When Blocking Becomes Censorship: The Circuit Split on Determining When Social Media Activity is a State Action

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ABSTRACT

When is the last time you thought about the constitutional implications of your social media activity? With social media use surging, courts face an increasing number of First Amendment cases involving government officials' social media activity.

When a citizen thinks a government official violated their First Amendment rights, that citizen may bring suit under 42 U.S.C. § 1983. To prove liability, the aggrieved citizen must show that the government official acted in their official capacity when performing the alleged harmful activity. This obligation is labeled the "state action requirement."

The Sixth Circuit recently created a circuit split regarding how to address the state action requirement. The Second, Fourth, Eighth, Ninth, and Eleventh Circuits apply the "purpose and appearance" test, focusing on the purpose and appearance of the government official's social media account. However, in the 2022 case of *Lindke v. Freed*, the Sixth Circuit declined to apply the "purpose and appearance" test. The Sixth Circuit instead applied the "state-official" test, asking whether the government official's social media account was part of their duties or used government resources.

The "state-official" test presents two major benefits: (1) it is more predictable in its application, and (2) it is more flexible and adaptable to changing technology. In the rapidly changing world of social media, current and future courts will find these benefits important.

Some circuits have yet to face the novel question of how to address the state action requirement of a government official's social media use. *Lindke* demonstrates why these circuits should adopt the state-official test.

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I. INTRODUCTION

"Social media." The term evokes different feelings for everyone, whether good or bad. Social media allows for quick and easy communication as well as access to information. However, it also brings new and difficult legal questions.[1] These legal questions become important when considering the overwhelming presence of social media in the United States.[2] As of 2021, over 70% of American adults use some form of social media.[3] Furthermore, many social media users access these sites on a daily basis.[4] For example, 70% of Facebook's users and 46% of Twitter's users admitted to visiting the respective sites at least once per day.[5] However, social media use is not strictly limited to private individuals, as government officials may use social media as well.[6] While

1. *See* Kathleen McGarvey Hidy, *Social Media Use and Viewpoint Discrimination: A First Amendment Judicial Tightrope Walk with Rights and Risks Hanging in the Balance*, 102 MARQ. L. REV. 1045, 1046 (2019).

2. *See Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://pewrsr.ch/3UaR76y.

3. *See id.*

4. *See id.*

5. *See id.*

6. *See* Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1163 (9th Cir. 2022), *cert. granted*, 2023 U.S. LEXIS 1690, at *1 (U.S. Apr. 24, 2023) (No. 22-324).

social media allows users to consume information and engage in discussions,[7] the social media activity of government officials may be held to stricter standards than an average citizen.[8]

Some citizens may find the presence of government officials on social media convenient. After all, is it not much easier to "tweet"[9] at your local elected official rather than calling them? Social media, in turn, allows elected officials to quickly communicate with their constituents.[10] However, what happens when these communications are no longer friendly? If a government official does not like what a constituent has to say, can that official "block"[11] the constituent? Research shows that many government officials do.[12] In fact, former President Donald Trump blocked certain users from following his Twitter account, which resulted in "one of the highest-profile court decisions yet" regarding the First Amendment and social media.[13]

With the increase in attention toward government officials' blocking constituents, some citizens may wonder what constitutional limits their government officials face when it comes to social media activity. To answer this question, courts must determine whether a government official's social media use is purely private or not.[14]

While government officials may use social media to post about purely private matters, they may also use social media to carry out their official duties.[15] When private citizens claim that a government official violated their First Amendment rights, the question centers on whether that government official used his or her social media account while acting in

7. *See* Hidy, *supra* note 1, at 1049.

8. *See* Matal v. Tam, 137. S. Ct. 1744, 1757 (2017) (explaining how government actors may not regulate speech in a manner "that favors some viewpoints or ideas at the expense of others").

9. *See* Ryan Mac & Tiffany Hsu, *From Twitter to X: Elon Musk Begins Erasing an Iconic Internet Brand*, N.Y. TIMES, https://nyti.ms/3s5o4Ir (July 24, 2023) (describing how a "tweet" refers to a post made on Twitter). This Comment refers to the social media site formerly known as Twitter and uses the vernacular common to that site's usage. Though the site's name changed to "X" in 2023, this Comment uses the "Twitter" name because that was the site's name at the time of the relevant court cases. *See id.*

10. *See Garnier*, 41 F.4th at 1163.

11. *Id*. at 1164. "Blocking" a social media user prevents the blocked user from interacting with posts on a social media page and may prevent the blocked user from viewing the social media page. *See id.*

12. *See* Leora Smith & Derek Kravitz, *Governors and Federal Agencies Are Blocking Nearly 1,300 Accounts on Facebook and Twitter*, PROPUBLICA (Dec. 8, 2017, 12:43 PM), http://bit.ly/3TsOhsn.

13. *See* Charlie Savage, *Trump Can't Block Critics From His Twitter Account, Appeals Court Rules*, N.Y. TIMES (July 9, 2019), http://bit.ly/3tsLk0k.

14. *See* Lindke v. Freed, 37 F.4th 1199, 1202 (6th Cir. 2022), *cert. granted*, 2023 U.S. LEXIS 1684, at *1 (U.S. Apr. 24, 2023) (No. 22-611).

15. *See id.*

an official capacity.[16] If the government official violated a citizen's First Amendment right, the citizen may file suit under 42 U.S.C. § 1983.[17] However, to be held liable for a § 1983 claim, a government official must have acted in their official capacity, meaning they acted on behalf of the government.[18] This requirement is often called the "'state action' requirement."[19] Therefore, violating a citizen's First Amendment rights while acting in an official capacity constitutes a "state action" and a government restriction of speech.[20]

Until recently, many federal circuit courts, including the Second, Fourth, Eighth, Ninth, and Eleventh Circuits, have analyzed the state action requirement by focusing on the "purpose and appearance" of a social media page.[21] However, the Sixth Circuit recently analyzed the state action requirement with a more holistic approach, which it called the "state-official test."[22] Under this test, the Sixth Circuit examines the social media account as a whole to determine whether the government official's social media activity is included within that official's duties or if the government official's authority was required for the social media activity to occur in the same manner.[23]

The Sixth Circuit's ruling in *Lindke v. Freed* created a circuit split regarding how federal courts analyze the state action requirement when evaluating the social media activity of government officials.[24] Because government officials will likely continue to use social media and block users in the future,[25] the state action requirement will likely pose novel questions in other federal circuits.

This Comment begins by providing background on the legal doctrines under which § 1983 cases such as *Lindke* developed.[26] Part II introduces the First Amendment and the Free Speech Clause as well as §

16. *See id.*; *see also* U.S. CONST. amend. I.

17. *See Lindke*, 37 F.4th at 1202; *see also* 42 U.S.C. § 1983.

18. *See Lindke*, 37 F.4th at 1202.

19. *Id*.

20. *See* Campbell v. Reisch, 986 F.3d 822, 824 (8th Cir. 2021).

