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## Looks Matter on Social Media: How Should Courts Determine Whether a Public Official Operates Their Social Media Account Under Color of State Law?

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## LOOKS MATTER ON SOCIAL MEDIA: HOW SHOULD COURTS DETERMINE WHETHER A PUBLIC OFFICIAL OPERATES THEIR SOCIAL MEDIA ACCOUNT UNDER COLOR OF STATE LAW?

*John B. Tsimis\**

*The widespread use of social media has presented a novel legal landscape for the application of constitutionally protected rights—particularly the First Amendment’s protection of free speech. The First Amendment prohibits the government from excluding citizens from a public forum on the basis of their viewpoints. Public officials acting under color of state law similarly may not use the authority of their offices to deprive citizens of their First Amendment rights.*

*However, the application of this protection in the context of social media has been inconsistent across federal circuit courts. Although these courts agree that viewpoint discrimination by the government on social media is unlawful, they disagree on how to assess whether a public official is acting under color of state law in the operation of their social media accounts. Some circuits focus on an account’s purpose and appearance to determine whether the official’s activity is fairly attributable to the state. The U.S. Court of Appeals for the Sixth Circuit, on the other hand, focuses on whether the official operates the account pursuant to their enumerated duties or with the use of state authority.*

*This Note examines the emerging circuit split over which test courts should apply in determining if a public official’s actions on social media constitute state action. This Note then advocates for future courts to adopt a modified version of the U.S. Court of Appeals for the Fourth Circuit’s test, which would consider the vital factors of an account’s purpose and appearance. This Note also provides a guiding principle to promote more consistent assessments of appearances in this context.*

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INTRODUCTION.....	2063
I. THE LEGAL BACKGROUND OF FIRST AMENDMENT RIGHTS ON SOCIAL MEDIA AND § 1983 .....	2066
A. <i>Public Officials’ Use of Social Media</i> .....	2066
B. <i>Social Media and the First Amendment</i> .....	2067
C. <i>42 U.S.C. § 1983 and the State Action Requirement</i> .....	2068
1. Off-Duty Police Officers and the Nexus Test .....	2070
2. Harassment Claims and the State-Official Test .....	2071
II. “PURPOSE AND APPEARANCE” VERSUS “DUTY AND AUTHORITY” .....	2072
A. <i>The Present Circuit Split</i> .....	2072
B. <i>The “Purpose and Appearance” Test</i> .....	2074
1. The Fourth Circuit: The Debut of the Purpose and Appearance Test .....	2074
2. The Second Circuit: The Nature of an Account Can Change Over Time.....	2075
3. The Eleventh Circuit: Campaign Accounts Are Private Accounts .....	2077
4. The Eighth Circuit: Assessing Appearances in Favor of Public Officials .....	2079
5. The Ninth Circuit: Weighing the Circuit Split.....	2081
C. <i>The “Duty and Authority” Test</i> .....	2083
1. The Sixth Circuit: The Debut of the Duty and Authority Test.....	2083
2. The Eastern District of Kentucky: Applying the Duty and Authority Test at the District Court Level.....	2086
D. <i>Defining the Gap</i> .....	2088
III. A MODIFIED PURPOSE AND APPEARANCE TEST IS THE BEST RESOLUTION TO THIS CIRCUIT SPLIT.....	2090
A. <i>The Purpose and Appearance Test Best Protects Social        Media Users from Government Abuse While Still        Giving Agency to Public Officials</i> .....	2090
1. The Duty and Authority Test Fails to Properly Credit These Interests.....	2091
2. The Purpose and Appearance Test Better Credits the Interests of Both Everyday Social Media Users and Public Officials.....	2092
B. <i>How to Deal with Inconsistent Evaluations of        Appearances</i> .....	2093

1. Appearances Are a Necessary Part of This Inquiry .....	2093
2. A Modified Approach to Appearances .....	2094
CONCLUSION.....	2097

#### INTRODUCTION

“James Freed prized his roles as father, husband, and city manager of Port Huron, Michigan. So his Facebook page listed all three.”<sup>1</sup> Which of these three hats does Freed wear when he posts from his Facebook page titled “JamesRFreed1”?<sup>2</sup> Can Freed’s Facebook activity be legally viewed as state action?<sup>3</sup> What about Phyllis J. Randall, chair of the Loudoun County Board of Supervisors, who banned a constituent from her Facebook page after he posted comments suggesting that board members had been taking kickbacks?<sup>4</sup> Was her decision to block this commenter a state action?<sup>5</sup> What about then President Donald J. Trump, who blocked users from his Twitter account because he disagreed with their speech?<sup>6</sup> Was he acting in his capacity as president when he blocked those users, despite the fact that he made the account long before assuming the presidency?<sup>7</sup>

Courts have faced these questions, among others, when dealing with claims that public officials have acted improperly by blocking constituents from social media pages,<sup>8</sup> but these questions have not all been resolved according to the same test.<sup>9</sup> As social media continues to grow as a medium for public officials to promote their platforms, initiatives, and campaigns, so too grows the need for consistent legal standards to govern the use of this powerful political tool.<sup>10</sup>

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1. *Lindke v. Freed*, 37 F.4th 1999, 1201 (6th Cir. 2022).  
 2. *See id.* at 1205.  
 3. *See id.* at 1201 (“The question here is whether involving his job makes Freed’s Facebook activity state action.”).  
 4. *See Davison v. Randall*, 912 F.3d 666, 673–76 (4th Cir. 2019).  
 5. *See id.* at 677 (detailing Davison’s allegation that Randall acted “under color of state law” when she banned him from her page).  
 6. *See Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019), *vacated as moot sub nom. Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021).  
 7. *See id.* at 231.  
 8. *See, e.g., Garnier v. O’Connor-Ratcliff*, 41 F.4th 1158, 1163 (9th Cir. 2022) (“The Garniers’ claims present an issue of first impression in this Circuit: whether a state official violates the First Amendment by creating a publicly accessible social media page related to his or her official duties and then blocking certain members of the public from that page . . . .”); *Campbell v. Reisch*, 986 F.3d 822, 823 (8th Cir. 2021) (“After Missouri state representative Cheri Toalson Reisch blocked Mike Campbell from her Twitter account, he sued her under 42 U.S.C. § 1983, claiming she had violated the First Amendment by denying him the right to speak.”).  
 9. *Compare, e.g., Davison*, 912 F.3d at 680–81 (applying a test that focuses on a page’s purpose and appearance), *with Lindke v. Freed*, 37 F.4th 1199, 1206 (6th Cir. 2022) (“Instead of examining a page’s appearance or purpose, we focus on the actor’s official duties and use of government resources or state employees.”).  
 10. *See Krista L. Baughman, Circuit Split: Do Public Officials Violate the First Amendment When They Block Social Media Comments?*, DHILLON L. GRP. INC.

42 U.S.C. § 1983 provides a cause of action when federal rights are violated by a person acting “under color of any statute, ordinance, regulation, custom, or usage of any State . . . .”<sup>11</sup> “As a general matter, social media is entitled to the same First Amendment protections as other forms of media.”<sup>12</sup> For First Amendment purposes, blocking users from a government social media page—and thus preventing them from viewing, replying to, and liking posts—is legally equivalent to excluding an individual from a public forum.<sup>13</sup> Thus, if a public official is found to be operating their social media account under color of state law, and they block a constituent from that account, § 1983 would step in to protect the constituent’s First Amendment rights.<sup>14</sup>

Over the past five years, six federal circuit courts have applied § 1983 to the novel context of a public official’s viewpoint discrimination on social media.<sup>15</sup> The first federal appellate court to confront this issue was the U.S. Court of Appeals for the Fourth Circuit in *Davison v. Randall*.<sup>16</sup> There, the court had to decide whether the chair of the Loudoun County Board of Supervisors, Phyllis J. Randall, acted under color of state law when she blocked a constituent from her Facebook page.<sup>17</sup> Randall’s Facebook page included her title as chair and her official government contact information, and it shared news related to her position.<sup>18</sup> Focusing on the page’s purpose and appearance, the Fourth Circuit held that Randall was acting under color of state law because she used the page “as a tool of governance” and “swathe[d it] in the trappings of her office.”<sup>19</sup> Four other appellate courts have since followed the Fourth Circuit’s lead and have likewise adopted what this Note refers to as the “Purpose and Appearance” test.<sup>20</sup>

The U.S. Court of Appeals for the Sixth Circuit, however, has taken a different approach. In *Lindke v. Freed*,<sup>21</sup> the Sixth Circuit had to decide whether Port Huron city manager James Freed violated § 1983 when he blocked a constituent from his Facebook page.<sup>22</sup> As was the case in *Davison*,

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(July 28, 2022), <https://www.dhillonlaw.com/circuit-split-do-public-officials-violate-the-first-amendment-when-they-block-social-media-comments/> [https://perma.cc/278U-NYUE].

11. 42 U.S.C. § 1983.

12. *Knight First Amend. Inst.*, 928 F.3d at 237.

13. *See id.* at 237–38. Although the U.S. Supreme Court has not “squarely addressed” the circumstances under which a governmental social media page becomes a public forum, courts have routinely found that such pages “bear the hallmarks” of a public forum. *Davison*, 912 F.3d at 682; *see also Knight First Amend. Inst.*, 928 F.3d at 237 (holding that a social media page was a public forum because it opened an instrumentality of communication “for indiscriminate use by the general public”). The issue of whether social media is a public forum is beyond the scope of this Note.

14. *See Davison*, 912 F.3d at 679.

15. *See infra* Part II.A.

16. 912 F.3d 666 (4th Cir. 2019).

17. *See id.* at 673–75.

18. *See id.* at 673–74.

19. *Id.* at 680–81.

20. *See infra* Part II.B.

21. 37 F.4th 1199 (6th Cir. 2022).

22. *See id.* at 1201.

Freed's page included his official government contact information, updates about directives he issued as city manager, and his title of city manager for Port Huron.<sup>23</sup> However, unlike the Fourth Circuit in *Davison*, the Sixth Circuit did not find these factors to be indicia of state action.<sup>24</sup> The Sixth Circuit instead held that Freed was *not* acting under color of state law because he "did not operate his page to fulfill any actual or apparent duty of office" and did not draw on his "governmental authority" to maintain the page.<sup>25</sup> While the Fourth Circuit focused on the page's purpose and appearance, the Sixth Circuit instead put greater emphasis on the official's duties and use (or lack thereof) of state authority.<sup>26</sup> This Note refers to the test used by the Sixth Circuit as the "Duty and Authority" test.<sup>27</sup>

Thus, while federal appellate courts agree that viewpoint discrimination by the government on social media is unlawful, they have struggled to reach a consensus on how to determine whether a public official is acting under color of state law in the operation of their social media account.<sup>28</sup> Indeed, which test a court chooses to adopt may ultimately prove to be dispositive.<sup>29</sup> As the cases of Phyllis Randall and James Freed illustrate, two courts addressing § 1983 claims with nearly identical fact patterns may nevertheless reach opposite conclusions as to whether the public official acted under color of state law, depending on which test they apply.<sup>30</sup>

This Note examines the emerging circuit split over which test courts should apply in determining whether a public official's actions on social media constitute state action. Part I provides background information on how public officials use social media to engage with their constituents, how the First Amendment's free speech protections operate in the context of social media, and § 1983's state action requirement. Part II examines the present circuit split over which test should determine whether a public official is acting under color of state law in the operation of their social media account. Finally, Part III advocates for future courts to adopt a modified version of the Fourth Circuit's test, which would consider the vital factors of an account's purpose and appearance. Part III also addresses the inconsistency in how courts have evaluated appearance-based factors when applying the Purpose and Appearance test, and it argues that framing the appearance assessment as whether the account displays a "badge of authority" will lead to more consistent rulings.

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23. *See id.*

24. *See id.* at 1204.

25. *Id.* at 1207.

26. *See id.* at 1203–04.

27. *See infra* Part II.C.

28. *See infra* Part II.A.

29. *See infra* Part II.D.

30. Compare *Lindke*, 37 F.4th at 1206, with *Davison v. Randall*, 912 F.3d 666, 681 (4th Cir. 2019).

## I. THE LEGAL BACKGROUND OF FIRST AMENDMENT RIGHTS ON SOCIAL MEDIA AND § 1983

To contextualize how a public official may operate their social media account under color of state law, this part details the legal background of First Amendment rights on social media and § 1983's protection of those rights. Part I.A details how social media has become a prevalent tool used by public officials and outlines how public officials and constituents interact on social media. Part I.B focuses on how the First Amendment applies to protect freedom of speech on social media. Lastly, Part I.C explains § 1983's state action requirement and examines how federal courts have approached the question of whether an official acts under color of state law in other contexts.

