



Politically astute, but not political . . . Politics and the Role of the City Attorney

Wednesday, May 7, 2025

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POLITICALLY ASTUTE, BUT NOT POLITICAL . . .
POLITICS AND THE ROLE OF THE CITY ATTORNEY

Essential Skills Subcommittee
Attorney Development and Succession Committee
May 7, 2025

I. ETHICAL PRINCIPLES

The City Attorneys Department of the League of California Cities has adopted Ethical Principles for City Attorneys to:

- Serve as an aspirational guide to city attorneys in making decisions in difficult situations,
- Provide guidance to clients and the public on the ethical standards to which city attorneys aspire, and
- Promote integrity of the city and city attorney office.

See: <https://www.cacities.org/UploadedFiles/LeagueInternet/d6/d60445e6-7918-459b-9780-00a714616297.pdf>

Principal number 3 is titled “No Politicization”:

The city attorney should provide legal advice in a manner that avoids the appearance that the advice is based on political alignment or partisanship, which can undermine client trust.

Explanation. The city attorney and the city attorney’s advice needs to be trusted as impartial by the entire council, staff and community.

Examples

1. The city attorney should provide consistent advice with the city’s overall legal interests in mind to all members of the city team regardless of their individual views on the issue.

2. Each city council member, irrespective of political affiliation, should have equal access to legal advice from the city attorney, while legal work on a matter consuming significant legal resources should require direction from a council majority.

3. The city attorney or persons seeking to become city attorney should not make campaign contributions to or participate in the campaigns of that city’s officials, including candidates running for that city’s offices or city officers running for other offices. For private law firms serving as city attorney or seeking to become city attorney, this restriction should apply to the law firm’s attorneys.

4. When considering whether to become involved in policy advocacy on an issue that may potentially come before the city, the city attorney should evaluate

whether such involvement might compromise the attorney's ability to give unbiased advice or create the appearance of bias.

For a discussion on how these Ethical Principles relate to the State Bar's Rules of Professional Conduct see: Ethical Principles for City Attorneys, 2019 City Attorney's Department Spring Conference: <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2019/2019-Spring-Conference/5-2019-Spring;-Montes-Ethical-Principles-for-City>; and Practicing Ethics Revised Third Edition 2020: <https://www.calcities.org/resource/practicing-ethics>

Additional Resources

Counsel and Council: A Guide to Building a Productive City Attorney-City Council Relationship: https://www.calcities.org/docs/default-source/city-attorneys/cc-counsel-council-2022-ver4.pdf?sfvrsn=ffd5aa65_3 ([A City Attorney] is not naïve about politics but doesn't "count the votes" prior to making a recommendation; can be counted on to provide his/her best professional advice on all legal issues; is politically astute, but not political.)

II. POLITICS AND LOCAL ELECTIONS

A. Election Laws

- Ballot Designations – Elections Code, sections 13106-13107.5, contain the requirements for ballot designations for candidates for local offices.
- Candidates' Statements - When running for office, candidates may prepare statements to convey information to voters about their qualifications (See Elections Code, section 13307.)

See: Ballot Arguments and Candidates' Statements: a Primer for Local Governments (2008): <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2008/2-2008-Cont-Ed-Issues-Arising-from-Candidate-State>

Practice Tip – It is important for city attorneys to familiarize themselves with these requirements to be able to closely work with your Elections Official about any issues in this area that may arise.

War Story - Early in my career, there was an issue regarding the ballot designation of a sitting council member running for mayor. The city clerk conveyed the issue and I had a

follow-up conversation with the councilmember, with whom I believed I had a good relationship. It seemed like a clear issue under the statutory law at that time. At the end of the conversation, the councilmember indicated that he understood. I naively thought that the issue was resolved.

What I didn't appreciate was that the councilmember's "political advisors" would apparently see things differently and the matter was not resolved at all. I ended up getting an outside legal opinion (from an election/political law firm with a similar political leaning as this council member). I told outside counsel that I didn't care what the outcome was, but just wanted an expert to opine. Outside counsel reached the same conclusion as I did, and a new ballot designation was eventually submitted. Don't forget that elections for sitting council members are incredibly personal (e.g. purpose, social standing, financial) in a way that policy decisions of that sitting council member may not be.

Additional Resources

The California Municipal Law Handbook (Cal. CEB 2024) Chapter 3 (Elections) - See also §3.42 (Ballot Designations) and §3.51(Candidates' Statements)

Municipal Elections: From Start to Finish (2018): [https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2018/Winter-Webinar,-Municipal-Elections-\(2018\)/Municipal-Elections-From-Start-to-Finish-Written-M](https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2018/Winter-Webinar,-Municipal-Elections-(2018)/Municipal-Elections-From-Start-to-Finish-Written-M)

B. Campaign Laws

City attorneys play an important role in educating staff, candidates, and officials on campaign related laws. These laws include the following:

- Soliciting Political Contributions – Government Code, section 3205, prohibits officers and employees of a local agency from soliciting political contributions from an officer or employee of the agency.
- Participating in Political Activities While in Uniform – Government Code, section 3206, prohibits officers and employees of a local agency from participating in political activities while in uniform.

- Using Public Resources for Campaign Activities – Government Code, section 8314, prohibits local officers and employees from using public resources for campaign activities
- Electioneering Near Polling Places and Ballot Drop Off Locations – If city facilities are used as a polling places or ballot drop off locations, Elections Code, section 18370, contains prohibitions on electioneering within 100 feet of such locations.

Practice Tip – Well before an election, it is helpful to distribute a brief memo to staff and city council reminding them of these campaign related laws. Preparing a one-page checklist in simple language of what is permitted and what is prohibited can be very helpful. (See Attachment A)

Additional Resources

Municipal Elections: From Start to Finish (2018): [https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2018/Winter-Webinar.-Municipal-Elections-\(2018\)/Municipal-Elections-From-Start-to-Finish-Written-M](https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2018/Winter-Webinar.-Municipal-Elections-(2018)/Municipal-Elections-From-Start-to-Finish-Written-M)

C. Initiatives, Referenda, and Local Ballot Measures

The Elections Code mandates a role for the City Attorney in initiatives, referenda and local ballot measures.

- Ballot Title & Summary for Initiative – Elections Code, section 9203, requires that within 15 days after notice of intention to circulate an initiative petition is filed, the City Attorney must prepare a non-argumentative ballot title and summary of 500 or fewer words describing the purpose of the initiative measure. The ballot title and summary must not be misleading or biased.

See: Drafting Titles, Summaries and Impartial Analyses (2008):

<https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2008/2-2008-Cont-Ed-Election-Seminar-Holly-Whatley-Sand>

- City Attorney Impartial Analysis of a Local Ballot Measure – Elections Code, section 9280, authorizes the City Council to direct the City Attorney to prepare an impartial analysis of a local ballot measure showing the effect of the measure on the existing law

and the operation of the measure. The impartial analysis must be 500 words or less. The impartial analysis has the same deadline as the ballot arguments.

See: Impartial Analysis (2015): <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2015/2015-Spring-Conference/5-2015-Spring-Michael-Jenkins-Impartial-Analysis>

- Impartial Summary of Referendum Against an Ordinance – If referendum proponents prepare an impartial summary of the referendum, Elections Code, section 9238, authorizes the City Attorney to edit the impartial summary. All edits made to the summary must be true and impartial and shall not contain argument or any matter likely to cause prejudice for or against the referendum. If the city attorney fails to issue an approved summary within 10 business days of submission by the referendum proponents, the proposed summary submitted by the proponents shall be considered approved.