21. *Lindke*, 37 F.4th at 1206 (citing Knight First Amend. Inst. v. Trump, 928 F.3d 226, 234–36 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1220–21 (2021); Davison v. Randall, 912 F.3d 666, 680–81 (4th Cir. 2019); *Campbell*, 986 F.3d at 826–27; Charudattan v. Darnell, 834 F. App'x 477, 482 (11th Cir. 2020) (per curiam)); *see also* Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1170–73 (9th Cir. 2022), *cert. granted*, 2023 U.S. LEXIS 1690, at *1 (U.S. Apr. 24, 2023) (No. 22-324).

22. *Lindke*, 37 F.4th at 1202.

23. *See id.* at 1203.

24. *See* Bernie Pazanowski, *Facebook Posts Not State Acts, 6th Cir. Says in Free Speech Case*, BLOOMBERG L.: U.S. L. WK. (Sep. 10, 2022, 8:30 AM), https://bit.ly/3QWp0pg.

25. *See* Hidy, *supra* note 1, at 1052–53 ("[F]ederal agencies and governors block hundreds of social media accounts.").

26. *See infra* Sections II.A–B.

1983 claims and the state action requirement.[27] Next, this Comment analyzes the circuit split by examining how the Second, Fourth, Eighth, Ninth, and Eleventh Circuits use the purpose and appearance test.[28] This Comment then analyzes the Sixth Circuit's use of the state-official test.[29]

Finally, Part III argues that federal circuits should adopt the Sixth Circuit's two-part test if the state action requirement for social media use still presents a novel issue.[30] This Comment further argues that the Sixth Circuit's test is more predictable, more flexible, and more easily adaptable than the current purpose and appearance test.[31]

II. BACKGROUND

To appreciate fully the circuit split regarding the state action requirement for state officials using social media, it is essential to understand the framework under which these cases developed. The First Amendment right to free speech and § 1983 provide citizens with separate, unique causes of action to protect their constitutional rights.[32] After detailing the First Amendment and § 1983, this Comment frames the current circuit split against that legal backdrop and, finally, examines the Sixth Circuit's test.[33]

A. What is the First Amendment?

In its entirety, the First Amendment to the United States Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[34] Although

27. *See infra* Sections II.A–B.

28. *See* Knight First Amend. Inst. v. Trump, 928 F.3d 226, 234–36 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1220–21 (2021); Davison v. Randall, 912 F.3d 666, 680–81 (4th Cir. 2019); Campbell v. Reisch, 986 F.3d 822, 826–27 (8th Cir. 2021); Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1170–73 (9th Cir. 2022), *cert. granted*, 2023 U.S. LEXIS 1690, at *1 (U.S. Apr. 24, 2023) (No. 22-324); Charudattan v. Darnell, 834 F. App'x 477, 482 (11th Cir. 2020) (per curiam); *see also infra* Section II.C.

29. *See* Lindke v. Freed, 37 F.4th 1199, 1202 (6th Cir. 2022), *cert. granted*, 2023 U.S. LEXIS 1684, at *1 (U.S. Apr. 24, 2023) (No. 22-611); *see also infra* Section II.C.

30. *See infra* Part III.

31. *See infra* Part III.

32. *See, e.g.*, *Lindke*, 37 F.4th at 1202 (describing how the plaintiff brought a claim under 42 U.S.C. § 1983 against the defendant for allegedly violating the plaintiff's First Amendment rights).

33. *See infra* Section II.C.

34. U.S. CONST. amend. I.

short in length, the phrase "abridging the freedom of speech,"[35] referred to as the Free Speech Clause, has resulted in extensive jurisprudence.[36]

The Free Speech Clause forbids Congress, governmental entities, and government actors from censoring a citizen or restricting a citizen's right to speak freely and publicly.[37] Viewpoint discrimination is a form of speech abridgement that occurs "[w]hen the government targets . . . particular views taken by speakers on a subject."[38] In the world of social media, viewpoint discrimination occurs in various forms, such as a government official "blocking" citizens from certain social media pages because that official disagrees with that citizen's opinions.[39] Aggrieved citizens may bring First Amendment violation claims, including viewpoint discrimination claims, through § 1983.[40]

B. What is 42 U.S.C. § 1983?

Section 1983 offers citizens a "'civil remedy' for deprivations of federally protected rights caused by persons acting under color of state law,"[41] including "any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia."[42] To act "under color of state law,"[43] a person must "act in a state capacity."[44] Thus, under this state action requirement, an official must act in their state capacity to be liable under § 1983.[45] Put another way, the "defendant's actions [must be] 'fairly attributable to the State'"[46] and cannot have occurred during "personal, private pursuits."[47]

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35. *Id.*

36. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019). Additionally, the Free Speech Clause became applicable to the States through the Fourteenth Amendment. *See id.*; U.S. CONST. amend. XIV.

37. *See* Matal v. Tam, 137. S. Ct. 1744, 1757 (2017).

38. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (citing R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992)).

39. *See* Knight First Amend. Inst. v. Trump, 928 F.3d 226, 230 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1220–21 (2021).

40. *See* Charudattan v. Darnell, 834 F. App'x. 477, 479 (11th Cir. 2020) (per curiam) (describing how the plaintiff brought suit against a government official for allegedly violating the plaintiff's First Amendment rights).

41. Parratt v. Taylor, 451 U.S. 527, 535 (1981), *overruled in part on other grounds by* Daniels v. Williams, 474 U.S. 327, 330–31 (1986).

42. 42 U.S.C. § 1983.

43. *Id.*

44. Lindke v. Freed, 37 F.4th 1199, 1202 (6th Cir. 2022) (citing West v. Atkins, 487 U.S. 42, 48 (1988)), *cert. granted*, 2023 U.S. LEXIS 1684 (U.S. Apr. 24, 2023) (No. 22-611).

45. *See id.* (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

46. *Lindke*, 37 F.4th at 1202.

47. *Id.* (citing Stengel v. Belcher, 522 F.2d 438, 441 (6th Cir. 1975)).

When a government official "blocks" or otherwise abridges a citizen's ability to communicate on social media, that citizen may bring a § 1983 suit against the government official for violating their First Amendment right to free speech.[48] In such cases, the viability of the citizen's claim crucially depends on whether the government official fulfilled the state action requirement.[49] In a § 1983 suit involving an alleged First Amendment violation, the already difficult state action requirement analysis becomes even more difficult when applied to "the ever-changing world of social media."[50]

C. The Circuit Split

Federal courts take varying approaches when applying the state action analysis to the novel setting of social media.[51] The Second, Fourth, Eighth, and Eleventh Circuits, for example, analyze the "social[ ]media page's purpose and appearance."[52] Similarly, the Ninth Circuit used a three-part framework that implicitly considers the social media page's purpose and appearance.[53] However, the Sixth Circuit takes a different approach, examining the duties and authority of the state actor who engaged in the relevant social media activity.[54] To understand the nuances between the circuits' approaches, this section presents an analysis of each circuit's approach to the state action requirement, followed by an analysis of the Sixth Circuit's novel approach.[55]

1. The Second Circuit

Does the President of the United States act in a government capacity when blocking citizens from interacting with his Twitter account? The

48. *See, e.g.*, Campbell v. Reisch, 986 F.3d 822, 823 (8th Cir. 2021) (analyzing a § 1983 claim brought by a citizen claiming their First Amendment rights were violated when the state representative blocked that citizen from the state representative's Twitter account).

