

WHEN SHOULD A PUBLIC OFFICIAL'S SOCIAL MEDIA CENSORSHIP
BECOME STATE ACTION? ANALYZING THE SIXTH AND NINTH
CIRCUITS' RECENT SPLIT AND WHERE WE SHOULD GO FROM HERE

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“Freedom is never more than one generation away from extinction. We didn't pass it to our children in the bloodstream. It must be fought for, protected, and handed on for them to do the same, or one day we will spend our sunset years telling our children and our children's children what it was once like in the United States where men were free.”

-President Ronald Reagan

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights”¹ Individual human freedoms are often taken for granted. Given the tribulations and rapid pace of life, we often do not stop to consider the God-given freedoms in the hands of each and every American. The Bill of Rights in the Constitution textualizes these freedoms, including the First Amendment's freedom of speech.² While not utterly absolute, freedom of speech in the United States allows any person to speak their mind, even messages critical of our government.³ “Those who won our independence believed . . . that public discussion . . . should be a fundamental principle of the American government,” and “they knew that order cannot be secured merely through fear of punishment for its infraction.”⁴ These are principles that past and current generations of Americans grew up with.

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¹THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

²See U.S. CONST. amend. I.

³New York Times Co. v. Sullivan, 376 U.S. 254, 295 (1964) (Black, J., concurring).

⁴Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

But what if public officials in our own government could cast these principles aside whenever they deem it to be politically advantageous? We might not think it is possible in the United States of America; however, as President Ronald Reagan aptly stated, that possibility may indeed exist.

INTRODUCTION

The First Amendment to the Constitution states that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”⁵ These words bring to life one of the pinnacle liberty interests of American citizens. When the government has attempted to subvert these words, the Supreme Court of the United States has responded; in the centuries since ratification, the Supreme Court has built a significant body of law around the freedom of speech.⁶

However, there are limits to the First Amendment’s application. Generally speaking, it only protects citizens from the excesses of government, not from the actions of non-governmental private individuals.⁷ This concept is known as the “state action doctrine,” but it is likewise not absolute.⁸ The Supreme Court has also set forth notable exceptions to the doctrine, through which a seemingly private individual could very well be liable for unjustified infringement upon another person’s constitutional rights, including those in the First Amendment.⁹ Through these cases, along with many others, the Supreme Court has built a large structure of law around the state action doctrine.¹⁰

This law-building process cannot stop there. As decades have passed and technology has progressed to incredible heights, we must now face new constitutional questions that were unthinkable thirty or forty years ago, much less when the state action doctrine was first announced.¹¹ The question at issue in this note combines the state action doctrine, enshrined in case law for well over a century, with a relatively novel (and perhaps regretful)

⁵ U.S. CONST. amend. I.

⁶ See, e.g., *Marsh v. Alabama*, 326 U.S. 501 (1946).

⁷ See *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

⁸ *Id.*

⁹ See generally *Marsh*, 326 U.S. at 501; *Terry v. Adams*, 345 U.S. 461 (1953); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974).

¹⁰ See, e.g., *Marsh*, 326 U.S. at 501; *Terry*, 345 U.S. at 461; *Flagg Bros., Inc.*, 436 U.S. at 149.

¹¹ See *The Civil Rights Cases*, 109 U.S. at 11.

phenomenon in modern society: *social media*. Since social media platforms such as Facebook and Twitter have only arrived within the twenty-first century,¹² the American court system, particularly the Supreme Court, has not yet had many opportunities to build a legal structure around issues arising from this combination.

Fortunately, the wait could soon come to an end. In the summer of 2022, a split between the Sixth and Ninth Circuit Courts of Appeals arose, raising a constitutional question at the core of the intersection between the state action doctrine and social media.¹³ The opinions were issued exactly one month apart, and both claims were brought under 42 U.S.C. § 1983.¹⁴ Further, the question in both cases was the same: *when a public official operates a social media account that contains content “related to his or her official duties,” is that public official a state actor infringing upon the First Amendment when he or she deletes critical comments from a private citizen or blocks that citizen from accessing the account?*¹⁵ If the Supreme Court grants review of this circuit split, its decision will have significant ramifications on the future of First Amendment protection and modern-day public discourse as a whole. Further, the presence of social media within the issue makes those ramifications even more significant, since so much of our political and social dialogue is vocalized online. Some have even called social media another “public forum.”¹⁶

This note will argue that if the Supreme Court hears the case, it should adopt the Ninth Circuit’s approach. In doing so, this note will analyze the issue in multiple parts. First, it will provide a general overview of the state action doctrine, including its history and its exceptions. Second, it will analyze the current split between the Sixth and Ninth Circuits. Third, it will argue that the Ninth Circuit’s approach more appropriately protects the First

¹²See generally Mark Hall, *Facebook*, BRITANNICA, <https://www.britannica.com/topic/Facebook> (last updated Apr. 27, 2023); Jonathan Vanian, *Twitter is now owned by Elon Musk—here’s a brief history from the app’s founding in 2006 to the present*, CNBC, <https://www.cnbc.com/2022/10/29/a-brief-history-of-twitter-from-its-founding-in-2006-to-musk-takeover.html> (last updated Oct. 30, 2022).

¹³See generally *Lindke v. Freed*, 37 F.4th 1199 (6th Cir. 2022); *Garnier v. O’Connor-Ratcliff*, 41 F.4th 1158 (9th Cir. 2022).

¹⁴See *Lindke*, 37 F.4th at 1202; *Garnier*, 41 F.4th at 1166.

¹⁵See *Lindke*, 37 F.4th at 1201; *Garnier*, 41 F.4th at 1163.

¹⁶Paul Domer, Note, *De Facto State Action: Social Media Networks and the First Amendment*, 95 NOTRE DAME L. REV. 893, 904–05 (2019).

Amendment. Finally, it will discuss the potential consequences of the Sixth Circuit's test and why the Supreme Court should decline to adopt it.

I. THE STATE ACTION DOCTRINE

The state action doctrine has existed in law for well over a century.¹⁷ Its roots are found in the language of the Fourteenth Amendment's Due Process Clause, which declares, "No State shall . . . deprive any person of life, liberty, or property, without due process of law."¹⁸ The Due Process Clause is also the foundation for a very large portion of our God-given individual rights under the Constitution.¹⁹ This section will discuss state action in sequence. First, it will provide an overview of the doctrine's history and primary function. Second, it will discuss a few of the notable exceptions to the doctrine and the ways in which a private citizen's conduct can result in a constitutional violation. Lastly, it will analyze the current circuit split, including a brief discussion of the limited Circuit Court precedent surrounding the issue.

A. History of the Doctrine

The state action doctrine goes all the way back to 1883.²⁰ At this time, the Supreme Court had to address Congress's first attempt at a nationwide reformation of civil rights in the United States, the Civil Rights Act of 1875.²¹ This legislation criminalized racial discrimination in certain places of business and mandated that all people in the United States, regardless of race, "be entitled to the full and equal enjoyment . . . of inns, public conveyances on land or water, theater, and other places of public amusement."²² Congress expressly based its power to enact this legislation in the Fourteenth Amendment.²³ However, the Supreme Court invalidated Sections 1 and 2 of the Act, and in doing so articulated the operation of the state action doctrine:

¹⁷ See generally *The Civil Rights Cases*, 109 U.S. 3 (1883).

¹⁸ U.S. CONST. amend. XIV, § 1.

¹⁹ See generally *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Obergefell v. Hodges*, 576 U.S. 644 (2015). These are just a few of the Supreme Court's landmark substantive due process decisions.

²⁰ See *The Civil Rights Cases*, 109 U.S. at 11.

²¹ *Id.* at 8.

²² *Id.* at 9.

²³ See *id.* at 10.

