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SOCIAL MEDIA AND STATE ACTION: CLICK "LIKE" AND FOLLOW THIS TWO-PART TEST

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ABSTRACT

The right to free speech was deemed so important by the Framers of the Bill of Rights that they enshrined this right in the Free Speech Clause of the First Amendment. There was, however, no way they could have envisioned how communication would evolve to what it is now in the twenty-first century and the related issues that would arise. The threshold question to all alleged First Amendment violations is whether the action at issue is state action. As means of communication progressively move more online to social media, this question has become more difficult to answer. Many government officials now use social media to espouse their policies and interact with their constituents, which has been beneficial in many senses. But this has also led to many contentious interactions between government officials and private citizens. These contentious interactions have resulted in courts grappling with the question of whether certain actions on social media, such as blocking a person from interacting with an account, constitute state action.

Most of the federal courts of appeals use a purpose and appearance test to answer this question. This test considers the purpose and appearance of the social media account at issue by weighing several factors to determine whether a government official's activity while using that account is state or private action. The Sixth Circuit, however, has opted to perform the state-official test to determine whether action taken on social media is state action. This test asks whether certain social media activity is part of an official's actual or apparent duties or could not have happened in the same way without the authority of their office. This has led to a circuit split as to how to best handle this issue.

This Comment examines the federal courts of appeals cases utilizing these tests and proposes a solution to this circuit split by creating a two-part test using both the state-official and the purpose and appearance tests. The first part of this two-part test calls for the use of the state-official test. The state-official test is a bright-line test that, if satisfied, would find state action without the need to consider the purpose and appearance of a social media account. If no state action is found, however, then the second part of this two-part test uses the more flexible, multi-factor purpose and appearance test to determine if there is state action. By combining these separate tests into a two-part test, in this order, it both takes advantage of their inherent strengths and mitigates their weaknesses. Social media has established itself as a major tool for private citizens and government officials to interact with each other to an extent previously not possible. It is imperative, therefore, that United States courts be prepared to uniformly handle this issue that has occurred numerous times and will continue to occur as long as social media exists.

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I. INTRODUCTION

One of the greatest obstacles to the ratification of the Constitution was the fight between the Federalists and Anti-Federalists over whether to include a bill of rights.[1] Ultimately, the need for a bill of rights prevailed, and the first ten Amendments were added to the Constitution.[2] Thomas Jefferson described the importance of the Bill of Rights as "what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."[3] Enshrined in the First Amendment of the Bill of Rights, the right to free speech was deemed critical to include.[4] The First Amendment, in relevant part, states, "Congress shall make no law . . . abridging the freedom of speech."[5]

The right to free speech now faces many novel issues in the age of social media. Since "[s]even in 10 American adults use at least one internet social networking service, and such services are . . . the principal sources for . . . speaking and listening in the modern public square,"[6] it is important that courts and legislatures address these issues. One such important issue is: To what extent are public officials able to prevent and limit citizens from interacting with them on their social media pages?[7] A threshold question that must be resolved in

1. *The Bill of Rights: A Brief History*, ACLU (Mar. 4, 2002), https://www.aclu.org/other/bill-rights-brief-history [https://perma.cc/N96D-6V7T].

2. *See id.*

3. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787) (on file with National Archives: Founder's Online), https://founders.archives.gov/documents/Jefferson/01-12-02-0454 [https://perma.cc/7HLD-3SCT].

4. *See* U.S. CONST. amend. I.

5. *Id.*

6. Elizabeth Williams, Annotation, *First Amendment Protection Against Curtailment of Access to, or Retaliation for Communications on, Social Media*, 38 A.L.R. Fed. 3d Art. 5, § 2 (2019).

7. *See, e.g.*, Lindke v. Freed, 37 F.4th 1199, 1202 (6th Cir. 2022), *cert. granted*, 143 S. Ct. 1780 (2023) (No. 22-611) (discussing the issue of an official who blocked a constituent on social media and whether this was a violation of federal rights by determining if this action was state action).

each of these situations is whether a public official's action constitutes state action because only then will the First Amendment be implicated.[8] This is a frequent question that arises in the context of government officials "blocking" constituents from the officials' social media accounts.[9]

This Comment is part of a movement among commentators to address the circuit split that has developed regarding the test that should be used to determine whether a public official's action on social media constitutes state action. This circuit split has been drawing more attention,[10] and it has been granted certiorari by the U.S. Supreme Court.[11] This Comment analyzes the federal courts of appeals' split on the issue of how to properly determine whether a public official's action is state action when interacting with private citizens on social media and proposes that a combination of the "state-official"[12] test and the "purpose and appearance"[13] test is the solution. The two-part test that this Comment proposes first implements the state-official test and identifies the elements that the state-official test requires to establish state action. Then, if none of the elements from the state-official test are satisfied, the second part of the proposed two-part test utilizes the purpose and appearance test with a defined list of factors to consider. Part II provides an overview of social media's prevalence in society today and its importance regarding political discourse. Part III describes how the federal courts of appeals currently analyze whether public officials' actions on social media constitute state action and how the *Lindke* case created a circuit court split involving this issue. Finally, in Part IV, this Comment puts forth a recommendation for the best way to resolve this split: by creating a two-part test that utilizes a

8. *See* Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 236 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (noting that once the President is determined to be a government actor viewpoint discrimination would be a First Amendment violation).

9. *See, e.g.*, *Lindke*, 37 F.4th at 1202.

10. *See e.g.*, Heather Van Hull, *To Block or Not to Block: Section 1983,* Lindke*, and Government Accountability in the Age of Social Media*, 83 OHIO ST. L.J. SIXTH CIR. REV. 1, 3, 6 (2022) (discussing the circuit split caused by *Lindke* and concluding that the use of the state-official test instead of the purpose and appearance test allows public officials "to publicize and celebrate their accomplishments while suppressing criticism of their work"); John B. Tsimis, Comment, *Looks Matter on Social Media: How Should Courts Determine Whether a Public Official Operates Their Social Media Account Under Color of State Law?*, 91 FORDHAM L. REV. 2061, 2065 (2023) (examining the circuit split caused by *Lindke* and proposing a solution by using a modified purpose and appearance test).

11. Olivia B. Hoff et al., *Supreme Court Grants Cert in* Lindke *and* O'Connor-Ratcliff, LAWFARE (May 24, 2023, 8:00 AM), https://www.lawfaremedia.org/article/supreme-court-grants-cert-in-lindke-and-o-connor-ratcliff [https://perma.cc/9N8K-58DP].

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

13. *Id.* at 1206.

combination of both the current state-official and purpose and appearance tests.

II. Social Media – Today's Public Forum

Social media's ability to keep private citizens informed and allow them to engage in public discourse has established social media as one of "the most powerful mechanisms available to . . . private citizen[s] to make [their] voice[s] heard."[14] People use social media for a myriad of reasons, including to stay connected with friends and family, read the news, read what is being discussed, and share and discuss their opinions with other people.[15] Out of all the possible uses for social media, only 29% of people use social media to post or share about political issues often (9%) or sometimes (20%).[16] While only a minority of people use social media to discuss their political beliefs, their right to share these beliefs is no less important.

