Social Media Free Speech Issues Are Trending At High Court

By **Sydney St. Pierre, Claire Juneau and Aaron Ruffin** (May 3, 2024)

Sydney St. Pierre

Claire Juneau

Aaron Ruffin

Social media has become increasingly prevalent in today's society. Many agree that the lines between personal and official use on social media are blurred, especially when state officials use their personal and/or private pages to post updates regarding their professional affairs.

In most instances, posting content online opens the doors to criticism and commentary from the public. Some users resort to blocking or restricting other's access to their social media page or posts for this very reason. But can government officials engage in this common practice without violating the public's guaranteed protections under the Constitution?

The U.S. Supreme Court recently resolved a circuit split examining what constitutes state action in the context of social media usage and held that public officials may be held liable in certain circumstances for violating the First Amendment when blocking or restricting access to their social media pages and posts.

In conjunction with the rulings in Lindke v. Freed and O'Connor-Ratcliff v. Garnier, the Supreme Court's recent oral argument hearings in Moody v. NetChoice LLC and NetChoice LLC v. Paxton, as well as Murthy v. Missouri, indicate that the Supreme Court sees the need for more clarity regarding how social media usage implicates the First Amendment.

Circuit Split Between the Sixth and Ninth Circuits

The government's ability to restrict public access to public forums, even online public forums, is limited by the First Amendment's free speech clause. Petitioners have begun suing public officials who block members of the public from viewing their pages.

Title 42 of the U.S. Code, Section 1983, provides the right to sue state government employees and others acting "under color of state law" for civil rights violations. These cases turn on whether a public official should be treated as using the state's voice versus their personal voice when posting on social media.

One of the first cases addressing a public official's use of social media was Knight First Amendment v. Trump,[1] in which then-President Donald Trump was alleged to have violated the First Amendment by blocking critics from the "interactive space" of his Twitter account.[2]

In 2019, the U.S. Court of Appeals for the Second Circuit held that the "interactive space" was a public forum associated with Trump's account and that blocking individuals from this public forum constituted viewpoint discrimination in violation of the First Amendment.[3] The U.S. Supreme Court vacated the decision with instructions to dismiss the case as moot because Trump was no longer president, and Twitter had deleted his account.

In March 2024, the U.S. Supreme Court resolved a circuit split examining what constitutes state action when public officials use social media in Lindke v. Freed.[4]

The same issue arose in Lindke, v. Freed in the U.S. Court of Appeals for the Sixth Circuit, and O'Connor-Ratcliff v. Garnier[5] in the U.S. Court of Appeals for the Ninth Circuit. Both cases involved citizens who were blocked or restricted from commenting on certain public officials' social media pages. The citizens alleged that the officials were attempting to silence the citizens' opinions and restricting their First Amendment right to free speech.

O'Connor involved two school board members whose public pages were used to campaign for election onto the board.[6] After their successful campaigns, the members continued using these pages to provide information about their jobs and engage with constituents.[7] Their pages described them as "government officials" and listed their official positions.[8] The board members ultimately blocked two parents who often criticized the board by commenting on their pages from their personal Facebook and Twitter accounts.[9]

Lindke involves Freed, a Port Hudson city manager with a personal public Facebook page on which he posted about his personal life as well as information related to his job.[10] Freed's "About" section contained his title, the city's website link, the city's email address, and a description stating that he was a father and husband.[11] He posted regarding personal subjects, such as photos of his family and Bible verses. He also used his Facebook page to convey information about his job.[12]

Lindke disagreed with the city's approach to the pandemic, which he expressed in numerous posts on Freed's page.[13] Freed ultimately blocked Lindke.[14] Lindke could see Freed's posts but could no longer comment on them.[15]

The U.S. Supreme Court developed a two-prong test in Lindke to determine whether a public official's social media usage constituted state action.[16] A public official who blocks someone from commenting on their page can be held liable only if the official engages in state action.

State action occurs under Section 1983 only if both (1) the official possessed actual authority to speak on behalf of the state on a particular matter and (2) the official purported to exercise that authority in the relevant posts.[17] The social media's appearance and content is only analyzed after there is a finding of state authority.

To determine whether the first prong of state authority has been met, the conduct must be fairly attributable to the state, meaning that the public official must engage in state action rather than functioning as a private citizen.[18] The question is whether the social media activity is actually part of the job that the state entrusted the official to do, not whether the activity could fit within the job description of the public official.

As for the second prong, the official must not only have state authority, but he or she must also purport to use that state authority.[19] Only then is it appropriate to investigate how the social media page is presented to the public.

Freed's page was mixed-use in that it was not designated as his personal page nor his official page as city manager.[20] He posted both in his personal capacity and in his official capacity.[21] The Supreme Court explained that a fact-specific undertaking is necessary when categorizing posts on an ambiguous page like Freed's, and the post's content and function are the most important considerations in this case.[22]

Lindke was remanded back to the Sixth Circuit to be decided according to the Supreme Court's opinion. O'Connor was remanded back to the Ninth Circuit to be decided consistently with the holding of Lindke. Neither the Sixth nor Ninth Circuit has yet rendered a decision on remand.

Fifth Circuit Challenges

The Supreme Court's holding in Lindke may forecast how the Supreme Court will rule on recent arguments heard concerning social media in the context of free speech.

This first of these cases is NetChoice LLC v. Paxton. The case concerns a 2021 Texas law restricting large social media companies from removing political posts or users from the platform.[23] H.B. 20 prohibits social media platforms from censoring speech based on the viewpoint of the speaker.[24]

NetChoice filed suit against the Texas attorney general, challenging two provisions of the law as unconstitutional: (1) Section 7, prohibiting censorship of users' posts based on the user's viewpoint; (2) Section 2, requiring platforms to disclose the criteria for moderating content, publish an "acceptable use" policy, and maintain a complaint-and-appeal system for users.

