within, it is outright prohibited from practicing viewpoint discrimination by blocking or restricting the speech of individuals based on their ideological beliefs or viewpoints.

The main factors that public officials and bodies should consider when reviewing their social media usage are as follows:

- Whether the social media account is intended to be solely for personal purposes, solely for official purposes, or for mixed-use purposes;
- Whether the public official's job duties may give rise to claims that his operation and management of the social media account is conducted in his official capacity;
- Who has access to and manages the social media account;

- Whether it is appropriate for the social media account to have a personal-use disclaimer; and
- What limitations should uniformly apply to the social media account's posts.

One final related consideration concerns disclosure and record retention: if a public official uses social media in the transaction of public business, the public official may be creating public records that are subject to public disclosure as well as record retention rules under the Freedom of Information Act.

This Issue Brief explores the current challenges for public officials' use of social media, provides a brief background of relevant case law regarding public officials' use of social media, and outlines some factors that public officials should consider when self-moderating their social media usage.

First Amendment, Freedom of Speech, Public Forums, and State Action Issues

The Free Speech Clause of the First Amendment generally limits the government's ability to exclude constituents from public forums.[1] While the majority of First Amendment case law predates the modern rise of the Internet, the Supreme Court of the United States (the Court) has considered how the Internet should be viewed as a venue in First Amendment challenges. In considering the nature of social media and free speech, the Court has equated the Internet to traditional public forums, such as streets or parks. In *Packingham v. North Carolina*, the Court struck down a North Carolina law that made it a felony for registered sex offenders to use commercial social networking websites that allow minor children to be members. Applying strict scrutiny, the Court held that the law impermissibly restricted lawful speech as it was not narrowly tailored to serve the government's interest in protecting minors because it "foreclose[d] access to social media altogether," thereby "prevent[ing] the user from engaging in the legitimate exercise of First Amendment rights."[2]

Beyond prohibiting fully foreclosing access to social media, the First Amendment's Free Speech Clause also prevents the government from unduly "abridging the freedom of speech."[3] While the Free Speech Clause's text only explicitly applies to Congress, the Court has understood the Clause's prohibition to extend to state government through the Fourteenth Amendment's Due Process Clause.[4] This prohibition extends to government employees and public officials who perform government functions, because, while such employees and officials are private individuals, they also may engage in state action whenever they act under color of law.[5] In other words, their actions may be considered a state action, subject to constitutional protections, whenever they act in an official capacity or while exercising official responsibilities.[6]

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[1] U.S. CONST. amend. I.
[2] *Packingham v. North Carolina*, 582 U.S. 98, 105, 107 (2017).
[3] U.S. CONST. amend I.
[4] *Gitlow v. New York*, 268 U.S. 652, 666 (1925); U.S. CONST. amend XIV.
[5] In the context of state action, the phrase "under color of law comes" from a federal law known as Section 1983 (42 U.S.C. § 1983) that authorizes lawsuits against state officials for constitutional violations.
[6] *See Manhattan Cmty. Access Corp. v. Halleck*, No. 17-702, slip op. at 6 (U.S. June 17, 2019) ("a private entity can qualify as a state actor in a few limited circumstances," [such as] "[1] when the private entity performs a traditional, exclusive public function; [2] when the government compels the private entity to take a particular action; or [3] when the government acts jointly with the private entity,"). *See also West v. Atkins*, 487 U.S. 42, 50 (1988).

United States Court of Appeals for the Fourth Circuit Case Law Background: Davison v. Randall and Scarborough v. Frederick County School Board

Two recent cases from Virginia, heard in the United States Court of Appeals for the Fourth Circuit (the U.S. Court of Appeals), provide guidance for public officials' social media usage and First Amendment protections.

In the first case, *Davison v. Randall*, Phyllis Randall, then the chair of the Loudoun County Board of Supervisors (the Board), appealed a district court ruling that found she had violated the First Amendment rights of one of her constituents, Brian Davison, when she banned Davison from the "Chair Phyllis J. Randall" Facebook page she administered.[7] Davison had posted comments on Randall's Facebook page that criticized Randall's statements at a town hall meeting. The U.S. Court of Appeals affirmed the ruling of the district court, finding that Davison had demonstrated an injury in fact since he continued to post about alleged municipal corruption on Randall's Facebook page and that, based on Randall's testimony that she believed she could ban Davison from her Facebook page based on his views, there was a credible threat of future bans based on the content of his posts. The U.S. Court of Appeals also held that the interactive component of Randall's Facebook page constituted a public forum for First Amendment purposes and that Randall engaged in unconstitutional viewpoint discrimination when she banned Davison from such forum.