Practice Tip—Don’t procrastinate. The City Attorney only has approximately 10-15 days, depending on the task, to complete this work.

Practice Tip—Check your City Charter to see if there are different rules applicable to election timelines.

Practice Tip – Having a non-attorney person you trust review your summaries and impartial analysis and give a “person on the street” perspective was incredibly helpful to avoid jargon and legalese. Despite some legal background, a legal secretary or legal assistant in the office may be a good choice if a spouse/partner is not. It is best to find a person in your office or firm rather than an outside party. This avoids early drafts becoming public records and any appearance of not being impartial.

- Defending a Challenge. The City Attorney is usually tasked with defending a challenge to the City Attorney’s Ballot Title & Summary, Impartial Analysis, or Impartial Summary. In addition, the City Attorney is usually tasked with defending challenges to actions of the Elections Official (often, the City Clerk). The Elections Code requires courts to expedite hearings on elections-related challenges, and oftentimes a challenger will initially appear *ex parte*.

Practice Tip—Closely communicate with your Elections Official about any rumors of a challenge so you can be prepared to quickly send an attorney to court to represent the Elections Official or the City Attorney.

Additional Resources

The California Municipal Law Handbook (Cal. CEB 2024) §§3.80 - 3.125 (Initiatives and Referenda) - See also 3.222 - 3.226 (Drafting Ballot Measures and Analyzing City Ballot Measures)

Initiatives/Referendums (2015): https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2015/2015-Spring-Conference/5-2015-Spring-Craig-Steele-Initiatives_Referendums

D. Speech

1. Elections-related activities

- Government entities are authorized to express opinions on ballot measures, but not expressly advocate for one side in the election. (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 36.)
- Campaign materials and campaign activities may not be paid for by using public funds, but it is acceptable to produce, develop, and/or disseminate informational materials, and conduct informational activities. (*Vargas, supra*, 46 Cal.4th 1; Gov. Code § 54964.)

Practice tip—It can be challenging to determine whether materials or activities are informational-related or constitute impermissible campaign conduct. In *Stanson v. Mott*, the California Supreme Court provided that commissioning materials such as bumper stickers, posters, advertising floats or television and radio spots are improper campaign-related conduct. ((1976) 17 Cal.3d 206, 221.)

Practice tip—During election season, cities often receive requests to opine on the veracity of election materials. While city officials may respond to requests for information utilizing city resources under *Vargas*, the ability of public entities to serve as roving factcheckers has First Amendment implications because false information is afforded constitutional protections. (*U.S. v. Alvarez* (2012) 567 U.S. 709, 717.)

Practice Tip – Election consultants can be quite aggressive in pushing cities closer (if not over) the line between information and advocacy. Familiarize yourself with the FPCC’s enforcement actions in this area so you can more definitively point to why an approach may be problematic as opposed to just giving a “gut reaction.” Also, like most legal advice, some suggested alternatives versus just a “no” will be better received.

Additional Resources

The California Municipal Law Handbook (Cal. CEB 2024) Chapter 3 (Elections) - §3.313 - 3.218 (City Participation in Ballot Measures)

Ballot Measures and Public Agencies: https://www.ca-ilg.org/sites/main/files/file-attachments/ballot_measures_and_public_agencies_faq_final.pdf?1652940596

Cities on the Ballot: What, When & How of Speech (2019): <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2019/2019-Annual-Conference/10-2019-AC;-Cameron-Perlmutter-Cities-on-the-Ballo>

2. Signs

War story - Handling violations of sign ordinances for campaign signs can be a difficult, particularly for cities that rely on complaint-based enforcement, like our city does. Our city regularly received complaints from one candidate regarding an opposing candidate's signs, resulting in the removal of the opposing candidate's signs. Code enforcement personnel removed the signs in accordance with the city's procedures. After a few weeks of this happening, it was brought to the attention of the city attorney's office that it appeared as if the city was enforcing its sign regulations disproportionately against one candidate.

Practice tip - Make a plan with the city's public information officer to inform the community about the jurisdiction's regulations, and the city's practices for enforcement, and ensure this information is shared with all candidates. If your jurisdiction has a complaint-based system, that fact should be referenced in those informational materials. In the event your jurisdiction has a proactive enforcement practice in addition to a complaint-based one, work with staff to ensure that the proactive enforcement plan is methodical, including by planning ahead for which streets or neighborhoods are slated to receive an inspection.

Additional Resources

The California Municipal Law Handbook (Cal. CEB 2024) §9.151 (Political Signs)

The Challenge of Content Neutrality (2016): <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2016/2016-Spring/5-2016-Spring-The-Challenge-of-Content-Neutrality>

Sign Regulation in the Wake of *Reed v. Town of Gilbert* (2015):

<https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2016/Sign-Regulation-in-the-Wake-of-Reed-v-Town-of-Gil>

3. Members of the Public

- The Brown Act provides in relevant part that “[e]very agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public . . . that is within the subject matter jurisdiction of the legislative body. (Government Code, section 54954.3(a).) It is unclear whether this section allows members of the public to engage in purely political speech during this time.

See: Open & Public VI: A Guide to the Ralph M. Brown Act:

https://www.calcities.org/docs/default-source/advocacy/open-public-vi-revised-2024.pdf?sfvrsn=2f412f0d_3:

Q. During the public comment period of a regular meeting of the legislative body, a resident urges the public to support and vote for a candidate vying for election to the body. May the presiding officer gavel the speaker out of order for engaging in political campaign speech?

A. There is no case law on this subject. Some would argue that purely campaign issues are outside the subject matter jurisdiction of the body within the meaning of Section 54954.3(a). Others take the view that the speech must be allowed under paragraph (c) of that section where relevant to the governing of the agency and an implicit criticism of the incumbents’ performance of city business.

4. Social Media

- Pursuant to Government Code section 8314, the use of public resources, including City-operated or maintained social media accounts administered by City personnel, must be limited to official City business. These platforms may not be utilized in any manner that constitutes—or could reasonably be interpreted as—advertising or promoting a specific elected official, as such use may violate restrictions on the personal or political use of public resources. This does not apply to informational or educational expenditures. (*DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236.)

War Story - In one California city, a councilmember running for re-election started posting campaign messages on their personal social media page using the official City logo in their posts and graphics.

Even though the account was personal, the use of the City's official logo made it seem like the City was endorsing the councilmember's campaign. City Attorney had to step in to explain that the City logo should not be used for personal post. A memo was sent out to staff and council members pointing to Government Code section 8314, which says public resources can't be used for personal or political purposes.

In this case, the City Attorney reminded everyone that official City resources—like logos and staff-run accounts—must stay neutral and can't be used to promote any candidate or initiative.

Practice Tip - Even unintentional use of City branding in campaign posts can cause confusion and may violate the law. It's always best to keep personal and campaign content separate from anything that looks "official."