Social media's ability to get a message out has also been noticed by our politicians.[17] Social media offers multiple benefits to politicians, including the ability to understand voters' preferences in real time and the reduced cost of communicating with constituents.[18] Between 2015 and 2018, the percentage of U.S. Representatives who used Facebook and Twitter increased from 97% and 95% to 99% and 100%, respectively.[19] Further, every U.S. Senator had adopted the use of Facebook and Twitter by 2018.[20] In 2020, every single U.S. Congress member posted on an official Facebook account at least once.[21] Facebook and Twitter, however, are not the only social media platforms used by Congress members, as they use an average of six forms of social media.[22]

Some politicians started using social media to appeal to younger constituents by leaning into the more casual communication styles

14. Williams, *supra* note 6, § 2; Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

15. *Why Do People Use Social Media?*, Oberlo, https://www.oberlo.com/statistics/why-do-people-use-social-media [https://perma.cc/8KYG-WFQ3].

16. Colleen McClain, *70% of U.S. Social Media Users Never or Rarely Post or Share About Political, Social Issues*, Pew Rsch. Ctr. (May 4, 2021), https://www.pewresearch.org/fact-tank/2021/05/04/70-of-u-s-social-media-users-never-or-rarely-post-or-share-about-political-social-issues/ [https://perma.cc/Y6Z2-G47M].

17. Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1163 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 1779 (2023) (No. 22-324).

18. Jacob R. Straus, Cong. Rsch. Serv., R45337, Social Media Adoption by Members of Congress: Trends and Congressional Considerations (2018).

19. *Id.* at 3 fig. 1.

20. *Id.*

21. *Percentage of U.S. Congress Members Who Posted on Official Social Media Accounts in 2020*, Statista (June 21, 2022), https://www.statista.com/statistics/958794/congress-members-posted-official-social-media-accounts-usa/ [https://perma.cc/PV2C-QD8W].

22. Straus, *supra* note 18, at 8.

that work well in this context.[23] Recently, the official White House Twitter account departed from its formal tone typically used by the Biden administration, and opted for a snarkier style when responding to criticism of the student loan forgiveness program.[24] Specifically, the official White House Twitter account responded to tweets from politicians, which criticized the student loan forgiveness program, with tweets showing how much of those politicians' Paycheck Protection Program (PPP) loans from during the pandemic were forgiven.[25]

Alexandria Ocasio-Cortez, a U.S. Representative, also departed from the traditional norms of politicians on social media by hosting a voter outreach event, solely online, using a live-streaming platform called Twitch.[26] During the event, Ocasio-Cortez and Ilhan Omar, another U.S. representative, played the video game "Among Us," which is an online game that gained a large following of players during the pandemic.[27] The event, used to encourage young voters to get out and vote in the 2020 presidential election, was a huge success and attracted 439,000 viewers.[28] To put the success of this youth voter outreach event into perspective, Biden and Trump had previously streamed campaign events on Twitch and only garnered 6,000 and 17,000 viewers, respectively.[29]

While social media has provided an inexpensive and efficient way to engage with large numbers of constituents, the proliferation of social media in politics has also led to controversy.[30] Following the 2016 presidential election, Special Counsel Robert Mueller indicted multiple Russian individuals and entities for interfering with the election.[31] The Internet Research Agency, commonly referred to in the media as the "Russian 'troll' farm," used Facebook and Twitter to attempt to

23. *See* Sarah Elbeshbishi, *When the White House Claps Back: Is the Official Twitter Tone Part of Biden's Shifting Approach?*, USA TODAY (Sept. 11, 2022, 11:14 AM), https://www.usatoday.com/story/news/politics/2022/09/11/white-house-twitter-account-new-jersey-veteran-megan-coyne/8016571001/ [https://perma.cc/N5AT-SNKG] (discussing the White House's shift in tone on Twitter).

24. *See id.*

25. *Id.*

26. *See* Joshua Rivera, *AOC Played Among Us and Achieved What Most Politicians Fail at: Acting Normal*, GUARDIAN (Oct. 22, 2020, 3:52 PM), https://www.theguardian.com/games/2020/oct/22/alexandria-ocasio-cortez-ilhan-omar-among-us-twitch-stream-aoc [https://perma.cc/WBZ8-CE7C].

27. *Id.*

28. *Id.*

29. *Id.*

30. *See Exposing Russia's Effort to Sow Discord Online: The Internet Research Agency and Advertisements*, U.S. HOUSE OF REPRESENTATIVES PERMANENT SELECT COMM. ON INTEL. DEMOCRATS, https://democrats-intelligence.house.gov/social-media-content/ [https://perma.cc/Y8NP-M4TG] (discussing interference by Russians in the 2016 presidential election).

31. *Id.*

interfere with the election, and it is estimated that millions of Americans were exposed to its posts and tweets.[32]

Furthermore, when U.S. government officials block and limit constituents from accessing and interacting with the officials' social media profiles, issues implicating the First Amendment arise.[33] Such issues include, but are not limited to: whether certain social media accounts constitute a public forum; whether the "speech is 'government speech' immune from the dictates of the Free Speech Clause"; and, the issue that this Comment revolves around, whether action taken on social media by a government official constitutes personal or state action.[34] As the Supreme Court takes on more cases revolving around the "emerging trend of speech taking place on social networking websites,"[35] it is vital that all U.S. courts be prepared to address the threshold question: When is there state action on social media that is "subject to the Constitution's protections?"[36]

III. The Circuit Split

In general, the First Amendment only applies to government activity, not private activity.[37] A threshold question, therefore, that must be answered in all cases of alleged First Amendment violations is whether the activity at issue was committed in a governmental or private capacity.[38] There are currently two tests used by the federal circuit courts of appeals to determine if an action taken by a public official on social media against another person is considered state action. The test used by most federal courts of appeals focuses "on a social-media page's purpose and appearance" to determine whether the account is a personal account or an account related to the public official's governmental position.[39] In *Lindke v. Freed*, however, the Sixth Circuit declined to follow this test used by its sister circuits.[40] Instead, the Sixth Circuit opted for a test that finds "social-media activity may be 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

32. *Id.*

33. *See* Dawn Carla Nunziato, *From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital*, 25 B.U. J. Sci. & Tech. L. 1, 5 (2019) (discussing how government officials have been accused of violating First Amendment rights when the officials blocked constituents on social media).

34. *Id.*

35. Michael Patty, *Social Media and Censorship: Rethinking State Action Once Again*, 40 Mitchell Hamline L.J. Pub. Pol'y & Prac. 99, 105 (2019).

36. *Id.* at 113.

37. *Id.* at 102.

38. *Id.*

39. *See* Lindke v. Freed, 37 F.4th 1199, 1205–06 (6th Cir. 2022), *cert. granted*, 143 S. Ct. 1780 (2023) (No. 22-611) (noting that several courts have used the purpose and appearance approach).