### A. Public Officials' Use of Social Media

Today, social media websites like Facebook and Twitter are, for many, the “principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”<sup>31</sup> Social media also plays a significant role in how government officials engage with their constituents.<sup>32</sup> Former President Trump, for instance, used Twitter to reach over eighty million followers during his time in office.<sup>33</sup> Such heavy use of social media extends beyond the presidency to state, city, and local governments as well.<sup>34</sup> New York City alone operates over three hundred different social media accounts.<sup>35</sup> The government can even use social media to contact the public in times of crisis or to informally poll constituents.<sup>36</sup> With seven out of ten Americans already using social media, government officials will likely continue to utilize these platforms as a political tool for the foreseeable future.<sup>37</sup>

Social media not only provides government officials with unprecedented means to communicate with constituents, but also “provide[s] perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.”<sup>38</sup> For example, members of the public interacting with a government social media page can use in-app features to “like” and

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31. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

32. See Micah Telegen, Note, *You Can't Say That: Public Forum Doctrine and Viewpoint Discrimination in the Social Media Era*, 52 U. MICH. J.L. REFORM 235, 247 (2018) (“Indeed, social media presence has become such a ubiquitous element of government operations and strategy that an entire industry has sprung up to service needs in that space.”).

33. See *id.* at 246.

34. See *id.* at 246–47 (describing how local and state governments rely on social media to spread messages and to solicit constituent input).

35. See *id.*

36. See Brian P. Kane, *Social Media Is the New Town Square: The Difficulty in Blocking Access to Public Official Accounts*, ADVOCATE, Oct. 2017, at 31, 31.

37. See Telegen, *supra* note 32, at 246 (emphasizing that government officials will not “be leaving social media any time soon” because “where Americans go, their government will follow”).

38. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

“comment” on that page’s posts.<sup>39</sup> Some platforms also allow users to give nonverbal responses, such as a “thumbs-up” or an “angry face.”<sup>40</sup>

Government officials who operate social media accounts have the same in-app powers to moderate their pages as everyday social media users do.<sup>41</sup> Specifically, the ability to block other users from an account is “a feature of the platforms that Facebook and Twitter have granted to [all] account owners—not just public officials.”<sup>42</sup> A Facebook user who is blocked from a Facebook page can still view the page but can no longer comment or nonverbally “react” to that page’s posts.<sup>43</sup> In contrast, a Twitter user who is blocked from a Twitter account “can neither interact with nor view the blocker’s twitter feed.”<sup>44</sup>

Taken together, these features enable public officials and constituents to “engage in public debate” and “publicly comment” with great ease.<sup>45</sup> The U.S. Supreme Court itself has acknowledged that social media “offers ‘relatively unlimited low-cost capacity for communication of all kinds.’”<sup>46</sup> The likelihood that social media will remain prominent in our political landscape further emphasizes the need for consistent legal standards to govern its use.

### B. Social Media and the First Amendment

When public officials use social media to engage with their constituents, their conduct may implicate the protections of freedom of speech found in the First Amendment.<sup>47</sup> Specifically, “[w]hen the government provides a [public] forum for speech . . . the government may be constrained by the First Amendment, meaning that the government ordinarily may not exclude speech . . . from the forum on the basis of viewpoint.”<sup>48</sup> This “viewpoint discrimination” occurs when the government excludes speech because of the speaker’s motivating ideology, opinion, or perspective.<sup>49</sup> This protection against viewpoint discrimination does not apply to *all* speech. For example, “‘threats of force that place a person in a reasonable apprehension of bodily harm,’ are not protected by the First Amendment.”<sup>50</sup> Rather, viewpoint

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39. See, e.g., Davison v. Randall, 912 F.3d 666, 674 (4th Cir. 2019) (explaining some of the features that constituents used to engage with the chair’s Facebook page).

40. See Garnier v. O’Connor-Ratcliff, 41 F.4th 1158, 1163–64 (9th Cir. 2022).

41. See Petition for Writ of Certiorari at 22, O’Connor-Ratcliff v. Garnier, No. 22-324 (U.S. filed Oct. 4, 2022), 2022 WL 5542882.

42. *Id.*

43. See Garnier, 41 F.4th at 1164.

44. *Id.*

45. Kane, *supra* note 36, at 36.

46. Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (2017) (quoting Reno v. ACLU, 521 U.S. 844, 870 (1997)).

47. U.S. CONST. amend. I; see also Davison v. Randall, 912 F.3d 666, 682–87 (4th Cir. 2019) (analyzing whether a government official’s Facebook page amounted to a public forum for First Amendment purposes).

48. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019).

49. See Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 828–29 (1995).

50. Felts v. Vollmer, No. 20-CV-00821, 2022 WL 17546996, at \*7–8 (E.D. Mo. Dec. 9, 2022) (quoting United States v. Dinwiddie, 76 F.3d 913, 922 (8th Cir. 2018)).



discrimination occurs when the government censors speech “otherwise within the forum’s limitations.”<sup>51</sup>

The traditional concept of a public forum resembled a park or town square where citizens assembled to discuss matters of public interest.<sup>52</sup> Over time, however, the definition of a public forum has expanded to include metaphysical spaces, such as the internet and social media.<sup>53</sup> As such, “if a public official . . . creates [a] social media presence designed to interact with the public, that presence will most likely be viewed as a limited public forum.”<sup>54</sup> Although the Supreme Court has not yet ruled on whether social media is “the public forum of the present,”<sup>55</sup> circuit courts examining this question have generally concluded that the interactive components of a government social media account create a public forum.<sup>56</sup> Thus, if a public official were to exclude an individual from one such government social media account on the basis of viewpoint, that public official would be violating the individual’s First Amendment rights.<sup>57</sup>

### C. 42 U.S.C. § 1983 and the State Action Requirement

Enacted in 1871, § 1983 provides a cause of action for monetary and injunctive relief when federal rights are violated by a person acting “under color of any statute, ordinance, regulation, custom, or usage of any State.”<sup>58</sup> Section 1983’s purpose is “to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights.”<sup>59</sup> Since the 1960s, § 1983 has acted as a powerful legal mechanism used to protect

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51. *Rosenberger*, 515 U.S. at 830.

52. *See Kane*, *supra* note 36, at 31.

53. *See id.* at 32.

54. *Id.*

55. *Id.*

56. *See, e.g., Campbell v. Reisch*, 986 F.3d 822, 830 (8th Cir. 2021) (“[I]n maintaining an interactive space through her Twitter account, [State Representative Reisch] ultimately created a designated public forum.”); *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019) (holding that President Trump created a public forum in his Twitter account by making its interactive features accessible to the public without limitation), *vacated as moot sub nom. Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021).

57. *See Knight First Amend. Inst.*, 928 F.3d at 234–35 (“If, in blocking, the President were acting in a governmental capacity, then he may not discriminate based on viewpoint.”). Some commentators have argued that blocking an individual from one social media account should not constitute viewpoint discrimination because that user could still express their views on another similar forum. *See, e.g., Thomas Wheatley, Opinion, Why Social Media Is Not a Public Forum*, WASH. POST (Aug. 4, 2017, 12:13 PM), <https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2017/08/04/why-social-media-is-not-a-public-forum/> [<https://perma.cc/5Z2J-DGJH>]. However, “[t]he public forum doctrine strongly suggests that the government cannot get away with viewpoint discrimination by pointing to a hypothetical alternative forum.” Telegen, *supra* note 32, at 249.

58. 42 U.S.C. § 1983.

59. *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000).

citizens from violations of their rights.<sup>60</sup> Among those rights protected by § 1983 are the protections of speech found in the First Amendment.<sup>61</sup>

To prevail on a § 1983 claim, “a plaintiff must show that the alleged constitutional deprivation at issue occurred because of action taken by the defendant ‘under color of . . . state law.’”<sup>62</sup> This state action requirement “turns on whether a defendant’s actions are ‘fairly attributable to the State.’”<sup>63</sup>

Not every act of a public official is an action under color of state law.<sup>64</sup> “A public [official] acts under color of state law while acting in [their] official capacity or while exercising [their] responsibilities pursuant to state law.”<sup>65</sup> In contrast, there is no state action when a public official acts “in the ambit of [their] personal, private pursuits.”<sup>66</sup> The state action doctrine thus “draws a line between actions taken in an official capacity and those taken in a personal one.”<sup>67</sup> Determining whether a public official acted under color of state law requires weighing the totality of the circumstances, as “there is no rigid formula for measuring state action for the purposes of section 1983 liability.”<sup>68</sup>

The Supreme Court has identified a number of tests for assessing what constitutes state action.<sup>69</sup> In the context of conduct by public officials, courts generally agree that the proper test for determining whether state action exists is some form of the so-called “nexus test.”<sup>70</sup> Under the nexus test, “state action may be found if, though only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the state itself.’”<sup>71</sup>

As mentioned above, there is no real on-point precedent for determining state action in the context of a public official’s use of social media. However, there is rich case law illustrating when a public official acts under color of state law in other contexts. As a result, courts examining the state action question in the novel arena of social media have looked to case law in these

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60. See Katherine A. Macfarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, 2018 UTAH L. REV. 639, 665–67 (detailing how § 1983 has acted as a powerful tool for challenging racial discrimination).

61. See *Myers v. County of Somerset*, 515 F. Supp. 2d 492, 500 (D.N.J. 2007).

62. *Davison v. Randall*, 912 F.3d 666, 679 (4th Cir. 2019) (quoting *Philips v. Pitt City Mem’l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009)).

63. *Lindke v. Freed*, 37 F.4th 1199, 1202 (6th Cir. 2022) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

64. See *id.*

65. *West v. Atkins*, 487 U.S. 42, 50 (1988).

66. *Lindke*, 37 F.4th at 1202 (quoting *Stengel v. Belcher*, 522 F.2d 438 (6th Cir. 1975)).

67. *Id.*

68. *Garnier v. O’Connor-Ratcliff*, 41 F.4th 1158, 1169 (9th Cir. 2022) (quoting *Gritchen v. Collier*, 254 F.3d 807, 813 (9th Cir. 2001)).

69. See *Lindke*, 37 F.4th at 1202 (“The Supreme Court has identified three tests for assessing state action: (1) the public-function test, (2) the state-compulsion test, and (3) the nexus test.”).

70. See *id.* at 1203; *Garnier*, 41 F.4th at 1170.

71. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

other contexts to help guide their analyses.<sup>72</sup> This section explores two such contexts and the tests that courts have applied in them.

### 1. Off-Duty Police Officers and the Nexus Test

When confronted with the interplay between § 1983 and social media, the U.S. Court of Appeals for the Ninth Circuit looked to case law underlying § 1983's applicability to off-duty police officers for guidance.<sup>73</sup> These cases further develop the aforementioned nexus test for state action.<sup>74</sup> Although the connection between law enforcement and First Amendment rights may appear tenuous, in both situations, the nexus test would ask "whether the state official 'abused [their] responsibilities and purported or pretended to be a state officer' at the time of the alleged constitutional violation."<sup>75</sup> Moreover, unlike the novel context of social media, the precedent assessing the interplay between § 1983 and off-duty law enforcement officers dates back decades, providing courts with deeper guidance in this unclear area of the law.<sup>76</sup>

This line of case law demonstrates that courts assessing violations of § 1983 in the context of off-duty governmental employees have placed great emphasis on appearances.<sup>77</sup> Under the nexus test, an off-duty officer acts under color of state law if (1) the officer appears to act under state law, (2) the officer's pretense of acting under state law has the purpose of influencing others, and (3) the harm suffered by the plaintiff meaningfully relates to the officer's duties.<sup>78</sup>

For example, in *Anderson v. Warner*,<sup>79</sup> the Ninth Circuit held that an off-duty police officer acted under color of state law when he assaulted another person because he told bystanders that he was a police officer and that his actions were police business.<sup>80</sup> Comparatively, in *Van Ort v. Estate of Stanewich*,<sup>81</sup> an off-duty officer was found *not* to be acting under color of state law while attempting a robbery because he was not in uniform, did not display a badge, and in fact *denied* being a police officer.<sup>82</sup> This focus on

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72. See *Garnier*, 41 F.4th at 1170–71 (examining cases applying the nexus test to § 1983 claims concerning off-duty police officers); *Lindke*, 37 F.4th at 1202–03 (examining cases applying the state-official test to § 1983 harassment claims).