NetChoice also recently challenged a Florida law similar to H.B. 20 in NetChoice v. Moody and successfully obtained a preliminary injunction in the district court.[25]

In Paxton, the district court issued a preliminary injunction, holding that the two provisions at issue were unconstitutional.[26] The court held that social media platforms hold a level of "editorial discretion" protected by the First Amendment, and H.B. 20 interferes with the exercise thereof.[27]

The U.S. Court of Appeals for the Fifth Circuit rejected the notion that social media platforms have an unchecked First Amendment right to censor what users say and found that H.B. 20 does not limit the speech of the platforms, but rather, it protects the speech of the users.[28]

The Florida law at issue in Moody was similar to H.B. 20 in that both laws limit social media companies' moderation of user-generated content. H.B. 20, however, created a broader restriction on social media platform oversight by prohibiting social media platforms from removing content based on the author's viewpoint.[29] Florida's law prohibited social media platforms from removing politicians, specifically, from the online platform.[30]

On Feb. 26, the U.S. Supreme Court heard oral arguments in Paxton and Moody. The justices noted that, while both the laws presented some challenges to free speech, they would likely not strike down the laws completely.[31]

Murthy v. Missouri is an appeal from the Fifth Circuit's decision in Missouri v. Biden, finding that various federal governmental officials engaged in state action in violation of the First Amendment by "encouraging" and "coercing" social media companies to engage in censorship.[32]

The case concerned whether actions of government officials in the Biden administration affecting the decisions of private social media companies could be considered state action.[33] A panel of judges on the Fifth Circuit ruled that the Biden administration likely brought unconstitutional pressure on the platforms.[34] The Fifth Circuit held that officials

cannot attempt to "coerce or significantly encourage" changes in online content.[35]

On March 18, the Supreme Court heard oral arguments for Murthy.[36] Chief Justice John Roberts, Justice Brett Kavanaugh and Justice Amy Coney Barrett expressed concerns about setting a standard that limited the government's ability to communicate with social media platforms over content that might be problematic.

Some justices suggested that, in certain situations, the government has a legitimate interest in influencing social media platforms' moderation of users' speech. A ruling has not yet been rendered in this case.

Conclusion

As illustrated in the Supreme Court's opinion in Lindke, there is a delicate balance between a public employee's right to exercise their First Amendment rights to speak as a citizen addressing issues of public concern versus a public official acting on behalf of the state in their official role. The lines between the two are easily blurred, especially when the official routinely interacts with the public via social media.

The manner in which you present your social media account matters, and the nature of the technology plays an important role in the state-action analysis. Providing labels or designations can help distinguish when a page is personal versus official. Blocking on a pagewide basis rather than deleting comments from a post will determine if a court must analyze the presence of state action in all posts or merely on particular posts.

Although the Supreme Court remanded these cases to the lower courts and did not fully resolve the issues presented, the Supreme Court outlined the two-prong test and gave insight on the factors that help make the determination as to whether a public official has unconstitutionally restricted public access to their social media pages.

In the words of Justice Barrett, "A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater liability."[37]

The Supreme Court's analysis of the state action inquiry will be relevant for claims that rely on other constitutional provisions as the opinion clarifies that some actual governmental authority must exist at the first step of the inquiry and that an individual engaging in private functions that do not depend on governmental authority may not be a state actor in this regard.

Rulings on the additional challenges from the Fifth Circuit are expected to be issued in early summer.

Sydney J. St. Pierre is an associate, Claire E. Juneau is a partner and Aaron M. Ruffin is an associate at Kean Miller LLP.

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[1] Knight First Amendment v. Trump, 928 F.3d 226.

[2] Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 234 (2d Cir. 2019), cert. granted, judgment vacated sub nom. Biden v. Knight First Amend. Inst. At Columbia Univ., 141 S. Ct. 1220, 209 L. Ed. 2d 519 (2021), and abrogated by Lindke v. Freed, 601 U.S. 187, 144 S. Ct. 756 (2024).

[3] Id.

[4] Lindke v. Freed, 601 U.S. 187, 144 S. Ct. 756 (2024).

[5] O'Connor-Ratcliff v. Garnier, 601 U. S. _____ (2024).

[6] Id.

[7] Id.

[8] Id.

[9] Id.

[10] Lindke, at 762.

[11] Id.

[12] Id.

[13] Id. at 763.

[14] Id. at 763-64.

[15] Id. at 764.

[16] Id. at 766.

[17] Id. at 759.

[18] Id.

[19] Id.

[20] Id. at 770.

[21] Id.

[22] Id.

[23] NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 443 (5th Cir. 2022), cert. granted in part sub nom. NetChoice, LLC v. Paxton, 144 S. Ct. 477, 216 L. Ed. 2d 1313 (2023).

[24] Id. at 445.

[25] Id. at 445–46.

[26] Id. at 447.

[27] Id.

[28] Id. at 454-55.

[29] Id. at 488–89.

[30] Id.

[31] See generally Transcript of Oral Argument, NetChoice, LLC v. Paxton (22-555).

[32] State v. Biden, 80 F.4th 641, 672 (5th Cir.), opinion withdrawn and superseded on reh'g, 83 F.4th 350 (5th Cir. 2023), cert. granted sub nom. Murthy v. Missouri, 144 S. Ct. 7, 217 L. Ed. 2d 178 (2023).

[33] See generally Id.

[34] Id. at 672.

[35] Id. at 664.

[36] See generally Transcript of Oral Argument, Murthy v. Missouri (23-411).

[37] Lindke, at 770.