40. *See id.* at 1206.

the authority of [the] office.'"[41] The *Lindke* court's departure from the commonly used purpose and appearance test has created a federal circuit split surrounding the test used to determine if an action on social media is state action.[42] This split should be resolved so that there is only one uniform test used by U.S. courts.

A. *The Purpose and Appearance Test*

The question of whether a public official's action on social media qualifies as state action has been analyzed using the purpose and appearance test by the Second, Fourth, Eighth, Ninth, and Eleventh Circuits.[43] This question has had vast implications impacting officials "[f]rom local county supervisors and state representatives to the President of the United States."[44] The United States District Court for the Northern District of California recently dismissed a lawsuit brought by former President Donald Trump, who claimed that Twitter had "violated his free speech rights by banning [him] from [the] platform."[45] Not long before that, however, former President Trump was sued for allegedly violating other peoples' right to free speech by blocking them from his Twitter account.[46]

In *Knight First Amendment Institute at Columbia University v. Trump*, former President Trump blocked the plaintiffs from viewing his Twitter account after they "post[ed] replies in which they criticized the President or his policies."[47] In resolving the issue of whether President Trump acted in a governmental or private capacity when blocking the plaintiffs, the Second Circuit focused on aspects relating to the purpose and appearance of President Trump's Twitter account.[48] In regards to the appearance of the account, his account clearly displayed his official government title: "Donald J. Trump, '45th President of the

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

42. *See* Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1176–77 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 1779 (2023) (No. 22-324) (noting that the Sixth Circuit used a different analysis than the Ninth, "Second, Fourth, and Eighth Circuits").

43. *See id.* at 1158; Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021); Davison v. Randall, 912 F.3d 666 (4th Cir. 2019); Campbell v. Reisch, 986 F.3d 822 (8th Cir. 2021); Charudattan v. Darnell, 834 F. App'x 477 (11th Cir. 2020) (cases analyzing a government official's action taken on social media toward a private citizen using the purpose and appearance test).

44. *Garnier*, 41 F.4th at 1163.

45. Erik Larson, *Trump Appeals Dismissal of His Lawsuit Over Permanent Twitter Ban*, BLOOMBERG (June 27, 2022, 9:22 AM), bloomberg.com/news/articles/2022-06-27/trump-appeals-dismissal-of-lawsuit-over-permanent-twitter-ban [https://perma.cc/F4FG-AHEH].

46. *See Knight First Amend. Inst.*, 928 F.3d at 230.

47. *Id.* at 232.

48. *See id.* at 235–36 (describing the appearance of President Trump's Twitter account and how he used it).

United States of America, Washington, D.C.'"[49] Also, President Trump used the account for the purposes of "[c]ommunicat[ing] directly with . . . the American people," to make announcements "related to official government business . . . and to announce foreign policy decisions and initiatives."[50] The Second Circuit, therefore, found "that the President [was] a government actor with respect to his use of the [a]ccount."[51] Thus, viewpoint discrimination on behalf of President Trump relating to his Twitter account was a violation of the First Amendment.[52]

When parties at lower levels of the government have been involved in a legal dispute, the question of what qualifies as state action has been appealed to the federal courts of appeals on multiple occasions.[53] In *Davison v. Randall*, Phyllis J. Randall was "Chair of the Loudoun County . . . Board of Supervisors" and Brian Davison was one of her county constituents.[54] Davison attended a town hall meeting where he asked a question implying unethical behavior on the part of the school board members.[55] That same evening, Randall posted a summary of the meeting on her Facebook page ("Chair's Facebook Page").[56] Davison then posted a comment on Randall's post that, according to Randall, contained "accusations" against school board members.[57] This comment resulted in Randall banning Davison's "[p]age from commenting on the Chair's Facebook Page."[58]

Davison brought an action under 42 U.S.C.A. § 1983, claiming that Randall violated his First Amendment rights.[59] Section 1983 states:

> Every person who, under color of any statute, ordinance, [or] regulation . . . of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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, suit in equity, or other proper proceeding for redress . . . .[60]

In other words, the constitutional violation must have "occurred because of [an] action taken by the defendant 'under color of . . . state

49. *Id.* at 235.
50. *Id.* at 235–36.
51. *Id.* at 236.
52. *Id.* at 239.
53. *See, e.g.*, Davison v. Randall, 912 F.3d 666, 676 (4th Cir. 2019) (analyzing a public official's blocking of a constituent on social media to determine if the blocking was state action).
54. *Id.* at 672.
55. *Id.* at 675.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 676.
60. 42 U.S.C. § 1983.

law'" to state a § 1983 claim.[61] The Fourth Circuit noted that to determine whether state action had occurred, it "must examine the 'totality of the circumstances' to determine if the action at issue 'bore a "sufficiently close nexus" with the State to be "fairly treated as that of the State itself."'"[62]

The Fourth Circuit determined whether Randall blocking Davison was state action by analyzing the purpose and appearance of Randall's Facebook Page.[63] The Fourth Circuit found that Randall's Facebook page was "swathe[d] . . . in the trappings of her office."[64] These "trappings" included: her official title; the page's categorization "as that of a government official"; contact information, including her county email address and her county office's telephone number; her county website's web address; most posts being addressed to Loudoun constituents; posts submitted "on behalf of the [Loudoun Board]"; Randall's request to use the page for conversations; and the content of the page tended toward Randall's official matters.[65] Randall also used the page to inform "the public about her and the Loudoun Board's official activities" and to solicit input from her constituents.[66] Notably, the Fourth Circuit went beyond analyzing the purpose and appearance of the page and looked at "the specific actions giving rise to Davison's claim."[67] The Fourth Circuit noted that Randall blocked Davison because of a comment related to the Loudoun Board's conduct.[68] For all of these reasons, the Fourth Circuit held that Randall had "acted under color of state law in banning Davison from the Chair's Facebook Page."[69]

Similar to the facts in *Davison*, in *Campbell v. Reisch*, Mike Campbell sued a public official under § 1983 for blocking him from the official's Twitter account.[70] The public official, "Missouri state representative Cheri Toalson Reisch," created her Twitter account at the time she announced that she was running for state representative.[71] Reisch used her account from the time she opened it until she

61. *Davison*, 912 F.3d at 679 (quoting Philips v. Pitt Cty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009)).

62. *Id.* at 680 (citation omitted) (quoting Rossignol v. Voorhaar, 316 F.3d 516, 525 (4th Cir. 2003)).

63. *See id.* at 680–81 (discussing the purposes for which Randall used her Facebook page and the appearance of her Facebook page).

64. *Id.* at 680.

65. *Id.* at 680–81.

66. *Id.* at 680.

67. *Id.* at 681.

68. *Id.*

69. *Id.*

70. *See id.* at 676; Campbell v. Reisch, 986 F.3d 822, 823 (8th Cir. 2021) (illustrating examples of a plaintiff seeking relief under § 1983 for alleged violation of their rights due to being blocked on a form of social media).