73. See *Garnier*, 41 F.4th at 1170–71 (applying the framework used in off-duty police officer cases to the issue of whether a public official used social media under color of state law); see also *Campbell v. Reisch*, 986 F.3d 822, 829 (8th Cir. 2021) (Kelly, J., dissenting) (describing the misconduct of off-duty police officers as an example of seemingly personal actions that may still be performed under color of state law).

74. See *Garnier*, 41 F.4th at 1170; *Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019).

75. *Garnier*, 41 F.4th at 1171 (quoting *Naffe v. Frey*, 789 F.3d 1030, 1036 (9th Cir. 2015)).

76. See *id.* at 1170–71.

77. See, e.g., *Van Ort v. Est. of Stanewich*, 92 F.3d 831, 833, 838 (9th Cir. 1996) (emphasizing appearance-related factors such as that the officer "did not display a badge," "denied being a police officer," and was not attired in a uniform).

78. See *Garnier*, 41 F.4th at 1170.

79. 451 F.3d 1063 (9th Cir. 2006).

80. See *id.* at 1066, 1068–71.

81. 92 F.3d 831 (9th Cir. 1996).

82. See *id.* at 833–38.

appearances when attributing § 1983 liability to off-duty government officials is largely consistent across federal circuit courts.<sup>83</sup> This approach to assessing state action previews the Purpose and Appearance test in the social media context.

## 2. Harassment Claims and the State-Official Test

When confronted with the interplay between § 1983 and social media, the Sixth Circuit looked to case law dealing with § 1983's applicability to harassment claims.<sup>84</sup> Again, although the similarities between harassment claims and First Amendment claims may seem tenuous at first, this case law seeks to explain when a public official is acting in their personal capacity rather than their official capacity.<sup>85</sup>

This case law expands on another version of the nexus test, which has been called the "state-official" test.<sup>86</sup> Under the state-official test, § 1983 generally does not apply "unless a state actor's conduct occurs in the course of performing an actual or apparent duty of [their] office."<sup>87</sup> The exception to the above rule exists when the official "abuses the position" given to them by the state.<sup>88</sup> The state-official test draws a key distinction from the nexus test and holds that § 1983 does not apply to state officials "in the ambit of their personal pursuits."<sup>89</sup>

In *Waters v. City of Morristown*,<sup>90</sup> the state-official test was applied to a harassment claim in which the defendant was both the plaintiff's employer and an alderman of the City of Morristown.<sup>91</sup> The plaintiff alleged that the defendant abused his authority as an alderman by asking police officers to track her whereabouts.<sup>92</sup> The court held that § 1983 could not support the claim because, though the defendant's conduct was "reprehensible," the defendant "was pursuing his purely personal, private interests."<sup>93</sup> The

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83. See, e.g., *Martinez v. Colon*, 54 F.3d 980, 986–87 (1st Cir. 1995) (holding that a policeman did not act in his official capacity because there was no "indicia of actual or ostensible state authority"); *Barna v. City of Perth Amboy*, 42 F.3d 809, 818 (3d Cir. 1994) (holding that off-duty officers did not act under color of law because they did not identify themselves as police or otherwise invoke their police authority). This focus on appearances was also adopted by the Sixth Circuit. See *Kalvitz v. City of Cleveland*, 763 F. App'x 490, 496 (6th Cir. 2019) (emphasizing factors such as whether an officer was in uniform, displayed a badge, identified himself as an officer, or attempted to arrest anyone). As discussed in Part II.C.1, the Sixth Circuit would eventually hold this line of case law relating to off-duty police officers to be inapposite in the context of social media. See *Lindke v. Freed*, 37 F.4th 1199, 1206 (6th Cir. 2022).

84. See *Lindke*, 37 F.4th at 1202–03.

85. See *id.*

86. See *id.* at 1203. Though these cases never refer to the test by that name, this was the term coined by the Sixth Circuit in *Lindke v. Freed* when it found these cases to be instructive in the social media context. See *id.*

87. *Waters v. City of Morristown*, 242 F.3d 353, 359 (6th Cir. 2001).

88. *Id.* (quoting *West v. Atkins*, 487 U.S. 42, 50 (1988)).

89. *Id.* (quoting *Screws v. United States*, 325 U.S. 91, 111 (1945)).

90. 242 F.3d 353 (6th Cir. 2001).

91. See *id.* at 355–56.

92. See *id.*

93. *Id.* at 359.

defendant's alleged requests that the police track the plaintiff were not done under color of state law, did not fall under his authority as an alderman, and were not "done in furtherance of any city business."<sup>94</sup>

This case law sets the foundation for what later became the Sixth Circuit's Duty and Authority test in the social media context. Thus, although the legal landscape of a public official's use of social media was largely unexplored until recently, other case law had addressed similar questions.

## II. "PURPOSE AND APPEARANCE" VERSUS "DUTY AND AUTHORITY"

This part analyzes the circuit split concerning which test should determine whether a public official is acting under color of state law in the operation of their social media page. Part II.A defines the circuit split by outlining the tenets of the Purpose and Appearance test and the Duty and Authority test. Part II.B analyzes the five appellate cases in which circuit courts have applied the Purpose and Appearance test and explains how these cases have built on one another to clarify the bounds of this test. Part II.C then analyzes the Sixth Circuit's decision in *Lindke*, which created the present circuit split by implementing the new Duty and Authority test. Part II.C also briefly analyzes the application of the Duty and Authority test at the district court level. Lastly, Part II.D seeks to define the gap between these two tests by applying the Duty and Authority test to the facts of *Garnier v. O'Connor-Ratcliff*,<sup>95</sup> a case in which the Ninth Circuit applied the Purpose and Appearance test.

### A. The Present Circuit Split

In the last five years, six federal circuit courts have applied § 1983 in the novel context of a public official's viewpoint discrimination on social media.<sup>96</sup> The central question in each of these cases was whether the public official operated their social media account under color of state law.<sup>97</sup> If so, then § 1983 would step in to provide recourse to the constituent.<sup>98</sup>

The U.S. Courts of Appeals for the Second, Fourth, Eighth, Ninth, and Eleventh Circuits all answered this question through a test that focused on the purpose and appearance of the social media account.<sup>99</sup> With regard to

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94. *Id.* at 360.

95. 41 F.4th 1158 (9th Cir. 2022).

96. *See id.* at 1163; *Lindke v. Freed*, 37 F.4th 1199, 1206 (6th Cir. 2022); *Campbell v. Reisch*, 986 F.3d 822, 823 (8th Cir. 2022); *Charudattan v. Darnell*, 834 F. App'x 477 (11th Cir. 2020); *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 230 (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, 673–75 (4th Cir. 2019).

97. *See, e.g., Campbell*, 986 F.3d at 823 ("Reisch appeals, arguing, among other things, that Campbell is not entitled to § 1983 relief because she was not acting under color of state law when she blocked him.").

98. *See Davison*, 912 F.3d at 679.

99. *See, e.g., id.* at 680–81 (emphasizing that Chair Randall "swathe[d]" the page in the "trappings" of her office and used it as a "tool of governance" (quoting *Davison v. Loudoun Cnty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 713–14 (E.D. Va. 2017))).

the account’s purpose, these courts considered whether the account was used “as a tool of governance.”<sup>100</sup> An account could be deemed a tool of governance through activity such as announcing government policy,<sup>101</sup> soliciting public opinion or involvement,<sup>102</sup> or utilizing government staff to maintain the account.<sup>103</sup> The nature of the account at its creation was not determinative in the assessment, and an originally private account could become a tool of governance over time.<sup>104</sup> With regard to the account’s appearance, these courts looked to whether the account bore the “trappings” of an official government account.<sup>105</sup> These trappings included characteristics such as labeling the page as “official”<sup>106</sup> or belonging to a government official,<sup>107</sup> providing government contact information,<sup>108</sup> including links to government web pages,<sup>109</sup> posting pictures depicting government events,<sup>110</sup> and including an official’s government title in the account’s name.<sup>111</sup>

In comparison, the Sixth Circuit answered this question through a test that asked whether the account was operated pursuant to “actual or apparent *dut[ies]*” or whether the social media activity “couldn’t happen in the same way” without official *authority*.<sup>112</sup> In *Lindke*, the Sixth Circuit outlined examples of what activities this new test would consider to have been done under color of state law.<sup>113</sup> Regarding the duty “anchor,” a public official could be acting pursuant to a duty of their office if a law required them to maintain a social media account,<sup>114</sup> or if they used state funds to pay for features on an account.<sup>115</sup> Regarding the authority “anchor,” a public official could be drawing on the authority of their office if the account belonged to the office rather than the officeholder, or if the official relied on government staff to operate the account.<sup>116</sup> Thus, the Duty and Authority test brings bright-line “state-action anchors” to this novel context.<sup>117</sup>

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100. *See, e.g., id.* at 680.

101. *See, e.g., Knight First Amend. Inst.*, 928 F.3d at 235–36.

102. *See, e.g., Garnier v. O’Connor-Ratcliff*, 41 F.4th 1158, 1176 (9th Cir. 2022); *Davison*, 912 F.3d at 680.

103. *See, e.g., Knight First Amend. Inst.*, 928 F.3d at 235.

104. *See id.*

105. *See, e.g., id.* at 231, 235.

106. *See Garnier*, 41 F.4th at 1176.

107. *See Knight First Amend. Inst.*, 928 F.3d at 231.

108. *See, e.g., Garnier*, 41 F.4th at 1164.

109. *See, e.g., Davison v. Randall*, 912 F.3d 666, 675 (4th Cir. 2019).

110. *See, e.g., Knight First Amend. Inst.*, 928 F.3d at 231.

111. *See, e.g., Davison*, 912 F.3d at 673.

112. *Lindke v. Freed*, 37 F.4th 1199, 1203 (6th Cir. 2022) (alteration in original) (emphasis added) (quoting *Waters v. City of Morristown*, 242 F.3d 353, 359 (6th Cir. 2001)).

113. *Id.* at 1203–04.

114. *See id.* at 1203.

115. *See id.* at 1204.

116. *See id.*

117. *Id.* at 1207.

*B. The “Purpose and Appearance” Test*

This section analyzes the five federal appellate cases that have been resolved according to the Purpose and Appearance test. Each of these cases presented unique circumstances that allowed the reviewing courts to refine the parameters of the Purpose and Appearance test over time.

1. The Fourth Circuit: The Debut of the Purpose and Appearance Test

The Fourth Circuit was the first federal circuit court to address the interplay between § 1983 and a public official’s use of social media. In *Davison v. Randall*, Phyllis Randall served as chair of the Loudoun County Board of Supervisors and blocked a constituent, Brian Davison, from her Facebook page after he commented allegations that board members had been “taking kickback money.”<sup>118</sup> Thus, the Fourth Circuit was faced with the novel question of whether Randall was acting under color of state law when she blocked Davison from her social media page.<sup>119</sup>

Randall shared control of the page titled “Chair Phyllis J. Randall” with her chief of staff, but Randall herself almost exclusively controlled the page’s content.<sup>120</sup> Chair Randall primarily used her page to share news and invite members of the public to participate in meetings.<sup>121</sup> The right-hand column of the page identified it as a “government official” page and provided the contact information for Chair Randall’s county office and email.<sup>122</sup> On a separate campaign page, Chair Randall directed constituents to engage in conversations with her through the “Chair Phyllis J. Randall” Facebook page.<sup>123</sup>

The Fourth Circuit resolved this novel issue by looking to the “traditional” standard requiring that “the conduct allegedly causing the deprivation of a federal right be fairly attributable to the state.”<sup>124</sup> This standard is synonymous with the aforementioned nexus test, which asks whether the challenged action bears a “sufficiently close nexus” with the state, such that it can be “treated as that of the state itself.”<sup>125</sup>

The Fourth Circuit analyzed the totality of the circumstances and held that Chair Randall acted under color of state law when she blocked Davison from

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118. *Davison v. Randall*, 912 F.3d 666, 675 (4th Cir. 2019) (“Randall testified that [the comment] contained ‘accusations’ regarding School Board members’ and their families’ putative conflicts of interests related to municipal financial transactions, suggesting, in Randall’s opinion, that School Board members had been ‘taking kickback money.’” (quoting Phyllis Randall)).

