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PERSONAL COMMENTS, PUCLIB LIABILITY: SUPREME COURT CLARIFIES GOVERNMENT LIABILITY FOR OFFICIALS' SOCIAL MEDIA USE

A unanimous Supreme Court offered guidance last week about when governments, and their employees and officers, can be held liable for statements and actions taken on personal social media accounts. The Court's decision left the door open to First Amendment liability against government officials who delete or block speech, but stressed that would-be plaintiffs must show that officials had, and acted with, actual authority from the state.

Lindke v. Freed featured a city manager for the city of Port Huron, Michigan, who used his personal Facebook page—which was made public—to post about and comment on a mix of personal and professional subjects. City Manager James Freed's page included his government title; a link to the city's website; and the city's general email address, along with a description of himself as "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI." Interspersed with pictures and posts about his family life, Freed shared press releases from city departments; talked about his on-the-job activities such as visiting high schools and starting a reconstruction project on the city's boat launch; occasionally solicited public feedback, including by sharing a city-sponsored survey and urging people to complete it; and responded to comments posted on his page—some of them asking questions about city policies and actions.

Along the way, Freed deleted comments that he found "derogatory" or "stupid"—including comments from fellow Facebook user Kevin Lindke, a city resident who was deeply critical of the city's response to the Covid pandemic. Eventually, after deleting numerous comments from Lindke, Freed blocked Lindke altogether from his page—prompting Lindke to sue, claiming that Freed had violated his First Amendment rights.

The Supreme Court did not decide Freed's case, specifically, but it sent the case back to lower federal courts with new instructions for how to analyze when a government official may be liable for actions taken on his or her personal social media account. The Court acknowledged that under Section 1983 (a provision of federal law that allows citizens to sue government officers for Constitutional rights violations), even private individuals can be sued for Constitutional violations when they act "under color of law" (for example, where a private security guard has been deputized by a sheriff to assist law enforcement). The key in Freed's case, for the Court, was identifying when a *public* official acts "under color of law"—versus when he or she is acting as a private citizen. The Court concluded that, to

hold a public official liable for actions on social media, this required two prongs be fulfilled: first, the official has to possess actual authority to speak on the State's behalf; and second, the official had to be using that authority when he or she took the challenged actions.

This meant that in Freed's case, to satisfy the first prong, there first had to be a law, ordinance, regulation, or custom that made him an official spokesperson on the subjects he spoke about on his Facebook page. The Court noted that in a clear case, this could take the form of an ordinance that gave him the ability to make official announcements for the city; or, possibly, a long-standing, recognized custom that city managers could make such official announcements. To satisfy the second prong, Freed had to not just *have* that authority, but also be *acting* under that authority when he made statements or took action on Facebook. By way of example, the Court suggested that a mayor who announced, "Pursuant to Municipal Ordinance 22.1, I am temporarily suspending enforcement of alternate-side parking rules" on his personal Facebook page, would almost certainly be acting under his *official* authority; but the same mayor would more likely be acting as a *private* citizen if he simply linked to the same parking announcement on the city's webpage. In other words, a government official is not acting under state authority simply because he or she comments on a public issue; it also needs to be clear that when he or she speaks or acts on social media, it is in order to carry out his or her authority to speak for the government.

The Court noted that certain contextual clues help this analysis. In Freed's case, the Court observed that he could have added labels or disclaimers such as "This is the personal page of James R. Freed," and "the views expressed are strictly my own," to show that he was not attempting to speak for the government. On the other hand, speaking from a social media account that belonged to the City of Port Huron, or an account that is passed down from office-holder to office-holder, would have made it more clear that he was exercising his government authority when he acted.

Finally, the Court noted that what Freed had done—completely blocking one individual's participation on his page, rather than just deleting select comments—also had an impact on his potential liability: "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." (Emphasis added.)

The Court's decision brings some clarity to an uncertain area of law, but it leaves no question that individual cases will be highly fact-specific, with no simple, uniform rule to shield local and state government employees and officials from liability. State and local governments should instead try to use the Court's guidance to minimize their potential exposure to First Amendment claims: first, by examining which of their officials are authorized by local law, ordinance, regulation or long-standing practice to speak or make decisions for their government employer. (Governments may find it helpful to formalize authority in local laws, municipal handbooks, or resolutions, if the authority to speak for the government is not codified and is the product of tradition or custom.) Once those

individuals with authority to speak for the government are identified, state and local governments should designate specific channels—such as government-owned, department-specific social media accounts—for the release of official announcements, press releases, or policy statements. Any government-sanctioned solicitation of public feedback or input—especially comments on proposed legislation or regulations—should be made through these accounts, rather than through personal accounts.

Officials with government authority, in turn, should be encouraged to limit their liability exposure through training on the Freed decision, and adding disclaimers to their own social media accounts, stressing the personal nature of the account, and identifying statements made about public subjects as their own opinions. Finally, to the extent that any action is taken against a social media-using member of the public, it should be as limited in scope as possible, to avoid sweeping curtailment of free-speech rights. The above measures do not guarantee protection from all social media-inspired First Amendment claims; however, they can place state and local governments, and their employees, in the best possible position to defend themselves from Constitutional-rights claims.

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