71. *Campbell*, 986 F.3d at 823.

won her election to post about her campaign.[72] Once elected, Reisch "tweeted about her work as a state representative and posted pictures of herself on the House floor."[73] She also tweeted about specific legislation, "testifying before the state senate," and "her performance as a representative."[74] Lastly, she "used her Twitter page to engage in discourse about political topics and/or to indicate her position relative to other government officials."[75]

The Eighth Circuit placed a large emphasis on the fact that Reisch's Twitter account was used "overwhelmingly for campaign purposes," having created it when she announced her candidacy and using it to solicit campaign donations and garner support for her election bid.[76] As the Eighth Circuit noted, campaigning is a private activity not amounting to state action.[77] The Eighth Circuit did acknowledge, however, that Reisch sometimes used her account to provide legislative updates and the effects of recently enacted laws.[78] But the Eighth Circuit interpreted these tweets as being closely tied to the campaign purposes of her Twitter account since they demonstrated that "she was . . . fulfilling campaign promises."[79] As far as the appearance of Reisch's account was concerned, the Eighth Circuit noted that her Twitter handle, "@CheriMO44, refer[red] to the district she represent[ed] and her role as state representative."[80] Furthermore, photos on her Twitter showed "Reisch on the House floor" and her Twitter contained conversations about political issues.[81] The Eighth Circuit's majority concluded that the Twitter page was originally a private campaign page, and its current purpose and appearance was not enough to convert it into an official page.[82]

The dissent in *Campbell* also performed the purpose and appearance test but arrived at the conclusion that "Reisch was acting under color of state law when she blocked Campbell."[83] This Comment, as well as at least one other commentator, agree the dissent reached the appropriate conclusion.[84] The dissent observed that, after Reisch won her election, she used her Twitter to "report on new laws, provide information about the Missouri legislature's work, inform the public

72. *See id.* at 823–24 (noting that her Tweets during this time sought contributions and utilized her campaign hashtags).
73. *Id.* at 824.
74. *Id.*
75. *Id.*
76. *Id.* at 826.
77. *Id.* at 825.
78. *Id.* at 826.
79. *Id.*
80. *Id.* at 827.
81. *Id.*
82. *Id.*
83. *Id.* at 828 (Kelly, J., dissenting).
84. Tsimis, *supra* note 10, at 2097 (arguing that Reisch's Twitter account should have been considered "an official government account").

of Reisch's own official activities, and interact with Missouri residents."[85] Also, the dissent took into consideration the appearance of Reisch's Twitter.[86] The appearance included the Twitter account's displayed location of "District 44, Missouri, USA"; a bio description reading "MO State Rep 44th District"; "a profile photo taken in the Missouri House chamber"; and a banner photo taken at her swearing-in ceremony.[87] While Reisch's activity was consistent with showing voters that she was sticking to her campaign promises, the dissent clarified that a public official can still "act 'under color of state law'" while acting in pursuit of her personal goals.[88]

In *Garnier v. O'Connor-Ratcliff*, two parents of students in the Poway Unified School District ("PUSD"), Christopher and Kimberly Garnier, were frustrated with the PUSD Board's unresponsiveness to the Garniers' concerns.[89] Eventually, they started commenting on the PUSD Board's trustees' (the "Trustees") posts, primarily complaining about alleged wrongdoing by the school district's superintendent and the school district's race relations.[90] Eventually, Michelle O'Connor-Ratcliff, a PUSD Trustee, "blocked both the Garniers from her Facebook page and . . . Twitter page."[91] Also, T.J. Zane, a PUSD Trustee, "blocked the Garniers from his Facebook page."[92] The Garniers, therefore, filed suit against the defendants, the PUSD Trustees, under § 1983 in response to being blocked on social media.[93] The Garniers claimed that O'Connor-Ratcliff and Zane "violated the Garniers' First Amendment rights."[94]

Like the Fourth Circuit in *Davison*, the Ninth Circuit noted that "a close nexus between the State and the challenged action" may result in seemingly private behavior being treated as state action.[95] The Ninth Circuit analyzed the Trustees' Facebook and Twitter pages, finding that they identified themselves "as 'government official[s]'" and listed their government titles on their social media pages.[96] Also, O'Connor-Ratcliff included her PUSD email address on her Facebook

85. *Campbell*, 986 F.3d at 828–29 (Kelly, J., dissenting) (cleaned up).

86. *See id.* at 829 (describing in detail the items on Reisch's Facebook page that would support her action being state action).

87. *Id.*

88. *Id.*

89. Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1166 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 1779 (2023) (No. 22-324).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 1166–67.

95. *Id.* at 1169; *see* Davison v. Randall, 912 F.3d 666, 680 (4th Cir. 2019) (stating that the Fourth Circuit had previously "held that a defendant's purportedly private actions bear a sufficiently close nexus with the State to satisfy Section 1983's color-of-law requirement when the defendant's challenged actions are linked to events which arose out of his official status") (internal quotations omitted).

96. *Garnier*, 41 F.4th at 1171.

page, and Zane stated on his Facebook page that it was an official PUSD member page "to promote public and political information."[97] Posts on the Trustees' pages included content related to school board meetings, policy decision surveys, the hiring process for the superintendent, budgeting, and public safety.[98] The appearance "of their social media pages . . . 'had the purpose . . . of influencing the behavior of others.'"[99] By "'invoking' their 'governmental status,'" the trustees encouraged their constituents to be involved with PUSD matters and to increase public engagement on social media.[100] Lastly, the Trustees claimed "that they blocked the Garniers because the Garniers['] . . . repetitive . . . comments" filled up the Trustees' social media pages and were a distraction from the Trustees' messages relating to their official duties.[101] This statement essentially demonstrated that the social media pages were related "to the [Trustees'] governmental status."[102] After considering the characteristics of these social media pages, the Ninth Circuit held that the Trustees' blocking the Garniers constituted state action that violated § 1983.[103]

It is worth noting that the Ninth Circuit filed *Garnier* in July 2022, which was after the Sixth Circuit issued its decision in *Lindke*.[104] The Ninth Circuit acknowledged that the Sixth Circuit performed a different analysis of state action in *Lindke* "by applying a 'state-official test'" instead of a purpose and appearance test.[105] The Ninth Circuit, however, explicitly "decline[d] to follow the Sixth Circuit's reasoning."[106]

Like most of its sister circuits, the Eleventh Circuit, in *Charudattan v. Darnell*, applied a purpose and appearance test to determine whether blocking someone from a Facebook page was state action under § 1983.[107] Here, Savitar Charudattan claimed that Sheriff Sadie Darnell violated Charudattan's free speech rights by blocking him from Darnell's Facebook "Campaign Page."[108] Darnell used the Campaign Page for her "reelection campaign and included pictures of campaign events, endorsements, and statements about her law