Practice Tip - To avoid the appearance of City endorsing any campaign-related content, you can send a memo to department directors and City Councilmembers before the election cycle. The memo should: (1) remind officials and staff that City-owned or maintained social media accounts are considered public resources; (2) reinforce that City logos, seals, and other branding may not be used in campaign materials or personal social media posts related to elections; (3) clarify the requirements under Government Code Section 8314, which prohibits the use of public resources for personal or political purposes; and (4) inform staff and officials to consult with legal before posting anything that references their campaign on official or staff-managed platforms.

Additional Resources

Case Law Update: *Lindke v. Freed* – When a Public Official's Social Media is Subject to the First Amendment (2024) - San Diego City Attorney's Office (See Attachment B)

Social Media and Public Agencies: Legal Issues (2010): https://www.ca-ilg.org/sites/main/files/file-attachments/3_-_social_media_paper_110813_0.pdf

E. Campaign Contributions

1. The Levine Act

- Government Code section 84308 (“Levine Act”) generally prohibits a party seeking a contract (other than competitively bid), license, permit, or other entitlement for use from making a contribution of more than \$500 to an official of the agency. Section 84308 also prohibits certain officials, including local elected officials, from taking part in an entitlement for use proceeding if the official has received a contribution exceeding \$500 from a party or participant in the proceeding within the preceding 12 months. An official is also prohibited from accepting, soliciting, or directing a contribution exceeding \$500 from a party or participant in the proceeding for 12 months after a final decision is rendered in such a proceeding.

Statutes such as section 84308 aim to maintain the integrity and public perception of government bodies and to prevent a culture in which bidders or applicants believe it is necessary to make political contributions to receive government contracts or permits.

See: FPPC - Pay-to-Play Limits and Prohibitions (Section 84308):

<https://www.fppc.ca.gov/learn/pay-to-play-limits-and-prohibitions.html>

Practice tips - To implement the provisions of the Levine Act, consider the following:

- Create a checklist for city staff that can be used to track Levine Act items, for example:

A check or "Y" in the checklist below indicates that the action being considered falls under a Levine Act category or exemption:

SUBJECT TO THE LEVINE ACT

___ Land development entitlements

___ Other permit, license, or entitlement for use

___ Contract or franchise

EXEMPT FROM THE LEVINE ACT

___ Competitively bid contract

- Add a reference to staff reports indicating that the item is subject to the Levine Act. This could be as simple as “This item is subject to the Levine Act (Govt. Code § 84308).” Alternatively, some cities offer a more detailed explanation:

This item is subject to the Levine Act. City elected and appointed officials, including candidates for City elected office, (City Officers) who have received a contribution of more than \$500 within 12 months prior from a party, participant, or their representatives involved in this proceeding may do either of the following: (1) disclose the contribution on the record and recuse themselves from this proceeding; OR (2) return the portion of the contribution that exceeds \$500 within 30 days from the time the elected official knew or should have known about the contribution and participate in the proceeding.

All parties, participants, and their representatives must disclose on the record of this proceeding any contribution of more than \$500 made to the City Officers, such as the Mayor and/or Councilmembers, within 12 months prior to the date of the proceeding. City Officers are prohibited from accepting, soliciting, or directing a contribution of more than \$500 from a party, participant, or their representatives during a proceeding and for 12 months following the date a final decision is rendered.

- Add a provision to agreements subject to the Levine Act, such as:

Campaign Contribution Disclosure. Consultant has complied with the campaign contribution disclosure provisions of the California Levine Act (Govt. Code § 84308) and has completed the Levine Act Disclosure Statement, attached.

- Create Levine Act disclosure statement form for items subject to the Act (See Attachment C)

2. Campaign Finance Ordinances

- Many cities have campaign finance ordinances that contain campaign expenditure and contribution limits. For a list of local ordinances see: <https://www.fppc.ca.gov/the-law/local-ordinances.html>
- In some campaign finance ordinances, the City Attorney has the duty to investigate and prosecute any violations. It is a best practice for such ordinances to include exceptions to enforcement by the City Attorney in instances where the City Attorney also is an elected official, and for instances where the City Attorney believes outside counsel is warranted.

As an alternative, upon mutual agreement between the FPPC and the city, the FPPC may assume primary responsibility for the enforcement of local campaign finance ordinances. See: See Cal. Gov't Code § 83123.6 [Enforcement of Local Government Campaign and Ethics Ordinance].

- Finally, Assembly Bill 571 (Stats. 2019, Ch. 556, AB 571 Mullin), effective January 1, 2021, applies a default campaign contribution limit to city candidates when the city has not already enacted a contribution limit. See: FPPC - Contribution Limits: City and County Candidates <https://www.fppc.ca.gov/learn/Contribution-Limits-City-and-County-Candidates.html>

Additional Resources

The California Municipal Law Handbook (Cal. CEB 2024) - §3.205 (Political Reform Act Contribution Limits); and §§3.210 - 3.211 (Local Regulations)

Pay to Play No More? Levine Act (SB 1439) (2023): https://www.calcities.org/docs/default-source/advocacy/9.2023-annual-fabela-freeman-moon---pay-to-play-no-more-levine-act-sb-1439.pdf?sfvrsn=6091b39e_3

Developments in Campaign Finance: How to Update Your City's CFRO (2018): <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2018/2018-Spring-Conference/5-2018-Spring;-Getman-Vidra-Developments-in-Campai>

A Primer on Local Campaign Finance Reform Ordinances (2008): <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2008/2-2008-Local-Campaign-Finance-Reform-Prasanna-Rasi>

III. INTERGOVERNMENTAL CONFLICTS

A. Some Examples of Intergovernmental Conflicts

- City/County disagree on whether County is subject to City's zoning or other regulations.
 - See: The California Municipal Law Handbook (Cal. CEB 2024) § 1.106 (Immunity from Zoning and Building Code Regulations)

- Government Code §§ 53090-91 (definition of “local agency” subject to applicable building ordinances and zoning ordinances of the county or city in which the local agency is situated does not include, e.g., counties)
- *Lawler v. City of Redding* (1992) 7 Cal.App.4th 778, 783 (construing §§ 53090-91)
- *Regents of the University of California v. City of Santa Monica* (1978) 77 Cal.App.3d 130, 138
- 68 Ops.Cal.Atty.Gen. 114 (1985) (governmental agency may not transfer its “section 53090 immunity” to lessee for purely private purposes)
- City and the state Department of Housing and Community Development (HCD) disagree on their respective jurisdictions, e.g., mobilehome parks.
 - Health & Safety Code § 18300(g)(1) provides that state law does not prevent local authorities from “establishing . . . certain zones for manufactured homes, mobilehomes, and mobilehome parks within the city . . . or establishing types of uses and locations.”
 - *County of Santa Cruz v. Waterhouse* (2005) 127 Cal.App.4th 1483 (construing § 18300(g)(1))
 - *Lagrutta v. City Council* (1970) 9 Cal.App.3d 890, 893
- Neighboring cities disagree on impacts to one city from development in another.
 - For example, a neighboring city may be impacted by traffic from a new residential or commercial development which it believes that the host city has not adequately studied or mitigated.
- City and Coastal Commission
 - The city has worked extensively with Coastal Commission staff to arrive at a positive recommendation from the Coastal Commission staff to the Commission. Unfortunately, the Coastal Commission staff is adamant that the proposed sites are not appropriate. The city staff believes that the full Commission will look at the proposed affordable housing sites favorably. At that point it may be necessary to insist upon going before the Commission with a negative staff report from the Coastal Commission staff.