It is State action of a particular character that is prohibited. *Individual invasion of individual rights is not the subject-matter of the amendment.* It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws.²⁴

Essentially, the private conduct of private individuals is not subject to the Fourteenth Amendment.²⁵ The Court further stated, in reference to the Civil Rights Act of 1875, that “[s]uch legislation cannot properly cover the whole domain of rights That would be to establish a code of municipal law regulative of all private rights between man and man in society.”²⁶ The year 1883 was very significant for the Bill of Rights and individual liberties: the Supreme Court made clear that the Constitution inhibits *governmental* infringement of rights, not the conduct of private individuals; rather, regulation of private conduct is left to the State legislatures.²⁷

This foundational principle of constitutional protection applies in the modern era with the same amount of force as it did in *The Civil Rights Cases*.²⁸ Regarding private conduct, “the [Fourteenth] Amendment affords no shield, no matter how unfair that conduct may be.”²⁹ In 1976, the NCAA Committee on Infractions handed down a report to UNLV, detailing misconduct allegations towards Jerry Tarkanian, the university’s head men’s

²⁴*Id.* at 11 (emphasis added).

²⁵*Id.*; see also John D. Niles et al., *Making Sense of State Action*, 51 SANTA CLARA L. REV. 885, 885 (2011) (“In fact, with the exception of the Thirteenth Amendment’s prohibition of slavery, nothing in the Constitution directly limits private behavior.”); Julie K. Brown, *Less is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 561 (2008) (“The latter are private actors, unburdened by Constitutional rules, with a degree of freedom and exclusionary power unavailable to governmental entities.”); *Shelley v. Kraemer*, 334 U.S. 1, 9 (1948) (“[T]he inhibitions of the constitutional provisions invoked, apply only to governmental action, as contrasted to action of private individuals.”).

²⁶*The Civil Rights Cases*, 109 U.S. at 13.

²⁷See *id.* (“It would be to make Congress take the place of the State legislatures and to supersede them.”).

²⁸See generally *NCAA v. Tarkanian*, 488 U.S. 179 (1988); *Blum v. Yaretsky*, 457 U.S. 991 (1982).

²⁹*Tarkanian*, 488 U.S. at 191.

basketball coach.³⁰ The NCAA later proposed sanctions against UNLV and requested the university to show cause as to why it should not be further sanctioned if it did not suspend Tarkanian.³¹ Tarkanian sued the NCAA and UNLV, alleging that the NCAA was a state actor and thus violated his rights under the Fourteenth Amendment.³² The Nevada Supreme Court found that the NCAA was a state actor, but the Supreme Court of the United States reversed and held that the NCAA acted as a private entity not subject to the Fourteenth Amendment.³³ “The NCAA enjoyed no governmental powers to facilitate its investigation . . . no power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual.”³⁴ While a private actor can become a state actor if delegated state authority, the Court distinguished Tarkanian’s case.³⁵ The NCAA was only authorized to levy sanctions against the *university itself*, not Tarkanian in his individual capacity.³⁶ Thus, UNLV was the final decision-maker in choosing to suspend Tarkanian.³⁷ As is evident in *The Civil Rights Cases* and *NCAA v. Tarkanian*, the Court has drawn a (perhaps blurry) line in the sand regarding when the Constitution does and does not apply to challenged conduct.³⁸ Additionally, a private actor does not have to be entirely disassociated from the State to qualify as “private.”³⁹ “[A]lthough it is apparent that nursing homes in New York are extensively regulated, ‘the mere fact that a business is subject to state regulation does not by itself convert its action into that of the State.’”⁴⁰ This is a logical conclusion: if an individual or entity could only be “private” if entirely unregulated by the state government, the state action doctrine would essentially become moot; given the vast extent of state and federal regulation today, almost everyone would be a “state actor.”

³⁰ *Id.* at 185.

³¹ *Id.* at 186.

³² *Id.* at 187.

³³ *Id.* at 189, 199.

³⁴ *Id.* at 197.

³⁵ *Id.* at 193–99.

³⁶ *Id.* at 196.

³⁷ *See id.*

³⁸ *See generally id.* at 179; *The Civil Rights Cases*, 109 U.S. 3 (1883).

³⁹ *Tarkanian*, 488 U.S. at 192.

⁴⁰ *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974)).

Today, the statutory cause of action for a civil rights violation brought against the government, federal or state, is found in 42 U.S.C. § 1983.⁴¹ For a plaintiff to win under this statute, he or she must prove that the defendant acted “under color of” the laws “of any State or Territory or the District of Columbia.”⁴² A finding of state action is a “threshold question” that must be answered before the merits can be adjudicated.⁴³ In *NCAA v. Tarkanian*, the Nevada Supreme Court found state action “as a *predicate* for its disposition.”⁴⁴ In other words, the first question to answer is always whether or not state action is present.

B. *Exceptions to the Doctrine*

While the state action doctrine makes it known that private conduct alone will not be subject to liability under the Federal Constitution,⁴⁵ the story does not end there. Throughout the doctrine’s history, the Supreme Court has carved out various exceptions through which a private individual or entity’s conduct can be properly labeled as that of the State itself.⁴⁶ However, as has been a subject of concern for others, the connection between the original rule and its exceptions can get quite convoluted.⁴⁷ “Despite this threshold position . . . state action law is a maze of dizzying options, countless factors, and no consistently applied test.”⁴⁸ In order to properly understand the Circuit split at issue here, it is important to have a baseline understanding of the exceptions and how they apply to differing sets of facts.

This subsection will discuss three of the most common exceptions found in the state action doctrine. First, it will discuss the “public function” test. Second, it will discuss the “entanglement” theory, including the concept of “compulsion.” Lastly, it will discuss the “nexus” test, which is the test most relevant to the issue in this note.

⁴¹ See 42 U.S.C. § 1983 (1996).

⁴² *Id.*

⁴³ Brown, *supra* note 25, at 563.

⁴⁴ 488 U.S. at 190 (emphasis added).

⁴⁵ See *id.* at 191; The Civil Rights Cases, 109 U.S. 3, 11 (1883); *Blum*, 457 U.S. at 1002.

⁴⁶ See generally *Marsh v. Alabama*, 326 U.S. 501 (1946); *Terry v. Adams*, 345 U.S. 461 (1953); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974).

⁴⁷ See Brown, *supra* note 25, at 578.

⁴⁸ *Id.*

1. Public Function

A classic case that presents the public function issue is *Marsh v. Alabama*.⁴⁹ Here, the small town of Chickasaw, Alabama was not owned by government or any public entity; rather, it was privately-owned by the Gulf Shipbuilding Corporation.⁵⁰ Chickasaw had every characteristic of a municipality, including a “shopping district,” streets and sidewalks, roads that connected to a public highway, and even a United States Post Office.⁵¹ According to the facts, the only distinction between Chickasaw and any other town was its private ownership.⁵²

A Jehovah’s Witness chose to stand on one of the sidewalks near the post office and hand out pamphlets.⁵³ Gulf Shipbuilding had posted signs in the town stores that notified citizens of the town’s private ownership and that no solicitation was allowed without a permit.⁵⁴ The company demanded that she stop her activities, but she refused; the deputy sheriff arrested her, and she was subsequently convicted.⁵⁵ The issue in the case was fairly straightforward: are an individual’s constitutional rights nullified simply by the fact that a privately-owned entity owns the town?⁵⁶ The Supreme Court reversed her conviction and articulated this first exception.⁵⁷ In its analysis, the Court drew an analogy to the operation of Chickasaw.⁵⁸ “Had [Gulf Shipbuilding] owned the segment of the four-lane highway which runs parallel to the ‘business block’ and operated the same under a state franchise” or through the State’s “mere acquiescence . . . [it] would still have been performance of a public function” and the appellant’s conviction would be unconstitutional.⁵⁹ The Court compared this analogy to the case of Chickasaw and found no “significant constitutional difference.”⁶⁰ “[And] since their operation is essentially a public function, it is subject to state regulation.”⁶¹

⁴⁹ See generally 326 U.S. at 501.

⁵⁰ *Id.* at 502.

⁵¹ *Id.* at 502–03.

⁵² *Id.* at 503.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 503–04.

⁵⁶ See *id.* at 505.

⁵⁷ See *id.* at 509–10.