49. *See id.* at 824 ("[F]or a § 1983 claim to succeed, a defendant must have acted 'under color of state law.'" (citing Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49–50 (1999))).

50. *Lindke,* 37 F.4th at 1202.

51. *See id.* at 1205–06 (discussing how the court looks to whether social media activity relates to the "jobs or duties or depends on [the defendant's] state authority," while "other courts . . . focus[] on a social-media page's purpose and appearance").

52. *See id.* at 1206 (citing Knight First Amend. Inst. v. Trump, 928 F.3d 226, 234–36 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1220–21 (2021); Davison v. Randall, 912 F.3d 666, 680–81 (4th Cir. 2019); *Campbell*, 986 F.3d at 826–27; Charudattan v. Darnell, 834 F. App'x 477, 482 (11th Cir. 2020) (per curiam)).

53. *See* Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1170–73 (9th Cir. 2022), *cert. granted*, 2023 U.S. LEXIS 1690, at *1 (U.S. Apr. 24, 2023) (No. 22-324).

54. *See* Lindke, 37 F.4th at 1203.

55. *See infra* Sections II.C.1–6.

Second Circuit addressed this issue in *Knight First Amendment Institute at Columbia University v. Trump*.[56] In 2017, then-President of the United States, Donald Trump, blocked multiple individuals from his Twitter account after the individuals criticized some of the President's Twitter posts.[57] The blocked individuals and the Knight First Amendment Institute jointly filed a claim against the President,[58] alleging that the President violated the blocked users' First Amendment rights.[59]

The Second Circuit held that President Trump violated the First Amendment by engaging in viewpoint discrimination.[60] In reaching this conclusion, the court determined that the President acted in an official capacity when blocking other Twitter users.[61] The court noted that the President held out and used his Twitter account "as an official account for conducting official business."[62] The court considered a short list of factors to determine whether a social media account is a government account: "how the official describes and uses the account; to whom features of the account are made available; and how others, including government officials and agencies, regard and treat the account."[63]

The court determined that the President's Twitter account appeared to be an official government page.[64] Furthermore, the court concluded that the page bore "all the trappings of an official, state-run account."[65] For example, the page was registered to the "45th President of the United States of America, Washington D.C."[66] and included prominent pictures depicting the President performing official duties.[67]

Additionally, the Second Circuit acknowledged the purpose of the President's Twitter account as an official government account.[68] Specifically, the court noted that the President himself explained that he

56. *See Knight*, 928 F.3d at 234.

57. *See id.* at 232.

58. *See* Knight First Amend. Inst. v. Trump, 302 F. Supp. 3d 541, 560 n.9 (S.D.N.Y. 2018). Although the plaintiffs did not bring a § 1983 claim against President Donald Trump in *Knight*, the district court chose to address the issue, in part, under precedent that "developed in the context of suits against state officials under 42 U.S.C. § 1983." *Id.*

59. *See Knight*, 928 F.3d at 233.

60. *See id.* at 234.

61. *See id.* at 236 ("Because the President, . . . acts in an official capacity when he tweets, we conclude that he acts in the same capacity when he blocks those who disagree with him.").

62. *Id.*

63. *Id.*

64. *See id.* at 234 ("We conclude that the evidence of the official nature of the [Twitter] [a]ccount is overwhelming.").

65. *Id.* at 231.

66. *Id.*

67. *See id.*

68. *See id.* at 236 ("[T]he President has consistently used the [Twitter] Account as an important tool of governance and executive outreach.").

used his Twitter account for presidential purposes;[69] the social media director for the White House described the President's Twitter account as a channel through which the President communicated directly with Americans;[70] the National Archives and Records Administration classified President Trump's Twitter posts as "official records that must be preserved under the Presidential Records Act;"[71] and the President used his Twitter account to "engage with foreign leaders and to announce foreign policy decisions and initiatives."[72]

In concluding that President Donald Trump acted in an official capacity when he blocked various Twitter users from his Twitter account,[73] the Second Circuit analyzed the purpose and appearance of the social media account.[74] The court's analysis focused on how the President himself described and treated the Twitter account, how other government officials described and treated the Twitter account, how the Twitter account was used for official purposes, and how extensively the government was involved with the Twitter account.[75]

2. The Fourth Circuit

The Second Circuit analyzed the state action requirement with respect to the then-President's Twitter account,[76] but how does the state action requirement apply to local officials? The Fourth Circuit evaluated this question in *Davison v. Randall*,[77] which involved the chair of the Loudon County Board of Supervisors banning a constituent from the chair's Facebook page.[78] The banned constituent subsequently brought a § 1983 claim against the chair for violating the First Amendment through viewpoint discrimination.[79] The court examined the "totality of the circumstances" to determine whether the chair banning the constituent constituted a state action.[80] The court agreed that the "circumstances surrounding [the chair's] creation and administration of the chair's Facebook page and [the] banning of [the constituent] from that page," in combination, constituted a state action.[81]

69. *See Knight*, 928 F.3d at 235.
70. *See id.*
71. *Id.* (citing *id*. app. at 57).
72. *Id.* at 236.
73. *See id.*
74. *See id.* at 235–36.
75. *See id.*
76. *See id.* at 234.
77. Davison v. Randall, 912 F.3d 666, 680 (4th Cir. 2019).
78. *See id.* at 672–73.
79. *See id.* at 676.
80. *See id.* at 680.
81. *Id.*

Multiple factors demonstrate how the chair's Facebook page had the appearance of an official account, as the account was "swathe[d] . . . in the trappings of [the] office."[82] The court considered eight specific factors, including "the page [being] categorized as that of a government official," and "the title of the page includ[ing] [the chair's] title."[83] Additionally, the court reasoned that the chair used the Facebook page for an official purpose, to "perform[] actual or apparent dut[ies] of h[er] office,"[84] and that the Facebook page was used "as a tool of governance."[85]

Like the Second Circuit, the Fourth Circuit analyzed whether an official's social media activity was a state action by examining the purpose and appearance of the social media page.[86] However, the Fourth Circuit also considered the "totality of the circumstances" and whether the official's status itself allowed the official to use social media "in a manner that private citizens never could have" used it.[87]

3. The Eighth Circuit

In *Campbell v. Reisch*, the Eighth Circuit analyzed how the state action requirement applies to a state representative's Twitter actions.[88] In *Reisch,* a Missouri state representative blocked the plaintiff on Twitter.[89] The plaintiff sued the representative under § 1983, claiming a First Amendment violation.[90] Pursuant to the § 1983 analysis, the court examined whether the representative acted under color of state law when blocking the plaintiff on Twitter.[91] The court answered no.[92]

The court determined that the state representative's Twitter account was not an official government account—it was a personal account used primarily for campaign purposes.[93] This use fell outside the scope of the representative's official duties.[94] For example, the "overall theme of [the] tweets" related to campaign material, and the Twitter account did not "become[] an organ of official business" at any point.[95] The court also analyzed the Twitter account's appearance and concluded that the "'trappings' of an official account" were "too equivocal to be helpful" in