119. *See id.* at 677.

120. *See id.* at 673.

121. *See id.* at 673–74.

122. *See id.* at 674.

123. *See id.* at 673 (“I really want to hear from ANY Loudoun citizen on ANY issues, request, criticism, complement or just your thoughts. However, I really try to keep back and forth conversations . . . on my county Facebook page.” (emphasis omitted) (quoting Phyllis Randall)). This Note will address the law surrounding campaign pages in Part II.B.3.

124. *Id.* at 679 (quoting *Holly v. Scott*, 434 F.3d 287, 292 (4th Cir. 2006)).

125. *Id.* at 680 (quoting *Rosignol v. Voorhaar*, 316 F.3d 516, 525 (4th Cir. 2003)).

the chair's Facebook page.<sup>126</sup> The court found a sufficiently close nexus between Chair Randall's operation of the page and the state because she used it "as a tool of governance."<sup>127</sup> The court drew special attention to the fact that Chair Randall "created and administered the [page] to further her duties as a municipal officer."<sup>128</sup> For example, two purposes of the page were to solicit public input and inform the public about serious public safety events.<sup>129</sup>

The court also emphasized the fact that Chair Randall "swathe[d]" the page in the "trappings" of her office.<sup>130</sup> The page was named after her government office, was categorized as belonging to a government official, contained government contact information, and made posts addressed "to Loudoun."<sup>131</sup> Altogether, the Fourth Circuit found that these trappings clothed the page with a "power and prestige" that a private citizen could not have created.<sup>132</sup> Thus, in a first-of-its-kind decision, the Fourth Circuit held that a public official acts under color of state law in operating a social media account when the page is "*clothed . . . in 'the power and prestige of [their] state office' and administered to perform . . . 'duties of [their] office.'*"<sup>133</sup> This emphasis on the page's use and presentation set the foundations of the Purpose and Appearance test.

## 2. The Second Circuit: The Nature of an Account Can Change Over Time

The Second Circuit was the next court to address the interplay between § 1983 and a public official's use of social media. In *Knight First Amendment Institute at Columbia University v. Trump*,<sup>134</sup> the Second Circuit was faced with the issue of whether President Trump acted in his official capacity when he blocked certain users' access to his Twitter account because he disagreed with their speech.<sup>135</sup> Unlike *Davison*, which dealt with a local board member who lacked nationwide social media notoriety,<sup>136</sup> this case dealt with President Trump, who was well known for his activity on Twitter.

The claim before the Second Circuit arose after President Trump blocked multiple users from the "@realDonaldTrump" Twitter account because they

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126. *See id.* at 681.

127. *Id.* at 680 (quoting *Davison v. Loudoun Cnty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 713 (E.D. Va. 2017)).

128. *Id.*

129. *See id.*

130. *Id.* (quoting *Davison v. Loudoun Cnty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 714 (E.D. Va. 2017)).

131. *See id.* (quoting *Davison v. Loudoun Cnty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 714 (E.D. Va. 2017)).

132. *See id.* at 681 (quoting *Harris v. Harvey*, 605 F.2d 330, 337 (7th Cir. 1979)).

133. *Id.* at 680–81 (emphasis added) (quoting *Harris v. Harvey*, 605 F.2d 330, 337 (7th Cir. 1979)).

134. 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).

135. *See id.* at 234.

136. *See supra* note 118 and accompanying text.



posted replies in which they criticized him or his policies.<sup>137</sup> The president conceded that he blocked these users because of their criticism.<sup>138</sup> The plaintiffs contended that because they were blocked (and thus unable to view, retweet, or reply to the president's tweets), they had been denied their First Amendment right to participate in this public forum solely on the basis of their viewpoints.<sup>139</sup>

President Trump first created the account in question, named “@realDonaldTrump” in March 2009, long before he became president.<sup>140</sup> President Trump argued that he could not be subjected to § 1983 liability in this action because the Twitter account was a privately owned and operated account, and that his becoming president did not change the nature of the account.<sup>141</sup> Thus, unlike in *Davison*, in which Chair Randall had not operated her Facebook page prior to taking office,<sup>142</sup> the dispute in this case focused on whether the nature of the account had *changed* since President Trump took office.<sup>143</sup>

The Second Circuit held that the original nature of the account was not determinative.<sup>144</sup> Rather, “[t]emporary control by the government can still be control for First Amendment purposes.”<sup>145</sup> The court then proceeded to analyze the totality of the circumstances and held that President Trump operated the account under color of state law.<sup>146</sup> As to appearances, the court found that the @realDonaldTrump Twitter account bore “all the trappings of an official, state-run account.”<sup>147</sup> It was registered to “Donald J. Trump ‘45th President of the United States of America,’” and its header photographs all showed the president operating in his official capacity.<sup>148</sup> The court also held that President Trump operated the account as a tool of his office.<sup>149</sup> President Trump himself stated that he used the account “to announce, describe, and defend his policies; to promote his Administration’s legislative agenda; to announce official decisions; to engage with foreign political leaders . . . [and]

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137. *See Knight First Amend. Inst.*, 928 F.3d at 232.

138. *See id.*

139. *See id.* at 232–33.

140. *See id.* at 231.

141. *See id.* at 234.

142. *See Davison v. Randall*, 912 F.3d 666, 673 (4th Cir. 2019) (explaining that Randall created the account the day before she was sworn into office).

143. *See Knight First Amend. Inst.*, 928 F.3d at 231 (“No one disputes that before he became President the Account was a purely private one or that once he leaves office the account will presumably revert to its private status. This litigation concerns what the Account is now.”).

144. *See id.* at 235.

145. *Id.*

146. *See id.* at 236.

147. *See id.* at 231.

148. *See id.* (detailing the appearance of the account and header photographs depicting President Trump “meeting with the Pope, heads of state, and other foreign dignitaries”).

149. *See id.* at 236 (“[S]ince he took office, the President has consistently used the Account as an important tool of governance and executive outreach.”).

to challenge media organizations whose coverage of his Administration he believes to be unfair.”<sup>150</sup>

Thus, the Second Circuit applied the Purpose and Appearance test, as it was set out in *Davison*, to a new set of facts and held that an account is operated under color of state law if it is used as a tool of governance and bears the trappings of state office.<sup>151</sup> Additionally, the Second Circuit clarified that the original nature of a social media account is not determinative, and an account’s nature can change over time.<sup>152</sup>

Before departing from this case, it is worth noting that the Second Circuit also rejected President Trump’s argument that blocking other users is not an “official” action because that function is available to all users—private users and government officials alike.<sup>153</sup> Although this argument did not meaningfully impact this case, it closely resembles an argument that would later be considered by the Sixth Circuit in its decision that created the Duty and Authority test.<sup>154</sup>

### 3. The Eleventh Circuit: Campaign Accounts Are Private Accounts

The Eleventh Circuit’s approach to the Purpose and Appearance test in *Charudattan v. Darnell*<sup>155</sup> further expanded on the previous two cases by introducing the concept of a *campaign* social media page.<sup>156</sup> In that case, the court was faced with the issue of whether Sheriff Sadie Darnell of Alachua County, Florida, acted in her official capacity when she blocked a user, Savitar Charudattan, from both the Alachua County Sheriff’s Office Facebook page and a separate campaign page.<sup>157</sup> This fact presented an interesting variable because Sheriff Darnell claimed that the campaign page was used only for her *private* reelection campaign and that it did not operate on behalf of the Sheriff’s Office.<sup>158</sup>

The campaign page included posts about the sheriff’s reelection campaign, pictures of campaign events, endorsements, and other statements promoting her philosophy and experience.<sup>159</sup> Sheriff Darnell created the campaign page

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150. *Id.* at 231.

151. *See id.* at 236.

152. *See id.* at 235.

153. *See id.* at 236.

154. *See Lindke v. Freed*, 37 F.4th 1199, 1206 (6th Cir. 2022) (considering the argument that Freed did not gain any actual authority on social media by holding himself out as a public official).

155. 834 F. App’x 477 (11th Cir. 2020).

156. *See id.* at 479.

157. *See id.* at 478–79. Unlike the previous two cases addressing this issue, *Charudattan* involved *two separate* social media accounts. *See id.* This part does not discuss the claim as it pertained to the Sheriff’s Office Facebook page in depth because it adds little to the development of the Purpose and Appearance test. The Eleventh Circuit affirmed in Sheriff Darnell’s favor on this claim because Savitar Charudattan’s comments on that specific page were not protected by § 1983. *See id.* at 479–81.

158. *See id.* at 482.

159. *See id.*

herself prior to her election.<sup>160</sup> The campaign page was *not* categorized as belonging to a “government official” and did not include Darnell’s official title as sheriff.<sup>161</sup>

The court ruled that the campaign page was privately owned, and thus Sheriff Darnell did not act under color of state law when she blocked Charudattan from the page.<sup>162</sup> This marked the first time that a circuit court found a public official *not* to be acting under color of state law in blocking a user from their social media page.<sup>163</sup> Unlike the pages in *Davison* and *Knight First Amendment Institute*, the page here did not bear the “trappings” of an official account.<sup>164</sup> Although it did feature pictures of campaign events and endorsements of Darnell’s law enforcement experience, the court held that these statements were clearly not made on behalf of the Sheriff’s Office.<sup>165</sup> Moreover, the court held that unlike the pages in *Davison* and *Knight First Amendment Institute*, the campaign page was not used as a “tool of governance.”<sup>166</sup> Rather, the campaign page in *Charudattan* was “a private page for Sheriff Darnell’s reelection,” rather than a page she used with official purpose to carry out her duties as sheriff.<sup>167</sup>

The Eleventh Circuit also rejected an argument that the campaign page was operated under color of state law because it was managed by off-duty deputies of the sheriff’s office.<sup>168</sup> The plaintiff asserted that these off-duty deputies should not be considered “true ‘volunteers,’” but rather, they were acting on behalf of the state.<sup>169</sup> The court, however, was unconvinced by this argument and stated instead that “[n]ot all acts by state employees are acts under color of law’ . . . and ‘acts of officers in the ambit of their personal pursuits are not done under color of law.’”<sup>170</sup> As discussed in Part II.C.1, the use of state employees in the management of a social media account is a

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160. *See id.*

161. *See id.*

162. *See id.*

163. *Cf. Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019) (holding that President Trump acted in his official capacity when he blocked users from his Twitter account), *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, 681 (4th Cir. 2019) (“Considering the totality of these circumstances, the district court correctly held that Randall acted under color of state law in banning Davison from the Chair’s Facebook page.”).

164. *See Charudattan*, 834 F. App’x at 482; *Knight First Amend. Inst.*, 928 F.3d at 231 (“The public presentation of the Account and the webpage associated with it bear all the trappings of an official, state-run account.”); *Davison*, 912 F.3d at 680 (“Randall ‘swathe[d] the [Chair’s Facebook page] in the trappings of her office.’” (alterations in original) (quoting *Davison v. Loudoun Cnty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 714 (E.D. Va. 2017))).

165. *See Charudattan*, 834 F. App’x at 482 (emphasizing that the page did not include Sheriff Darnell’s official title and was not categorized as belonging to a government official).

166. *Cf. Davison*, 912 F.3d at 680 (describing the use of the chair’s Facebook page as a “tool of governance”); *Knight First Amend. Inst.*, 928 F.3d at 236 (describing President Trump’s use of his Twitter account as a “tool of governance”).

167. *See Charudattan*, 834 F. App’x at 482.