⁵⁸ *Id.* at 505–06.

⁵⁹ *Id.* at 506–07.

⁶⁰ *Id.* at 507.

⁶¹ *Id.* at 506.

The language of the exception became more explicit in *Jackson v. Metropolitan Edison Co.*, which this section will later discuss in regards to the “nexus” test.⁶² Here, the plaintiff sued a privately-owned utility company under § 1983, alleging that it violated her due process rights by terminating her utility service without providing any hearing or notice.⁶³ The plaintiff’s primary argument was that the utility company became a state actor by providing electrical utilities to citizens, thereby performing an “essential public service.”⁶⁴ The Supreme Court rejected this argument, proclaiming that “state action [is] present in the exercise by a private entity of powers *traditionally exclusively* reserved to the State.”⁶⁵ The Court referenced the town’s ownership in *Marsh* and eminent domain, which are activities “traditionally associated with sovereignty.”⁶⁶ However, since the supply of utilities is “not traditionally the exclusive prerogative of the State,”⁶⁷ the Court did not rule it to be a public function subject to the Constitution.⁶⁸ Similarly, the Supreme Court did not find state action when a private storage company threatened to sell an evictee’s possessions if she did not pay the moving and storage fee within ten days.⁶⁹ “Creditors and debtors have had available to them historically a far wider number of choices” than the appellant in *Marsh*.⁷⁰ The Court also expressed concern over the exception’s expansion, saying that its application to private transactions would be “particularly inappropriate.”⁷¹

Overall, the public function exception applies to privately conducted activities that are both “traditional” and “exclusive” to the state government.⁷² While this exception is not applicable to the issue in this note, it is still important in understanding the development of the state action doctrine over time.

⁶² See 419 U.S. 345, 352 (1974).

⁶³ *Id.* at 347–48.

⁶⁴ *Id.* at 352.

⁶⁵ *Id.* (emphasis added).

⁶⁶ *Id.* at 352–53.

⁶⁷ *Id.* at 353.

⁶⁸ See *id.*

⁶⁹ See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166 (1978).

⁷⁰ *Id.* at 162.

⁷¹ *Id.* at 163.

⁷² See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

2. Entanglement

The “entanglement” exception is perhaps vaguer than the public function exception,⁷³ but likewise important in understanding the doctrine. Essentially, this exception applies whenever there is enough of a relationship between the private actor and the State to say that the private actor is that of the State.⁷⁴ The Supreme Court has approached this scenario in multiple cases, one of which is *Burton v. Wilmington Parking Authority*.⁷⁵ In *Burton*, privately-owned Eagle Coffee Shoppe entered into a twenty-year lease with the Wilmington Parking Authority.⁷⁶ The government agency needed additional funding in order to pay for the construction of a new parking garage.⁷⁷ As a result, the agency chose to lease out commercial space in the building.⁷⁸ The building was also clearly intended for public use; it even flew both the Delaware and American flags.⁷⁹ Unfortunately, Eagle Coffee Shoppe denied service to the appellant because he was black.⁸⁰ The appellant brought an Equal Protection claim, and the Supreme Court again found state action.⁸¹ However, the Court did not rely on the public function exception; rather, it increased the scope of what is and is not purely private conduct.⁸² “By its inaction . . . the State . . . has elected to place its power, property, and prestige behind the admitted discrimination.”⁸³ Further, “the State has so far insinuated itself into a position of interdependence . . . that it must be recognized as a *joint participant* in the challenged activity.”⁸⁴ Therefore, Eagle Coffee Shoppe made itself part of the State for purposes of the Fourteenth Amendment.⁸⁵

This concept of “interdependence” can be taken even further. In 1960, at the heart of the Civil Rights Movement, the sit-in at Greenville occurred.⁸⁶

⁷³ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 553 (6th ed. 2019).

⁷⁴ See *id.*

⁷⁵ See generally 365 U.S. 715 (1961).

⁷⁶ *Id.* at 719.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 720.

⁸⁰ *Id.* at 716.

⁸¹ *Id.* at 716–17.

⁸² See *id.* at 725–26.

⁸³ *Id.* at 725.

⁸⁴ *Id.* (emphasis added).

⁸⁵ See *id.*

⁸⁶ See *Peterson v. City of Greenville*, 373 U.S. 244, 245 (1963).

When ten African-Americans sat at the S.H. Kress lunch counter, demanding to be served, the manager called the police, who arrested the protesters;⁸⁷ they were later convicted under a city ordinance that banned the serving of whites and blacks together and mandated separation between the races in dining.⁸⁸ However, the Supreme Court reversed the convictions:

When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by *attempting to separate the mental urges of the discriminators*.⁸⁹

In the course of its argument, the State tried to shield itself from constitutional liability by claiming that the manager of S.H. Kress would have removed the African-Americans from the store regardless of the ordinance.⁹⁰ However, the Court wholly rejected this argument.⁹¹ “When the State has commanded a particular result . . . [it] has ‘become involved’ in it”⁹² In *Burton*, the State simply allowed racial discrimination to occur in the coffee shop, but there was no evidence that the State necessarily desired it.⁹³ However, the State went a step further in *Peterson*: it explicitly mandated the discrimination.⁹⁴ This is a more blatant example of the State “jointly participating” in such discrimination.⁹⁵

Conversely, the Court has also found a *lack* of State participation. In another case, an African-American man was denied service at a private club, the Moose Lodge, solely because of his race.⁹⁶ He brought an Equal Protection action, claiming that the refusal of service was state action because the State had granted Moose Lodge its liquor license.⁹⁷ He sought an

⁸⁷ *Id.* at 245–46.

⁸⁸ *See id.* at 246–47.

⁸⁹ *Id.* at 248 (emphasis added).

⁹⁰ *Id.*

⁹¹ *See id.*

⁹² *Id.*

⁹³ *See* 365 U.S. 715, 725 (1961).

⁹⁴ *See* 373 U.S. at 246–47.

⁹⁵ *Compare id.*, with *Burton*, 365 U.S. at 725.

⁹⁶ *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 164–65 (1972).

⁹⁷ *Id.* at 165.

injunction that would revoke the liquor license until Moose Lodge ended its policy of racial exclusion.⁹⁸ However, the Supreme Court rejected this claim, distinguishing the granting of the liquor license from the factual scenarios in *Burton* and *Peterson*.⁹⁹ “Unlike *Burton*, the Moose Lodge building is located on land owned by it Nor is it located and operated in such surroundings . . . [that] it discharges a function or performs a service that would otherwise . . . be performed by the State.”¹⁰⁰ Further, the state agency that granted liquor licenses had no say in Moose Lodge’s discriminatory policies, unlike the state ordinance in *Peterson*.¹⁰¹ Therefore, these cases seem to suggest that there needs to be some sort of State-originated mandate or “ratification” of the anti-constitutional behavior in order for legal infringement to occur.

a. “Compulsion”

Another Supreme Court case has invoked a similar principle, but under a different title.¹⁰² This case involves an S.H. Kress location in Mississippi, the same franchise at issue in *Peterson*.¹⁰³ Sandra Adickes, a white teacher, sat down to eat lunch at S.H. Kress, accompanied by six of her students, all of whom were African-American.¹⁰⁴ The store took the students’ orders but refused service to Ms. Adickes, solely because she was a “white person ‘in the company of Negroes.’”¹⁰⁵ After Ms. Adickes and her students left, a policeman who saw them in the store arrested Ms. Adickes for vagrancy.¹⁰⁶ Ms. Adickes brought a claim under 42 U.S.C. § 1983, but the District Court directed a verdict in favor of S.H. Kress & Co. on one count and granted summary judgment in favor of S.H. Kress & Co. on the other.¹⁰⁷ However, the Supreme Court overturned the trial court’s ruling and remanded for a full trial on the merits, and in doing so expanded upon the idea of

⁹⁸ *Id.*

⁹⁹ *See id.* at 173–74.

¹⁰⁰ *Id.* at 175.

¹⁰¹ *See id.*; *Peterson v. City of Greenville*, 373 U.S. 244, 246–47 (1963).