B. What is the role of the city attorney when interfacing with state agencies and counties?

Practice Tips –

- Know what role you are supposed to play before any meeting. Sometimes, your city council might want you to take a stand against another agency even if the law is not on your side. Since policy issues are involved consider whether you should bring other city officials (e.g., City Manager) to support your advocacy and explain the policy reasons for the City's position.
- It's usually a good idea to prepare an agenda ahead of time – ideally shared with everyone who will attend, but if not, then at least as “talking points” for yourself. There might be a more detailed agenda for your city clients outlining who is going to handle what parts of the discussion or field questions with a more general agenda shared with the other agency.
- This can be a great opportunity to develop relationships with attorneys in different agencies. If you are aware of a thorny issue that is likely to come up at a meeting, give a “heads up” to the opposing agency's attorney and share what you can. It is helpful to develop credibility and a trusting relationship with the agency's attorney.
- Body language (including where attendees decide to position themselves in the meeting room) can say a lot; be aware of what is said out loud and what is not.
- Intergovernmental meetings have the potential to make news; make sure you and other city representatives observe appropriate decorum.
- Sometimes it may be appropriate for staff, not the city attorney, to be the primary city representative at intergovernmental meetings, especially standing meetings (for instance, with HCD), so consider recommending this to your City Manager. This can be a good way to build rapport and understanding between agencies so that future conflicts may be avoided or minimized.

Nonetheless, it may make sense for the city attorney (or a deputy) to attend at least some of these meetings, depending on the subject matter. Under these circumstances, you may want to set parameters ahead of time for your participation, i.e., when is it best to just listen and when is it appropriate to speak?

C. Sometimes the public does not understand that state law may preclude local government discretion. What is the City Attorney's role in explaining that to the public? What are some strategies for doing that in a public, contentious setting, such as a city council meeting?

Practice Tips –

- Explain that as the city's attorney you do not advance or oppose policies. Rather, you are nonpartisan legal advice. You can play the role of unbiased, plain-language "educator" on the applicable legal issues/standards.

This often works better as part of the staff presentation before public comments so the city attorney is less likely to find themselves responding to a public comment which can appear like the city attorney is arguing with the member of public.

- Try to provide clear, concise explanations of the law in a non-defensive manner. Remind the governing body (in particular, the board or commission chair or mayor), and the public, of the applicable legal standard prior to or at the meeting. Preparing a script or talking points in advance can help. The city attorney will sometimes need to take "flak" for the Council; ideally you will know in advance when you need to play this role.
- It may also be advisable to establish flexible procedures or protocols covering how and when the city attorney will participate (or not) in community meetings, and your availability to meet with community representatives. Then make sure to explain those protocols and take care to treat all groups and similarly situated community members equally.
- Sometimes it may be more appropriate for the city attorney to refrain from interjecting, and for staff or city officials to convey information to the public instead. Particularly when facing a hearing on a potentially controversial project, seek to prepare staff and the board or commission chair or mayor on how to deal with acrimonious public comments, so they are better equipped to maintain objectivity/non-bias.
- Depending on the subject matter, you may need to provide advice in private versus a public setting. In that case, provide confidential analysis to staff and/or officials before the meeting (e.g., at the same time as the public staff report, or one-on-one briefings if necessary), regarding applicable legal standards and factual findings to be established relating to consideration of the project. You may have to explain that those standards will not allow them to take the action they want (e.g., deny a particular housing project), and in certain cases, that it could be against the city's interest even to ask certain questions of the city attorney, where

their responses could become part of the record. And provide legal options and analysis of potential risks if the project decision conflicts with any legal standard and/or requirement.

D. How would you try to resolve intergovernmental conflicts before litigation?

Practice Tips –

- If neighbor city(ies) are facing a similar conflict with the same agency, it can help to form a “united front” with other cities. Monthly or semi-annual luncheons with other city attorneys, and/or county counsel, in your area can be a great way to share information and identify allies.
 - For example, in Alameda County, the city attorneys coordinated to oppose the position of the County related to tenant protections.
 - In Contra Costa County, the cities came together to discuss the handling of Pitchess/Brady matters with the District Attorney instead of a more ad-hoc approach by individual cities. There was also a concerted effort by the city attorneys in dealing with County stormwater issues. Different city attorneys would take the lead with different issues with the county, which also had the benefit of spreading the workload of being the point person with the county, which is especially helpful for smaller cities. These efforts would have been harder to organize if there wasn’t already the practice of monthly lunches/MCLE/roundtables among the city attorneys in the county.
- Litigation should usually be the option of last resort; the public (as a whole) generally dislikes seeing public agencies “wasting” taxpayer dollars on litigating.

E. What do you think is the appropriate role for the city attorney when communicating with the press on issues of intergovernmental conflict?

Practice Tips –

- It may be desirable or necessary for the city attorney and/or the Public Information Officer (PIO) to prepare talking points that will effectively communicate the city’s position on the intergovernmental issue, as well as identify issues and areas of concern that should be avoided if at all possible. For cities that do not have a PIO, it may fall to the city attorney, who is often viewed as a de facto PIO.
- Except when it is a personnel matter, it is usually better to say something in response to a media inquiry, rather than “no comment.” Consider attempting a joint statement with the other agency(ies) that explains and frames the legal issues.

- Have “off the record” conversations only when appropriate; some attorneys advise never having “off the record” conversations, on the theory that no conversation with the media is truly off limits for publication.
- Following up with the reporter with a written summary of the points you made can be helpful to ensure that your comments are accurately stated in the article. The follow up summary also can include some key facts you may have omitted in the oral conversation.

Additional Resources

Difficult Conversations: Complaints Against a Councilmember (2025):

https://www.calcities.org/docs/default-source/city-attorneys-spring-conference/ethics-complaints-against-a-council-member.pdf?sfvrsn=d6b8a3a5_3

"...And Other Duties As Required": Talking to Non-Clients (2023):

https://www.calcities.org/docs/default-source/city-attorneys/5.2023-spring-adsc-and-other-duties-as-required.pdf?sfvrsn=fba78e63_3

Ethics of Speaking One’s Mind (2008): <https://www.westerncity.com/article/ethics-speaking-ones-mind>

Dealing with Emotional Audiences (2009): https://www.ca-ilg.org/sites/main/files/file-attachments/everyday_ethics_emotional_audiences7-2013.pdf?1442364939

Dealing with Deeply Held Concerns and other Challenges to Public Engagement Processes: https://www.ca-ilg.org/sites/main/files/file-attachments/deeply_held_concerns.pdf?1497552740

Beyond the Usuals Ideas to Encourage Broader Public Engagement in Community Decision Making: https://www.ca-ilg.org/sites/main/files/file-attachments/beyond_the_usuals_8_15.pdf?1477947600

A Local Official’s Guide to Intergovernmental Conflict Resolution:

https://www.ca-ilg.org/sites/main/files/file-attachments/2008_-_conflict_resolution_guide.pdf

CITY OF SAN PABLO
CITY ATTORNEY'S OFFICE

TO: All City Employees
FROM: Lynn Tracy Nerland, City Attorney
DATE: July 7, 2020

SUBJECT: City Employees and Political Activities



With the upcoming November 2020 election, I want to remind you of State law restrictions on political activities, in addition to your ongoing compliance with the City's personnel rules.

