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Legal Sidebar

Free Speech Constraints on Public Officials' Social Media Pages

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On October 31, 2023, the Supreme Court heard oral argument in two cases challenging public officials' social media activity, *O'Connor-Ratcliff v. Garnier* and *Lindke v. Freed*. Government actors are constrained by the First Amendment, including when they act online. As such, when the government creates a public forum online, its ability to bar people from the forum is limited by the First Amendment. If public officials use a forum such as a social media page for both private and government activity, it can be open to debate whether or how the First Amendment applies. This question has been a regularly recurring issue in the lower courts—one high-profile ruling in 2019, discussed in a prior Legal Sidebar, involved a First Amendment challenge to then-President Trump's decision to block users from his Twitter account. (Twitter has since been renamed "X," but at the time periods relevant in this and other cases discussed in this Legal Sidebar, the officials had "Twitter" accounts.) The appeals courts in *Garnier* and *Freed* employed different legal tests to determine whether public officials' use of social media constituted state action implicating the First Amendment. The cases could have significant implications for federal officials, including Members of Congress, who operate social media pages.

Legal Background

The First Amendment's Free Speech Clause prevents the government from "abridging the freedom of speech." The First Amendment only restricts the *government*. A private party's actions that burden another person's speech usually will not implicate the First Amendment. This is referred to as a "state action" requirement. The word "state" in this phrase is used in the general sense to refer to the government, including federal, state, and local governments. This constitutional requirement is reflected in the main federal statute that authorizes lawsuits against state or local officials who violate the Constitution: 42 U.S.C. § 1983. That law applies to a person who, "under color" of state law, deprives another person of the rights, privileges, or immunities secured by the Constitution. The Supreme Court has said this "under color" of law requirement is identical to the Constitution's state action requirement. The Court has recognized a variety of tests to determine whether an action was taken by the government. For example, one Supreme Court case asks "whether there is a sufficiently close nexus between the State and the challenged action," so that the challenged action "may be fairly treated as that of the State itself."

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State action questions may arise when public officials allegedly violate the First Amendment through their social media use. Generally, if a government employee or elected official restricts citizens' ability to obtain information or speak in a public forum, that action can implicate the First Amendment—whether the forum is in a park, in a community building, or online. A growing body of cases in lower courts has recognized that government officials can violate free speech protections if, for example, they block a constituent on social media because they find the constituent's viewpoint offensive. Nonetheless, First Amendment protections are only triggered if the official was engaged in state action. When a government official uses a social media account for both personal and government activity, it may be unclear whether the actions restricting others' speech were taken in a private or public capacity. (These cases thus present distinct state action questions from *Murthy v. Missouri*, a case the Supreme Court agreed to hear this term that involves questions about whether the government coerced admittedly private parties into acting.)

The Supreme Court has said that "generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." This standard can include an official who *purports* to act under government authority. For instance, in *Griffin v. Maryland*, the Court held that a deputy sheriff hired as security by an amusement park was acting under color of state authority when he excluded Black patrons from the park. Although he acted on private property and solely under the control of a private employer, he "wore a sheriff's badge and consistently identified himself as a deputy sheriff," purporting to exercise his authority as a deputy sheriff. The Court said it was "irrelevant that he might have taken the same action had he acted in a purely private capacity."

In a 2019 challenge to a county official's decision to ban a constituent from her Facebook page, the Fourth Circuit summarized the tests federal appeals courts have used to determine whether a public official acted in a private capacity. The Fourth Circuit stated that "although no one factor is determinative," an action is "more likely to be" state action if it was made possible by the defendant's status as a public official or if it occurs while the defendant is performing a duty of the office. The court held that the county official in the case acted under color of state law because she used the Facebook page "to further her duties as a municipal official," including informing the public and soliciting input on public issues. In contrast, in another case, the Eighth Circuit ruled that a state representative had not acted under color of state law when she blocked a user on Twitter, because her account was used "overwhelmingly for campaign purposes" rather than official business, even after she took office.

As mentioned above, the Second Circuit held in 2019 that then-President Trump violated the First Amendment by blocking users from his Twitter account. The Second Circuit did not reference the nexus test or the tests cited by the Fourth Circuit. It concluded instead that although the President had initially created his Twitter account as a private citizen in 2009, his use of the account during his presidency was no longer private given "the record of substantial and pervasive government involvement with, and control over, the Account." This opinion was later vacated by the Supreme Court on procedural grounds, with instructions to the Second Circuit to dismiss the case as moot.