82. *Id.*
83. *Id.* at 680–81.
84. *Id.*
85. *Id.* at 680.
86. *See id.* at 679–81.
87. *Davison*, 912 F.3d at 680.
88. Campbell v. Reisch, 986 F.3d 822, 824–28 (8th Cir. 2021).
89. *See id.* at 823.
90. *See id.*
91. *See id.* at 824.
92. *See id.* at 823.
93. *See id.* at 826.
94. *See id.*
95. *Id.*

determining whether the appearance converted the Twitter page into an official account.[96]

Unlike the courts in *Knight* and *Davison*, the Eight Circuit found these "trappings" unhelpful because the Eighth Circuit attempted to distinguish whether the Twitter account appeared to be an official page or a campaign page, rather than attempting to classify the page as an "official page."[97] Ultimately, the court found the state representative's Twitter account "more akin to a campaign newsletter" than an official account.[98]

However, the Eighth Circuit's opinion was not unanimous.[99] Judge Kelly's dissent argued that the state representative acted under color of state law when blocking the plaintiff on Twitter[100] and that the representative engaged in viewpoint discrimination.[101]

Unlike the majority, Judge Kelly believed the theme of the state representative's tweets changed after the representative was sworn into office.[102] For example, the representative no longer used the Twitter account to request campaign donations but instead used the account to relay information to the public about the representative's official activities.[103] The dissent found that this use turned representative's Twitter account into a "tool of governance."[104]

Moreover, Judge Kelly believed the representative "clothed" her Twitter account "in the trappings of her public office."[105] For example, the Twitter account described the representative as "MO State Rep 44th District,"[106] and the Twitter account profile picture depicted the representative in the Missouri House chamber.[107] Because the representative's Twitter account turned into a "tool of governance" after her election[108] and the account contained various "trappings of her public office,"[109] Judge Kelly concluded that the state representative engaged in viewpoint discrimination under color of state law.[110]

The Eighth Circuit's majority opinion focused on the purpose and appearance of the representative's Twitter account when determining

96. *Id.* at 827.
97. *Id.*
98. *Campbell*, 986 F.3d at 827.
99. *See id.* at 828–831 (Kelly, J., dissenting).
100. *See id.* at 828.
101. *See id.* at 829–830.
102. *See id.* at 828.
103. *See id.*
104. *Id.* at 829.
105. *Id.*
106. *Id.*
107. *See id.*
108. *Campbell,* 986 F.3d at 829 (Kelly, J., dissenting).
109. *Id.*
110. *See id.* at 828–31.

whether the representative acted under color of state law when blocking the plaintiff.[111] The Eighth Circuit focused on the lack of unequivocal "'trappings' of an official account,"[112] as well as the failure of the Twitter account "becom[ing] an organ of official business" after the representative's election into office.[113] However, the dissent believed that the representative's Twitter account became a "tool of governance" after the representative's election.[114] The dissent further believed the account contained the "'trappings" of the representative's public office.[115] Subsequently, in *Garnier v. O'Connor-Ratcliff*,[116] the Ninth Circuit found the Eighth Circuit's analysis of a potential tonal shift from a private social media account to an official account persuasive.[117]

4. The Ninth Circuit

Like the Fourth Circuit, the Ninth Circuit applied the state action requirement to local officials' social media activity in *Garnier v. O'Connor-Ratcliff*.[118] In *Garnier*, two members of a school district's Board of Trustees (the "trustees") acted under color of state law by blocking the plaintiffs on various social media pages.[119] The trustees created public Twitter and Facebook accounts to promote their campaigns for their election to the trustees' office.[120] After the trustees won, they continued to use the social media accounts to communicate school district issues and events directly to parents and constituents.[121] The plaintiffs, two parents of children within the school district, left critical comments on the trustees' social media pages.[122] The trustees deleted comments from both plaintiffs and eventually blocked the plaintiffs from the trustees' social media pages.[123] The plaintiffs subsequently filed a § 1983 suit claiming that the trustees violated the plaintiff's First Amendment rights by blocking them.[124]

111. *See id.* at 826–27 (majority opinion).
112. *Id.* at 827.
113. *Id.* at 826.
114. *Id.* at 829 (Kelly, J., dissenting).
115. *Id.*
116. Garnier v. O'Connor-Ratcliff, 41 F.4th 1158 (9th Cir. 2022), *cert. granted*, 2023 U.S. LEXIS 1690, at *1 (U.S. Apr. 24, 2023) (No. 22-324).
117. *See id.* at 1172.
118. *See id.* at 1170–73.
119. *See id.* at 1170.
120. *See id.* at 1163.
121. *See id.*
122. *See id.*
123. *See id.*
124. *See id.* at 1166–67.

The Ninth Circuit held that the trustees acted under color of state law when blocking the plaintiffs.[125] In reaching this decision, the court used a three-part framework: whether "(1) the employee 'purport[s] to or pretend[s] to act under color of law,' (2) his 'pretense of acting in the performance of his duties . . . had the purpose and effect of influencing the behavior of others,' and (3) the harm inflicted on [the] plaintiff 'related in some meaningful way either to the officer's governmental status or to the performance of his duties.'"[126]

First, the Court determined that the trustees "'purport[ed] . . . to act in the performance of [their] official duties' through the use of their social media pages."[127] The trustees presented their "official identifications" on the Facebook and Twitter pages by listing their official titles.[128] Additionally, the social media pages clearly provided information about Board activities to the public.[129] The "appearance and content" of the trustees' social media pages demonstrated how "the [t]rustees held their social media pages out to be official channels of communication with the public about the work of the . . . [b]oard."[130]

Next, the court determined that the trustees' social media pages appeared official because the pages "had the purpose and effect of influencing the behavior of others."[131] The public continually engaged with the trustees' social media pages because the trustees "actively solicited" their constituents to provide feedback and input about official school district matters, and the trustees often responded to constituents' comments.[132] The court determined that the trustees accomplished this engagement by using their status as government officials to "influence the behavior of those around them."[133]

Finally, the court determined that the trustees managed the social media pages in a way that significantly related to the trustees' "'governmental status' and 'the performance of [their] duties.'"[134] The content of the trustees' posts directly related to the responsibilities of their

125. *See id.* at 1170.

126. *Garnier*, 41 F.4th at 1170 (citing Naffe v. Frey, 789 F.3d 1030, 1037 (9th Cir. 2015) (first quoting Van Ort v. Est. of Stanewich, 92 F.3d 831, 838 (9th Cir. 1996); then quoting Anderson v. Warner, 451 F.3d 1063, 1069 (9th Cir. 2006); and then quoting Martinez v. Colon, 54 F.3d 980, 987 (1st Cir. 1995)).

127. *Id.* at 1171 (citing *Anderson*, 92 F.3d at 1069).

128. *Id.*

129. *See id.*

130. *Id.*

131. *Id.* (citing *Naffe*, 789 F.3d at 1037).

132. *Id.*

133. *Id.* (citing Anderson v. Warner, 451 F.3d 1063, 1069 (9th Cir. 2006)).