168. *See id.*

169. *Id.*

170. *Id.* (second alteration in original) (quoting *Myers v. Bowman*, 713 F.3d 1319, 1329 (11th Cir. 2013)).

critical anchor of the Sixth Circuit’s test for finding state action.<sup>171</sup> Nevertheless, the Eleventh Circuit found the deputies’ involvement to be inconsequential, in light of the fact that the campaign page served no official purpose and did not bear the trappings of an official account.<sup>172</sup>

#### 4. The Eighth Circuit: Assessing Appearances in Favor of Public Officials

In *Campbell v. Reisch*,<sup>173</sup> the Eighth Circuit applied the Purpose and Appearance test but took a different approach to assessing an account’s appearance-based factors.<sup>174</sup> In this case, Missouri state representative Cheri Toalson Reisch blocked plaintiff Mike Campbell from her campaign Twitter account after he questioned her fitness for office.<sup>175</sup>

State Representative Reisch, much like Sheriff Darnell,<sup>176</sup> argued that she could not have acted under color of state law when she blocked Campbell because she operated the Twitter account in a private capacity as a *campaigner* for political office.<sup>177</sup> However, this case resembled *Knight First Amendment Institute* more closely than *Charudattan* because it implicated the question of whether the character of the campaign account had evolved after its owner took office.<sup>178</sup>

State Representative Reisch created the Twitter account in question as a private individual when she first announced that she would be running for office.<sup>179</sup> The account was named “@CheriMO44,” in reference to the district she would represent.<sup>180</sup> The account posted pictures of Reisch with other politicians and regularly tweeted about her campaign using the hashtags “#MO44” and “#TeamCheri.”<sup>181</sup> After winning office, State Representative Reisch continued to use the account to tweet about her work and regularly used the hashtag “#MO44.”<sup>182</sup> State Representative Reisch also used the account to “tout[] her performance as a representative.”<sup>183</sup>

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171. *See Lindke v. Freed*, 37 F.4th 1199, 1204 (6th Cir. 2022).

172. *See Charudattan*, 834 F. App’x at 482.

173. 986 F.3d 822, 823 (8th Cir. 2022) (“Reisch appeals, arguing, among other things, that Campbell is not entitled to § 1983 relief because she was not acting under color of state law when she blocked him.”).

174. *See id.* at 827.

175. *See id.* at 824.

176. *See Charudattan*, 834 F. App’x at 482.

177. *See Campbell*, 986 F.3d at 825 (“Running for public office is not state action; it is a private activity.”).

178. *See id.* at 826 (considering whether the “essential character” of State Representative Reisch’s account changed after her election); *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 235 (2d Cir. 2019) (holding that an originally private social media account can transform into a government account), *vacated as moot sub nom. Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021).

179. *See Campbell*, 986 F.3d at 823 (“Her very first [tweet] read ‘I am proud to announce my candidacy to represent Missouri’s 44th District. Let’s work together & create opportunities for jobs and education.’” (quoting Cheri Toalson Reisch)).

180. *Id.* at 827.

181. *Id.* at 823–24.

182. *See id.* at 824.

183. *Id.*

The Eighth Circuit looked to *Knight First Amendment Institute* and *Davison* for guidance in resolving this case.<sup>184</sup> It especially weighed the *Knight First Amendment Institute* court's interpretation that "not every social media account operated by a public official is a government account."<sup>185</sup> The Eighth Circuit continued this reasoning and held that State Representative Reisch's account was "the kind of unofficial account that the [*Knight First Amendment Institute*] court envisioned."<sup>186</sup>

In holding that State Representative Reisch did not operate the account under color of state law, the court pointed out that she originally created the account as a private individual running for office and used it primarily for campaign purposes.<sup>187</sup> The court by no means held that "the essential character of a Twitter account is fixed forever," but instead sought to emphasize that the "overall theme" of the account remained the same even after State Representative Reisch was elected to office.<sup>188</sup> The court held that "sporadic" mentions of Reisch's official duties did not interrupt the private purpose of "creat[ing] a favorable impression of State Representative Reisch in the minds of her constituents."<sup>189</sup> Thus, as to purpose, the Eighth Circuit held that State Representative Reisch's campaign account maintained a private purpose, even after she was elected to office.<sup>190</sup>

As to the account's appearance, the Eighth Circuit assessed the trappings of an official account differently than the other circuit courts had. For example, State Representative Reisch's Twitter account handle referenced the district she represented and posted pictures of her with other politicians.<sup>191</sup> But whereas past courts considered these factors to be trappings of an official account,<sup>192</sup> the Eighth Circuit found them to be "too equivocal to be helpful here."<sup>193</sup> It instead found that "even if these can be [the] trappings of an official account, they can quite obviously be trappings of a personal account as well."<sup>194</sup> Thus, although the Eighth Circuit still implemented the Purpose

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184. *See id.* at 825–27 (considering the differences between the present case and the cases considered by the Second and Fourth Circuits).

185. *See id.* at 826 (quoting *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)).

186. *Id.*

187. *See id.* ("[E]ven if Reisch had been a public official at the time, we would still hold that she had not created an official governmental account because she used it overwhelmingly for campaign purposes.").

188. *Id.*

189. *Id.* at 827.

190. *See id.* ("The dissent points to a few tweets that Reisch posted after the election . . . . But it is not obvious that their purpose was different.").

191. *See id.* at 824, 827.

192. *See Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 231 (2d Cir. 2019) (noting President Trump's inclusion of pictures of himself with heads of state and other foreign dignitaries as a trapping of his office), *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, 680 (4th Cir. 2019) (noting Randall's inclusion of her government title as a trapping of her office).

193. *Campbell*, 986 F.3d at 827.

194. *Id.*

and Appearance test, its evaluation of appearance-based factors was more favorable to public officials than the evaluations conducted by the Second and Fourth Circuits were.<sup>195</sup>

The Eighth Circuit's ruling in *Campbell* was not unanimous.<sup>196</sup> In her dissent, Judge Jane L. Kelly argued that the changes that State Representative Reisch made to her campaign account after her election were sufficient to transform it into an official account.<sup>197</sup> As to purpose, Judge Kelly pointed out that State Representative Reisch stopped using the account for campaign activities, such as posting with her campaign hashtag, announcing endorsements, and soliciting donations.<sup>198</sup> Instead, State Representative Reisch started using the account to share information about the Missouri legislature's work.<sup>199</sup> As to the account's appearance, Judge Kelly pointed out that State Representative Reisch changed her location to the district she represented, described herself by her government title, and displayed a profile photo taken in the legislature's chamber.<sup>200</sup> In short, Judge Kelly believed that State Representative Reisch acted under color of state law because the "persistent invocation" of her official status "overwhelmed any implicit references one might perceive to her campaign or future political ambitions."<sup>201</sup>

### 5. The Ninth Circuit: Weighing the Circuit Split

The Ninth Circuit most recently addressed this issue in *Garnier v. O'Connor-Ratcliff*.<sup>202</sup> Unlike the previous decisions analyzed in this section, the *Garnier* decision came *after* the Sixth Circuit's ruling in *Lindke* that created the circuit split.<sup>203</sup> Thus, the Ninth Circuit had the opportunity to examine both the Purpose and Appearance test and the Duty and Authority test before deciding which test would govern in its jurisdiction. In *Garnier*, the Ninth Circuit had to decide whether trustees of a California school district violated the First Amendment when they blocked highly involved parents from their social media pages.<sup>204</sup>

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195. *See id.* ("In short, we think Reisch's Twitter account is more akin to a campaign newsletter than to anything else, and so it's Reisch's prerogative to select her audience and present her page as she sees fit.")

196. *See id.* at 828.

197. *See id.* at 828–29 (Kelly, J., dissenting).

198. *See id.* at 828.

199. *See id.*

200. *See id.* at 829.

201. *Id.*

202. 41 F.4th 1158, 1163 (9th Cir. 2022) ("The Garniers' claims present an issue of first impression in this Circuit: whether a state official violates the First Amendment by creating a publicly accessible social media page related to his or her official duties and then blocking certain members of the public from that page.")

203. *See generally* *Lindke v. Freed*, 37 F.4th 1199 (6th Cir. 2022). The defendants in *Garnier* sought to avoid § 1983 liability by arguing that they did not use district resources to maintain the account. *See Garnier*, 41 F.4th at 1172. Although this defense was rejected by the Ninth Circuit, it likely would have prevailed under the test set forth in *Lindke*. *See infra* Part II.C.1.

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

The defendants, collectively referred to as the “Trustees,” created public Facebook pages to promote their campaigns for the Poway Unified School District (PUSD) Board of Trustees.<sup>205</sup> Though the Trustees used the pages for campaign purposes at first, after winning the election, they posted content related to their work on the PUSD board.<sup>206</sup> All of the Trustees’ pages were described as “official” and included the Trustees’ official titles.<sup>207</sup> One page included an official PUSD email address.<sup>208</sup> On the “interests” section of one Trustee’s page, they listed “being accessible and accountable; retaining quality teachers; increasing transparency in decision making; preserving local standards for education; and ensuring our children’s campus safety.”<sup>209</sup> Some of the pages’ posts described visits to district schools and reported on other PUSD business.<sup>210</sup> They also invited engagement from constituents, such as encouraging community members to apply for representative positions and posting surveys for users to complete.<sup>211</sup>

The plaintiffs, Christopher and Kimberly Garnier, were constituents who frequently criticized the board on the subject of “race relations” in the district.<sup>212</sup> The Garniers were frustrated by the Trustees’ lack of engagement with them at public meetings, so they began commenting their criticisms on the Trustees’ social media pages.<sup>213</sup> These comments never used profanity or threatened harm but were lengthy and repetitive.<sup>214</sup> The Trustees subsequently blocked the Garniers.<sup>215</sup>

On review, the Ninth Circuit ruled that the Trustees acted under color of state law in blocking the Garniers, “given the close nexus between the Trustees’ use of their social media pages and their official positions.”<sup>216</sup> In reaching this conclusion, the court first pointed to the fact that the Trustees identified themselves as public officials on social media.<sup>217</sup> As to appearances, the court found that the Trustees’ inclusion of their official titles and government contact information on their social media pages strengthened the nexus between their positions and their actions online.<sup>218</sup>

The court also emphasized that the Trustees’ social media activity “had the *purpose* and effect of influencing the behavior of others.”<sup>219</sup> The court held that by inviting social media users to engage in activities such as public meetings or surveys, the Trustees were “invoking their governmental status”

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205. *See id.*

206. *See id.* at 1164.

207. *See id.*

208. *See id.*

209. *Id.*

210. *See id.* at 1164–65 (recounting posts that updated the public about hiring and firing decisions, achievements of teachers, and proposed budgetary plans).

211. *See id.* at 1165.

212. *See id.* at 1165–66.

213. *See id.* at 1166.

214. *See id.*

215. *See id.*

216. *Id.* at 1170.

217. *See id.* at 1171.

218. *See id.*

219. *Id.* (emphasis added) (quoting *Naffe v. Frey*, 789 F.3d 1030, 1037 (9th Cir. 2015)).

through these accounts.<sup>220</sup> Thus, the Ninth Circuit found that the Trustees were acting under color of state law when they blocked the Garniers from their social media pages.<sup>221</sup>

In its *Garnier* ruling, the Ninth Circuit included a section detailing the “Decisions of Other Circuits.”<sup>222</sup> That section addressed *Knight First Amendment Institute*, *Davison*, *Campbell*, and *Lindke*, and it analogized the present case to those cases from other circuits.<sup>223</sup> In declining to follow the Sixth Circuit’s novel reasoning in *Lindke*, the Ninth Circuit emphasized that its case law for determining whether one acts under color of law focuses on “actions in addition to appearance.”<sup>224</sup> Thus, the Ninth Circuit weighed the two tests used by other circuits and decided that the Purpose and Appearance test would govern in its jurisdiction.<sup>225</sup>

Thus, these five appellate cases have developed the bounds of the Purpose and Appearance test and its core holdings. An account has official purpose if it is used as a “tool of governance.”<sup>226</sup> An account has an official appearance if it bears the “trappings” of public office.<sup>227</sup> The nature of an account is not fixed, and an originally private account can become official.<sup>228</sup> Lastly, campaign accounts, which are meant to create a favorable impression of the official in the minds of constituents, serve only a private purpose.<sup>229</sup> These tenets mark the bounds of the Purpose and Appearance test.

### C. The “Duty and Authority” Test

This section analyzes the Duty and Authority test as it was set forth in the Sixth Circuit’s decision in *Lindke v. Freed*. Since its recent adoption, the Duty and Authority test has only been applied once to assess a public official’s use of social media at the federal appellate court level.<sup>230</sup> Thus, Part II.C.2 examines how the Duty and Authority test was recently applied at the district court level in *Farmer v. Gonzalez*.<sup>231</sup>

#### 1. The Sixth Circuit: The Debut of the Duty and Authority Test

The Sixth Circuit’s ruling in *Lindke v. Freed* created the present circuit split on how to assess whether a public official’s action on social media is

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220. *Id.*

221. *See id.*

222. *Id.* at 1174.

223. *See id.* at 1174–77.

224. *Id.* at 1176–77 (explaining that much of the case law surrounding § 1983 concerns off-duty police officers, and these inquiries put great weight on appearance).

225. *See id.*

226. *See Davison v. Randall*, 912 F.3d 666, 680–81 (4th Cir. 2019).