Fundamentally, a person does not give up the Constitutional right to participate in political activities by being a City employee. However, State law restricts certain political activities of employees of general law cities, such as the City of San Pablo. (Cal. Gov't Code sections 3201 *et seq.*) ***State law prohibits City employees from using City resources for political activities. Accordingly, it is inappropriate for an employee to engage in political activities during work hours or at the work place.*** Therefore:

- DO NOT use work time or City resources to gather information for candidates (outside of a formal Public Records Act request);
- DO NOT use work time or City resources to campaign for candidates or ballot measures;
- DO NOT use work time or City resources to hand out flyers for candidates or ballot measures;
- DO NOT participate in any political activity while in uniform even if off-duty;
- DO NOT solicit political contributions from other City employees or use the City email or address or other City resources to solicit political contributions; and
- DO NOT wear campaign buttons while on City business.

The City may need to compile information if there is a ballot measure (not advocacy), but the City Manager or City Attorney will direct that effort to avoid legal issues.

State law also prohibits candidates for elective offices from using City resources for campaign activities (including office space, equipment, supplies, vehicles, staff time) or City communication channels to distribute campaign materials (including the City's internal mail systems, fax machines, bulletin boards or email systems). In addition, the City cannot give preference to campaign-related requests to use agency facilities.

Elected officials and candidates cannot seek campaign contributions from City staff. This law is not intended to prohibit general solicitations, so long as City employees are not targeted and City resources are not used.

If you have questions about any of these matters or are concerned about possible violations, please contact your Department/Division Head, City Manager or me immediately.

cc: Mayor and Members of the City Council; City Clerk; City Treasurer

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: May 14, 2024

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Case Law Update: *Lindke v. Freed* – When a Public Official’s Social Media is Subject to the First Amendment

INTRODUCTION

In less than 20 years, social media websites like Facebook and Twitter (now known as X) have become for many the principal sources for information on current events, news, and the like, and are “perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.” *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). Public officials’ use of social media has given rise to a key legal question – under the First Amendment, may public officials delete unwelcome comments to their social media posts or block individuals from viewing or interacting with their social media accounts entirely?

In 2021, this Office issued a memorandum explaining the laws relating to the use of social media by elected officials. *See, e.g., City Att’y MS 2021-8* (Apr. 9, 2021) (MS-2021-8), attached. In March, the United States Supreme Court, in a unanimous decision, addressed the use of social media by public officials in *Lindke v. Freed*, 601 U.S. 187 (2024), establishing a two-part test to determine whether a public official’s use of social media is the act of a private citizen or represents official public communications subject to the First Amendment. This memorandum supplements our prior advice to address this recent ruling.

ANALYSIS

1. First Amendment – Free Speech And Social Media

The First Amendment of the United States Constitution holds, in part, that Congress shall make no law “abridging the freedom of speech, or of the press.” These protections apply to the States under the Fourteenth Amendment’s Due Process Clause.¹ As a general matter, the right to free speech means that the government has “no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Nat’l Inst. of Family & Life Advocates v. Becerra*,

¹ Local governments are subdivisions of the State, and their officials are subject to the First Amendment. *See Monell v. Dep’t of Social Services*, 436 U.S. 658, 690 (1978).

585 U.S. 755, 766 (2018) (citation omitted). These protections, however, are not absolute, and, in a public forum, the government may impose reasonable time, place, or manner restrictions that are narrowly tailored to serve a significant governmental interest.

Historically, public fora (i.e., places traditionally open to political speech and debate) were limited to government buildings, public parks, streets, and sidewalks. *See Packingham*, 582 U.S. at 104 (“[a] basic rule . . . is that a street or park is a quintessential forum for the exercise of First Amendment rights”). With the introduction of the Internet and social media in particular, the concept of public fora has evolved beyond physical locations and now encompasses cyberspace.² *Id.*

Unsurprisingly, recent court decisions throughout the country have found that certain governmental officials’ social media accounts were public fora subject to the First Amendment and any attempt to limit public engagement is subject to reasonable time, place, or manner restriction standards. *See Davison v. Randall*, 912 F.3d 666, 682 (4th Cir. 2019); *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019), *vacated as moot sub. nom. Biden v. Knight First Amend. Inst. at Columbia Univ.*, — U.S. —, 141 S. Ct. 1220 (2021) (President intentionally opened a Twitter account and repeatedly used the account as an official vehicle of governance and made its interactive features accessible to the public without limitation); *Garnier v. O’Connor-Ratcliff*, 41 F.4th 1158, 1178-79 (9th Cir. 2022), *vacated*, 601 U.S. 205 (2024) (a designated public forum is created when the government has made the forum available for public use and has no policy or practice of regulating posted content).

These cases have been brought under 42 U.S.C. section 1983 (Section 1983), which allows an injured party to pursue 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 federal constitutional or statutory right. To be held liable under Section 1983, a defendant must be acting in an official governmental capacity.³ *See West v. Atkins*, 487 U.S. 42, 47-48 (1988). Conversely, a private citizen who is not acting on the government’s behalf or performing a governmental function cannot be held liable under Section 1983. *See Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 812 (2019) (“when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor”). When a government official uses social media, they may be acting in a private, personal capacity, in an official capacity under authorization granted to them, or a mix of both.

² *See* City Att’y MS 2020-30 (Dec. 14, 2020) (discussing California Government Code section 54952.2 which excludes certain government officials’ communications over social media from the Brown Act).

³ Known as the “state-action” requirement, a plaintiff must show that the defendant “exercised power ‘possessed by virtue of state law’” to establish liability. *West*, 487 U.S. at 49 (citation omitted).

A. *Garnier v. O'Connor-Ratcliff*

As discussed in MS-2021-8, Christopher and Kimberly Garnier sued two members of the Poway Unified School District's Board of Trustees in federal court after the Trustees blocked the Garniers from their Facebook and Twitter accounts due to repetitive comments and complaints. The Garniers alleged that the Trustees' social media pages constitute public fora and that, by blocking them, the Trustees violated the Garniers' First Amendment rights. The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision in 2022, finding that, under the circumstances presented, "the Trustees have acted under color of state law by using their social media pages as public fora in carrying out their official duties." *Garnier*, 41 F.4th at 1163. Recognizing that it is not always easy to determine if an official is acting in an official capacity on social media, the Ninth Circuit used what is known as the governmental "nexus test" which examines if there is "such a close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself." *Id.* at 1169 (citation omitted). The Ninth Circuit found that the Trustees' use of their social media accounts was directly connected to, although not required by, their official positions and the Trustees' blocking of the Garniers from their social accounts constituted state action under Section 1983 and violated the Garniers' First Amendment rights.

B. *Lindke v. Freed*

On similar facts, the United States Court of Appeals for the Sixth Circuit reached the opposite conclusion in finding the actions of the Port Huron city manager in blocking an individual on Facebook did not constitute state-action under Section 1983. *See Lindke v. Freed*, 37 F.4th 1199, 1204 (6th Cir. 2022), *vacated*, 601 U.S. 187 (2024).