97. *Id.*
98. *Id.*
99. *Id.* (quoting Naffe v. Frey, 789 F.3d 1030, 1037 (9th Cir. 2015)).
100. *Id.* (quoting Anderson v. Warner, 451 F.3d 1063, 1069 (9th Cir. 2006)).
101. *Id.* at 1172, 1179.
102. *Id.* at 1172 (alteration in original) (quoting *Naffe*, 789 F.3d at 1037).
103. *Id.* at 1173.
104. *Id.* at 1158; Lindke v. Freed, 37 F.4th 1199, 1199 (6th Cir. 2022), *cert. granted*, 143 S. Ct. 1780 (2023) (No. 22-611).
105. *Garnier*, 41 F.4th at 1176 (quoting *Lindke*, 37 F.4th at 1202–03).
106. *Id.* at 1177.
107. *See* Charudattan v. Darnell, 834 F. App'x 477, 482 (11th Cir. 2020) (finding factors such as "pictures of campaign events" on a Facebook page and the creation of a Facebook page for campaigning purposes relevant to the state action analysis).
108. *Id.* at 479.

enforcement philosophy and experience."[109] Also, the Campaign Page "did not include her official title," posts from the Sheriff's Office, nor was it presented as a "government official" page.[110] The Eleventh Circuit also addressed Charudattan's argument that blocking him was state action because off-duty deputies assisted with the page.[111] The Eleventh Circuit found this argument to be unpersuasive, noting that "acts of officers in the ambit of their personal pursuits are not done under color of law."[112] Given these facts, the Eleventh Circuit found that blocking Charudattan from the Campaign Page was not state action.[113] There was, therefore, no First Amendment violation.[114]

While following a similar formula when using the purpose and appearance test, not all of these courts have used the exact same set of factors in their analyses.[115] This is to be expected when faced with novel conduct, especially since "there is no rigid formula for measuring state action for purposes of [§] 1983 liability."[116] While the determination of state action on social media is still a relatively novel issue, the analyses performed by the Second, Fourth, Eighth, Ninth, and Eleventh Circuits have provided a useful guide for determining which factors are important in establishing state action under the purpose and appearance test.[117] This Comment asserts that the factors used by these courts can be compiled and refined into a definitive list that will provide more consistency to the purpose and appearance test to be used as the second part of the two-part test proposed in this Comment.

B. Lindke v. Freed

While so many of the federal courts of appeals have adopted the purpose and appearance test, not every circuit has followed the same analysis. Breaking from its sister circuits, the Sixth Circuit, in *Lindke*,

109. *Id.* at 482.

110. *Id.*

111. *Id.*

112. *Id.* (quoting Myers v. Bowman, 713 F.3d 1319, 1329 (11th Cir. 2013)).

113. *Id.*

114. *Id.*

115. *See* Davison v. Randall, 912 F.3d 666, 681 (4th Cir. 2019) (noting that the actions that led to Davison's claim also demonstrated the banning from Randall's Facebook page was state action).

116. Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1169 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 1779 (2023) (No. 22-324) (quoting Gritchen v. Collier, 254 F.3d 807, 813 (9th Cir. 2001)).

117. *See* Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021); *Davison*, 912 F.3d 666; Campbell v. Reisch, 986 F.3d 822 (8th Cir. 2021); *Garnier*, 41 F.4th 1158; *Charudattan*, 834 F. App'x 477 (analyzing a government official's action taken on social media toward a private citizen using the purpose and appearance test).

decided to forgo the purpose and appearance test and use the "state-official" test instead.[118]

In *Lindke*, James Freed was the "city manager of Port Huron, Michigan."[119] When the spread of COVID–19 began in 2020, Freed shared his policies and public-health information related to COVID–19 on his Facebook page.[120] Kevin Lindke was a Port Huron citizen who saw Freed's posts and did not approve of Freed's response to the pandemic.[121] Lindke commented on Freed's posts and criticized his policies.[122] In response to this criticism, Freed deleted Lindke's comments and blocked Lindke from his Facebook page.[123] Lindke then sued Freed under § 1983 and argued that Freed blocking Lindke and deleting his comments violated Lindke's First Amendment rights.[124]

The Sixth Circuit in *Lindke* faced the same issue that its sister circuits have considered: whether a public official blocking someone from his or her social media page was state action.[125] In its analysis, the Sixth Circuit followed the state-official test, which states, "social-media activity may be 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.'"[126]

The Sixth Circuit explained that an actual duty would exist "when the text of state law requires an officeholder to maintain a social-media account."[127] An actual or apparent duty could also exist when state resources are used to operate a social media page, such as when an official "is given a budget for community outreach efforts."[128] Here, no state law required Freed to use his Facebook page, nor did Freed use government funds to operate his Facebook page.[129]

To satisfy the second element of this test, state authority might be used when the "social-media account[] belong[s] to [the] office" itself or the social media account is run by employees "on the state's payroll."[130] Freed's action was not state action under this element of the test because the Facebook "page did not belong to the office of city

118. Lindke v. Freed, 37 F.4th 1199, 1202 (6th Cir. 2022), *cert. granted*, 143 S. Ct. 1780 (2023) (No. 22-611).
119. *Id.* at 1201.
120. *Id.*
121. *Id.*
122. *Id.* at 1201–02.
123. *Id.* at 1202.
124. *Id.*
125. *Id.*; *see, e.g.*, Charudattan v. Darnell, 834 F. App'x 477, 482 (11th Cir. 2020) (analyzing a plaintiff's claim that his free speech rights were violated by being blocked from a Sheriff's Facebook page).
126. *Lindke*, 37 F.4th at 1203 (quoting Waters v. City of Morristown, 242 F.3d 353, 359 (6th Cir. 2001)).
127. *Id.*
128. *Id.* at 1204.
129. *Id.* at 1204–05.
130. *Id.* at 1204.

manager."[131] Also, Freed was the only person who ran his page and no other government employees had access to the page.[132] The Sixth Circuit held that "Freed did not operate his page [as part of] any actual or apparent duty," and he did not "use his governmental authority to maintain it," so "there was no state action."[133]

Lindke did make the argument that the appearance of Freed's account made the act of Freed blocking Lindke state action.[134] Lindke referenced Freed's "use of a city address, email, and website on the Facebook page, along with a profile photo featuring Freed wearing his city-manager pin and his frequent use of 'we' and 'us.'"[135] The Sixth Circuit found this argument unpersuasive and contrasted it to police officer cases.[136] The Sixth Circuit stated that in police officer cases, the officers' "*appearance* actually evokes state authority."[137] According to the Sixth Circuit, however, a public official does not gain authority by presenting themselves in their official capacity on social media.[138]

IV. A Path Forward

Now that the Sixth Circuit has created a split of opinion due to its *Lindke* decision,[139] this Comment contends that this split can be resolved by combining the state-official test and purpose and appearance test in a way that both takes advantage of the tests' strengths and mitigates their weaknesses. By combining these tests, this proposed two-part test will provide predictability to government officials using social media and protection to private citizens exercising their right to free speech when interacting with government officials on social media. Currently, both tests are common law products that have been developed by the various federal courts of appeals.[140] In April of 2023, the Supreme Court granted certiorari in both *Lindke v. Freed* and *O'Connor-Ratcliff v. Garnier* "to resolve the circuit split."[141] This

131. *Id.* at 1205.
132. *Id.*
133. *Id.* at 1207.
134. *Id.* at 1205.
135. *Id.* at 1206.
136. *See id.*
137. *Id.*
138. *See id.*
139. Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1176–77 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 1779 (2023) (No. 22-324).
140. *See, e.g.*, Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 239 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (applying the purpose and appearance test); Davison v. Randall, 912 F.3d 666, 681 (4th Cir. 2019) (applying the purpose and appearance test); Campbell v. Reisch, 986 F.3d 822, 827–28 (8th Cir. 2021) (applying the purpose and appearance test); *Garnier*, 41 F.4th at 1171 (applying the purpose and appearance test); Charudattan v. Darnell, 834 F. App'x 477, 482 (11th Cir. 2020) (applying the purpose and appearance test); *see also Lindke*, 37 F.4th at 1202 (using the state-official test).
141. Hoff et al., *supra* note 11.