The U.S. Court of Appeals acknowledged that Randall created and administered her Facebook page to further her duties as a municipal official, noting that she used it "as a tool of governance" to provide information to the public about her and the Board's official activities and to solicit input from the public on policy issues that she and the Board considered. Supporting this finding, the U.S. Court of Appeals utilized a "totality of the circumstance" approach to find that Randall had taken action "under the color of state law" and ultimately determined that Randall's actions "bore a 'sufficiently close nexus' with the State to be 'fairly treated as that of the State itself.'"[8] To that end, the U.S. Court of Appeals concluded that the Facebook page at least "met the requirements of a limited public forum," as Randall had:

> Swathe[d] the [page] in the trappings of her office by, among other things: (1) posting her official title on the page; (2) describing the page as belonging to a government official; (3) listing her government contact information; (4) linking to official government websites; and (5) posting content that had 'a strong tendency towards matters related to [her] office.[9]

Finally, the U.S. Court of Appeals affirmed the district court's finding that "Randall's ban of Davison amounted to an effort 'to suppress speech critical of [such members'] conduct of [their] official duties or fitness for public office,'" which reinforced that the ban was taken under color of state law.[10]

In the second case, *Scarborough v. Frederick County School Board*, the United States District Court for the Western District of Virginia, Harrisonburg Division (the U.S. District

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[7] *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019).
[8] *Id*. at 680 (*citing Rossignol v. Voorhaar*, 316 F.3d 516 at 525 (2003)).
[9] *Scarborough v. Frederick Cty. Sch. Bd.*, 517 F. Supp. 3d 569, 577 (W.D. Va. 2021) (*quoting Davison*, at 680-81).
[10] *Davison*, at 681 (internal citations omitted).

Court), granted in part and denied in part the defendants' motion to dismiss.[11] The pro se plaintiff, Christie Scarborough, filed a civil rights suit against the Frederick County School Board and several employees of Frederick County Public Schools (FCPS) alleging that they violated her First Amendment rights and engaged in viewpoint discrimination in violation of the First Amendment when they (a) deleted her comments that criticized FCPS's COVID-19 protocols and face mask policy from FCPS's official Facebook page, (b) blocked her from such Facebook page, and (c) blocked her from two FCPS superintendents' official Twitter, known since July 2023 and referred to herein as X, pages.[12] The defendants filed a motion to dismiss the First Amendment claims, arguing that Scarborough failed to state any viable constitutional claims.

The U.S. District Court, in part, denied the motion to dismiss the First Amendment claims, determining that Scarborough had sufficiently alleged that the social media accounts at issue were public forums and that the defendants engaged in unconstitutional viewpoint discrimination by deleting her comments and blocking her from these public forums. In making this finding, the U.S. District Court determined that Scarborough's Facebook comments about FCPS's COVID-19 protocols constituted public expression, also known as "speech on matters of public concern," which fell squarely within the ambit of First Amendment protection.[13] Additionally, the U.S. District Court, utilizing the reasoning from *Davison*, decided that FCPS's Facebook page satisfied the public-forum threshold for a social media platform.[14] The U.S. District Court noted that, unlike the Facebook page in *Davison* that belonged to an individual government employee, FCPS's Facebook page was an arm of the government entity itself. Moreover, FCPS's Facebook page was registered as a "Government Organization" and continued to hold itself out as a platform for unlimited and unrestricted discussion on matters related to school operations.[15] Therefore, the U.S. District Court found that Scarborough had sufficiently alleged that FCPS's Facebook page was a public forum.