134. *Id.* (citing *Naffe*, 789 F.3d at 1037).

positions,[135] such as selecting a superintendent.[136] Further, the court noted how the trustees' social media pages were no longer personal campaign pages because the trustees posted almost exclusively about official school district business after the elections ended.[137]

When public officials block citizens from social media pages, the Ninth Circuit uses a three-part test to determine whether the blocking occurred under color of state law.[138] Similar to the other circuits, the Ninth Circuit implicitly looks at the purpose and appearance of the official's social media page.[139]

5. The Eleventh Circuit

Similar to the Second, Fourth, Eighth, and Ninth Circuits, the Eleventh Circuit assesses the purpose and appearance of a social media page.[140] In the Eleventh Circuit case of *Charudattan v. Darnell*,[141] the court determined that a sheriff did not act under color of state law when blocking a private citizen from the sheriff's Facebook account.[142] An elected county sheriff created and maintained a Facebook page for reelection purposes.[143] After the sheriff won reelection, the sheriff changed the name of the page from "Re-elect Sadie Darnell" to "Sheriff Sadie Darnell."[144] Multiple sheriff's office employees regulated the comments on the sheriff's Facebook page while they were off duty.[145] Additionally, the sheriff's office maintained a separate Facebook page, also moderated by employees of the sheriff's office, to convey important information to the public.[146] The sheriff's office Facebook page was separate from the sheriff's individual Facebook page.[147]

The plaintiff, a private citizen, brought a § 1983 suit against the sheriff after the sheriff deleted the plaintiff's comments and banned the plaintiff from the sheriff's individual Facebook page and from the sheriff's

135. *See id.*
136. *See Garnier*, 41 F.4th at 1171.
137. *See id.* at 1172.
138. *See id.* at 1170–73.
139. *See id.*
140. *See* Charudattan v. Darnell, 834 F. App'x 477, 479–82 (11th Cir. 2020) (per curiam).
141. *Id.* at 477.
142. *See id.* at 482.
143. *See id.* at 479.
144. *Id.*
145. *See id*.
146. *See id.* at 478.
147. *See id.* at 478–49.

office Facebook page.[148] The plaintiff alleged that the sheriff violated the plaintiff's First Amendment right to free speech.[149]

The court did not determine whether the sheriff acted under color of state law when deleting the plaintiff's comments from the sheriff's office Facebook page.[150] However, the court held that the sheriff did not act under color of state law by blocking the plaintiff from the sheriff's individual Facebook page.[151]

The court concluded the sheriff's individual Facebook page was a private account,[152] and the sheriff used the account for private purposes—primarily reelection.[153] The sheriff "created and administered the page for her private reelection campaign," and the "page did not contain posts on behalf of the [s]heriff's [o]ffice."[154] Additionally, the sheriff's official title was not listed on the Facebook page, and the page was not classified as a government official's page.[155] Finally, off-duty employees managing the sheriff's Facebook page "did not establish state action" because the off-duty employees "were not acting in any official capacity" when managing the page.[156]

The Eleventh Circuit focused on the purpose and appearance of the sheriff's individual Facebook account to determine that the sheriff did not act under color of state law when blocking the plaintiff.[157] However, the court also considered why the Facebook page was created and who was involved in managing the page.[158]

6. The Sixth Circuit

Until recently, the federal circuits have followed similar tests for analyzing the state action requirement for a government official's social media activity—the courts analyzed the social media page's purpose and appearance.[159] However, the Sixth Circuit took a different approach in *Lindke v. Freed*.[160] In *Lindke*, the Sixth Circuit explored whether certain

148. *See id.* at 478.
149. *See id.* at 479.
150. *See Charudattan*, 834 F. App'x at 480–81 (discussing how the plaintiff's comments on the sheriff's office Facebook page were "off-topic and subject to removal" due to the page's policy of "precluding topics that are 'clearly off the intended topic of discussion'").
151. *See id.* at 482.
152. *See id.*
153. *See id.*
154. *Id.*
155. *See id.*
156. *Id.*
157. *See id.*
158. *See id.*
159. *See, e.g.*, Davison v. Randall, 912 F.3d 666, 679–81 (4th Cir. 2019).
160. Lindke v. Freed, 37 F.4th 1199, 1202–03 (6th Cir. 2022), *cert. granted*, 2023 U.S. LEXIS 1684, at *1 (U.S. Apr. 24, 2023) (No. 22-611).

social media activity by James Freed, the city manager for Port Huron, Michigan, was state action.[161] Before being appointed city manager, Freed created a public Facebook page for personal use which any Facebook user could "follow."[162] After being appointed city manager, Freed included his new title in the "About" section of his Facebook page, which described Freed as "Daddy to Lucy, Husband to Jessie and City Manager, . . . for the citizens of Port Huron, MI."[163] Freed's Facebook page contained a wide variety of posts, ranging from photos of family picnics to posts about "administrative directives [Freed] issued as city manager."[164]

After the COVID-19 pandemic began, Freed posted news articles related to the pandemic and certain COVID-19 policies he implemented for Port Huron.[165] Kevin Lindke, a Port Huron citizen, criticized Freed's posts in the comment section.[166] Freed deleted Lindke's comments and blocked Lindke from Freed's Facebook page.[167] As a result, Lindke could no longer leave comments on Freed's Facebook page.[168] Lindke subsequently sued Freed under § 1983, claiming that Freed "violated his First Amendment rights by deleting [Lindke's] comments and blocking him from" Freed's Facebook page.[169]

To determine Freed's liability under § 1983, the court had to answer a critical question: Was Freed "engaged in state action" when he blocked Lindke?[170] The court began its analysis by articulating the Sixth Circuit's "state-official test."[171] Under the state-official test, "social-media activity may be a state action when it (1) is part of an officeholder's 'actual or apparent dut[ies]' or (2) couldn't happen in the same way 'without the authority of [the] office.'"[172]

After announcing this test, the Sixth Circuit emphasized the importance of "look[ing] to a page or account as a whole, not each individual post."[173] Looking at the whole social media page provides the necessary background for analyzing the state official's activity and avoids

161. *See id.* at 1201.

162. *See id.* "Following" a social media account causes public posts from the account to show up on a social media user's home page. *See* Law Offs. of Herssein & Herssein, P.A. v. United Servs. Auto. Ass'n, 271 So. 3d 889, 903 n.7 (Fla. 2018).

163. *Lindke*, 37 F.4th at 1201.

164. *Id.*

165. *See id.*

166. *See id.* at 1201–02.

167. *See id.* at 1202.

168. *See id.*

169. *Id.*

170. *See id.*

171. *Id.*

172. *Id.* at 1203 (citing Waters v. City of Morristown, 242 F.3d 353, 359 (6th Cir. 2001)).

173. *Lindke*, 37 F.4th at 1203.