227. *See id.*

228. *See 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).

229. *See Campbell v. Reisch*, 986 F.3d 822, 827 (8th Cir. 2021); *Charudattan v. Darnell*, 834 F. App’x 477, 482 (11th Cir. 2020).

230. *See generally Lindke v. Freed*, 37 F.4th 1199 (6th Cir. 2022).

231. No. CV 21-49, 2022 WL 4591637 (E.D. Ky. Sept. 29, 2022).



state action.<sup>232</sup> In that case, Kevin Lindke alleged that Port Huron city manager James Freed violated § 1983 when he blocked Lindke from his Facebook page and deleted Lindke's critical comments.<sup>233</sup>

Freed initially created the Facebook profile in question as a private account, but when he grew too popular for the 5,000-friend limit, he converted it to a "page."<sup>234</sup> When he was appointed city manager of Port Huron, Freed updated his page's "About" section to read "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron."<sup>235</sup> He also updated the page to include an official government email and the address of city hall.<sup>236</sup> The page featured a wide variety of posts, ranging from pictures of Freed's family gatherings to directives he issued as city manager.<sup>237</sup> During the COVID-19 pandemic, Freed used the page to share the policies he initiated for Port Huron, as well as articles detailing public-health statistics.<sup>238</sup> Lindke was a Port Huron resident who critiqued Freed's pandemic response in the page's comments section.<sup>239</sup> Freed blocked Lindke from the page and deleted the comments because he "didn't appreciate" them.<sup>240</sup>

The Sixth Circuit began its reasoning by noting that it would proceed with this case of first impression by following its state-official test.<sup>241</sup> Applying this test to the context of social media, the court explained that "just like anything else a public official does, 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 [their] office.'"<sup>242</sup>

Applying this test to the context of social media, the Sixth Circuit provided two examples of behavior that could amount to an "actual or apparent *dut[y]*" under the first factor of its test.<sup>243</sup> First, an actual duty would exist if a law "require[d] an officeholder to maintain a social-media account."<sup>244</sup> The court reasoned that this example "fits neatly within the text of section 1983," specifically the language requiring that the action be "under color of *statute*."<sup>245</sup> Second, the court noted that the use of state resources in running a social media account could indicate an "actual or apparent duty."<sup>246</sup> Thus,

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

233. *See id.* at 1201–02.

234. *See id.* at 1201.

235. *Id.*

236. *See id.*

237. *See id.* ("He shared photos of his daughter's birthday, his visits to local community events, and his family's weekend picnics. He also posted about some of the administrative directives he issued as city manager.").

238. *See id.*

239. *See id.* at 1201–02.

240. *Id.*

241. *See id.* at 1202–03.

242. *Id.* at 1203 (emphasis added).

243. *Id.* at 1203–04.

244. *Id.*

245. *Id.* at 1204 (emphasis added).

246. *Id.*

if a public official used community funds to pay for an account on a paid platform or to access paid features, there would be an anchor to state action.<sup>247</sup>

The Sixth Circuit also explained how the second, authority-based factor of its test applies in the social media context.<sup>248</sup> First, the court described an instance in which the account in question belongs to the *public office* rather than the *individual officeholder*.<sup>249</sup> Second, the court suggested that a public official would draw on the authority of their office if they used government staff to maintain their social media account.<sup>250</sup> Under both circumstances, the public official would be drawing on the *authority* of their office because they only have access to the government account or government employees through the office they hold.<sup>251</sup>

Having laid out the parameters of this new Duty and Authority test, the Sixth Circuit applied the test to the facts of the present case and held that Freed did not operate his Facebook page under color of state law.<sup>252</sup> First, Freed did not operate the account as part of his actual or apparent duties.<sup>253</sup> No Michigan law of any kind compelled Freed to operate the page, nor did he use any government funds in his operation of the page.<sup>254</sup> Lindke argued that Freed used the page as an avenue to “fulfill [the] ‘essential’ task of communicating with constituents.”<sup>255</sup> The Sixth Circuit rejected this argument, finding that Freed’s own desire to maintain regular communication with his constituents could not turn every communication he had into state action.<sup>256</sup>

Second, the court concluded that Freed’s page did not rely on the authority of his office because “Freed created the page years before taking office, and there’s no indication his successor would take it over.”<sup>257</sup> Moreover, Freed did not use any government employees to maintain the account.<sup>258</sup> Although Lindke argued that Freed posted photos that were taken by government

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247. *See id.*

248. *See id.*

249. *See id.* (“For an example, imagine there’s an official Facebook account for the Governor of Kentucky titled @KentuckyGovernor . . . . Since an individual is entrusted with that page only while he’s governor, it’s available only under the authority of the office.”).

250. *See id.* (“Indeed, a tech-savvy governor might hire a social-media team to manage her online presence. And when those employees are on the state’s payroll, using them to manage a page can transform it into state action.”).

251. *See id.*

252. *See id.* (“In short, Freed operated his Facebook page in his personal capacity, not his official capacity. Walking through the examples above shows why.”).

253. *See id.* at 1204–05.

254. *See id.*

255. *Id.* at 1205.

256. *See id.* (“When Freed visits the hardware store, chats with neighbors, or attends church services, he isn’t engaged in state action merely because he’s ‘communicating’—even if he’s talking about his job.”).

257. *Id.*

258. *See id.* (“[T]here’s no evidence that staffers were involved in preparing content for Freed to use on the page, or that staff ever posted on Freed’s behalf.”).

employees, the court was unconvinced that such minimal involvement could convert the page into an official one.<sup>259</sup>

Before concluding its opinion in *Lindke*, the Sixth Circuit acknowledged that its reasoning departed from that of other circuits confronting this issue.<sup>260</sup> The Sixth Circuit found the case law on off-duty police officers to be inapposite in the context of social media.<sup>261</sup> It reasoned that although appearances are significant in that context, the *Lindke* case presented a different circumstance: “Freed gains no authority by presenting himself as city manager on Facebook. His posts do not carry the force of law simply because the page says it belongs to a person who’s a public official.”<sup>262</sup> Thus, the Sixth Circuit concluded that “[i]nstead of examining a page’s appearance or purpose, [it would] focus on the actor’s official duties and use of government resources or state employees.”<sup>263</sup> As a result, Freed was not liable under § 1983 because these “state-action anchors” were absent.<sup>264</sup>

## 2. The Eastern District of Kentucky: Applying the Duty and Authority Test at the District Court Level

Though *Lindke* is the only case at the appellate level to employ the Duty and Authority test, in *Farmer v. Gonzalez*, the U.S. District Court for the Eastern District of Kentucky followed the Sixth Circuit’s holding. In *Farmer*, the court was faced with the question of whether a group of public defenders, the defendants, acted under color of state law when they took retaliatory action on social media against Detective James Farmer after he traveled to Washington D.C. on January 6, 2021, to hear former President Trump speak.<sup>265</sup>

Detective Farmer was not present at the January 6 rally and insurrection; he was interviewed the following day on “traditional media” and “unequivocally condemned” the violence at the Capitol.<sup>266</sup> Following this interview, the defendants shared a letter on social media containing allegations that, among other things, Detective Farmer stormed the Capitol and “fraternizes with racists and white supremacists.”<sup>267</sup> Detective Farmer was reassigned to another role in the sheriff’s department shortly thereafter,

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259. *See id.* (“It could be different if Freed’s employees designed graphics specifically for the page and no other use. But snapping a few candids at a press conference is routine—not a service Freed accesses by the ‘authority of his office.’”).

260. *See id.* at 1206–07.

261. *See id.* at 1206 (“*Lindke*’s focus on the page’s appearance seems akin to considering whether an officer is on duty . . . . But the resemblance is shallow. In police-officer cases, we look to officers’ appearance because their *appearance* actually evokes state authority.”).

262. *Id.*

263. *Id.*

264. *Id.* at 1207.

265. *See Farmer v. Gonzalez*, No. 21-CV-49, 2022 WL 4591637, at \*1–3 (E.D. Ky. Sept. 29, 2022) (“Farmer alleges that the Defendants deprived him of his First Amendment rights to petition, assemble, and engage in free speech by subjecting him to retaliatory actions, and they did so under color of state law.”).

266. *Id.* at \*1.

267. *See id.* at \*2.

and the department promised a thorough investigation of the defendants' allegations.<sup>268</sup> Detective Farmer claimed to have suffered harm, including reassignment and reputational harm.<sup>269</sup>

The defendants posted the letter to their social media accounts and distributed it to various media organizations using an official state email account.<sup>270</sup> The letter identified the defendants by their positions as public defenders.<sup>271</sup> The defendants wrote the letter during work hours.<sup>272</sup>

The court followed the Sixth Circuit's guidance in *Lindke* and focused on whether the action was "part of the official's 'actual or apparent duties'" or "couldn't happen in the same way without the authority of the office."<sup>273</sup> As to the defendants' duties pursuant to their offices, the court held that no law, ordinance, or regulation compelled the defendants to write the letter, send it, or post it on social media.<sup>274</sup>

The court also held that the defendants did not act by any authority they possessed by virtue of their offices.<sup>275</sup> It held instead that "[a]ny person could have written and sent the letter, posted on social media, and shared the letter with the media."<sup>276</sup> The court was not persuaded by facts such as the letter being sent from an official account, its mention of the defendants' positions as public defenders, or its being authored during work hours.<sup>277</sup> Although Detective Farmer argued that these facts transformed the act into an official one, the court found that they were too minimal to be impactful.<sup>278</sup>

The court did briefly consider certain "presentation-based factors" resembling the appearance-based analysis of other circuits.<sup>279</sup> However, consistent with the Sixth Circuit's approach, it dismissed these "trappings" as falling "far short" of what is required to constitute state action.<sup>280</sup> Thus, *Farmer* presents an application of the Duty and Authority test to a new fact pattern and further emphasizes that the focus of this test is whether an actor was acting pursuant to their official duties or "could have acted in the same manner without the authority of their office."<sup>281</sup>

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268. *See id.*

269. *See id.* Unlike the previous cases examined by federal appellate courts, which dealt with viewpoint discrimination, this case involves a First Amendment retaliation claim. *See id.* at \*6.

270. *See id.* at \*2, \*4.

271. *See id.* at \*4.

272. *See id.*

273. *Id.* (quoting *Lindke v. Freed*, 37 F.4th 1199, 1203 (6th Cir. 2022)).

274. *See id.* at \*3–4 (pointing out that public defenders' specific duties under statute are to provide legal representation to indigent persons accused of crimes).

275. *See id.* at \*4–5.

276. *Id.* at \*5.

277. *See id.* at \*4.

278. *See id.* at \*4–5 ("To the extent that they used state resources (the paper the letter was written on, their official email accounts, and time at the office), such use was minimal.")

279. *Id.* at \*6.

280. *See id.*

281. *Id.*

*D. Defining the Gap*

So, in practice, what is the difference between the Purpose and Appearance test and the Duty and Authority test? Perhaps the best way to illustrate this difference is by returning to the facts of *Garnier*. On October 4, 2022, the Trustees from *Garnier*, who were found to be acting under color of state law, filed a petition for a writ of certiorari to the Supreme Court.<sup>282</sup> The Trustees' brief in support of this petition argued that the Ninth Circuit erred in applying the Purpose and Appearance test and should have instead implemented the Duty and Authority test.<sup>283</sup>

In *Garnier*, the Trustees created their Facebook pages as campaign accounts before they held any positions in public office.<sup>284</sup> The pages included the Trustees' official government titles and were described as belonging to government officials.<sup>285</sup> One Trustee even described their page's purpose as "promot[ing] public and political information."<sup>286</sup> The pages' posts described official business, such as visits to schools, faculty hires, and the details of school board meetings.<sup>287</sup> The Trustees also used their pages to invite constituent participation in official business, such as applying for representative positions.<sup>288</sup>

If one were to apply the Purpose and Appearance test (as the Ninth Circuit did),<sup>289</sup> then the Trustees would be found to have acted under color of state law. First, the Trustees used their social media pages as a tool for the performance of their official duties.<sup>290</sup> They used the pages generally to "keep the public apprised of the goings-on at PUSD."<sup>291</sup> This purpose is consistent with the board's role of informing citizens of the district's educational programs and school activities.<sup>292</sup>

Moreover, the Trustees "clothed their pages in the authority of their offices."<sup>293</sup> They identified themselves as government officials and displayed their official titles prominently on their pages.<sup>294</sup> One Trustee included their official PUSD email address and another described their page as "the official page for T.J. Zane, Poway Unified School District Board Member, to promote public and political information."<sup>295</sup> In short, the Trustees' activities on their social media accounts likely bore all the hallmarks of state action under the Purpose and Appearance test.