Finally, the U.S. District Court found that Scarborough adequately alleged that FCPS engaged in viewpoint discrimination, as, after Scarborough posted comments criticizing aspects of FCPS's reopening plans and face mask mandates, Steve Edwards, the head of communications for FCPS and one of the named defendants in the case, deleted those comments and later informed Scarborough that she would be blocked from FCPS's Facebook page entirely.[16] The U.S. District Court said "[t]hese allegations strongly support the inference that Defendants took these actions because they did not like what Scarborough had said about their policies, or, to put it in First Amendment terms, because they were 'impermissibly motivated by a desire to suppress a particular point of view.'"[17] The U.S. District Court additionally denied the defendants' motion to dismiss Scarborough's First Amendment claims regarding her being blocked from the two FCPS superintendents' X pages, reasoning that the determination of whether the superintendents operated the X pages in their official capacities is fact-specific and would be better resolved after

[11] *Scarborough*, 517 F. Supp. 3d 569.
[12] Other named defendants (along with FCPS) included Steve Edwards, the head of communications for FCPS; David Sovine, the superintendent of FCPS; and James Angelo, the assistant superintendent of FCPS.
[13] *Scarborough*, at 577.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 578.
[17] *Id.* (*quoting Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 812 (1985)).

factual development, rather than at the motion to dismiss stage.[18] Following the ruling, the defendants filed a motion for reconsideration but were denied on March 9, 2021, and there have been no appellate proceedings recorded since the denial.

Supreme Court of the United States Case Law Background: Lindke v. Freed and O'Connor-Ratcliff v. Garnier

The Court had not explicitly addressed government social media accounts until March 2024 when it heard *Lindke v. Freed*, an appeal from the United States Court of Appeals for the Sixth Circuit (the Sixth Circuit), and *O'Connor-Ratcliff v. Garnier*, an appeal from the United States Court of Appeals for the Ninth Circuit (the Ninth Circuit).[19] Both cases involved public officials who had blocked constituents from posting on such officials' Facebook and X pages because of the constituents' negative or repetitive comments.[20]

In *Lindke*, James Freed, the city manager of Port Huron, Michigan, converted his private Facebook page into a public page before he held public office. Once he became city manager, Freed listed his job title on his Facebook page and continued to post about his personal life while also authoring posts regarding city business.[21] The Sixth Circuit ultimately held that Freed "operated his Facebook page in his personal capacity, not his official capacity" because, although he used the Facebook page to communicate with constituents about city responsibilities, he was not performing any duties of his office as no statute, ordinance, or regulation required him to operate a Facebook page.[22] Additionally, the Sixth Circuit also stressed that because the Facebook page would not be passed along to the next city manager and because city resources were not regularly used to maintain the Facebook page, it was operated in Freed's personal capacity rather than in his official capacity.[23]

The Court, however, disagreed. Justice Amy Coney Barrett authored a unanimous opinion in *Lindke* vacating the Sixth Circuit opinion and remanding the case, outlining a new standard that the lower court should apply. The Court initially highlighted that Freed's role as a state employee did not immediately settle the issue, as the Court had prior established in numerous precedents that government employees retain certain First Amendment rights to speak as private citizens, even when discussing information related to their public employment.[24] However, the Court said that "a public official's social-media activity constitutes state action under 42 U.S.C. § 1983 only

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[18] *Id*. at 580.
[19] *Lindke v. Freed*, 601 U.S. 187 (2024); *O'Connor-Ratcliff v. Garnier*, 601 U.S. 205 (2024).
[20] *See* "CRS Legal Sidebar 11146," Congressional Research Service (04/09/2024). https://crsreports.congress.gov/product/pdf/LSB/LSB11146
[21] *See Lindke* at 187 ("[Freed] created a private Facebook profile sometime before 2008. He eventually converted his profile to a public 'page....' In 2014, Freed updated his Facebook page to reflect that he was appointed city manager of Port Huron, Michigan, describing himself as 'Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI.' Freed continued to operate his Facebook page himself and continued to post prolifically (and primarily) about his personal life. Freed also posted information related to his job, such as highlighting communications from other city officials and soliciting feedback from the public on issues of concern. Freed often responded to comments on his posts, including those left by city residents with inquiries about community matters. He occasionally deleted comments that he considered 'derogatory' or 'stupid,'").
[22] *Lindke v. Freed*, 37 F.4th 1199, 1204 (6th Cir. 2022).
[23] *Id*. at 1206.
[24] *See, e.g., Reitman v. Mulkey*, 387 U. S. 369, 378 (1967) ("'[o]nly by sifting facts and weighing circumstances' on a case-by-case basis can a 'nonobvious involvement of the State in private conduct be attributed its true significance,'") (internal citation omitted); *Gilmore v. Montgomery*, 417 U.S. 556, 574 (1974).

if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media."[25]

