Public Posting 2.0: High Court Creates Test for When Social Media Posts Are State Action

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(by **Harley Stone**, **Anna Jewart** and **Alex Farone**)

In August of 2023, we discussed the ongoing trend of recent cases to blur the line between public officials' "public" and "private" digital communications and social media, focusing primarily on two 2023 Pennsylvania Commonwealth Court cases – *Penncrest School District v. Cagle* and *Wyoming Borough v. Boyer*. In these cases the courts were called upon to decide when a public official's own social media posts are "public" and therefore subject to disclosure under the Pennsylvania Right-to-Know Law (RTKL). While release of messages or comments intended to be kept private can be embarrassing, on March 15, 2024, the U.S. Supreme Court weighed in on an issue that more directly impacts the legal interests of public officials: when does a public official's social media activity on a personal account constitute state action under 42 U.S.C. §1983, subjecting the public official to liability?

Section 1983 provides a cause of action against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage of any State" deprives someone of a civil right granted under the U.S. constitutional or federal statute. It protects against acts attributable to a State (interpreted to include local government agencies), not those of a private person. When a person associated with a State or local government agency acts in a manner that allegedly deprives someone of a federal constitutional or statutory right, the question therefore arises as to whether that act rose to the level of "state action" that triggers potential §1983 liability or was merely the private conduct of that individual. The line between private conduct and state action can be hard to draw, and the age of social media has only made such distinctions more difficult. The U.S. Supreme Court recently weighed in on this specific, but prolific, issue in *Lindke v. Freed*, No. 22-611 (Mar. 15, 2024).

Lindke v. Freed involved a city manager who created a private, personal Facebook profile page in 2008. He later changed the settings on his page so that it would be "public" – meaning anyone could see and comment on his posts. In 2014 he updated his profile page to reflect that he had been appointed as city manager and thereafter continued to post on the profile page about his private life as well as information related to his job and issues of public concern. During the COVID-19 Pandemic, a member of the public commented on some of the manager's posts and expressed displeasure with the city's approach to the pandemic. The manager initially deleted these comments, then ultimately blocked the user. The Facebook user sued the manager under §1983, arguing that the manager had violated the user's right to free speech under the First Amendment because the manager's Facebook profile page was a public forum.

The U.S. District Court for Eastern District of Michigan granted summary judgment to the manager, finding that the Facebook profile page was populated with predominantly personal posts and that there was an absence of "government involvement" in the posts. On appeal from the district court's decision, the Sixth Circuit inquired into whether the manager ran his profile page as part of his actual or apparent duties, or whether the social media activity "couldn't happen in the same way without the authority of the office." In addressing this issue, the Sixth Circuit considered the following nonexclusive factors: whether (1) state law requires the office holder to maintain a social media account; (2) state funds are used in running the account; (3) the account belongs to the state or office itself; and (4) operating the account requires the authority of the office, e.g. , the office holder instructs government staff to operate the account. These same factors were considered by the Pennsylvania Commonwealth Court in *Penncrest* to aid in establishing the factors applicable the "public" nature of social media posts under the Pennsylvania RTKL. The Sixth Circuit affirmed the

District Court.

On appeal, the U.S. Supreme Court noted that the manager's status as an employee of the State was not determinative, and the distinction between private conduct and state action turns on substance, not labels. According to the Court, while public officials can act on behalf of the State, they are also private citizens with their own constitutional rights. The "state action" requirement of §1983 excludes from liability the acts of officers in the ambit of their personal pursuits, and thereby protects a sphere of individual liberty for those who serve as public officials or employees. This case, as the Court discussed, illustrates this dynamic. The manager did not lose his own First Amendment rights when he became city manager, and he was permitted to speak as a private citizen even as to matters of public concern, or about information learned through his public employment. The Court noted, as the Pennsylvania Commonwealth Court had in *Penncrest*, that there was no consensus amongst the federal circuits as to when a public official was acting in an official capacity when engaging in social media activity. Therefore, the Supreme Court established a new two-part, fact-specific rule to analyze this issue: a public official's social media activity constitutes state action under §1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when the official spoke on social media. The appearance and function of the social media account are relative to the second step, but they cannot make up for lack of state authority in the first step. Ultimately, the Court unanimously vacated and remanded for consideration of the Facebook user's claim in light of its newly established test.

Lindke resolved the discrepancies between federal circuits regarding state action and social media under §1983. It should therefore be closely reviewed and considered by any public employee or official who desires to engage in social media activity. However, it also clouds the longevity of Pennsylvania cases, such as *Penncrest* and *Boyer*, which established factors for the related, but not identical, legal question of when private social media is a "public" record under the RTKL.

Additionally, municipalities should take this opportunity to revisit their internal policies concerning social media, using *Lindke* as a guidepost. Social media policies can be made applicable to both municipal employees and elected officials due to RTKL and §1983 concerns. These policies should caution against or prohibit the employees or elected officials from making public posts on social media concerning official matters unless the employee or elected official either (1) makes a disclaimer that they are speaking on their own personal behalf and not on behalf of the municipality or (2) specifically states that they are speaking with the authority of or on behalf of the municipality. These social media policies can also place limits on which municipal employees have the authority to speak on behalf of the municipality without prior approval of a supervisor or the elected officials, and the protocol for obtaining such approval.

Harlan S. Stone is a Shareholder in the Public Sector Services and Energy and Natural Resources groups of the Pittsburgh law firm of Babst, Calland, Clements & Zomnir, P.C. Anna S. Jewart is an associate in Babst Calland's Public Sector Services group and focuses her practice on zoning, subdivision, land development, and general municipal matters. Alexandra G. Farone is an associate in Babst Calland's Employment & Labor and Litigation groups, and her practice includes employment, labor, and human resources counseling to both public and private sector clients.

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