Garnier v. O'Connor-Ratcliff: Ninth Circuit Ruling

The first case heard by the Supreme Court on October 31, *Garnier v. O'Connor-Ratcliff*, is an appeal from a Ninth Circuit opinion holding that two public officials had violated the First Amendment. Two school board trustees had created Facebook and Twitter accounts while campaigning for office. Once in office, they used the accounts to provide information, solicit input, and generally communicate about school board activity. The trustees blocked two parents in the school district, the Garniers, after they left lengthy and repetitive comments complaining about the superintendent and race relations in the district. The Garniers alleged this blocking violated the First Amendment by retaliating against them for their speech and preventing them from further commenting.

On the state action question, the appeals court applied the reasoning of a line of Ninth Circuit cases addressing actions by off-duty government officials. Those cases focused on whether a "public official's conduct, even if 'seemingly private,' is sufficiently related to the performance of his or her official duties to create 'a close nexus between the State and the challenged action,' or whether the public official is instead 'pursu[ing] private goals via private actions.'" The court concluded the trustees' use of their social media pages was state action because (1) looking to the "appearance and content" of the pages, the trustees identified the pages as official and used them as official channels of communication about school board work; (2) the trustees used the pages to influence the behavior of others, including by seeking public feedback and responding to comments; and (3) their posts—and their decision to block the Garniers because of their comments—"related directly" to the trustees' duties and were linked to their official status. The Ninth Circuit viewed this analysis as consistent with the approaches taken by the Second, Fourth, and Eighth Circuits in the cases referenced above. The court recognized, however, that its analysis was "somewhat different" from the approach adopted by the Sixth Circuit in *Lindke v. Freed*.

Lindke v. Freed: Sixth Circuit Ruling

The Supreme Court also agreed to hear an appeal of *Lindke v. Freed*. The public official in that case, Freed, converted his private Facebook profile into a public page before holding public office. Once he became city manager, he listed that title and official city contact information on his page. He posted about his personal life as well as city business. Freed blocked Lindke based on his negative comments responding to Freed's posts about the city's COVID-19 policies, and Lindke sued Freed for First Amendment violations.

In its opinion, the Sixth Circuit said it has applied a different version of the nexus test when it evaluates whether a public official acted in his state capacity, as opposed to when it evaluates whether a private party's action is attributable to the state. The court's so-called "state-official test" asks "whether the official is 'performing an actual or apparent duty of his office,' or if he could not have behaved as he did 'without the authority of his office.'" The Sixth Circuit explained that, in contrast to the analysis used by other federal appeals courts, this test focuses on "the actor's official duties and use of government resources or state employees" rather than "a page's appearance or purpose." Applying this test, the court held that Freed's posts "do not carry the force of law simply because the page says it belongs to a person who's a public official." Although Freed used the page to communicate with constituents about city responsibilities, similarly to the trustees in *Garnier*, the Sixth Circuit concluded Freed was not performing any duties of the office because no statute, ordinance, or regulation required him to operate a Facebook page. The Sixth Circuit also stressed that the page would not be passed along to the next city manager and that city resources were not regularly used to maintain the page.

Arguments at the Supreme Court

The Supreme Court granted the petitions for certiorari in *Garnier* and *Lindke* on the question of what the proper state action test is in these circumstances. The government officials in both cases—the trustees in *Garnier* and city manager in *Lindke*—have urged the Supreme Court to adopt the Sixth Circuit's "duty or authority" test. The United States submitted amicus briefs in support of the government officials but suggests the Court should apply a slightly different test in ruling for the officials. The United States claims that the private nature of the property where the speech occurs should be "all but dispositive": if a government official blocks someone on "her own personal property, she's probably acting in her capacity as a private property owner, not as an agent of the state." When an official denies access to private property, the United States contends state action is present only if the official "is invoking official powers or exercising a traditional and exclusive public function." Finally, the blocked constituents in both cases argue for a broader view of state action. At bottom, the Garniers claim that state action was present in their case because the trustees "were doing their job" in running and administering their social media

pages. Lindke emphasizes that the Supreme Court has never adopted a "one-size-fits-all test" and says a page's "appearance and function" can be an important consideration in these dual-role cases.

At oral argument, the attorneys for the trustees and the United States seemed to walk back their strict state action tests slightly. Multiple Justices pressed the parties on the private property test, questioning both how that applies to social media pages and whether official activity becomes immunized from constitutional scrutiny solely because it takes place on private property. The attorneys for the United States acknowledged that if a government official were performing a duty of the office, that could qualify as state action even if performed on private property.