¹⁰² *See generally* *Adickes v. S.H. Kress Co.*, 398 U.S. 144 (1970).

¹⁰³ *Id.* at 146.

¹⁰⁴ *Id.* at 149.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 147–48.

entanglement.¹⁰⁸ Under the exact language of § 1983, a person who acts “under color of any . . . custom, or usage of any State” can be liable for constitutional infringement.¹⁰⁹ In order for infringement to occur, however, that “‘custom or usage’ . . . must have the force of law by virtue of the persistent practices of state officials.”¹¹⁰ The Court essentially articulated a two factor test for proving state action through a custom or usage:

[I]f petitioner can show (1) the existence of a *state-enforced custom* of segregating the races in public eating places in Hattiesburg at the time of the incident in question; and (2) that Kress’ refusal to serve her was motivated by that state-enforced custom, she will have made out a claim under § 1983.¹¹¹

State action under an entanglement theory does not exist solely through an unconstitutional state law; it can also arise through an unconstitutional State-licensed custom or through joint participation of the State in a private party’s discriminatory behavior.¹¹²

b. “Nexus”

The Supreme Court has also articulated a third test that is broader than its “public function” and “entanglement” tests. As referenced in an earlier section of this note, *Jackson v. Metropolitan Edison Co.* primarily focuses on “public function” and the general standard that must be satisfied for the private party’s conduct to be actionable under a constitutional infringement claim.¹¹³ However, *Jackson* also defines the nexus test: “[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.”¹¹⁴

¹⁰⁸ *See id.* at 173–74.

¹⁰⁹ 42 U.S.C. § 1983 (1996).

¹¹⁰ *Adickes*, 398 U.S. at 167.

¹¹¹ *Id.* at 173–74 (emphasis added).

¹¹² *See id.*; *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961); *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963).

¹¹³ *See* 419 U.S. 345, 352–53 (1974).

¹¹⁴ *Id.* at 351.

The Court then explained that the regulation of a private business does not, without more, subject that business to constitutional claims.¹¹⁵ However, if there is enough of a nexus or connection between the two, that business might be in danger of a constitutional violation.¹¹⁶

Out of the three tests discussed, the nexus test is most relevant to the circuit split at issue in this note. Most notably, both the Sixth and Ninth Circuits specifically reference the nexus test as a precursor to their own respective tests.¹¹⁷ The state-official test “is simply a version of the Supreme Court’s nexus test.”¹¹⁸ “As here, the focus . . . is on whether the public official’s conduct, even if ‘seemingly private,’ . . . create[s] ‘a close nexus between the State and the challenged action’”¹¹⁹ Overall, the nexus test and its differing applications by the two Circuit Courts play a central role in determining the ultimate outcome of the issue.

C. The Sixth and Ninth Circuits are Split on the Doctrine’s Application to Social Media Use

The issue of state action has been litigated in many Supreme Court cases. Further, government censorship of private speech is well-documented in the Supreme Court’s jurisprudence. However, social media is a relatively new aspect of modern society, as platforms like Facebook and Twitter have only existed since the early 21st century: Facebook was founded by Mark Zuckerberg in 2004,¹²⁰ and Twitter was founded by Jack Dorsey and others in 2006.¹²¹ The societal and political effects of these platforms make for entertaining (and never-ending) debate; however, their effect on the Supreme Court’s state action jurisprudence is not yet known.

The unique combination of state action and censorship on social media does not have much foundation in case law, and the only substantive precedent on the issue comes from a handful of the Circuit Courts of

¹¹⁵ *See id.* at 357.

¹¹⁶ *See id.* at 358–59.

¹¹⁷ *See Lindke v. Freed*, 37 F.4th 1199, 1203 (6th Cir. 2022); *Garnier v. O’Connor-Ratcliff*, 41 F.4th 1158, 1170 (9th Cir. 2022).

¹¹⁸ *Lindke*, 37 F.4th at 1203.

¹¹⁹ *Garnier*, 41 F.4th at 1170.

¹²⁰ Hall, *supra* note 12.

¹²¹ Vanian, *supra* note 12.

Appeals.¹²² In the summer of 2022, the Sixth and Ninth Circuit Courts of Appeals issued opinions on the same issue exactly one month apart.¹²³ Each court applied completely different tests, one narrow and the other broad, and as a result reached opposite outcomes.

1. The Sixth Circuit's State-Official Test

The Sixth Circuit announced this test in June of 2022.¹²⁴ James Freed, the defendant-respondent, was appointed city manager of Port Huron, Michigan in 2014.¹²⁵ Prior to his appointment, he owned a Facebook page that originally limited access to his “friends.”¹²⁶ However, he later made his page public since he became quite popular in his community.¹²⁷ After his appointment, he changed his page biography to include his official title of “City Manager, Chief Administrative Officer for the citizens of Port Huron, MI.”¹²⁸ The city’s website was listed as his page’s website, his page’s contact information was the city’s email address, and his page’s physical address was that of City Hall.¹²⁹ Regarding content, he shared posts of all different genres, including family activities and the policies he implemented as city manager, such as his COVID-19 policies and various “community development initiatives.”¹³⁰ Kevin Lindke, a Port Huron resident, was frustrated with Freed’s handling of COVID-19, and he let Freed hear it.¹³¹ Lindke posted comments on Freed’s Facebook page, levying criticism against Freed’s COVID-19 policies.¹³² Freed not only deleted the comments, but also blocked Lindke from accessing the page at all.¹³³ Lindke brought a claim against

¹²² See generally *Lindke*, 37 F.4th at 1199; *Garnier*, 41 F.4th at 1158; Knight First Amend. Inst. at Colum. Univ. v. Trump, 928 F.3d 226 (2nd Cir. 2019), cert. granted, vacated as moot sub. nom. Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220 (2021); Davison v. Randall, 912 F.3d 666 (4th Cir. 2019); Campbell v. Reisch, 986 F.3d 822 (8th Cir. 2021).

¹²³ See generally *Lindke*, 37 F.4th at 1199; *Garnier*, 41 F.4th at 1158.

¹²⁴ See *Lindke*, 37 F.4th at 1202–03.

¹²⁵ *Id.* at 1201.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*; see also *Lindke v. Freed*, 563 F. Supp. 3d 704, 706 (E.D. Mich. 2021), *aff'd*, 37 F.4th 1199 (6th Cir. 2022).

¹³¹ See *Lindke*, 37 F.4th at 1201–02.

¹³² *Id.*

¹³³ *Id.* at 1202.

Freed in United States District Court under 42 U.S.C. § 1983, alleging that Freed was a state actor and thus violated his First Amendment rights when he deleted Lindke’s comments and blocked him from accessing the Facebook page.¹³⁴ Freed successfully moved for summary judgment and Lindke appealed to the Sixth Circuit Court of Appeals.¹³⁵

The Sixth Circuit affirmed the District Court’s ruling.¹³⁶ The Court began its analysis by providing background behind the state-official test and the context in which the test applies. Second, it articulated the analytical framework it used in ruling on the case. Lastly, the Court applied the state-official test and ultimately did not find state action.

a. Foundational Principles and Sixth Circuit Precedent

As a preliminary matter, the Sixth Circuit stated that its state-official test is “simply a version of the Supreme Court’s nexus test.”¹³⁷ However, this test does not apply in traditional state action contexts, such as a privately-owned company operating an otherwise publicly accessible municipality.¹³⁸ Instead, it applies “when asking whether a *public official* was acting in his state capacity.”¹³⁹ Thus, for the state-official test to have applicability, a *public official’s conduct* must be at issue, not just the conduct of a private party.

Sixth Circuit precedent also provides additional information about the state-official test.¹⁴⁰ In finding state action, “[t]he key determinant is whether the actor intends to act in an official capacity or to exercise official responsibilities pursuant to state law.”¹⁴¹ Therefore, if the public official’s conduct is “outside the course . . . of his duties and unaided by any indicia of . . . state authority,” state action is not present.¹⁴²

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 1207.