In this case, James Freed created a private Facebook account before he was appointed city manager for Port Huron and used it for years like many average citizens. When the account outgrew Facebook's 5,000-friend limit, Freed converted his account to a public page with unlimited followers instead of friends. In 2014, Freed was appointed city manager for Port Huron, Michigan, and updated his page to reflect his new title. During the COVID-19 pandemic, Freed's posts caught the attention of Kevin Lindke, who did not approve of how Freed was handling the pandemic and began posting criticism to Freed's Facebook account. Freed did not appreciate the comments, so he deleted them. Freed eventually blocked Lindke from the page.

Lindke sued Freed in federal court alleging that Freed violated his First Amendment rights. As Lindke saw it, he had a right to comment on Freed's Facebook page as a public forum and Freed had engaged in impermissible viewpoint discrimination by deleting Lindke's comments and blocking him.

Recognizing that Section 1983 distinguishes actions taken in an official capacity from those taken in a personal one, the Sixth Circuit concluded that Freed maintained his Facebook page in his personal capacity and his conduct in deleting social media posts and blocking a user did not constitute a state-action under Section 1983. *Lindke*, 37 F.4th at 1202, 1204. The Sixth Circuit

used what it calls the “state-official test,” which “asks whether the official is ‘performing an actual or apparent duty of his office,’ or if he could not have behaved as he did ‘without the authority of his office.’” *Id.* at 1202 (citation omitted).

The Sixth Circuit acknowledged that its analysis differs with how other Circuit courts approached the question of state-action involving public official’s social media usage.⁴ Instead of examining whether a social media account’s appearance and content looks official like the Ninth Circuit, the Sixth Circuit focused on the official’s duties and whether government resources or employees were used to maintain the social media account.

II. Supreme Court Establishes New Test For Determining Whether A Public Official Engaged In State-Action When Deleting Or Blocking Comments On Social Media

Recognizing a split in the Circuit courts, the Supreme Court in *Lindke* established a two-part test to determine whether a public official’s social media posts and activities constitute state-action subject to the First Amendment. Under this two-part test, a public official’s social media activity can only be characterized as state-action if the official “(1) possesses actual authority to speak on behalf of the government regarding a particular matter or topic, and (2) purports to exercise that authority when speaking on social media.” *Lindke*, 601 U.S. at 198.

According to the Court, an analysis of these two factors will determine if a government official engaged in state-action or functioned as a private citizen on social media.⁵ Purely personal accounts are not subject to the First Amendment’s protections and the account owner may delete third-party comments and block their authors.

A. Plaintiff Must Demonstrate the Public Official Possessed Specific Authority to Speak on the Government’s Behalf to Establish Liability under Section 1983

The test’s first prong is based on the principle under Section 1983 that the conduct allegedly causing the constitutional violation must be “fairly attributable to the State.” *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982). The alleged conduct, therefore, must be traceable to the official’s power or authority to speak for the public agency, which can be found either in the agency’s statutes, ordinances, or regulations, or may be derived from well-established customs or usage.⁶ The Supreme Court cautioned that “[p]rivate action – no

⁴ The Second Circuit adopted a similar approach to the state-action question as the Ninth Circuit. See *Knight First Amend. Inst. at Columbia Univ.*, 928 F.3d at 236.

⁵ The Supreme Court identified the nature of the technology involved as an additional factor to consider in making the state-action analysis. *Lindke*, 601 U.S. at 204. For example, in matters involving the deletion of comments, the only relevant social media posts are those from which comments were removed. “Blocking, however, is a different story,” and requires that a court consider whether the public official engaged in state-action with respect to any post in the account. *Id.* “If page-wide blocking is the only option, a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts.” *Id.*

⁶ “Custom” and “usage” encompasses “‘persistent practices of state officials’ that are ‘so permanent and well settled’ that they carry ‘the force of law.’” *Lindke*, 601 U.S. at 200 (citation omitted).

matter how ‘official’ it looks – lacks the necessary lineage” to hold the State “responsible for the specific conduct of which the plaintiff complains.” *Lindke*, 601 U.S. at 198-199. A plaintiff must show more than simply that the public officials had some authority to communicate on behalf of the public agency. It is insufficient to merely allege that “making official announcements *could* fit within [an official’s] job description.” *Lindke*, 601 U.S. at 201 (emphasis in original). Rather, a plaintiff must show that “making official announcements is *actually* part of the job that the State has entrusted the official to do.” *Id.* (emphasis in original).⁷

If this threshold showing of authority cannot be met, there is no state-action and, thus, no liability under Section 1983 for blocking individuals or removing comments.

B. The Speech is Purportedly Made on the Government’s Behalf

The second prong looks to whether the public official was using their official authority in the disputed social media posts. Recognizing that government officials have a choice about the capacity in which they choose to speak to the public, the Supreme Court held that it is generally accepted that a public official “purports to speak on behalf of the State while speaking ‘in his official capacity or’ when he uses his speech to fulfill ‘his responsibilities pursuant to state law.’” *Id.* (citation omitted). If the public official is not speaking in furtherance of their official responsibilities, they are speaking in their own voice and cannot be held liable under Section 1983 for alleged violations of the First Amendment.⁸ *Id.*

The factors to consider in determining whether a specific social media post purports to speak on the government’s behalf include whether the account belongs to a governmental office or is passed down to whoever occupies a particular office. Another consideration is whether the official uses government staff to maintain the account or make a particular post. In these situations, the context can make it clear that the social media account speaks for the government. *Id.* at 202. Conversely, if the account carries a label (e.g., “this is the personal page of”) or disclaimer (e.g., “the views expressed are strictly my own”), the account will be entitled to “a heavy (though not irrebuttable) presumption” that all the posts contained therein are personal. *Id.*

For ambiguous or hard-to-classify accounts, “a fact-specific undertaking” is required which examines a specific post’s “content and function.” *Id.* at 203. The Court cautioned that there must be an awareness that an official does not necessarily purport to exercise their authority

⁷ The Supreme Court states that “[t]he alleged censorship must be connected to speech on a matter within [the public official’s] bailiwick.” *Lindke*, 601 U.S. at 200. The Court explained that if Freed, as city manager, had posted a list of local restaurants with health code violations and subsequently deleted snarky comments made by other social media users, state-action could not be established unless it is shown that public health is within the city manager’s portfolio of responsibilities. *Id.*

⁸ The Supreme Court outlined a hypothetical situation to explain this distinction. In the hypothetical, a school board president announces at a school board meeting that the board has lifted COVID-19 restrictions at public schools. The next day, at a backyard barbecue with friends whose children attend public schools, the president shares that the board has lifted the restrictions. Although the substance of the announcements is the same, the Supreme Court states that only the former is state-action taken by the school board president in their official capacity while the latter is a private action taken in a personal capacity as a friend and neighbor. *Id.* at 201-02.

simply by posting about a matter within it. The Court recognized that a public official may post job-related information on social media for any number of personal reasons, including a desire to raise public awareness or to promote the official's reelection prospects. *Id.*

In sum, because public officials have the right to speak about public affairs in their personal capacities, a plaintiff must show the official is intentionally exercising their state authority in the specific, complained-of social media posts for there to be state-action.

C. Cases Remanded to Respective Circuit Courts

The Supreme Court remanded both *Lindke* and *O'Connor-Ratcliff* to their respective lower courts for review under the newly announced two-part test.