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282. Petition for Writ of Certiorari, *supra* note 41, at 1.

283. *See id.* at 18–33.

284. *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1163 (9th Cir. 2022).

285. *See id.* at 1164.

286. *Id.*

287. *See id.* at 1164–65.

288. *See id.*

289. *See id.* at 1177 ("In short, we follow the mode of analysis of the Second, Fourth, and Eighth Circuits.").

290. *See id.* at 1171.

291. *Id.*

292. *See id.* at 1171–72.

293. *Id.* at 1172.

294. *See id.* at 1171.

295. *See id.*

However, the Ninth Circuit would likely have reached the opposite conclusion if it had applied the Duty and Authority test.<sup>296</sup> First, there is no indication that operating a Facebook page was an actual duty of PUSD board members.<sup>297</sup> There is also no indication that the Trustees used any state resources, such as funding, in the operation of their pages.<sup>298</sup> One might argue that the Trustees were fulfilling their statutorily enumerated duty to ensure that the district is responsive to constituents and involves them in its decision-making.<sup>299</sup> However, this duty does not actually require the Trustees *to operate a social media account* to achieve this goal.<sup>300</sup> The Sixth Circuit found that this type of argument “proves too much” and instead held that the desire to communicate with the public through social media “can’t render every communication state action.”<sup>301</sup> Thus, a court applying the Duty and Authority test would not likely find that the Trustees operated their accounts to perform an actual or apparent duty of office.

Moreover, the Trustees’ use of their accounts did not involve state authority. The Trustees created the accounts as private citizens when they began their campaigns for office,<sup>302</sup> and the pages would still belong to them after they left office.<sup>303</sup> There was also no indication that the Trustees drew on their authority over government staff to manage the pages.<sup>304</sup> A court applying the Duty and Authority test would likely find the pages’ seemingly official content to be immaterial and little more than citizens speaking in their personal capacity about matters of public interest.<sup>305</sup> Thus, because the Duty and Authority test’s state action anchors are missing here, the Trustees would not likely be found to have acted under color of state law when blocking the Garniers, and they would likely have avoided liability under § 1983 if the Ninth Circuit chose to apply the Duty and Authority test.

This example demonstrates that the chosen test for finding state action can have a significant outcome on a court’s eventual decision. If the Supreme

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296. The respondents to the aforementioned petition for a writ of certiorari argue in their brief that there is *not* in fact a circuit split on this issue because “[g]iven the same facts, every circuit will reach the same outcome.” Brief in Opposition to Petition for Writ of Certiorari at 12, *O’Connor-Ratcliff v. Garnier*, No. 22-324 (Dec. 13, 2022), 2022 WL 17732808. This part will argue against this assertion and point out that the Sixth Circuit would *not* agree that the Trustees were acting under color of state law.

297. *See Garnier*, 41 F.4th at 1163–66 (failing to mention any statutory requirement that members of the PUSD board maintain social media accounts).

298. *See* Petition for Writ of Certiorari, *supra* note 41, at 23 (indicating that neither party disputes that the Trustees maintained their pages without the use of district funding).

299. The respondents put forth this argument in their brief in opposition. *See* Brief in Opposition to Petition for Writ of Certiorari, *supra* note 296, at 13.

300. *See Lindke v. Freed*, 37 F.4th 1199, 1205 (6th Cir. 2022) (acknowledging that the outcome of the case could be different “[i]f Port Huron’s list of city-manager responsibilities mentioned operating a Facebook page to tell residents about city initiatives”).

301. *Id.*

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

303. *See* Petition for Writ of Certiorari, *supra* note 41, at 22 (“[A]ll the pages will still be owned by [the Trustees] after they leave office.”).

304. *See id.* at 23 (indicating that neither party disputes that the Trustees maintained their pages without any support or other involvement of the district).

305. *See id.* at 24–25.

Court chooses to grant the Trustees' petition for a writ of certiorari, then it will likely choose between adopting the Purpose and Appearance test or the Duty and Authority test.

### III. A MODIFIED PURPOSE AND APPEARANCE TEST IS THE BEST RESOLUTION TO THIS CIRCUIT SPLIT

This part advocates for future courts to adopt a modified version of the Purpose and Appearance test that will lead to a more consistent analysis of an account's appearance-based factors. Part III.A argues that the Purpose and Appearance test is the most prudent resolution to this circuit split because it protects everyday social media users and also considers the presentation choices of public officials. Part III.B then addresses the inconsistent evaluations of appearances by courts applying the Purpose and Appearance test and suggests a new guiding principle to promote more consistent evaluations of appearance-based factors.

#### *A. The Purpose and Appearance Test Best Protects Social Media Users from Government Abuse While Still Giving Agency to Public Officials*

Selecting which test should apply in this novel legal context requires weighing two major interests. First, everyday social media users have an interest in participating in social media as an online public forum.<sup>306</sup> The Supreme Court itself has acknowledged that “[t]oday, one of the most important places to exchange views is cyberspace, particularly social media, which offers ‘relatively unlimited, low-cost capacity for communication of all kinds.’”<sup>307</sup>

Second, public officials have an interest in accessing the powerful political benefits of social media. Government officials use social media in many meaningful ways, such as by promoting their political platforms, communicating with constituents, and coordinating emergency services.<sup>308</sup> Given social media's critical role in governmental operations,<sup>309</sup> public officials also have an interest in established standards for their use of this powerful tool. Without such standards, these public officials would not be on notice of whether their actions on social media would open them up to litigation.<sup>310</sup> The test for determining when a public official acts under color

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306. See, e.g., *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237–38 (2d Cir. 2019) (holding that President Trump's conduct on his Twitter account created a public forum where viewpoint discrimination by the government is not permitted), *vacated as moot sub nom. Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021).

307. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)).

308. See *Telegen*, *supra* note 32, at 247–48.

309. See *id.* at 247.

310. See Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1516 (2019) (explaining that “[c]ourts might want to make allowances for . . . officials . . . who have had to make difficult predictions” in the face of uncertain “legal outcomes”).

of state law in the use of their social media account should credit both interests at play in this situation.

### 1. The Duty and Authority Test Fails to Properly Credit These Interests

The Duty and Authority test is an undesirable resolution to this issue because it does not sufficiently credit either of the interests at play. First, the Duty and Authority test does little to consider the interests of the everyday social media user. Barring an express disclaimer from the public official, there is no way for a social media user to readily know if the account that they are interacting with uses government resources or is mandated by official duties.<sup>311</sup> This can be especially confusing when public officials maintain a second, seemingly personal, social media account that acts for an official purpose.<sup>312</sup> By ignoring the appearance of the account in question, the Duty and Authority test ignores the critical consideration of “how others . . . regard and treat the account.”<sup>313</sup>

The Duty and Authority test also fails to truly credit public officials’ interest in having clear standards to govern their use of social media. In departing from the rulings of other circuits, the Sixth Circuit sought to “bring[] the clarity of bright lines to a real-world context that’s often blurry.”<sup>314</sup> But the supposed bright lines of the Duty and Authority test are not all that bright.

Under the Duty and Authority test, state action can arise from a public official’s use of their authority over government staff.<sup>315</sup> But how much use of staff is required for a finding of state action? For example, in *Davison*, Chair Randall used an official county newsletter to publicize her social media page.<sup>316</sup> The newsletter was hosted on the county’s website and was prepared by county employees.<sup>317</sup> Chair Randall certainly could not have used the newsletter or involved these employees in the promotion of the account without the authority of her office.<sup>318</sup> But then again, the employees preparing the newsletter did not have access to the account itself.<sup>319</sup> Chair

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311. The *Garnier* petitioners, who are asking the Supreme Court to adopt the Duty and Authority test, explicitly oppose any potential requirement that public officials provide a disclaimer as to the nature of their social media accounts. See Petition for Writ of Certiorari, *supra* note 41, at 28–29 (arguing that the Ninth Circuit erred in faulting petitioners for not posting a disclaimer about the nature of their social media accounts).

312. See, e.g., *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 235 (2d Cir. 2019) (explaining that President Trump’s tweets from the @realDonaldTrump account were often republished by a second account called @POTUS), *vacated as moot sub nom. Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021).

313. See *id.* at 236.

314. *Lindke v. Freed*, 37 F.4th 1199, 1207 (6th Cir. 2022).

315. See *id.* at 1204.

316. *Davison v. Randall*, 912 F.3d 666, 675 (4th Cir. 2019).

317. See *id.*

318. See *Davison v. Loudoun Cnty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 713 (E.D. Va. 2017) (“These newsletters were drafted by a County employee, are hosted in PDF format on the County’s website, and have been disseminated through a mailing list provided to [Randall] by the County.”).

319. See *Davison*, 912 F.3d at 673–75.



Randall almost exclusively controlled the page's content, and the only other government employee who shared access to the account was her chief of staff.<sup>320</sup> The Duty and Authority test as laid out by the Sixth Circuit does not present a clear answer to this question.

On the one hand, Chair Randall might argue that, much like in James Freed's case, there is "no evidence that staffers were involved in *preparing content* for . . . the page."<sup>321</sup> On the other hand, Chair Randall's chief of staff did have access to the account, and the newsletter could be described as a "service" that Chair Randall accessed only "by the 'authority of [her] office.'"<sup>322</sup> And regardless of the outcome of the test, social media users engaging with the account might not even know of the newsletter's existence, and thus, they would have no way of knowing of the government's potential involvement. Therefore, the Duty and Authority test's rule that "minimal involvement isn't enough to transform a personal page into an official one"<sup>323</sup> fails to establish the bright-line rule that the Sixth Circuit sought.

## 2. The Purpose and Appearance Test Better Credits the Interests of Both Everyday Social Media Users and Public Officials

The Purpose and Appearance test does the better job of balancing the interests on both sides of this issue. First, this test's appearance analysis considers both (1) "how *the official* describes . . . the account"<sup>324</sup> and (2) "how *others* . . . regard and treat the account."<sup>325</sup> Thus, both the everyday social media user's perception and the public official's presentation choices are considered. Second, this test's purpose analysis considers "how *the official* . . . uses the account"<sup>326</sup> and acknowledges that "not every social media account operated by a public official is a government account."<sup>327</sup> It is oftentimes public officials who "encourage their citizens to use the Internet to access government services and discuss issues of public concern."<sup>328</sup> This was certainly the case in *Davison*, in which Chair Randall was using her account to invite public participation in government meetings.<sup>329</sup> It is this use of the account as "an organ of official business" that transforms a private account into a public one.<sup>330</sup> Again, the Purpose and Appearance test's consideration of the *choice* of the public official to involve their official

320. *See id.* at 673.

321. *Lindke*, 37 F.4th at 1205 (emphasis added).

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

323. *Id.*

324. *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019) (emphasis added), *vacated as moot sub nom. Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021).

325. *Id.* (emphasis added).

326. *Id.* (emphasis added).

327. *Id.*

328. John B. Morris, Jr. & Julie M. Carpenter, *Free Speech on the Internet—Overview of Modern Free Expression Analysis Under the First Amendment—Public Forum Doctrine*, in 2 INTERNET LAW AND PRACTICE § 24:6 (2022).

329. *Davison v. Randall*, 912 F.3d 666, 674 (4th Cir. 2019).

330. *Campbell v. Reisch*, 986 F.3d 822, 826 (8th Cir. 2021).

duties in their social media presence gives the public official agency over how they want to use social media in light of their position.<sup>331</sup>

It is also possible that social media presents a novel context in which technology advances too quickly for courts to confidently establish bright-line rules.<sup>332</sup> It seems all but certain that social media platforms will continue to evolve and create new ways for users to interact with one another.<sup>333</sup> Rather than finding state action through a set of concrete anchors, it is preferable to allow courts to weigh flexible factors such as how an account is used and presented.<sup>334</sup> Thus, the Purpose and Appearance test does the better job of considering the interests at stake and providing meaningful factors for courts to weigh as they assess liability in this ever-evolving landscape.