¹³⁷ *Id.* at 1203 (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

¹³⁸ *See id.* at 1202; *Marsh v. Alabama*, 326 U.S. 501, 503 (1946).

¹³⁹ *Lindke*, 37 F.4th at 1202 (emphasis added).

¹⁴⁰ *See Waters v. City of Morristown*, 242 F.3d 353, 359 (6th Cir. 2001).

¹⁴¹ *Id.*

¹⁴² *Id.*

b. The State-Official Test's Framework

The Sixth Circuit found that the state-official test applies just the same in the context of a public official's actions and behavior on *social media*.¹⁴³ However, in the context of social media, the state-official test must be applied to the *entire account*, not just a singular post or piece of content.¹⁴⁴ "That's because to answer our cornerstone question . . . we need more background than a single post can provide."¹⁴⁵ Next, the Sixth Circuit laid out the actual framework. This test comes straight from prior Sixth Circuit precedent:

So 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 [the] office."¹⁴⁶

However, as is discussed in the next subsection, this test is quite rigid and looks more towards the explicit authority of the defendant's office itself.

c. The Test's Application in Lindke v. Freed

The state-official test provides a narrow view of the nexus test. In order to elaborate on its application, the Sixth Circuit provided some examples as to when either factor of the test could be met.¹⁴⁷

First, state action is obviously present under the first factor when a state statute explicitly mandates that the public official operate and maintain a social media account.¹⁴⁸ "[I]f the law itself provides for it," the account is one of the official's "actual duties," thereby making his or her actions in its operation that of the State.¹⁴⁹ Second, the "use of state resources" can bring about a finding of state action.¹⁵⁰ The Court gives the example of a public official using state-sanctioned community outreach funds to pay for an account or to pay for advertisements.¹⁵¹ This seems to fall under an "apparent

¹⁴³ See *Lindke*, 37 F.4th at 1203.

¹⁴⁴ See *id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (emphasis added); see also *Waters*, 242 F.3d at 359.

¹⁴⁷ See *Lindke*, 37 F.4th at 1203–04.

¹⁴⁸ *Id.* at 1203.

¹⁴⁹ *Id.* at 1203–04.

¹⁵⁰ *Id.* at 1204.

¹⁵¹ *Id.*

duty” of the official’s position.¹⁵² Third, if the account belongs to the office rather than the official and is passed down to each new person in that office, it is “state property.”¹⁵³ Thus, “without the authority of [the] office,” the public official would not have any access to that account.¹⁵⁴ “While the office’s account is *always* state action, the officeholder’s may not be.”¹⁵⁵ This is a key distinction: if the account goes with the public official as he or she departs the office, it in all likelihood will not be considered state action.¹⁵⁶ Lastly, the Court used the example of a public official ordering his or her government staff to manage the account, which would likely create a finding of state action.¹⁵⁷ This example also provides a combination of both factors in the framework.

However, the Sixth Circuit did not find state action on the part of Freed.¹⁵⁸ The Court made this determination by applying the examples above to the facts of Lindke’s claim.¹⁵⁹ Freed was not mandated to operate the Facebook page under any state statute or ordinance.¹⁶⁰ The Facebook page belonged to Freed and not the city manager’s office, particularly since Freed had been operating the account for a few years prior to becoming city manager.¹⁶¹ Further, Freed was the only person who participated in the operation of the account; his staff did not have access to it.¹⁶² Lindke tried to rebut this point by proving that Freed posted photos taken by government employees.¹⁶³ However, the Court rejected this assertion: “[S]uch minimal involvement isn’t enough . . . snapping a few candids at a press conference is routine—not a service Freed accesses by the ‘authority of his office.’”¹⁶⁴

Lindke’s last argument is based on Freed’s “presentation” of the account.¹⁶⁵ This argument is based on the approach the Ninth Circuit took

¹⁵² *See id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1203–04 (quoting *Waters v. City of Morristown*, 242 F.3d 353, 359 (6th Cir. 2001)).

¹⁵⁵ *Id.* at 1204 (emphasis added).

¹⁵⁶ *See id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See id.* at 1204–05.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1205.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* (quoting *Waters v. City of Morristown*, 242 F.3d 353, 359 (6th Cir. 2001)).

¹⁶⁵ *Id.*

exactly one month later.¹⁶⁶ The Sixth Circuit said this approach analyzes the “purpose and appearance” of the account.¹⁶⁷ However, the Sixth Circuit expressly declined to adopt this approach.¹⁶⁸ “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.”¹⁶⁹ Since Lindke did not meet these thresholds, the Sixth Circuit affirmed the District Court’s ruling in favor of Freed.¹⁷⁰

2. The Ninth Circuit’s Expansive Approach

Exactly one month after the decision in *Lindke v. Freed*, the Ninth Circuit decided a parallel case, creating a circuit split.¹⁷¹ Michelle O’Connor-Ratcliff and T.J. Zane, the defendants, were elected to the Poway Unified School District Board of Trustees in 2014.¹⁷² Both had public Facebook pages, and in 2016 O’Connor-Ratcliff also created a public Twitter page.¹⁷³ Prior to being elected, the defendants used the pages for campaign purposes, but after their election they began posting about the Board of Trustees’s activities.¹⁷⁴ On their Facebook pages, both labeled themselves as “government officials.”¹⁷⁵ Some of their posts included: reports on actions of the Board, solicitations of the community to apply for jobs as Board representatives, invitations for the community to fill out a survey related to the district’s budgetary plan, hiring and firing actions, safety issues, and perhaps most significantly, solicitations of social media comments from other citizens and even their own responses to those comments.¹⁷⁶ Overall, the defendants were quite active on social media.

Christopher and Kimberly Garnier, the plaintiffs, were the parents of children who attended school in the district.¹⁷⁷ They were highly critical of

¹⁶⁶ See *id.* at 1205–06; *Garnier v. O’Connor-Ratcliff*, 41 F.4th 1158, 1170–71 (9th Cir. 2022).

¹⁶⁷ *Lindke*, 37 F.4th at 1206.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1207.

¹⁷¹ See generally *Garnier*, 41 F.4th at 1158.

¹⁷² *Id.* at 1163.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1164.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1164–65.

¹⁷⁷ *Id.* at 1165.

the Board for a long time, and they often went to Board meetings and met with its members.¹⁷⁸ In 2015, the Garniers took their frustrations to social media and began commenting on the defendants' posts.¹⁷⁹ However, the Garniers' activity on the defendants' pages became somewhat bizarre. For example, Christopher Garnier posted 42 identical comments on various posts from O'Connor-Ratcliff, and he even posted 226 identical comments on O'Connor-Ratcliff's Twitter within a span of ten minutes.¹⁸⁰ At some point, the defendants were fed up with the Garniers, so they decided to restrict their access to the pages.¹⁸¹ First, they deleted the Garniers' comments; however, in 2017 they outright blocked the Garniers from having any access.¹⁸² The Garniers sued O'Connor-Ratcliff and Zane under 42 U.S.C. § 1983, alleging state action and a subsequent violation of their First Amendment rights.¹⁸³ The District Court ruled in favor of the Garniers.¹⁸⁴

The Ninth Circuit affirmed the District Court's ruling.¹⁸⁵ The Court articulated its approach's framework, which finds foundation in prior Circuit Court precedent, including a case of its own.¹⁸⁶ Second, the Court applied its approach to the facts of this case. Lastly, the Court referenced the support for its approach in that prior precedent and expressly rejected the Sixth Circuit's state-official test.¹⁸⁷

a. Foundational Precedent and the Ninth Circuit's Framework

Since this was a case of first impression for the Ninth Circuit (as well as for the Sixth Circuit), the Ninth Circuit analyzed precedent that got as close as possible to this specific issue.¹⁸⁸ Prior cases from other circuit courts provide somewhat abstract support for the Ninth Circuit's approach to the

¹⁷⁸*Id.* at 1165–66.

¹⁷⁹*See id.* at 1166.

¹⁸⁰*Id.*

¹⁸¹*See id.*

¹⁸²*Id.*

¹⁸³*Id.* at 1166–67.