RECOMMENDATIONS

The two-part test announced in *Lindke* highlights several important issues for public officials, the agencies that employ them, and their interactions on social media. Key among them is the importance of clarifying whether the public official is speaking as an authorized representative on the agency's behalf or in a personal capacity.⁹ Additionally, there are other actions that can be taken to lessen any confusion and avoid potential liability when public officials use social media:

- Public officials should label their social media accounts to identify whether they are personal accounts or official ones. Social media accounts labeled as personal are entitled to a strong presumption that their posts are personal.
- If an account is labeled as public, the public officials should make sure they have authority to post on the agency's behalf. It may be appropriate to include a disclaimer if authority does not exist.
- Public officials should not post personal news to their official accounts and vice versa.
- If public information is posted on a personal account, the public official should include links or re-posts to the location where the information is officially released so it is clearly shown that the information is publicly available elsewhere.

⁹ As stated above, Section 1983 liability is contingent on a plaintiff establishing that the complained of action or conduct can be fairly attributable to the State. The Supreme Court's test focuses on whether making public announcements is an actual, specifically enumerated part of an official's job function and not merely an incidental (i.e., "could") one. If no express authority exists, the official's conduct is likely personal in nature and not subject to Section 1983.

Honorable Mayor and Councilmembers
May 14, 2024
Page 7

Questions about whether a public official may delete comments or block individuals on social media must be analyzed on their specific facts. This Office is available to assist and answer any questions as they arise.

MARA W. ELLIOTT, City Attorney

By /s/ David J. Karlin
David J. Karlin
Senior Deputy City Attorney

DJK:cm
MS-2024-2
Attachment: City Attorney Miscellaneous Memorandum MS-2021-8 (Apr. 9, 2021)
Doc. No. 3652734

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: April 9, 2021

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Case Law Update on Elected Officials' Use of Social Media: *Garnier v. O'Connor-Ratcliff*

In December 2020, this Office issued a legal memorandum discussing amendments to the Ralph M. Brown Act clarifying that members of a legislative body may communicate with the public on social media platforms. City Att'y MS 2020-30 (Dec. 14, 2020). As this type of activity grows more common, courts are being asked to determine whether activities like blocking individuals from posting on elected officials' social media accounts violate the First Amendment. This memorandum discusses a recent local federal court case evaluating these issues. *Garnier v. O'Connor-Ratcliff*, No. 3:17-cv-02215-BEN-JLB, 2021 WL 129823 (S.D. Cal. Jan. 14, 2021). Although the outcome is currently being appealed and subject to change, the case merits consideration by elected officials in their use of social media.¹

I. FACTS

In *Garnier*, two members (Board Members) of the Poway Unified School District (PUSD) Board of Trustees blocked a husband and wife (Plaintiffs) from their public Facebook pages after Plaintiffs posted numerous repetitive comments. The Facebook accounts were established before the Board Member were elected to the PUSD Board to promote their campaigns and political activities. The Board Members updated their Facebook pages after their election to reflect their new positions and provide information about PUSD and their participation in PUSD activities. PUSD did not regulate or control the pages or spend money maintaining these accounts. Also, the Board Members did not have in place social media rules of etiquette or decorum.

Plaintiffs' children were enrolled in public schools within PUSD, and Plaintiffs regularly attended Board meetings to voice concerns on PUSD issues. Plaintiffs began posting comments to the Board Members' social media accounts when they believed the Board Members were not responding to their emails and other communication efforts.²

¹ Although this Office can only advise on social media accounts used to discuss official City business, the issues discussed in *Garnier* are equally applicable to private campaign and personal social media accounts.

² Evidence shows Plaintiffs emailed one of the Board Members at her PUSD email address 780 times, and Plaintiffs testified that email messages sent to the Board Members either went unanswered or the recipient refused to talk or meet. *Garnier*, 2021 WL 129823, at *3.

None of Plaintiffs' comments used profanity or threatened physical harm, and almost all related to PUSD. Plaintiffs' comments were often repetitive, however. For example, one of the Plaintiffs posted the same comment to 42 Facebook posts made by one of the Board Members and posted the same reply on Twitter to 226 separate tweets made by that Board Member in a 10-minute period. *Garnier*, 2021 WL 129823, at *6.

The Board Members testified they blocked Plaintiffs due to the disruptive and repetitive nature of their comments and not due to the content of the comments.³

II. LEGAL CLAIMS AND RULING

On October 30, 2017, Plaintiffs filed suit in the United States District Court for the Southern District of California against the Board Members in their individual capacities. Plaintiffs alleged the Board Members violated their First Amendment rights by blocking them from their public social media pages. Plaintiffs also named PUSD in the lawsuit but voluntarily dismissed the District in January 2018.⁴

Plaintiffs' federal claim arises out of 42 U.S.C. section 1983 (1996), pursuant to which "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law." 42 U.S.C. § 1983 (1996). To state a claim under Section 1983, a plaintiff must allege: (1) the violation of a right secured by the Constitution and laws of the United States; and (2) that the alleged deprivation was committed by a person acting under color of state law. Plaintiffs allege that the Board Members violated section 1983 by restraining their ability to participate in a public forum (Facebook).

Under the First Amendment, the government may regulate speech in a public forum by imposing reasonable time, place, or manner restrictions, "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

Here, the District Court found the Board Members were acting in their official capacity as PUSD board members in blocking Plaintiffs. *Garnier*, 2021 WL 129823, at *10. Because the Board Members "could not have used their social media pages in the way they did but for their

³ One of the Board Members blocked Plaintiffs after contacting Facebook. The other Board Member implemented a 2,000-word filter preventing all Facebook users from commenting on his posts. Although this Board Member may not have intentionally blocked Plaintiffs, the District Court found the result of the Board Member's actions was that he prevented Plaintiffs from commenting on any of his posts, which is consistent with what a blocked user would experience. *Garnier*, 2021 WL 129823, at *7.

⁴ PUSD is defending the Board Members in this action. This is consistent with California Government Code section 995, which requires a public entity to defend public officials or employees if the civil action is being brought on account of an act or omission within the scope of employment. Here, Plaintiffs alleged the Board Members used their private social media accounts as a tool for governance and thus were acting in "under the color of law" in blocking Plaintiffs.

positions on PUSD's Board," the Court found their blocking of Plaintiffs "satisfies the state-action requirement for a section 1983 claim." *Id.* The Court's ruling is consistent with other recent cases which found legislators acted in their official governmental capacity in making blocking decisions on social media. *See, e.g., Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019) (county board chair); *Campbell v. Reisch*, 367 F. Supp. 3d 987, 994 (W.D. Mo. 2019) (state representative); and *Felts v. Reed*, No. 20-cv-821-JAR, 2020 WL 7041809, at *6 (E.D. Mo. Dec. 1, 2020) (municipal alderman).

The District Court recognized that whether Plaintiffs' repetitive comments and replies disrupted the Board Members' original posts, making the Board Members' blocking of Plaintiffs a reasonable time, place, or manner restriction on Plaintiffs' speech was an issue of first impression. *Garnier*, 2021 WL 129823, at *11. The Court found that the blocking of Plaintiffs' repetitive posts was content-neutral and "promoted the legitimate interest in facilitating discussion on the[] social media pages and did not burden substantially more speech than necessary because it *immediately responded to high frequency posting during a short period of time.*" *Id.* at *13 (emphasis added).⁵ The Court expressed a need to intervene because the 3-year length of blocking "applies a regulation on speech substantially more broadly than necessary to achieve the government interest." *Id.* at *14.

