F3 Law

Article, Client Alert

U.S. Supreme Court Gives School Board Members Back Control of Their Personal Social Media Pages

On March 15, 2024, the Supreme Court of the United States issued a decision in *O'Connor-Ratcliff v. Garnier*, which impacts a school board member's ability to control their social media pages. This case marks a departure from the previous Ninth Circuit Court of Appeal ruling and sets forth a new framework upon which school board members should abide by in managing their social media accounts. F3 represented and advocated on behalf of the California School Boards Association (CSBA) in the case and we are providing this Alert to inform school districts on the legal and practical implications of today's ruling.

The Court clarified that only when school board members are acting as state actors and within their official duties, are they limited in their ability to block unwelcome content on their social media pages. Today's ruling, along with the companion case *Lindke v. Freed*, provides guidance on how to determine whether a school board member is engaged in state action or is functioning as a private citizen online[1]. Specifically, a public official's social-media activity constitutes state action only if the official:

1. possessed actual authority to speak on the State's behalf; *and*
2. purported to exercise that authority when they spoke on social media.

If state action is found, the official's social media page will be considered a public forum meaning speech and social media comments cannot be regulated or restricted by a school board member.

Based on the above test, a school board member may have a private social media page where they may freely block and delete unwelcome comments and content as they are not acting within their official capacity. A public official, including district employees and board members, who are acting in their private capacity, may discuss topics related to their school board position and still maintain their private status.

Add Disclaimer

Additionally, in its amicus brief, F3 Law argued that public officials should be able to include a disclaimer or label in their social media pages to clearly identify when a social media page is private. The Court agreed with this position and asserted that to avoid any confusion or accidental creation of a public forum on a public official's social media page, a public official should clearly indicate, through the use of a label or disclaimer, that the social media page is private. Language such as "this is the personal page of James Freed" or "the views expressed are strictly my own" will create a rebuttable presumption that the posts on that social media page are private and not state action.

Separate Public and Personal Social Media Pages

School board members should also be wary of "mixed-use" applications of social media where there is a mix of private and public posts. A mixed-use social media page requires a fact-specific analysis to determine whether a post was public or private and leaves a gray area that may not be clear how a court would rule. A mixed-use page may prevent the owner from blocking disruptive community members if it means the blocking will prevent them from being able to comment on posts that are deemed public. However, the Court also noted that a disclaimer would be persuasive in protecting a school board member for such mixed-use social media pages.

In light of this landmark decision, we recommend school boards and their members:

- Engage in Governance Trainings so board members are well educated on how they can and cannot engage and interact with social media and how to maintain the private status of their private social media pages.
- Review Bylaws and revise as needed to restrict board members from speaking without authority of the board president or majority of the board.

The F3 legal team that wrote the amicus brief comprised Peter Fagen, Chris Keeler, Gretchen Shipley, and Lynn Beekman.

If your school district has questions regarding the decision or is interested in a virtual governance training on school board social media management and bylaw review, please contact one of the authors listed below or the F3 attorney with whom you normally consult.

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[1] The Supreme Court vacated and remanded the case back to the Ninth Circuit for further proceedings consistent with its ruling in *Lindke v. Freed.*

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