Analyzing the first prong, the Court held that Freed's blocking would be a state action if he had actual government authority "to post city updates and register citizen concerns" and if the alleged censorship was "connected to speech on a matter within Freed's bailiwick."[26] The Court contrasted further with the Sixth Circuit's ruling, ruling that state authority under 42 U.S.C. § 1983 can come not only from written law, like statutes or ordinances, but also may arise from custom or usage, meaning well-settled and persistent practices.[27] The Court noted that in some contexts, official power to speak about a particular subject "may reasonably encompass authority to speak about it officially" but cautioned that the mere appearance of authority would not suffice with respect to this first prong.[28] A private action that is not traceable to state authority cannot qualify as state action "no matter how 'official' it looks."[29]

The Court said that the appearance of authority may, however, be relevant to the second prong of the inquiry: whether public officials are purporting to speak in their official capacity or to further official responsibilities. The Court suggested that any determination would be "a fact-specific undertaking in which the post's content and function are the most important considerations."[30] While the Court refrained from ruling on whether Freed had actually satisfied this prong, it did provide some suggested guidance that could be used for future analyses. For example, the Court said that if "Freed's account carried a label (e.g., 'this is the personal page of James R. Freed') or a disclaimer (e.g., 'the views expressed are strictly my own'), he would be entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal."[31] The Court also suggested that if any post expressly invoked state authority, appeared to have "immediate legal effect," utilized government resources, such as having staff write the post, or was the only location where information or an announcement was available, then it would appear more likely that a public official was exercising official power.[32]

Finally, the Court cautioned that the nature of a public official's action may alter the scope of an inquiry, noting that Lindke objected to two separate actions: Freed's deletion of Lindke's comments and Freed blocking him and preventing him from commenting again. The Court distinguished the two actions, saying:

> So far as deletion goes, the only relevant posts are those from which Lindke's comments were removed. Blocking, however, is a different story. Because blocking operated on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment. The bluntness of Facebook's blocking tool highlights the cost of a "mixed use" social-media account: If page-wide blocking is the only option, a public official might be unable to prevent

[25] *Lindke*, 601 U.S. 187, 198.
[26] *Id.* at 199.
[27] *Id.* at 200.
[28] *Id.* at 200-01.
[29] *Id.* at 198.
[30] *Id.* at 203.
[31] *Id.* at 202.
[32] *Id.* at 202-03.

> someone from commenting on his personal posts without risking liability for also preventing comments on his official posts. A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability.[33]

In *Garnier*, the Ninth Circuit used a similar approach to the Sixth Circuit's "totality of the circumstance" approach that was used in *Davison*.[34] *Garnier* involved two members of the Poway Unified School District (PUSD) Board of Trustees (the Board) in Poway, California, who had created Facebook and X accounts while campaigning for office. Once in office, such members used the social media accounts to communicate directly with constituents about the Board's activity, including informing constituents about goings-on at the PUSD and on the Board, inviting the public to meetings of the Board, soliciting input about important Board decisions, and communicating with parents about safety and security issues at PUSD schools.[35] Two parents of children in the PUSD, Christopher and Kimberly Garnier, "frequently left comments critical of the Trustees and the Board on the Trustees' pages, sometimes posting the same long criticisms repeatedly."[36] The two Board members began to hide or delete the Garniers' comments on their social media pages and eventually blocked the Garniers entirely. The Garniers sued, asserting that the two Board members violated the Garniers' First Amendment rights by blocking them from the social media pages. Following a bench trial, the district court agreed with the Garniers' assertion that their First Amendment rights had been violated, and both parties appealed.

In its decision, the Ninth Circuit cited three factors to conclude that the two Board members' use of their social media pages qualified as state action: (1) in "appearance and content," the pages were "official channels of communication with the public" about the work of the Board; (2) this presentation of the social media pages intentionally affected others' behavior; and (3) the two Board members' posts "related directly to" their duties, and the specific blockings challenged in the case were "linked to events" arising out of their official status.[37] The Ninth Circuit concluded by giving a powerful warning to public officials, saying:

> The protections of the First Amendment apply no less to the "vast democratic forums of the Internet" than they do to the bulletin boards or town halls of the corporeal world . . . . That is not to say that every social media account created by public officials is subject to constitutional scrutiny or that, having created a public forum online, public officials are powerless to manage public interaction with their profiles. As this case demonstrates, analogies between physical public fora and the virtual public fora of the present are sometimes imperfect, and courts applying First Amendment protections to virtual spaces must be mindful of the nuances of how those online fora function in practice. Whatever those nuances, we have little doubt that social media will continue

[33] *Id.* at 204.
[34] *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158 (9th Cir. 2022).
[35] *Id.* at 1163.
[36] *Id.*
[37] *Id.* at 1171-72.