### B. *How to Deal with Inconsistent Evaluations of Appearances*

Having established that the Purpose and Appearance test is preferable to the Duty and Authority test, this section addresses the inconsistent evaluations of appearance-based factors by courts utilizing the Purpose and Appearance test. Part III.B.1 affirms that appearances are too important to remove from the inquiry entirely. Part III.B.2 then argues that assessing appearances under the principle of whether the public official displays a metaphorical “badge of authority” will lead to more consistent evaluations.

#### 1. Appearances Are a Necessary Part of This Inquiry

Critics of the Purpose and Appearance test have made much of the “shallow” resemblance between a public official’s use of social media and an off-duty police officer’s actions.<sup>335</sup> In *Lindke*, the Sixth Circuit posited that appearances are relevant when considering off-duty police officers because “an officer couldn’t take certain action without the authority of his office—authority he exudes when he wears his uniform, displays his badge,

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331. Public officials are by no means prevented from enjoying the more social aspects of social media. See *Social Media for Public Officials 101*, KNIGHT FIRST AMEND. INST. COLUM. UNIV., <https://knightcolumbia.org/blog/social-media-for-public-officials-101> [<https://perma.cc/FFF3-7ETJ>] (Oct. 18, 2022) (“If you’d like to, you can maintain a *personal* social media account and use it to discuss your family, your golf game, or your thoughts as a citizen about world affairs.” (emphasis added)).

332. See Telegen, *supra* note 32, at 242.

333. See generally Christopher McFadden, *A Brief History of Facebook, Its Major Milestones*, INTERESTING ENG’G (July 7, 2020, 3:07 PM), <https://interestingengineering.com/culture/history-of-facebook> [<https://perma.cc/LRH7-HBX9>] (detailing the timeline of Facebook’s development and the introduction of new features such as the now famous “like button”).

334. See David S. Han, *Constitutional Rights and Technological Change*, 54 U.C. DAVIS L. REV. 71, 113 (2020) (“At some point, the benefits rooted in the predictability, administrability, and judicial constraint associated with a rule-like regime are outweighed by the increasing lack of fit between the rigid rules in question and the rapidly evolving world in which they are applied.”).

335. See *Lindke v. Freed*, 37 F.4th 1199, 1206 (6th Cir. 2022).

or informs a passerby that he is an officer.”<sup>336</sup> In contrast, the Sixth Circuit explained that a public official “gains no authority by presenting himself as city manager on Facebook.”<sup>337</sup>

However, the Supreme Court has held otherwise: “If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity . . . .”<sup>338</sup> The Sixth Circuit itself acknowledged this standard in *Dean v. Byerley*.<sup>339</sup> This approach properly considers “how others . . . regard and treat the account.”<sup>340</sup>

Moreover, considering the account’s appearance and whether the public official *purports* to act under color of state law is consistent with the holistic nature of this legal inquiry. Assessing state action under § 1983 “is a matter of normative judgment.”<sup>341</sup> Regardless of the test that a court applies, the focus of the inquiry must be whether “the alleged infringement of federal rights [is] fairly attributable to the government.”<sup>342</sup>

Such an infringement would be fairly attributable to the government if the individual “purported” to be a state actor.<sup>343</sup> The Sixth Circuit is correct to point out that the appearance of a police officer carries special authority in American society.<sup>344</sup> However, just as citizens are taught to respect police officers, they are also taught to respect government officials and to expect them to meaningfully consider the views of their constituents. Just like police officers, these government officials possess positions of “power and prestige.”<sup>345</sup> Thus, even though a public official’s social media posts “do not carry the force of law,”<sup>346</sup> purporting to act under the state’s power should be considered in the state action assessment.<sup>347</sup>

## 2. A Modified Approach to Appearances

Having established that courts should consider the appearance of the social media page in question, this section next discusses how those appearances should be evaluated. Even the courts that agree that appearances should be

336. *Id.*

337. *Id.*

338. *Griffin v. Maryland*, 378 U.S. 130, 135 (1964).

339. 354 F.3d 540 (6th Cir. 2004); *see id.* at 553 (“[T]he fact that Byerley could have made a private report . . . is not controlling . . . . Rather the controlling issue is whether Byerley possessed state authority and whether Byerley purported to act under that authority.”).

340. *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).

341. *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003).

342. *Id.* at 1096.

343. *See Naffe v. Frey*, 789 F.3d 1030, 1036–37 (9th Cir. 2015).

344. *See Lindke v. Freed*, 37 F.4th 1199, 1206 (6th Cir. 2022) (“We’re generally taught to stop for police, to listen to police, to provide information police request.”).

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

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

347. The Trustees’ petition also raises the question of whether respondents must prove that they were *actually* confused as to the nature of the account. *See* *Petition for Writ of Certiorari*, *supra* note 41, at 28. This question is beyond the scope of this Note.

considered have not evaluated those appearances by the same standards.<sup>348</sup> For example, the Fourth and Eighth Circuits both chose to apply the Purpose and Appearance test when confronted with the interplay between § 1983 and a public official's use of social media.<sup>349</sup> In *Davison*, the Fourth Circuit held that Chair Randall's Facebook page bore all the "trappings" of an official account because, among other things, it included her official title, addressed posts to constituents, and posted content generally related to her office.<sup>350</sup> In *Campbell*, State Representative Reisch's Twitter account included her official title, addressed posts to constituents, and posted content generally related to her office.<sup>351</sup> However, for cases in which the Fourth Circuit would have found these appearances to be indicia of state action, the Eighth Circuit found them to be "just too equivocal to be helpful here."<sup>352</sup> Having clarified that appearances should be a factor of this state action assessment, there should also be clearer standards to guide courts in weighing these appearance-based factors.

So how should courts weigh appearance-based factors when assessing the interplay between § 1983 and a public official's use of social media? Here, it may be helpful to return to the purpose of § 1983—to "deter state actors from *using the badge of their authority* to deprive individuals of their federally guaranteed rights."<sup>353</sup> The public official's use of a "badge" is the language most relevant to an assessment of appearances.

A badge is generally defined as "a special or distinctive mark . . . worn as a sign of . . . authority."<sup>354</sup> Thus, the assessment of appearances should be reframed to focus on whether the account's presentation acts as a badge of authority. Of course, on social media, the badge will be metaphorical rather than physical. Nonetheless, a public official effectively displays a badge on social media if they "clothe[] [their] page in the power and prestige of [their] state office."<sup>355</sup>

Applying this new guiding principle to the facts of past cases leads to a more practical assessment of appearances. For example, Chair Randall almost always addressed her posts to her constituents by beginning them with "to Loudoun."<sup>356</sup> This activity displays a metaphorical badge because it presents to other users that she is speaking from her official position as chair. She is addressing others on social media in a manner that everyday users

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348. Compare *Davison*, 912 F.3d at 680–81 (finding appearances such as the inclusion of an official title to be indicia of state action), with *Campbell v. Reisch*, 986 F.3d 822, 827 (8th Cir. 2021) (finding no state action despite considering appearances such as the inclusion of an official title).

349. See *Campbell*, 986 F.3d at 826–28; *Davison*, 912 F.3d at 679–81.

350. See *Davison*, 912 F.3d at 680–81.

351. *Campbell*, 986 F.3d at 827.

352. *Id.*

353. *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000) (emphasis added) (citing *Wyatt v. Cole*, 504 U.S. 158, 161 (1992)).

354. *Badge*, DICTIONARY.COM, <https://www.dictionary.com/browse/badge> [<https://perma.cc/79LD-QTKX>] (last visited Mar. 6, 2023).

355. *Davison*, 912 F.3d at 681.

356. See *id.* at 673.

would not use to address each other. Similarly, including one's official title in the name of the account<sup>357</sup> or explicitly describing the account as official<sup>358</sup> displays a "badge." Other users will likely see these features and reasonably conclude that they are interacting with a government account.

In comparison, James Freed did not display a badge by sharing his participation in a local community event.<sup>359</sup> Although a public official may be motivated to attend community events because of the office they hold, they do not display a badge on social media by sharing their attendance. When a public official shares content on social media that expresses pride in their work, it is more akin to a celebratory post than it is to the display of a badge.

A public official also does not display a badge when they share content meant *only* to create a "favorable impression of [them] in the minds of [their] constituents."<sup>360</sup> Public officials may view themselves as always running for reelection,<sup>361</sup> and simply sharing their pride in their achievements in office does not display a badge if done correctly. People use social media to share their pride in career accomplishments all the time, and public officials should be able to do the same. If a police officer took to social media to share their pride in their job, other users would likely not think that the post was made on behalf of the police department.

However, a public official still might simultaneously use social media to create a favorable impression of themselves and act under color of state law if they display a badge of authority.<sup>362</sup> The campaign account in *Campbell* initially displayed no badge of authority through its appearance.<sup>363</sup> State Representative Reisch's tweets primarily used a specific campaign hashtag, solicited campaign donations, and publicized endorsements.<sup>364</sup> However, after State Representative Reisch was elected, she clothed the account in the power and prestige of her office.<sup>365</sup> She described herself by her government office, used a photo of her swearing-in as the page's banner, and displayed a profile photo taken in the Missouri House chamber.<sup>366</sup> Furthermore, after

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357. See, e.g., *Campbell*, 986 F.3d at 827 (noting that State Representative Reisch's Twitter account was named "@CheriMO44" after Missouri's 44th district, which she represents).

358. See, e.g., *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1164 (9th Cir. 2022) (noting that one Trustee described his page as "the official page for T.J. Zane, Poway Unified School District Board Member").

359. See *Lindke v. Freed*, 37 F.4th 1199, 1201 (6th Cir. 2022) (noting that Freed's page shared photos of his participation in community events alongside family-related photos).

360. See *Campbell*, 986 F.3d at 827.

361. See Petition for Writ of Certiorari, *supra* note 41, at 31–32 (arguing that public officials view themselves as always running for reelection and thus hope that their social media pages will portray them in a positive light).

362. See *Campbell*, 986 F.3d at 829 (Kelly, J., dissenting) ("Indeed, it seems that the statements of lawmakers carrying out their official duty . . . will very often harken back to some campaign promise or another, so this factor does not merit the outsized importance the court places on it today.").

363. See *id.* at 828.

364. See *id.*

365. See *id.* at 829.

366. See *id.*

her election, she stopped using her campaign hashtag and tweeting about campaign donations and instead reported on new Missouri laws.<sup>367</sup> This account no longer resembled one meant to promote a campaign or a public official's achievements. The Eighth Circuit should have held that State Representative Reisch's "persistent invocation" of her authority displayed a badge and rendered the once-private campaign account an official government account.<sup>368</sup>

There is nothing preventing public officials from operating *both* a private campaign page (which allows them to create a favorable opinion of themselves in the eyes of constituents) *and* an official page (for soliciting feedback and sharing official news).<sup>369</sup> In the future, public officials who wish to have campaign accounts should continue to present themselves on that account *solely* as campaigners for office rather than as public officials.

As discussed above, this is a context in which new developments to social media will likely hamper the effectiveness of rigid standards.<sup>370</sup> The Sixth Circuit seemed especially concerned with the notion that involving one's job as a public official on their social media could make their social media activity state action.<sup>371</sup> The court wanted to protect public officials who "prized" their offices, just as those officials "prized" aspects of their personal lives.<sup>372</sup> Framing the issue around the display (or lack thereof) of a badge enables these public officials to share their pride while also considering the reasonable perceptions of other users who interact with the account. The Purpose and Appearance test finds strength in its flexibility, but this guiding principle will help rein in inconsistent assessments of appearances.

#### CONCLUSION

The Purpose and Appearance test is the best resolution to the circuit split over how to determine whether a public official operated a social media account under color of state law. The Duty and Authority test fails to consider the interests of the everyday social media user and anchors findings of state action to incongruous factors. The Purpose and Appearance test more properly considers *both* how the public official chooses to use their social media account and how constituents will perceive their interactions with that account. Although evaluations of appearances by circuit courts have not been entirely consistent, implementing the guiding principle of whether an account's appearance acts as a metaphorical badge of authority will promote more consistent evaluations in the future.

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367. *See id.* at 828.

368. *See id.* at 829.

369. *See, e.g., Davison v. Randall*, 912 F.3d 666, 673 (4th Cir. 2019) (explaining that Chair Randall operated a private campaign page and directed all official dialogue regarding county affairs to her "county Facebook page").

370. *See supra* note 334 and accompanying text.

371. *See Lindke v. Freed*, 37 F.4th 1999, 1201 (6th Cir. 2022) (emphasizing the personal aspects of Freed's social media activity that were at risk of becoming state action).

372. *See id.*