Comment, therefore, recommends that the Supreme Court resolves this circuit split by using a two-part test composed of both the state-official and purpose and appearance tests, in that order. This two-part test will provide more protection to private citizens and predictability when resolving the issue of whether an action is state action across all U.S. federal courts.

In novel situations, like determining whether actions on social media constitute state action, some complexity will exist in finding the answer based on the specific facts of each case.[142] For example, many different factors are taken into consideration by the courts that have applied the purpose and appearance test, but not all of the circuit courts have considered the same factors as their sister circuits.[143] This complexity makes it difficult to develop a one-step bright-line rule that, on its own, can be applied with ease to every instance of potential First Amendment violations that occur on social media. This Comment argues, however, that combining both the state-official and purpose and appearance tests, in that order, into a two-part test can mitigate this complexity.

A. *Part One – A Bright-Line Rule*

The first part of the two-part test proposed here is the state-official test in *Lindke*, which states, "social-media activity may be 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.'"[144] The Sixth Circuit stated that the first part of the state-official test could be satisfied "when the text of state law requires an officeholder to maintain a social-media account" or government resources are used to maintain the social media account.[145] The second part of the state-official test could be satisfied when a "social-media account[] belong[s] to an office, rather than an individual officeholder" or government staff members assist in maintaining a social media account.[146] One benefit that this test provides is that government officials would know the answers to these questions, making the results of the test more predictable for them.[147] Also, the answer to

142. *See Garnier*, 41 F.4th at 1169.

143. *See Davison*, 912 F.3d at 681 (noting that the actions that led to Davison's claim also demonstrated the banning from Randall's Facebook page was state action).

144. *Lindke*, 37 F.4th at 1203 (quoting Waters v. City of Morristown, 242 F.3d 353, 359 (6th Cir. 2001)).

145. *Id.* at 1203–04.

146. *Id.* at 1204.

147. *But see* Tsimis, *supra* note 10, at 2085–86, 91–92. Tsimis argues that there is still uncertainty under this test, especially when government staff assist in running an official's social media account but only have "minimal involvement" making it insufficient to be an official social media account. *Id.* When referencing the "minimal involvement," however, Tsimis is referring to an employee taking photos of an official in *Lindke*. *Id.* This involves no activity directly related to a social media account, which is what this Comment argues is more predictable to government officials. *Id.*

each of the questions underlying these elements is relatively easy to determine by a court. Courts, therefore, faced with the question of whether a government official's action is state action can first begin with a bright-line test that,[148] if satisfied, will resolve the issue without the need for the second part, which is a more flexible multi-factor balancing test. So the first part of this test is the state-official test, and if "the text of state [or federal] law requires an officeholder to maintain a social-media account;" government funds are used to run the social media account; the "social-media account[] belong[s] to [the] office" itself; or the social media account is run by employees "on the state's payroll," then any action involving that account will be considered state action.[149] If state action is found at this step, then no further inquiry would be needed.

Starting with this test also makes sense because each of the ways that the two elements can be satisfied individually demonstrate how an official's actions "may be fairly treated as that of the State itself."[150] First, for example, if a statute requires an elected official to perform some activity, such as a police chief maintaining "a public-safety Facebook page," then that activity is an official duty of that official.[151] So it would follow that any action taken using that social media page would constitute state action.[152] Second, if an official is allocated a budget, which is used to pay for a social media account or any associated feature, such as ads, the account has now become state-funded and its operation is part of the official's state duties.[153] Third, if an office has its own social media account that is controlled by whoever is the officeholder at the time, then the social media account is really "state property" and not the individual property of the person holding that position.[154] Finally, a page run by government staff uses state resources, and if the official is "directing her employees to operate the page," then the operation of the page has become an official duty and related action should be considered state action.[155]

Under this Comment's proposed two-part test, if one of the two elements in the first part is satisfied by one of these listed ways, then it would be unnecessary to even consider the purpose and appearance of a social media account. But, if neither of the two elements in the first part are satisfied, then the court could analyze the social media page

148. *See Lindke*, 37 F.4th at 1206–07 (describing the Sixth Circuit's use of the state-official test as "bringing the clarity of bright lines to a real-world context that's often blurry"). *But see* Tsimis, *supra* note 10, at 2091 (arguing that the state-official test, which Tsimis refers to as the "Duty and Authority" test, should not be used because "the supposed bright lines of the Duty and Authority test are not all that bright").

149. *See Lindke*, 37 F.4th at 1203–04.

150. *Id.* at 1203 (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)).

151. *Id.*

152. *Id.* at 1203–04.

153. *See id.* at 1204.

154. *Id.*

155. *Id.*

using the purpose and appearance test and still possibly find state action.

B. *Part Two – The Purpose and Appearance Test Revisited*

By making the first part of this proposed two-part test the state-official test, where each element is considered by asking questions that can be resolved with a simple yes or no answer, at least some of these cases can be decided with more objectivity and predictability.[156] One issue, however, with bright-line rules, is that they can result in inequitable outcomes due to their lack of flexibility.[157] While all of the state-official test elements could be easily determined using a court's resources, these questions may not be as easily answered by an average citizen.[158] For example, Lindke argued "that Freed used the 'trappings of an official, state-run account' to give the impression that the page operated under the state's imprimatur."[159] Even if an action, therefore, fails to meet the first part of this Comment's proposed two-part test, an average citizen may be under the impression that action taken by a government official on their social media account carries the weight of government action.[160] This is where the second part of the test becomes relevant. If none of the elements of the first part are satisfied, then the purpose and appearance test, using a defined list of factors identified by the various federal courts of appeals, should be implemented.[161]

Notably, one factor all the federal courts of appeals that performed the purpose and appearance test considered was whether the social

156. *See Bright-Line Rule*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/bright-line_rule [https://perma.cc/YG89-WS8E] (last updated June 2022) (discussing how bright-line rules are "objective rule[s] that resolve[] legal questions in a straightforward, predictable manner").

157. *Id.*

158. *See* Tsimis, *supra* note 10, at 2091 (noting that one weaknesses of the state-official test is that it is hard for citizens to determine certain answers on their own under this test).

159. *Lindke*, 37 F.4th at 1206 (quoting Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 231 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021)).