The District Court suggested the Board Members "could adopt content-neutral rules of decorum for their pages to further the substantial government interest of promoting online interaction with constituents through social media." *Garnier*, 2021 WL 129823, at *14. Those rules "could contain reasonable restrictions prohibiting the repeated posting of comments and include sanctions such as blocking for a limited period of time." *Id.* Although the Court stated that it "cannot decide a precise time limit that might be reasonable," it did suggest that "blocking for one month may pass muster given the ease at which a page administrator can block and unblock a user from a particular page" while "[b]locking for three years, on the other hand, cannot." *Id.*

III. RECOMMENDATIONS

As demonstrated by *Garnier*, elected officials should use caution when blocking individuals from their public-facing social media accounts. The first step in making a blocking decision, as suggested by the District Court, is the adoption of content-neutral guidelines or rules of decorum. Regularly monitoring and reviewing comments with the potential for removing comments or users (also known as "moderating" comments) should be performed without consideration of the viewpoint expressed by the user. The rules should expressly state that prohibited activity will lead to user-generated posts being rejected or removed, or the user being temporarily blocked from the account. For example, the rejection or removal of an offending post, or temporary blocking of a user, could be warranted against users who on multiple occasions posts a comment that:

⁵ The Court commented that it was "undeniable that Defendants, by creating and maintaining public Facebook pages and Twitter accounts, serve a substantial government interest," by "leverag[ing] technology to provide new ways for their constituents to gain awareness of their activities and initiatives as elected officials." *Garnier*, 2021 WL 129823, at *14. According to the Court, the Board Members' social media accounts facilitate "transparency in government" which "is one of the most 'significant government interests' the Court could imagine." *Id.*

- a. contains sexually explicit, profane, or obscene language or content;
- b. would be threatening, abusive, or harassing to a reasonable person;
- c. incites or promotes violence or illegal activities;
- d. contains information that reasonably could compromise individual or public safety;
- e. contains or links to malicious or harmful software;
- f. violates the copyright, trademark or other intellectual property rights of any person or entity; or
- g. violates a local, state, or federal regulation or law, including privacy laws.

Detailed documentation on any blocking decision should be meticulously maintained and include the reason for the blocking. Decisions cannot be based on the content of the speech.

Elected officials may also consider adding a disclaimer as applicable. If, for instance, the elected official maintains a personal Facebook page, the official may wish to post on the page that the page is maintained for personal purposes and is not affiliated with official government business. The elected official should refrain from using the forum for anything other than personal business.

In addition, if social media is used for government business, the elected official may wish to note on social media that the site is not regularly checked or maintained, if that is the case, and refer the public to an alternative mode of communication that may be more responsive to the public, such as an office phone number, website, or even the Get It Done app.

The City's Communications Department maintains social media standards for City department use in developing and maintaining social media pages that may prove helpful when addressing issues that arise on City officials' private social media accounts. We are also available to address specific questions related to official City websites and social media.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ David J. Karlin
David J. Karlin
Senior Deputy City Attorney

CITY OF SAN JOSE
California Levine Act Disclosure Statement
[Cal. Govt. Code § 84308](#)

The Levine Act requires a Party in a proceeding pending before the City of San José that involves any action related to their contract, license, permit, or use entitlement to disclose any campaign contributions to City elected or appointed officials totaling more than \$500 within the twelve (12) months prior to the City decision. A Participant in a proceeding may voluntarily report a campaign contribution on this form.

1. Have you or your company/organization, or any agent on behalf of you or your company/organization, made any political contributions of more than \$500 to any San José City Council Member or San José City Quasi-Judicial Body Member in the 12 months preceding the anticipated date of any Council or Quasi-Judicial Body action related to this license, permit, or other use entitlement?

☐ YES ☐ NO

2. If yes to 1, please identify:

- a. City Council or specific Quasi-Judicial Body:
- b. Meeting Date:
- c. Agenda item number:
- d. Brief Agenda Description (e.g., contract, license, permit, use entitlement):

3. If yes to 1, please identify the Council Member(s) or Quasi-Judicial Body Member(s)

Answering yes to question #1 does not preclude the San José City Council or San José City Quasi-Judicial Body from taking action on the license, permit, or other use entitlement. It does, however, preclude the identified Council Member(s) or Quasi-Judicial Body Member(s) from participating in the actions.

Verification

I have used all reasonable diligence in preparing this Disclosure Statement. I have reviewed this Disclosure Statement and to the best of my knowledge the information contained in this statement is true and complete. I declare under penalty under the laws of the State of California that the foregoing is true and correct.

Signature of Authorized Individual

Date

Name of Authorized Individual:

Name of Company/Organization:

CITY OF SAN JOSE
California Levine Act Disclosure Statement
Cal. Govt. Code § 84308

INSTRUCTIONS AND DEFINITIONS

Effective January 1, 2025, [California Government Code Section 84308](#), commonly referred to as the "Levine Act," prohibits a local elected official or quasi-judicial appointed official from participating in any action related to a contributor's contract, license, permit, or other use entitlement if the official receives any campaign contributions totaling more than \$500 within the twelve (12) months prior to the City decision, and for twelve (12) months following the date a final decision has been made, from the party, participants, or agents in the proceeding. The Levine Act also requires a member of the San José City Council or San José City Quasi-Judicial Body who has received such a contribution to disclose the contribution on the record of the proceeding and recuse themselves before the proceeding unless the violation has been properly cured.

"License, permit, or other use entitlement" means all business, professional, trade, and land use licenses and permits and all other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor, or personal employment contracts), and all franchises.¹ The FPCC interprets "competitively bid" contracts to apply only when the bidders submit fixed amounts in their bids and the City is required to select the lowest qualified bidder with no discretion in awarding the contract. "License, permit, or other use entitlement" excludes: 1) Contracts a) valued under \$50,000, b) where no party receives financial compensation, or c) between two or more government agencies, and 2) competitively bid contracts with material modifications/amendments less than 10% of the contract value or \$50,000, whichever is less.

Members of the San José City Council can be found at <https://www.sanjoseca.gov/your-government/departments-offices/mayor-and-city-council>

San José City Quasi-Judicial Bodies can be found at <https://www.sanjoseca.gov/your-government/appointees/city-clerk/boards-commissions>

Members of San José City Quasi-Judicial Bodies can be found at <https://www.sanjoseca.gov/your-government/appointees/city-clerk/boards-commissions/boards-and-commissions-roster>.

Parties,² Participants³ or Agents for a proceeding involving a license, permit, or other use entitlement pending before the City Council or a City Quasi-Judicial Body are responsible for accessing the above links to review the names prior to answering the following questions, and must complete this form prior to their proceeding.

¹ Cal. Govt. Code § 84308(a)(5).

² "Party" means any person who files an application for, or is the subject of, a proceeding involving a license, permit, or other entitlement for use. Cal. Govt. Code § 84308(a)(1).

³ "Participant" means any person who is not a party but who actively supports or opposes a particular decision in a proceeding involving a license, permit, or other entitlement for use and who has a financial interest in the decision. A person actively supports or opposes a particular decision in a proceeding if that person lobbies in person the officers or employees of the City of San José, testifies in person before the City, or otherwise acts to influence officers of the City. Cal. Govt. Code § 84308(a)(2).