Public Officials and Social Media Posts: U.S. Supreme Court Provides Guidance on First Amendment Compliance

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In its recent opinions in *Linke v. Freed* and *O'Connor-Ratcliff v. Garnier*, the U.S. Supreme Court considered if and when public officials violate the First Amendment rights of members of the public by blocking them from the officials' social media accounts.

In *Linke,* the Sixth Circuit had concluded that a city manager in Port Huron had *not* acted as a government official, and thus did not violate the First Amendment, when blocking a city resident from a social media account that the city manager used to comment on both his and his family's personal activities, as well as his official activities as city manager.

In *O'Connor-Ratcliff*, the Ninth Circuit had concluded that two school board members *had* acted as government officials, and thus violated the First Amendment, when blocking parents from their social media accounts that they also used to comment on their personal and official activities.

The Supreme Court reversed and remanded both decisions, adopting a new test for First Amendment compliance as it applies to social media posts.

The test is essentially two steps and requires a post-by-post analysis. The first step is a determination as to whether the official possessed *actual authority* to speak on the State's behalf on the particular topic in the post. If the answer is no, there is no potential First Amendment violation. But if the answer is yes, the court must move to the second step. The second step requires a determination of whether the official *purported to exercise their governmental authority*when speaking on social media. If the answer is again yes, then the government official will have committed a First Amendment violation if they block someone from their social media account due to the viewpoint of the comment.

The Court also observed that if a public official's social media account carries a label indicating that it is a "personal" page, or a disclaimer "(*e.g.,* 'the views expressed are strictly my own')," the official would be entitled to a "heavy (though not irrebuttable) presumption" that all of the posts on that social media page were personal.

However, if the social media account belonged to the public agency, or if public agency staff assisted with the posts to the site, then the presumption would be that all posts were government business.

The Court further observed that page-wide blocking of "mixed-use" accounts creates significant risk of First Amendment violations by public officials because of the possibility that the page would include personal and official public posts.

The key takeaway from these decisions for public officials with respect to First Amendment compliance: keep personal posts in a clearly designated personal account; and include official pronouncements, commentary and communications with the public regarding an official's public duties in a separate official social media account from which members of the public may not be blocked.

And for public officials in California, remember that current state law includes broad prophylactic prohibitions on members of legislative bodies responding "directly to any communication on an internet-based social media platform regarding a matter that is within the subject matter jurisdiction of the legislative body that is made, posted, or shared by any other member of the legislative body." (Cal. Gov. Code sec. 54952.2(b)(3)(3).) This prohibition includes the use of emojis, the "like" button, or reposting of posts. This law sunsets on January 1, 2026, unless extended.