"losing the forest for the trees."[174] In essence, the Sixth Circuit stressed the need to look at the social media post in the post's broader context.[175]

The Sixth Circuit determined that Freed blocking Lindke from his Facebook account was not a state action.[176] The court assessed several criteria and determined that Freed's Facebook page was neither part of "the duties of his office, nor depend[ed] on his state authority."[177]

Turning to the first part of the state-official test, the court determined that Freed's Facebook activity was not part of his "actual or apparent duties."[178] The court reasoned that "no state law, ordinance, or regulation compelled Freed to operate his Facebook page,"[179] nor did Freed use government funds to operate the page.[180]

Next, the court determined that Freed's Facebook activity did not require his state authority because the "page did not belong to the office of the city manager"[181] and Freed did not "rely on government employees to maintain his Facebook page."[182]

In contrast to the other circuits, the Sixth Circuit explicitly rejected Lindke's assertion that the court should determine whether "the presentation of the account is connected with the official's position,"[183] by concentrating on the "social-media page's purpose and appearance."[184] The Sixth Circuit declined to explore the nuances of this purpose and appearance test, choosing instead to use the state-official test.[185] The court offered support for the state-official test by asserting that the test "offer[s] predictable application for state officials and district courts alike" and that it offers "the clarity of bright lines."[186]

III. ANALYSIS

As social media grows in popularity,[187] federal circuits grapple with the state action requirement in the increasing number of cases involving

174. *Id.*
175. *See id.*
176. *See id.* at 1204.
177. *Id.*
178. *See id.*
179. *Id.*
180. *See id.* at 1205.
181. *Id.*
182. *Lindke*, 37 F.4th at 1205.
183. *Id.*
184. *Id.* at 1206 (citing Knight First Amend. Inst. v. Trump, 928 F.3d 226, 234–36 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1220–21 (2021); Davison v. Randall, 912 F.3d 666, 680–81 (4th Cir. 2019); Campbell v. Reisch, 986 F.3d 822, 826–27 (8th Cir. 2021); Charudattan v. Darnell, 834 F. App'x 477, 482 (11th Cir. 2020) (per curiam)).
185. *See Lindke,* 37 F.4th at 1206.
186. *Id.* at 1206–07.
187. *See Social Media Fact Sheet*, *supra* note 2.

the abridgement of private citizens' speech on social media platforms.[188] However, some federal circuits have yet to address this state action issue,[189] which presents the opportunity for undecided circuits to adopt the Sixth Circuit's state-official test.[190]

Circuits that are deciding this issue as a matter of first impression should adopt the Sixth Circuit's state-official test.[191] Undecided circuits should adopt the state-official test rather than the purpose and appearance test because the state-official test is more predictable in its application[192] and because the test is more flexible and easily adaptable to the rapidly changing world of social media.[193]

A. The State-Official Test is Predictable in its Application

The number of social media-based viewpoint discrimination claims is increasing,[194] and the need for predictability in legal standards remains important.[195] As stated in *Lindke*, the state-official test "offer[s] predictable application for state officials and district courts alike."[196] First, the state-official test requires courts to analyze two factors,[197]—not the numerous possible factors a judge may consider in the purpose and appearance test.[198] Because of this more limited inquiry, a court's analysis using the state-official test's factors will likely have more predictable outcomes than under the purpose and appearance test.[199]

1. The State-Official Test Must Use Specific Factors When Assessing the State Action Requirement

The state-official test offers predictable application by requiring courts to use two specific factors when analyzing the state action

188. *See*, *e.g.*, *Lindke*, 37 F.4th at 1202–03.

189. *See, e.g.*, One Wis. Now v. Kremer, 354 F. Supp. 3d 940, 950–51 (W.D. Wis. 2019). For example, the Seventh Circuit has not addressed the state action requirement for a state actor's social media use. *See id.* (analyzing the state action requirement under Fourth Circuit precedent in the absence of Seventh Circuit precedent). However, at least one federal district court within the Seventh Circuit has addressed this state action requirement. *See id*. Because a federal district court within the Circuit has addressed this issue, the Seventh Circuit will likely address this issue in the near future. *See id.*

190. *See Lindke*, 37 F.4th at 1206.

191. *See id.*

192. *See infra* Section III.A.

193. *See infra* Section III.B.

194. *See* Hidy, *supra* note 1, at 1053.

195. See *id.* at 1046 (discussing how lower courts' struggle to understand social media users' legal rights leaves the rights of those users at risk).

196. *Lindke*, 37 F.4th at 1206.

197. *See id.* at 1203.

198. *See supra* Sections II.C.1–5.

199. *See infra* Section III.A.2.

requirement.[200] The following example demonstrates why two specific factors will benefit state actors using social media.

Meet fictitious Senator John Smith. Senator Smith is considering blocking a constituent from Senator Smith's social media page, but the Senator is worried the blocked constituent may bring a § 1983 claim against him for viewpoint discrimination.[201] Senator Smith, therefore, needs to determine whether a court within his jurisdiction would find his decision to block a constituent as state action. If Senator Smith's jurisdiction uses the purpose and appearance test, Senator Smith will have to guess which factors can and will be applied to his case.[202] Senator Smith may have a difficult time determining which factors a court will apply to his case because the purpose and appearance test allows the presiding court discretion to determine which specific factors to use.[203]

As a real-world example of the purpose and appearance test's uncertainty, the court in *Campbell* assessed the Twitter page in question using the purpose and appearance test to determine specifically whether the social media page was an official page or a campaign page.[204] Alternatively, the court in *Knight* applied the purpose and appearance test but did not attempt to distinguish whether the Twitter page was an official page or campaign page.[205] With this discretion available to the court under the test,[206] Senator Smith will likely be unsure which factors a court will consider to determine whether his action was a state action. Therefore, Senator Smith may not be able to determine whether he is able to permissibly block a constituent.

On the other hand, if Senator Smith's jurisdiction applies the state-official test, Senator Smith will already know the two factors a court will assess if the blocked constituent brings a § 1983 claim.[207] Under this test,

200. *See Lindke*, 37 F.4th at 1203 (describing how the state-official test requires a court to analyze whether the social media activity "(1) is part of an officeholder's 'actual or apparent dut[ies],' or (2) couldn't happen in the same way 'without the authority of [the] office'").

201. *See* 42 U.S.C. § 1983; *see also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (citing R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992)).

202. *See supra* Sections II.C.1–5 (describing the possible factors courts may use when applying the purpose and appearance test).

203. *See* Davison v. Randall, 912 F.3d 666, 680 (4th Cir. 2019) (describing how courts must "examine the 'totality of the circumstances'" to determine whether an actor committed a state action, and how "no one factor is determinative").

204. *See* Campbell v. Reisch, 986 F.3d 822, 827 (8th Cir. 2021); *see also supra* Section II.C.3.

205. *See* Knight First Amend. Inst. v. Trump, 928 F.3d 226, 234–40 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1220–21 (2021); *see also supra* Section II.C.1.

206. *See Davison*, 912 F.3d at 680.

207. *See* Lindke v. Freed, 37 F.4th 1199, 1203 (6th Cir. 2022), *cert. granted*, 2023 U.S. LEXIS 1684, at *1 (U.S. Apr. 24, 2023) (No. 22-611).