160. *See id.*

161. *See, e.g.*, *Knight First Amend. Inst.*, 928 F.3d at 239 (using the purpose and appearance test to determine if President Trump blocking an individual from his Twitter account was state action); Davison v. Randall, 912 F.3d 666 (4th Cir. 2019) (using the purpose and appearance test to determine whether a county official blocking a constituent on Facebook was state action); Campbell v. Reisch, 986 F.3d 822 (8th Cir. 2021) (using the purpose and appearance test to determine whether a state representative blocking a constituent from her Twitter page was state action); Garnier v. O'Connor-Ratcliff, 41 F.4th 1158 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 1779 (2023) (No. 22-324) (using the purpose and appearance test to determine whether a school board member blocking a district parent from interacting with the board member's social media was state action); Charudattan v. Darnell, 834 F. App'x 477 (11th Cir. 2020) (using the purpose and appearance test to determine whether Sheriff Darnell blocking a constituent from accessing Darnell's social media was state action).

media pages displayed the government title of the officials.[162] Even in *Lindke*, the court notes that Lindke's Facebook displayed his title, although the court ultimately found this fact to be irrelevant since it chose to implement the state-official test.[163] *Lindke* states that a police-officer's "*appearance* actually evokes state authority," while presenting one's self as a state official on social media does not.[164] This Comment disagrees and, instead, believes that presenting one's self as a state official does give the impression of wielding state authority.[165] Whether a government official, therefore, notes their title on one of their social media accounts is a factor that courts should weigh when performing the purpose and appearance test. The best example of why courts should weigh this factor is former President Trump's Twitter account, as discussed previously.[166] President Trump created his Twitter account in 2009 prior to becoming President.[167] Once elected, however, he displayed his title of "45th President of the United States of America" on his Twitter account.[168] Although this was not the official White House Twitter account, his displayed title was considered one of "the trappings of an official, state-run account" by the court.[169] Also, in *Garnier*, the court noted that by the Trustees "invoking their governmental status" on their social media accounts they had encouraged their constituents to be involved with PUSD matters and increased public engagement on social media.[170] So it is feasible to see how citizens may interpret an official's title displayed on their account to mean that the account is connected to the state.

Another factor that the courts should consider when analyzing a social media page's purpose and appearance is whether the page is designated in some way as belonging to a government official or public figure.[171] Three of the circuits that performed the purpose and ap-

162. *See Knight First Amend. Inst.*, 928 F.3d at 231; *Davison*, 912 F.3d at 680; *Campbell*, 986 F.3d at 829 (Kelly, J., dissenting); *Garnier*, 41 F.4th at 1171; *Charudattan*, 834 F. App'x at 482; *see also* Tsimis, *supra* note 10, at 2096 (arguing that "including one's official title in the name of the account" is a factor that should be considered in the purpose and appearance test).

163. *See Lindke*, 37 F.4th at 1201, 1203.

164. *Id.* at 1206.

165. *See* Tsimis, *supra* note 10, at 2094 (noting how citizens are "taught to respect government officials," similar to how they are "taught to respect police officers").

166. *Knight First Amend. Inst.*, 928 F.3d at 235 (noting that President Trump displayed his official title on his Twitter account).

167. *Id.* at 231.

168. *Id.*

169. *Id.*

170. Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1171 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 1779 (2023) (No. 22-324) (cleaned up) (quoting Anderson v. Warner, 451 F.3d 1063, 1069 (9th Cir. 2006)).

171. *See* Lindke v. Freed, 37 F.4th 1199, 1201 (6th Cir. 2022), *cert. granted*, 143 S. Ct. 1780 (2023) (No. 22-611) (noting that Freed's Facebook page category was "public figure"); Davison v. Randall, 912 F.3d 666, 680 (4th Cir. 2019) (noting that Randall's Facebook page category was "government official"); *Garnier*, 41 F.4th at 1164 (noting that O'Connor-Ratcliff's Facebook page category was "Government Official");

pearance test noted whether the social media page at issue was described as a government official page.[172] For example, when creating a Facebook Page, the page can be designated as belonging to a certain category, including the offered category of "Government Official."[173] This Comment contends that designating a social media account as a government official page or public official page can lead a person to believe it is connected to the government in the same way that displaying an official title on a social media account can lead people to believe this connection exists. Meta, the company that runs Facebook, even markets Facebook Pages to elected officials as a way to "allow [them] to reach and engage . . . voters and supporters."[174]

Courts should also consider whether the account at issue has some connection to an official social media account for the official's government position.[175] Such connections should include links and references to or from social media accounts related to the position as well as official contact information noted on the social media account at issue.[176] For example, in *Davison*, the Loudoun Board's Chair, Randall, provided her county office phone number, email address, and county website internet address on her Facebook page.[177] Also, in *Garnier*, the court noted that one of the school district Trustees included "a link to her . . . official [school district] email address" on her Facebook page.[178] Including official channels as ways to get in contact with a government official, as was done in both *Davison* and *Garnier*,[179] encourages interaction from constituents with the government official in the official's formal, not personal, capacity.

The last factor that the circuit courts have considered that should be used going forward is whether a government official uses their social media account to discuss official business.[180] In *Knight First Amend-*

Charudattan v. Darnell, 834 F. App'x 477, 482 (11th Cir. 2020) (noting that "the page was not categorized as belonging to a 'government official' "); *see also* Tsimis, *supra* note 10, at 2096 (arguing that "describing [an] account as official" is an important factor in the purpose and appearance test).

172. *Davison*, 912 F.3d at 680; *Garnier*, 41 F.4th at 1164; *Charudattan*, 834 F. App'x at 482.

173. *Resources: Create Your Page*, META, https://www.facebook.com/gpa/resources/basics/create-page [https://perma.cc/S5GR-7A56].

174. *Id.*

175. *See, e.g.*, Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 235 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (noting that the @WhiteHouse Twitter account "direct[ed] Twitter users to 'Follow for the latest from . . . @realDonaldTrump' " and that "the @POTUS account frequently republish[ed] tweets from the [@realDonaldTrump] Account").

176. *See id.*; *Davison*, 912 F.3d at 680–81; *Garnier*, 41 F.4th at 1171.

177. *Davison*, 912 F.3d at 674.

178. *Garnier*, 41 F.4th at 1164.

179. *See id.*; *Davison*, 912 F.3d at 674.

180. *See Knight First Amend. Inst.*, 928 F.3d at 235–36; *see also* Tsimis, *supra* note 10, at 2096–97 (finding that Reisch's use of her Twitter account to discuss new Mis-

ment Institute, former President Trump used his Twitter account as a tool to discuss his administration with the public.[181] Former President Trump also made major announcements through his Twitter account, including changes in high-level government positions and changes in national and foreign policy.[182] Similarly, as the dissent in *Campbell* noted, state representative Reisch used her Twitter account to discuss official business.[183] Also, both *Charudattan* and *Davison* make references to the use of the social media accounts at issue to discuss official business.[184] The account in *Davison* included updates for the public on official business,[185] which the court considered as a factor demonstrating that blocking a constituent was state action.[186] All these examples of government figures discussing official business on their social media pages demonstrate an effort to present themselves in an official capacity even though the accounts were not owned by their respective offices. Conversely, Sheriff Darnell's account in *Charudattan* was not used to discuss official business,[187] which was part of the reason that Sheriff Darnell was found to have not performed state action in blocking a constituent from the account.[188] This is an appropriate conclusion in *Charudattan*,[189] given that a lack of discussion of official activities would not lead a private citizen to believe that they were interacting with Sheriff Darnell in her official capacity.