> to play an essential role in hosting public debate and facilitating the free expression that lies at the heart of the First Amendment. When state actors enter that virtual world and invoke their government status to create a forum for such expression, the First Amendment enters with them.[38]

However, this three-factor test would not last. In 2024, the Court vacated the ruling and remanded the case to the Ninth Circuit, directing the lower court to follow the newly announced approach of *Lindke* for identifying state action in the context of public officials using social media.[39]

Conclusion

While the Court's *Lindke* decision does not explicitly provide directions for public officials' use of social media, it does provide a number of factors that public officials and bodies can utilize when crafting guidance for such officials' use of social media platforms. Under the First Amendment, state action can only be proven where there is a demonstration of actual government authority.[40] State action is not present unless the public official was exercising authority to communicate with citizens about "a matter within [the official's] bailiwick."[41] As such, public officials may look to their official duties to determine whether they are constrained by the First Amendment. However, as the *Lindke* decision warns, authority may sometimes be *implied* from a written duty or from well-settled custom, which could subject public officials' actions to the protections of the First Amendment.[42] It is important to consider the facts that surround a public official's use of social media platforms, as a reviewing court would not be permitted to dismiss a First Amendment claim solely because the public official's job duties do not explicitly outline a social media policy.

Additionally, the *Lindke* decision indicated that a social media page-wide notice or disclaimer that an account is for personal use may provide enough weight to reject a state action inquiry.[43] It is recommended that any public official should write a personal-use disclaimer for any social media account that he intends to use for personal purposes, regardless of his past usage of such account. However, this is not a catchall "get out of jail free card," as the Court did emphasize that any such disclaimer would not insulate any posts that did in fact carry out official business, such as if a social media page is designated "as the official channel for receiving comments on a proposed regulation" or is used as the sole location for constituents to receive information.[44]

Lindke also limits the extent to which state action could be shown by apparent authority rather than actual authority. The Court ruled that some degree of actual government authority must exist, and, further, that an individual who is exercising private functions, not depending on government authority, may not be a state actor.[45] However, this does not include any misuse of

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[38] *Id.* at 1185.
[39] *O'Connor-Ratcliff v. Garnier*, 601 U.S. 205, 208.
[40] *Lindke*, at 198.
[41] *Id.* at 199.
[42] *Id.* at 198.
[43] *Id.* at 202.
[44] *Id.* at 202-03.
[45] *Id.* at 199.

authority that a public official has been granted and can include someone who is purporting to act under government authority but is truly exceeding the scope of the authority that is actually granted.[46]

The state action inquiry is only the first step in a constitutional analysis concerning public officials' use of social media accounts. Even where a court finds that a public official acted in an official capacity and is subject to the First Amendment, the court still must determine whether such public official actually violated the First Amendment's protections. To do so, a reviewing court may ask whether the public official created a public forum by intentionally opening the social media page for public discourse. Even if so, the government still may be permitted to state clear limitations on the scope of allowed discourse, which may rely upon previously announced social media policies for public officials' accounts. However, even if the government may provide limitations to the public forum and permitted discourse, it may not engage in viewpoint discrimination and block citizens due to their ideology or perspective.

The main factors that public officials and bodies should consider when reviewing their social media usage are as follows:

- Whether the social media account is intended to be solely for personal purposes, solely for official purposes, or for mixed-use purposes;
- Whether the public official's job duties may give rise to claims that his operation and management of the social media account is conducted in his official capacity;
- Who has access to and manages the social media account;
- Whether it is appropriate for the social media account to have a personal-use disclaimer; and
- What limitations should uniformly apply to the social media account's posts.

One final related consideration concerns disclosure and record retention requirements: if a public official uses social media in the transaction of public business, the public official may be creating public records that are subject to public disclosure as well as record retention rules under the Freedom of Information Act (FOIA). The Virginia Freedom of Information Advisory Council has published a guide to FOIA and Social Media that is available on their website.[47]

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[46] *Id.* at 204.
[47] https://foiacouncil.dls.virginia.gov/ref/FOIASocialMedia.pdf