Senator Smith will be able to reliably assess whether his potential action will be considered a state action, which, in turn, will allow him to determine whether his action will open him up to liability.[208]

Knowing which factors will be applied to potential claims affords state actors, such as Senator Smith, predictability when trying to assess whether their social media activity is state action.[209] This predictability allows state officials to increase their focus on performing their jobs rather than trying to decide whether their social media posts will expose them to liability under § 1983.

2. The State-Official Test Factors Will Likely Provide More Predictable Results

In addition to offering a more predictable application of which factors courts will apply,[210] the state-official test also offers more predictable results when those factors are applied.[211] The state-official test factors offer more predictable results because they require a more objective analysis than the purpose and appearance factors.[212]

For example, the court in *Lindke* provided multiple examples of when social media activity is part of an official's "actual or apparent duty."[213] These examples require a relatively objective analysis—very little discretion is required to determine whether state law requires an official to hold a social media account,[214] whether state resources are used in running the social media account,[215] or whether the social media account belongs to a particular office as opposed to the officeholder.[216]

208. *See supra* Section II.C.6. (detailing how the Sixth Circuit applies the state official test when analyzing the state action requirement).

209. *See id.* The state-official test uses two specific factors. *See Lindke,* 37 F.4th at 1203. A court applying the purpose and appearance test, however, may use factors of their choosing. *See supra* Sections II.C.1–5 (describing the possible factors courts may use when applying the purpose and appearance test).

210. *See supra* Section III.A.1.

211. *See Lindke*, 37 F.4th at 1206–07 (discussing how the state-official test factors "bring[] the clarity of bright lines to a real-world context that's often blurry").

212. *Compare* Knight First Amend. Inst. v. Trump, 928 F.3d 226, 236 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1220–21 (2021) (discussing how determining whether a social media account is a government account is a "fact-specific inquiry" involving various subjective factors), *with Lindke*, 37 F.4th at 1204 (discussing how Freed's blocking Lindke on Facebook was not a state action simply because Freed's Facebook page "neither derives from the duties of [Freed's] office nor depends on [Freed's] state authority").

213. *Lindke*, 37 F.4th at 1203–04.

214. *See id.* at 1203.

215. *See id.* at 1204.

216. *See id.*

On the other hand, the purpose and appearance test allows courts more discretion when analyzing chosen factors.[217] Judges may disagree regarding whether a social media page has the purpose or appearance of being an official account.[218] For example, the majority opinion in *Campbell* found that a state representative's Twitter account was not an official account,[219] in part, because the purpose of the Twitter account continued to support and promote the representative's private election campaign.[220] However, Judge Kelly, in her dissent, stated that she believed the purpose of the representative's Twitter account changed.[221] Despite initially using the Twitter account for private election purposes, the representative later used the Twitter account for an official purpose "as a 'tool of governance.'"[222] The court's application of the purpose and appearance test in *Campbell* resulted in two conflicting determinations based on the same facts,[223] demonstrating how a court's discretion may produce unpredictable results.[224]

The Sixth Circuit's state-official test is more predictable in its application than the purpose and appearance test.[225] By choosing to adopt the state-official test, a circuit will allow its state officials to spend less time analyzing whether their social media action will attribute them to state action and allow courts to spend less time determining which factors to apply and how to apply them.

B. The State-Official Test is Flexible and Adaptable

The state-official test provides a more predictable application than the purpose and appearance test.[226] Additionally, and perhaps most importantly, the test is more flexible and adaptable.[227] Social media

217. *See*, *e.g.*, Campbell v. Reisch, 986 F.3d 822, 826 (8th Cir. 2021) (describing how the court may determine that a private social media account turned into an official account, and the court has discretion in determining whether this change has occurred).

218. *See id.* at 823, 831.

219. *See id.* at 826; *see also supra* Section II.C.3.

220. *See Campbell*, 986 F.3d at 826–27.

221. *Id.* at 828 (Kelly, J., dissenting).

222. *Id.* at 829.

223. *See id.* at 823 (majority opinion). *See also id.* at 828–29 (Kelly, J., dissenting).

224. *Compare id.* at 826–27 (majority opinion) (describing how the majority applied the purpose and appearance test and determined that the representative's account was not an official account), *with id.* at 828–29 (Kelly, J., dissenting) (describing how the dissent applied the purpose and appearance test and determined the representative's account was an official account).

225. *See supra* Sections III.A.1–2. Importantly, under the state-official test, though a state official may know which factors the court will apply, he cannot know for certain how the court ultimately will rule in applying those factors to his specific case.

226. *See supra* Section III.A.

227. *See* Lindke v. Freed, 37 F.4th 1199, 1206 (6th Cir. 2022), *cert. granted*, 2023 U.S. LEXIS 1684, at *1 (U.S. Apr. 24, 2023) (No. 22-611) (discussing how applying the purpose and appearance test to Lindke's case "might not be enough" to determine whether

websites have rapidly changed in their short lifetimes.[228] This trend will likely continue in the future.[229] After all, the internet as a whole is rapidly changing: Anything courts say about the internet, including statements about social media, "might be obsolete tomorrow."[230] However, laws concerning social media are evolving at a slower rate than social media sites themselves.[231] Due to this dilemma, courts should adopt precedent that can be adapted easily to new and unforeseen versions of social media. The flexible and adaptable nature of the state-official test ensures that the test can be used for state-action questions regarding current social media activity and state-action questions that may arise with future social media use.[232]

The state-official test is more flexible and adaptable because it can be easily applied to new social media websites that a judge may be unfamiliar with. If a judge is unfamiliar with a particular social media website, that judge may not be able to properly apply the purpose and appearance test to determine whether a particular social media account has the "purpose and appearance" of being an official government account with the officeholder acting in an official capacity.[233]

For example, when analyzing the appearance of the Facebook page in question, the court in *Davison* listed various state office "trappings" on the Facebook page, such as the categorization of the page as belonging to a government official.[234] The court used these "trappings" on the Facebook page to determine that the chair acted under the color of state law when blocking a constituent from the chair's Facebook account.[235] However, if the social media page in question was not a Facebook account, but rather a new and unique social media site that the court was unfamiliar with, the court may not have been able to properly determine whether these "trappings" gave the social media page the appearance of an official state

Freed acted under the color of state law when blocking Lindke). *But see id.* at 1204–06 (discussing why the state-official test can be used to determine that Freed did not act under the color of state law in this "novel circumstance").

228. *See* Esteban Ortiz-Ospina, *The Rise of Social Media*, OUR WORLD DATA (Sept. 18, 2019), http://bit.ly/3YNt14P.

229. *See id.*

230. Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017).

231. *See* Esteban Ortiz-Ospina, *supra* note 228. For example, social media began sometime in the early 2000s. *See id.* However, the United States Supreme Court did not address the relationship between the First Amendment and social media websites until 2017. *See Packingham*, 137 S. Ct. at 1736.

232. *See Lindke*, 37 F.4th at 1206–07 (discussing how the state official test brings "the clarity of bright lines to a real-world context that's often blurry").

233. *See*, *e.g.*, Knight First Amend. Inst. v. Trump, 928 F.3d 226, 235–36 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1220–21 (2021).