¹⁸⁴*Id.* at 1167.

¹⁸⁵*Id.* at 1185.

¹⁸⁶*See id.* at 1170, 1174–77; *see also* Naffe v. Frey, 789 F.3d 1030, 1037 (9th Cir. 2015); Campbell v. Reisch, 986 F.3d 822, 825–28 (8th Cir. 2021); Davison v. Randall, 912 F.3d 666, 679–80 (4th Cir. 2019); Knight First Amend. Inst. at Colum. Univ. v. Trump, 928 F.3d 226, 236 (2nd Cir. 2019).

¹⁸⁷*See Garnier*, 41 F.4th at 1174–77.

¹⁸⁸*See id.* at 1170, 1174–77.

current issue,¹⁸⁹ but the Ninth Circuit took inspiration from those cases and built on that precedent.¹⁹⁰ Further, the Ninth Circuit took directly from one of its own prior cases in articulating a full-fledged framework for determining state action in this context.¹⁹¹

In announcing its approach, the Ninth Circuit built on three prior cases from the Second, Fourth, and Eighth Circuits.¹⁹² In *Knight First Amend. Inst. at Colum. Univ. v. Trump*, the Second Circuit concluded that then-President Trump was a state actor when he blocked the plaintiffs from his Twitter account after they replied to his tweets with criticism.¹⁹³ The Second Circuit stated that a public official's social media account is not private when "[the] public official . . . hold[s] out and use[s] a social media account open to the public as an official account . . . [which] has interactive features open to the public, making public interaction a prominent feature of the account."¹⁹⁴ The Court also listed some general factors that can be used in this analysis, such as "how the official describes and uses the account," who can access the account's features, and "how others . . . regard and treat [the] account."¹⁹⁵ Further, in *Davison v. Randall*, a case with facts similar to *Garnier v. O'Connor-Ratcliff*, the Fourth Circuit found state action when the public official deleted the plaintiff's comments on the public official's Facebook page and blocked the plaintiff from accessing her account.¹⁹⁶ In doing so, the Court analyzed the "totality of the circumstances," a broad term that is similar to the expansiveness of the Ninth Circuit's approach.¹⁹⁷ The Fourth Circuit listed a group of factors that can be used to determine the existence of state action, including whether the official "used the power and prestige" of her position to infringe on a citizen's constitutional rights and whether the official used the account as a "tool of governance."¹⁹⁸ Lastly, in *Campbell v. Reisch* the Eight Circuit did *not* find state action when a public official blocked the plaintiff from accessing her Twitter account.¹⁹⁹ The Court did not

¹⁸⁹ See *Campbell*, 986 F.3d at 825–28; *Davison*, 912 F.3d at 679–680; *Knight*, 928 F.3d at 236.

¹⁹⁰ See *Garnier*, 41 F.4th at 1174–77.

¹⁹¹ See *id.* at 1170–71; see also *Naffe*, 789 F.3d at 1037.

¹⁹² See generally *Knight*, 928 F.3d at 226; *Davison*, 912 F.3d at 666; *Campbell*, 986 F.3d at 822.

¹⁹³ *Knight*, 928 F.3d at 236.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Davison*, 912 F.3d at 681.

¹⁹⁷ *Id.* at 680; see also *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1170 (9th Cir. 2022).

¹⁹⁸ *Davison*, 912 F.3d at 680.

¹⁹⁹ *Campbell v. Reisch*, 986 F.3d 822, 827–28 (8th Cir. 2021).

explicitly endorse the plaintiff's approach, which was similar to the approach taken in *Knight* and *Davison*, because even under that approach the plaintiff would still lose.²⁰⁰ However, in its analysis the Court made an important distinction that can influence the outcome under the Ninth Circuit's approach.²⁰¹ If the "overall theme" of the account is directed to fulfilling campaign promises and the official's performance while in office, the account is "more akin to a campaign newsletter," which likely precludes a finding of state action.²⁰² Conversely, if the account "becomes an organ of official business" or is used to carry out actual "governance," the account becomes official and thus state action is likely present.²⁰³ While none of these cases applied the exact framework used by the Ninth Circuit, they provided a foundation for the generally expansive nature of the Ninth Circuit's approach.

In *Naffe v. Frey*, a previous Ninth Circuit case, the Court laid out a series of broad elements that can be used to determine whether an "off-duty" public official's conduct still constitutes state action:

A state employee who is off duty nevertheless acts under color of state law when (1) the employee "purport[s] to or pretend[s] to act under color of law," (2) his "pretense of acting in the performance of his duties . . . had the purpose and effect of influencing the behavior of others," and (3) the harm inflicted on plaintiff "related in some meaningful way either to the officer's governmental status or to the performance of his duties."²⁰⁴

b. Application in Garnier v. O'Connor-Ratcliff

In the current case, the Ninth Circuit synthesized the above precedent, applied the exact framework from *Naffe*, and found state action.²⁰⁵ Regarding the first element, the Court found that the defendants "purported to act in the performance of their official duties."²⁰⁶ Specifically, they labeled themselves as "government officials" on their pages, O'Connor used her Trustee-specific

²⁰⁰ *See id.* at 825.

²⁰¹ *See id.* at 826.

²⁰² *Id.* at 826–27.

²⁰³ *Id.* at 825–26.

²⁰⁴ *Naffe v. Frey*, 789 F.3d 1030, 1037 (9th Cir. 2015).

²⁰⁵ *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1171 (9th Cir. 2022).

²⁰⁶ *Id.*

email address on the page, and their posts were “overwhelmingly geared” towards providing the public information and even asking for its thoughts on various issues.²⁰⁷ “[B]oth through *appearance* and *content*, the Trustees held their social media pages out to be official channels of communication . . . about the work of the PUSD Board.”²⁰⁸

As to the second element, the Court found that the defendants’ social media use had the “purpose and effect of influencing” the public.²⁰⁹ Both O’Connor-Ratcliff and Zane asked for the public’s thoughts on issues through their pages, to save the date for Board meetings, and to apply for Board volunteer roles.²¹⁰ This is the exact kind of behavioral influence the *Naffe* court alluded to.²¹¹

Lastly, the Court found the third element also satisfied.²¹² How the defendants operated their social media pages was “related in some meaningful way” to their roles as Board members.²¹³ First, the defendants posted about topics such as the budgetary plan, appointing the superintendent, and the agenda at Board meetings.²¹⁴ Most significantly, however, the defendants blocked the Garniers from accessing their pages because they would not stop commenting criticisms of the defendants’ performance in office.²¹⁵ Specifically, the defendants even admitted that they blocked the Garniers because their incessant criticisms “detract[ed] from the messages they wished to communicate[.]”²¹⁶ These messages, of course, were about policy and official “duties.”²¹⁷

c. Rejecting Lindke v. Freed and Adopting an Expansive Approach

The Ninth Circuit’s discussion of state action did not stop at its finding of such. The Court also acknowledged the rigidity of the Sixth Circuit’s state-

²⁰⁷ *Id.*

²⁰⁸ *Id.* (emphasis added).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *See Naffe v. Frey*, 789 F.3d 1030, 1037 (9th Cir. 2015).

²¹² *See Garnier*, 41 F. 4th at 1171.

²¹³ *Id.*; *Naffe*, 789 F.3d at 1037.

²¹⁴ *Garnier*, 41 F.4th at 1171.

²¹⁵ *See id.* at 1172.

²¹⁶ *Id.*

²¹⁷ *See id.*

official test and expressly rejected it.²¹⁸ Rather than analyzing narrow categories such as the public official's "duties" in office or his or her "use of government resources or state employees,"²¹⁹ the Ninth Circuit analyzed "whether the officer self-identified as a state employee and . . . 'purported' to be a state officer."²²⁰ This, as the Ninth Circuit noted, is "an inquiry that considers actions in addition to appearance."²²¹

The Ninth Circuit also expressly followed the "mode of analysis" of the precedent from the Second, Fourth, and Eighth Circuits.²²² Therefore, within the legal question at issue in this note, only one Circuit Court of Appeals has held in favor of the much narrower state-official test,²²³ while four have either provided support for or expressly adopted a more expansive approach.²²⁴

If the Supreme Court of the United States decides to hear the case, it should adopt the Ninth Circuit's approach because, albeit imperfect, the test provides greater protection for the First Amendment rights of American citizens.