There was also significant discussion at oral argument of when a government official is performing a duty, and the attorneys for the trustees, city manager, and United States distanced themselves from the Sixth Circuit's approach to this factor. As Justice Sotomayor pointed out, the Sixth Circuit effectively held that to qualify as state action, a duty must be expressly and specifically written into law. The attorneys for the trustees, the city manager, and the United States all agreed that at minimum, some customary activities could also qualify as duties. The attorneys arguing in *Lindke* took the narrowest approach to this issue, saying a custom would need to be backed by significant force such as police enforcement. At the same time, all the attorneys supporting the government officials argued for a stricter view of duty than the Ninth Circuit took. The trustees argued in their briefs that it was insufficient for the content of their pages to be merely related to their official duties; instead, they claimed, their pages had to be operated for the purpose of carrying out official duties. As the city manager's attorney contended, state action should not be present "every single time a government employee talks about their job and they happen to be in public." Some Justices seemed sympathetic to these arguments. In particular, Justice Kavanaugh raised concerns about too broadly sweeping in any and all communications related to official duties. Justice Alito also asked whether a mayor who is approached by constituents in the grocery store would be performing official duties if he listens to their positions or tells them to call his office.

The attorneys for the blocked constituents argued for a broader conception of function or duty that asks whether the government official was doing their job, regardless of whether there was a specific authorization for that exact activity. Both attorneys claimed state action is present where a government official creates and maintains a channel for communicating with constituents, distinguishing this circumstance from a situation where an official is approached in the grocery store.

In part, the constituents' arguments also seemed to relate to the concept of whether the government official had authority, or the appearance of authority. The Garniers' attorney, for instance, suggested that where a government official does not have a formal or customary duty to communicate with constituents, then the inquiry should turn to whether the official had the authority to do so. Justice Gorsuch asked the Garniers' attorney whether the parties were "coalescing around a test that everybody more or less agrees on"—one that focuses both on duties and authorities and also takes into account custom as well as any written duties. The attorney responded that "appearance and function are also relevant to whether someone is engaged in state action." Lindke's attorney seemed to link the question of appearance to the authority aspect of the state action test, saying state action is present if "you hold yourself out as doing your job through your page," requiring reference to the page's design and content. The city manager, in contrast, claimed that a mere appearance or pretense of authority is insufficient to meet the authority prong of the Sixth Circuit test.

Continuing the focus on authority, the trustees argued their pages' references to their offices did not create state action where the power to use those pages was not made possible because of the indicia of office. The trustees' attorney repeatedly stressed that the trustees were engaged in speech that could have been made in a private capacity, and that the Court should find there was no state action because there was no government control over the speech and no government resources used. Justice Jackson posed a hypothetical that seemed to push back on this idea. Implicitly referencing *Griffin v. Maryland*, she asked whether, if police officers provided security at a concert on private property, they would be engaged in

state action even if they were "not doing anything more than a private security guard could have done." The United States responded that the officers would be engaged in state action if they were performing official duties and if they were hired as police officers because their state authority made them more effective. The United States claimed this analogy did not carry over to social media, though, where state authority does not make a "block" more effective since "anyone can block equally."

Implications for Congress

An opinion interpreting the Constitution's state action requirement could have significant implications for federal and state officials, in the First Amendment and other constitutional contexts. The Supreme Court's ruling in the *Garnier* and *Lindke* cases could help determine when a government official's social media page is subject to First Amendment limitations. This could be relevant for Members of Congress who use social media pages for both personal and official business.

Ultimately, the state action inquiry is only a preliminary consideration under the First Amendment. Even if a government official is speaking as a state actor, a court may still conclude the official has not created an open public forum with the social media page. The public forum issue is explored in a different Legal Sidebar, but courts often look to whether the government official has opened the page up for constituent speech, and what policies limit the type of speech allowed on the page. If a government official clearly states limitations on the page's use at the outset, that can sometimes preclude free speech claims.

One concern the attorneys for the trustees and the United States raised was that if speech is official, it could be subject to government control; for example, the city manager's supervisor could tell him what he could say on his "official" Facebook page. The attorneys expressed concern that an overly expansive view of state action could unduly restrict the free speech rights public officials should retain in their capacity as private citizens, limiting their ability to choose what to post. In the trustees' brief, they specifically expressed concern about restricting government officials' rights of "editorial discretion." In short, editorial discretion refers to the idea that private parties have constitutional rights to decide whether and how they will distribute others' speech. This concept is at the core of another set of cases the Supreme Court is set to hear this term, which will consider a trade group's challenges to state laws restricting online platforms' ability to moderate user content. That trade group, NetChoice, filed amicus briefs in *Garnier* and *Lindke* cautioning against a ruling that would restrict digital services' editorial discretion. The oral arguments in the *Garnier* and *Lindke* cases did not wade into this issue, although some of the Justices' questions about online platforms' control over government pages suggested they may have been considering the intersections between the various social media cases the Court is set to hear this term.

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