One factor that should not be considered in the purpose and appearance test is the events leading up to the alleged state action.[190] In *Davison*, the comment by Davison that led to Randall blocking Davison from Randall's Facebook account was related to alleged financial issues of school board members.[191] The Fourth Circuit considered this when performing the purpose and appearance test because it considered this an attempt "to suppress speech critical of [the official's] conduct of [their] official duties or fitness for public office."[192]

souri laws is important in determining whether the account had become an official government account).

181. *Knight First Amend. Inst.*, 928 F.3d at 235–36.

182. *Id.*

183. Campbell v. Reisch, 986 F.3d 822, 828 (8th Cir. 2021) (Kelly, J., dissenting).

184. *See* Charudattan v. Darnell, 834 F. App'x 477, 482 (11th Cir. 2020) (noting that Sheriff Darnell's Facebook page did not include posts about the Sheriff's Office); *Davison*, 912 F.3d at 680 (noting that Randall's Facebook page was used to provide safety updates and announce the County's snowstorm response plans).

185. *But see Davison*, 912 F.3d at 680–81 (noting that the content of Randall's Facebook page tended to include matters of her office).

186. *See id.* at 681 (finding that "the totality of these circumstances" meant that Randall blocking Davison was state action).

187. *See Charudattan*, 834 F. App'x at 482.

188. *See id.* (holding that Sheriff Darnell's "Campaign Page was a private page").

189. *See id.*

190. *See Davison*, 912 F.3d at 681 (considering the actions that led to the lawsuit in the purpose and appearance analysis).

191. *Id.*

192. *Id.* (quoting Rossignol v. Voorhaar, 316 F.3d 516, 525 (4th Cir. 2003)).

The court held that this demonstrated that the action was state action,[193] but the court used this information in the wrong part of its analysis. First, the actions of the plaintiffs that lead to the alleged state action are something that the government officials have no control over, while the other factors in the purpose and appearance test are things that the government officials can control. Also, the acts leading up to the banning are more demonstrable of whether there was viewpoint discrimination,[194] not whether the action at issue was state action. For example, in *Knight First Amendment Institute* the disfavored speech that led to Trump blocking the plaintiffs was considered in determining whether he had "violated the First Amendment," not whether the banning was considered state action.[195] While the actions of others leading up to an alleged state action are important, they should not be considered in the purpose and appearance part of this test for these reasons.

To summarize, the factors that courts should continue to use when implementing the purpose and appearance test include: (1) whether the social media account at issue displays the official's government title;[196] (2) whether the account is designated as belonging to a public or government official;[197] (3) whether the account contains some form of connection to or from social media accounts designated as belonging to that specific office or contains official contact information;[198] and (4) whether the account is used to discuss official business.[199] The factor that should no longer be considered is the events that led up to the alleged state action.[200] By creating a list of factors that can be uniformly considered by courts across the country, the purpose and appearance test will have some flexibility to protect private citizens if the first part of this Comment's two-part test does not find state action and will also provide more predictability to government officials by identifying what is considered in this analysis.

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193. *Id.*

194. *See* Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 239 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (holding that blocking a constituent due to the constituent's disfavored speech was a First Amendment violation).

195. *Id.*

196. *See id.* at 235 (noting that President Trump displayed his official title on his Twitter account).

197. *See, e.g.*, Lindke v. Freed, 37 F.4th 1199, 1201 (6th Cir. 2022), *cert. granted*, 143 S. Ct. 1780 (2023) (No. 22-611) (noting that Freed's Facebook page category was "public figure"); *Davison*, 912 F.3d at 680 (noting that Randall's Facebook page category was "government official").

198. *See, e.g.*, *Knight First Amend. Inst.*, 928 F.3d at 235 (noting that the @WhiteHouse Twitter account "direct[ed] Twitter users to 'Follow for the latest from . . . @realDonaldTrump'" and that "the @POTUS account frequently republish[ed] tweets from the [@realDonaldTrump] Account").

199. *See id.* at 235–36.

200. *But see Davison*, 912 F.3d at 681 (considering the actions that led to the lawsuit in the purpose and appearance analysis).

V. Conclusion

Freedom of speech is so important that it was once described by U.S. Supreme Court Justice Benjamin Cardozo as "the matrix [and] the indispensable condition[] of nearly every other form of freedom."[201] Communication, however, has changed as a majority of American adults now use social media as a way to "speak[] and listen[] in the modern public square."[202] As means of communication have evolved through the proliferation of social media, our courts have needed to determine how to apply the words of our Constitution to "a real-world context that's often blurry."[203] To apply the Constitution to interactions on social media, our courts must answer a threshold question, which is whether certain social media activity constitutes state action, to determine if the First Amendment is implicated.[204]

So far, the federal courts of appeals have identified two different tests to apply in these situations: the state-official test and the purpose and appearance test.[205] Both of these tests have strengths, but they also have weaknesses. The state-official test offers a set of bright-line questions that offer solutions to an otherwise murky problem,[206] but it can overlook important factors to consider in social media. The purpose and appearance test is flexible and allows for an in-depth examination of a social media page at issue.[207] It has been applied, however, without using an agreed upon list of factors to take into consideration by the various courts of appeals.[208]

This Comment contends that the Supreme Court can resolve this circuit split by using a two-part test when considering this issue. This test would apply (1) the state-official test, which, if satisfied, would find state action with no need to consider part two, but if not satisfied, would then apply (2) the purpose and appearance test using a defined list of factors as described above.[209] This Comment contends that this test will provide both more predictability for government officials interacting with constituents on social media and more protection to private citizens exercising their right to free speech when interacting with government officials on social media.

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201. Palko v. Connecticut, 302 U.S. 319, 326–27 (1937).

202. Williams, *supra* note 6, § 2.

203. Lindke v. Freed, 37 F.4th 1199, 1207 (6th Cir. 2022), *cert. granted*, 143 S. Ct. 1780 (2023) (No. 22-611).

204. *See* Patty, *supra* note 35, at 113.

205. *See Lindke*, 37 F.4th at 1202, 1206.

206. *See id.* at 1206–07.

207. *See, e.g.*, Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1171 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 1779 (2023) (No. 22-324) (analyzing various attributes related to a social media page's purpose and appearance to determine whether the owner of the account had performed a state action).

208. *See* Davison v. Randall, 912 F.3d 666, 681 (4th Cir. 2019) (considering actions leading up to an individual being banned from a social media account instead of only considering the purpose and appearance of the account at issue).

209. *Supra* notes 196–99 and accompanying text.