III. THE SUPREME COURT SHOULD ADOPT THE NINTH CIRCUIT'S APPROACH

If the Supreme Court hears the case, it should adopt the Ninth Circuit's approach, for two reasons. First, this approach addresses the practical realities of public officials' social media use and their relationship with citizens, which gives plaintiffs the space to make a complete constitutional argument; on the contrary, the state-official test is too narrow. Second, the state-official test carries potential consequences that fly in the face of the First Amendment.

²¹⁸ *See id.* at 1177.

²¹⁹ *See id.* at 1176–77 (quoting *Lindke v. Freed*, 37 F.4th 1199, 1206 (6th Cir. 2022)).

²²⁰ *Id.* at 1177.

²²¹ *Id.*

²²² *Id.*

²²³ *See Lindke*, 37 F.4th at 1203.

²²⁴ *See Garnier*, 41 F.4th at 1170 (expressly adopting its own approach from *Naffe v. Frey*); *Davison v. Randall*, 912 F.3d 666, 679–80 (4th Cir. 2019); *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 928 F.3d 226, 236 (2nd Cir. 2019); *Campbell v. Reisch*, 986 F.3d 822, 825–28 (8th Cir. 2021).

A. The State-Official Test is Too Narrow

As noted above, the Sixth Circuit described factual scenarios in which state action by a public official is present under this test.²²⁵ However, all of these examples carry a common characteristic: in each one, the public official was either mandated by the State or definitively used the power of the State itself.²²⁶ If state statutory law requires that a public official operate a social media account as part of his or her “actual duties,” that official does not have a choice; he or she must use social media. Likewise, if the relevant social media account passes from officeholder to officeholder, it is considered State property.²²⁷ In that case, it is not too much of a logical jump to say that the public official is using the power of the State itself, since, as the Sixth Circuit noted, the public official would have no access to that account if it were not for the authority of the office.²²⁸ Further, if a public official hires staff to operate the account, the official is obviously leveraging the power of the State in making hiring decisions and requiring employees to perform certain tasks.²²⁹ Therefore, the common theme in all of these examples is that the public official’s social media use is *directly connected* to State power, which is consistent with the two-pronged state-official test.

However, this test has severe shortcomings. At the end of the day, both of these cases are the same: a government official held himself or herself out to be such on a social media page, usually in an obvious manner, and eventually censored another citizen’s political criticism because the official did not like what that citizen had to say.²³⁰ Even still, we are faced with two entirely different outcomes, one with a finding of state action and one without. The question that necessarily follows is this: *why?* State action is most definitely not a black-and-white topic; there is “near universal acknowledgement that the state action doctrine is a mess.”²³¹ Even the Supreme Court has recognized that the “question” of state action in any given case “frequently admits of no easy answer.”²³² However, in the case at hand, the “why” is quite straightforward: the state-official test significantly

²²⁵ See *Lindke*, 37 F.4th at 1203–04.

²²⁶ See *id.*

²²⁷ *Id.* at 1204.

²²⁸ *Id.*

²²⁹ See *id.*

²³⁰ See *id.* at 1201–02; *Garnier v. O’Connor-Ratcliff*, 41 F.4th 1158, 1164–66 (9th Cir. 2022).

²³¹ Niles et al., *supra* note 25, at 889.

²³² *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972).

restrains the facts that will actually matter at trial, and the Sixth Circuit makes that clear through its examples of state action.²³³ Conversely, the Ninth Circuit’s approach allows a plaintiff to make a complete constitutional argument.

1. The State-Official Test Excludes Many of the Most Important Facts in This Type of Dispute

James Freed, the City Manager of Port Huron, used his Facebook page, at least in significant part, to post about policy “directives” he himself issued.²³⁴ Additionally, when the COVID-19 pandemic came to the United States, he posted public health information and more policies that he issued.²³⁵ Freed even used the city government’s contact information on his account.²³⁶ This is analogous to how O’Connor-Ratcliff and Zane operated their social media pages while serving as Board members.²³⁷ In both cases, it is quite obvious that the social media pages were directed towards the government positions that the account owners held.

None of this mattered to the Sixth Circuit. There is no debate around the fact that Freed censored Lindke because he disagreed with what Lindke had to say. The Sixth Circuit did not disagree with that assertion, but instead chose to focus solely on the “actual or apparent duties” of Freed and whether he leveraged the power he possessed to run the account, such as through the use of government money or staff members.²³⁸ If the analysis in *Garnier* was limited to the factors in the state-official test, the plaintiffs surely would have lost their state action claim. O’Connor-Ratcliff and Zane posted content regarding hiring and firing decisions, Board decisions, safety alerts, and even requests for community feedback and applications for Board representative positions.²³⁹ To a normal observer, these behaviors surely seem to have all the “trappings” of official government business.²⁴⁰ Following from that, censorship of the plaintiff would seem to have those same trappings. However, there was no indication that O’Connor-Ratcliff and Zane were

²³³ See *Lindke*, 37 F.4th at 1203–04.

²³⁴ *Id.* at 1201.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See *Garnier v. O’Connor-Ratcliff*, 41 F.4th 1158, 1164–65 (9th Cir. 2022).

²³⁸ See *Lindke*, 37 F.4th at 1203, 1206.

²³⁹ See *Garnier*, 41 F.4th at 1164–65.

²⁴⁰ See *Davison v. Randall*, 912 F.3d 666, 683 (4th Cir. 2019).

statutorily required to operate the accounts, or that the accounts were passed down to them from their predecessors, or that they leveraged state resources such as money or staff to operate the accounts.²⁴¹ The accounts were operated by the defendants alone, with no external assistance.²⁴² And as the Sixth Circuit said, these “posts do not carry the force of law simply because the page says it belongs to . . . a public official.”²⁴³ Therefore, the Garniers would have most likely lost under the state-official test.

This outcome blocks plaintiffs from being able to utilize the vast majority of the facts available to them in litigation. *Garnier* provided a litany of facts describing how the defendants used the account and the content they posted.²⁴⁴ But if the Sixth Circuit had the final say, it would have made its decision turn on two individual facts: the official’s “duties” and the use of state authority, such as resources to operate the account.²⁴⁵ Here, a plaintiff would walk into the courtroom automatically disadvantaged. The court could have dozens of pages of evidence regarding actual use of the account, but only a paragraph or two would ultimately matter. Conversely, all the public official needs to do is prove (1) that he or she is not required to have a social media account, and (2) that he or she did not leverage the office’s power in operating the account.²⁴⁶ Even if the account itself was obviously a political platform and nothing else, the defendant would likely prevail. Therefore, the state-official test excessively limits the factual inquiry to the point where the plaintiff is at a loss before he or she even steps foot in the courthouse.

2. The Ninth Circuit’s Approach Addresses the Reality of the Relationship Between Public Officials and Normal Citizens

While the state-official test severely limits the scope of a plaintiff’s argument, the Ninth Circuit’s approach does not. Rather, the Ninth Circuit looks at facts which show a public official “purporting” to act as one through his or her social media, that the “purpose” of the account was to persuade the public into taking some sort of action, and ultimately that a public official’s online censorship practices are “related to” his or her official

²⁴¹ See *Garnier*, 41 F.4th at 1164.

²⁴² See *id.*

²⁴³ *Lindke*, 37 F.4th at 1206.

²⁴⁴ See *Garnier*, 41 F.4th at 1164–65.

²⁴⁵ See *Lindke*, 37 F.4th at 1204, 1207.