234. Davison v. Randall, 912 F.3d 666, 680 (4th Cir. 2019).

235. *See id.*

account or even what "trappings" to consider.[236] If the social media page had a unique appearance, the court may have been unable to determine whether the social media page contains certain "trappings," such as the categorization of the page.[237] In these situations, the purpose and appearance test proves inadequate at adapting to new and unique social media pages.

Alternatively, the state-official test is easier to apply to social media pages regardless of the court's experience or familiarity with that platform.[238] For example, a court does not have to fully understand the appearance of a social media page to determine whether certain social media activity is part of an officeholder's "actual or apparent dut[ies]."[239] Even if a court is unfamiliar with a particular site, that court can still determine that a social media account is within an officeholder's "actual or apparent dut[ies]"[240]—for example, if state law or regulation requires the officeholder to maintain that account.[241]

Additionally, a court could also determine that maintaining a social media account is within an officeholder's apparent duties, rather than the duty being prescribed by law or regulation.[242] However, determining whether maintaining a social media page is an apparent duty of an officeholder requires an examination of that officeholder's social media activity, rather than a thorough understanding of the social media page or site.[243]

To determine whether the officeholder acted under color of state law, courts only need to look at the requirements of the officeholder's position rather than the social media website itself.[244] In the face of new and unique social media websites, the first factor of the state-official test allows courts to evaluate adequately the state action requirement.

The second factor of the state-official test is also easily adaptable to new forms of social media.[245] The following example demonstrates why

236. *See supra* Sections II.C.1–5 (discussing how the purpose and appearance test relies on a fact-intensive inquiry about the specifics of a social media site in question).

237. *Davison*, 912 F.3d at 680 (discussing the various Facebook specific features that contained "trappings" of the chair's office).

238. *See, e.g.*, Lindke v. Freed, 37 F.4th 1199, 1203, 1205 (6th Cir. 2022). For example, the court in *Lindke* did not require a thorough understanding of Facebook to determine that no state law required Freed to maintain a Facebook account, or that Freed did not rely on government employees to maintain the account. *See id.*

239. *Id*. at 1203.

240. *Id.*

241. *See id.* at 1204.

242. *See id.* at 1203.

243. *See id.* at 1206 (discussing how a social media account may be within an official's "actual or apparent duty" if the official uses state funds to run the account).

244. *See id.* at 1204.

245. *See id*. at 1204–06 (discussing why the state-official test can be used to determine that Freed did not act under the color of state law in this "novel circumstance").

the second factor—whether the social media activity "couldn't happen in the same way 'without the authority of [the] office'"[246]—does not depend heavily on the court's understanding of the social media account. For example, if government employees maintain a state official's social media page,[247] or the social media page belongs to the office itself rather than the officeholder,[248] a court need not fully understand every detail of a social media website to determine that the second part of the state official test is fulfilled. As a result, courts will spend less time familiarizing themselves with the intricacies of social media websites to properly determine whether a state-official's activity occurred under color of state law.

To the benefit of both courts and state actors, the Sixth Circuit's state-official test provides a predictable set of factors courts will analyze,[249] and the test provides a predictable application of the selected factors when faced with the state action requirement for social media activity.[250] As previously discussed, predictability allows state officials to properly focus on performing their job, rather than trying to assess the likelihood of liability under a possible § 1983 claim.[251] Further, courts will spend less time trying to determine which factors to apply to a case.

Additionally, the state-official test is flexible and adaptable,[252] which will likely become important with the rapidly changing landscape of social media websites.[253] With this flexibility, courts will not be required to learn the nuances of new social media websites, as would be required by the purpose and appearance test.[254] Due to the benefits of the state-official test, circuits deciding this issue as a matter of first impression should adopt the state-official test, rather than the purpose and appearance test.

IV. CONCLUSION

American adults' social media use is nearly universal.[255] Moreover, this use is not limited to private individuals—many government and state

246. *Id.* at 1203.
247. *Id.* at 1205.
248. *Lindke*, 37 F.4th at 1205.
249. *See supra* Section III.A.1.
250. *See supra* Section III.A.
251. *See, e.g.*, Knight First Amend. Inst. v. Trump, 928 F.3d 226, 235–36 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1220–21 (2021) (describing the numerous ways in which President Trump used his Twitter account as a "tool of governance and executive outreach"). When focusing on important job functions such as this, "[s]ociety insists that the President base his decisions on sound policy for the nation, not on individual threats of a lawsuit." Zervos v. Trump, 171 A.D.3d 110, 123 (N.Y. App. Div. 2019).
252. *See supra* Section III.B.
253. *See* Ortiz-Ospina, *supra* note 228.
254. *See supra* Section III.B.
255. *See Social Media Fact Sheet*, *supra* note 2.

officials now frequently use social media for both private and official matters.[256] Although social media allows government officials a quick and easy method of communicating information,[257] these communications raise novel First Amendment issues.[258] Furthermore, the determination of these issues will undoubtedly impact the future of free speech.[259]

The Sixth Circuit broke from its sister courts and created a circuit split when deciding what test to apply to determine whether a government official's social media activity constituted a state action.[260] Unlike the Second, Fourth, Eighth, Ninth, and Eleventh Circuits, which look at the social media page's purpose and appearance,[261] the Sixth Circuit uses the state-official test and asks whether the social media activity is part of the government official's "actual or apparent dut[ies]" or "couldn't happen in the same way 'without the authority of [the] office.'"[262]

The state action requirement regarding government officials' social media activity presents a novel issue in some circuit courts.[263] When deciding how to approach the state action requirement, circuit courts should adopt the Sixth Circuit's state-official test because the state-official test offers more predictability, flexibility, and adaptability than the purpose and appearance test.[264] The state-official test allows courts to easily assess the state action requirement implicated by current social media websites,[265] and the test allows courts to assess the state action requirement when new and unique social media websites inevitably appear in the rapidly changing world of internet communications.[266]

256. *See* Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1163 (9th Cir. 2022), *cert. granted*, 2023 U.S. LEXIS 1690, at *1 (U.S. Apr. 24, 2023) (No. 22-324).

257. *See* Hidy, *supra* note 1, at 1049.

258. *See* Lindke v. Freed, 37 F.4th 1199, 1202 (6th Cir. 2022), *cert. granted*, 2023 U.S. LEXIS 1684, at *1 (U.S. Apr. 24, 2023) (No. 22-611).

259. *See* Hidy, *supra* note 1, at 1082.

260. *See* Pazanowski, *supra* note 24.

261. *See, e.g.*, Knight First Amend. Inst. v. Trump, 928 F.3d 226, 234–36 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1220–21 (2021); Davison v. Randall, 912 F.3d 666, 680–81 (4th Cir. 2019); Campbell v. Reisch, 986 F.3d 822, 826–27 (8th Cir. 2021); *Garnier*, 41 F.4th at 1170–73; Charudattan v. Darnell, 834 F. App'x 477, 482 (11th Cir. 2020) (per curiam).

262. *Lindke*, 37 F.4th at 1203.

263. *See supra* note 189 and accompanying text.

264. *See supra* Part III.

265. *See Lindke*, 37 F.4th at 1203–05 (applying the state-official test to a government employee's Facebook page).

266. *See supra* Section III.B.