²⁴⁶ See *id.* at 1203.

responsibilities.²⁴⁷ “Purporting” and “appearing” to act as a public official via social media are not the same as ordering staff members to maintain the account or operating an account as mandated by state statute. However, the Ninth Circuit’s approach does not let the argument rise or fall on the latter.²⁴⁸ Even if the state-official factors are not met, this more expansive approach provides a plaintiff with other arguments that directly confront a public official’s actual *use* of the account, which is what the public ultimately sees.

This distinction is made clearer through an analogy both the Sixth and Ninth Circuits referenced.²⁴⁹ Both courts used the example of off-duty law enforcement officers using excessive force against a citizen.²⁵⁰ While the facts in the referenced cases differ, the Sixth and Ninth Circuits’ commentary carries weight. In the case of an off-duty law enforcement officer, the Sixth Circuit noted that it does look at the officer’s appearance at the time of the incident, but only because “their *appearance* actually evokes state authority.”²⁵¹ “[A]n officer couldn’t take certain actions without the authority of his office—authority he exudes when he wears his uniform, displays his badge, or informs a passerby that he is an officer.”²⁵² The Sixth Circuit only recognized “appearance” as an influential factor in this scenario because it ties into the state-official test.²⁵³ However, the Court did not feel the same way about the appearance of a public official’s social media use. “Freed gains no authority by presenting himself as city manager on Facebook.”²⁵⁴

Conversely, the Ninth Circuit avoided this stringent approach. “[W]e consider whether the officer . . . generally ‘purported . . . to be a state officer.’”²⁵⁵ As the Court went on to explain, this is an analysis which “considers actions in addition to appearance.”²⁵⁶ The Ninth Circuit’s departure from the Sixth Circuit’s view on this matter speaks to the Ninth Circuit’s efforts to address the realities of our interactions with public

²⁴⁷ *Garnier*, 41 F.4th at 1170.

²⁴⁸ *See id.* at 1177.

²⁴⁹ *See id.*; *Lindke*, 37 F.4th at 1206.

²⁵⁰ *Lindke*, 37 F.4th at 1206; *Garnier*, 41 F.4th at 1177; *see also* *Kalvitz v. City of Cleveland*, 763 Fed. App’x. 490 (6th Cir. 2019); *Van Ort v. Estate of Stanewich*, 92 F.3d 831 (9th Cir. 1996).

²⁵¹ *Lindke*, 37 F.4th at 1206.

²⁵² *Id.*

²⁵³ *See id.*

²⁵⁴ *Id.*

²⁵⁵ *Garnier*, 41 F.4th at 1177.

²⁵⁶ *Id.*

officials, including law enforcement officers.²⁵⁷ If the analysis is limited to narrow facts such as a uniform, a badge, or an officer announcing his presence, the plaintiff is likely left in the same situation as noted in the previous section. If an off-duty police officer assaults an innocent pedestrian, but does not disclose his status as a police officer, does that victim have a valid § 1983 claim? It's not entirely clear from the case law,²⁵⁸ but it seems as though the victim will be disadvantaged at the start of litigation. If that's the case, the plaintiff's recourse would be quite limited, if existent at all, and in cases of excessive force, that cannot happen. However, the Ninth Circuit's expansive approach curtails these risks by allowing the plaintiff to have access to *all* the facts and to make a complete state action argument. In turn, this allows the plaintiff to have a better chance at fighting for his or her First Amendment rights.

B. Consequences of the Stringent State-Official Test

Why does the difference in scope between the state-official test and the Ninth Circuit's approach matter? Its significance in cases involving excessive force is more obvious, but what about a public official's use of social media? The comparison between the two appears to be a false equivalency. However, upon a closer look, the intermingling of public office and social media carries similar significance.

In the 21st century, social media has become a dominant force in American political culture. In 2019 and 2020, the 116th Congress posted on Twitter and Facebook more than 2.2 million times.²⁵⁹ That number outpaced the 114th Congress's social media activity by about 738,000 posts.²⁶⁰ Even in just the last few years, political discourse on social media, even from elected members of Congress, has boomed. Further, Congress uses social media for many different purposes, such as "sharing news and information" and "communicating with constituents."²⁶¹ This is significant: in today's technologically dominant world, a primary avenue for political commentary,

²⁵⁷ *See id.*

²⁵⁸ *See* Kalvitz v. City of Cleveland, 763 Fed. App'x. 490 (6th Cir. 2019); Van Ort v. Estate of Stanewich, 92 F.3d 831 (9th Cir. 1996).

²⁵⁹ Aaron Smith & Sono Shah, *Though not especially productive in passing bills, the 116th Congress set new marks for social media use*, PEW RESEARCH CENTER (Jan. 25, 2021), <https://www.pewresearch.org/fact-tank/2021/01/25/though-not-especially-productive-in-passing-bills-the-116th-congress-set-new-marks-for-social-media-use/>.

²⁶⁰ *Id.*

²⁶¹ *Id.*

and often backlash, is social media. The Supreme Court of the United States has even acknowledged such a reality: “While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace . . . *and social media in particular.*”²⁶²

With that background, a critical question arises related to the Sixth Circuit’s approach: does the state-official test create an avenue for unchecked censorship by public officials through their use of social media, impeding the First Amendment rights of the constituents they allegedly represent? Under this test, it appears the answer is yes. If the relevant facts are narrowed down solely to job requirements or the actual use of authority through government funds or staff,²⁶³ many public officials will likely be able to censor any negative backlash, without the slightest hint of constitutional accountability. This only increases the incentive for politicians to craft online censorship strategies that will maximize popularity and minimize dissent. Further, Pew Research Center found that during 2020–2021, 33% of tweets from adults on Twitter were “political in nature.”²⁶⁴ In today’s world, online censorship will only cause even more widespread damage to American political dialogue.

With all of that being said, the damage inherent in political censorship has been well-known for over a century. In 1919, Justice Oliver Wendell Holmes coined a “market” of political thought and speech.²⁶⁵ “[T]hat the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted *in the competition of the market.*”²⁶⁶ Justice Holmes also explained the evil this “market” is to fight against: “If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.”²⁶⁷ In other words, if you are so convinced you are right and want nothing but power over others, you will stop at nothing to obtain that power. These are very compelling words that have guided over a century of First Amendment jurisprudence. However, the “market” that Justice Holmes spoke of in 1919 has expanded dramatically in

²⁶²Packingham v. North Carolina, 582 U.S. 98, 104 (2017) (emphasis added).

²⁶³Lindke v. Freed, 37 F.4th 1199, 1203–04 (6th Cir. 2022).

²⁶⁴Sam Bestvater et al., *Politics on Twitter: One-Third of Tweets from U.S. Adults are Political*, PEW RESEARCH CENTER (June 16, 2022), <https://www.pewresearch.org/politics/2022/06/16/politics-on-twitter-one-third-of-tweets-from-u-s-adults-are-political/>.

²⁶⁵Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

²⁶⁶*Id.* (emphasis added).

²⁶⁷*Id.*

the last century, particularly into the realm of social media. If social media censorship by public officials is made easy and lacks any accountability in the Judiciary, this “market” will be destroyed. In arenas of political speech as popular as Facebook and Twitter, the state-official test could allow public officials to operate public accounts in such a way as to achieve two goals at once: censoring dissent, while also avoiding a lawsuit. This is not “competition of the market”²⁶⁸; it is *non-competition*.

CONCLUSION

If the Supreme Court decides to hear this circuit split, it should adopt the Ninth Circuit’s approach. It should do so because the Sixth Circuit’s state-official test is too narrow, while the Ninth Circuit’s more expansive approach allows the plaintiffs to make a complete argument and to actually have a fighting chance in the courtroom. Additionally, the state-official test is antithetical to our First Amendment protections. Namely, it blocks plaintiffs from utilizing the majority of the important facts in these types of cases, allows public officials to censor without consequence, and most significantly, flies in the face of Justice Holmes’s “market” that has been the foundation of the First Amendment for over a century.

President Ronald Reagan famously said that “freedom is never more than one generation away from extinction.” If censorship by public officials becomes a normal occurrence, enabled by a flawed legal test, that generation may have already arrived.

²⁶⁸ *Id.*