APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-2977

KEVIN LINDKE,
Plaintiff - Appellant,

v.

JAMES R. FREED, in his official and personal capacities,
Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

No. 2:20-cv-10872—Mark A. Goldsmith, District Judge.

Argued: April 27, 2022

Decided and Filed: June 27, 2022

Before: GUY, THAPAR, and READLER, Circuit Judges.

COUNSEL

ARGUED: Philip L. Ellison, OUTSIDE LEGAL COUNSEL PLC, Hemlock, Michigan, for Appellant. Victoria R. Ferres, FLETCHER, FEALKO, SHOUDY & FRANCIS, PC, Port Huron, Michigan, for Appellee. **ON BRIEF**: Philip L. Ellison, OUTSIDE LEGAL COUNSEL PLC, Hemlock, Michigan, for Appellant. Todd J. Shoudy, FLETCHER, FEALKO, SHOUDY & FRANCIS, PC, Port Huron, Michigan, for Appellee.

OPINION

THAPAR, Circuit Judge. James Freed prized his roles as father, husband, and city manager of Port Huron, Michigan. So his Facebook page listed all three. The question here is whether involving his job makes Freed's Facebook activity state action. In Freed's case, it does not.

I.

Like many Americans, James Freed joined Facebook to connect with friends and family. He created a Facebook profile—a private account limited to his "friends"—and used it for years. But eventually, he grew too popular for Facebook's 5,000-friend limit on profiles. So Freed converted his profile to a "page," which has unlimited "followers" instead of friends. His page was public, and anyone could "follow" it; for the page category, Freed chose "public figure."

In 2014, Freed was appointed city manager for Port Huron, Michigan. So he updated his Facebook page to reflect his new title. In the "About" section, he most recently described himself as "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI." R. 1-1, Pg. ID 17. Freed listed the Port Huron website as his page's website, the City's general email for "City Administration and Staff" (CommunityComments@PortHuron.org) as his page's contact information, and the City Hall address as his page's address.

Freed was an active Facebook user whose page featured a medley of posts. 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. And when the Covid-19 pandemic hit in spring 2020, he posted about that too, sharing the policies he initiated for Port Huron and news articles on public-health measures and statistics.

Freed's Covid-19 posts caught the attention of one disconcerted citizen, Kevin Lindke. Lindke didn't approve of how Freed was handling the pandemic. He saw Freed's posts about new policies and responded with criticism in the comments section. Freed didn't appreciate the comments, so he deleted them. And Freed eventually "blocked" Lindke from the page, which kept Lindke from commenting on Freed's page and its posts.

Upset that he could no longer use Facebook to engage with the city manager, Lindke sued Freed in federal court under 42 U.S.C § 1983. He argued that Freed violated his First Amendment rights by deleting his comments and blocking him from the page. The district court granted summary judgment to Freed, and Lindke appeals.

II.

Section 1983 provides a cause of action when federal rights are violated by someone acting "under color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983. Courts have interpreted this language to mean that a defendant must be acting in a state capacity to be liable under the statute. *West v. Atkins*, 487 U.S. 42, 48 (1988). This is known as the "state action" requirement, and it turns on whether a defendant's actions are "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

How do we know if Freed was engaged in state action? One might think it's easy—Freed is a state official, after all. So we might assume everything he does is state action. But the analysis isn't that simple. When a state official acts "in the ambit of [his] personal, private

pursuits," section 1983 doesn't apply. *Stengel v. Belcher*, 522 F.2d 438, 441 (6th Cir. 1975). In this way, the doctrine draws a line between actions taken in an official capacity and those taken in a personal one. But the caselaw is murky as to when a state official acts personally and when he acts officially. That imprecision is made even more difficult here, since we must apply the doctrine in a novel setting: the ever-changing world of social media.

To clear the state-action waters, we analyze the current state of the doctrine and realign how state officials' actions fit into the current framework. We then explain when state officials' social-media activity constitutes state action. And lastly, we conclude Freed maintained his Facebook page in his personal capacity.[1]

A.

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. *Lugar*, 457 U.S. at 939; *see Chapman v. Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003) (en banc) (adopting the same). But each of these tests is framed to discern whether a *private party's* action is attributable to the state—they don't make clear the distinction between *public officials'* governmental and personal activities.

So in practice, our court has applied a different test when asking whether a public official was acting in his state capacity—which we'll call the "state-official test."

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[1] Lindke contends that the district court erred in addressing state action as a question of law; instead, he says it's a factual question that must go to a jury. But Lindke is wrong. Our court has repeatedly recognized that while the existence of state action may be fact-intensive, it is a question of law. *See, e.g., Neuens v. City of Columbus*, 303 F.3d 667, 670 (6th Cir. 2002) ("Whether [a defendant] was acting under color of law is a legal issue."); *Layne v. Sampley*, 627 F.2d 12, 13 (6th Cir. 1980) (holding that "in certain cases" state action may be decided "as a matter of law").

See, e.g., Dean v. Byerley, 354 F.3d 540, 552–53 (6th Cir. 2004); *Waters v. City of Morristown*, 242 F.3d 353, 359–60 (6th Cir. 2001). This test asks whether the official is "performing an actual or apparent duty of his office," or if he could not have behaved as he did "without the authority of his office." *Waters*, 242 F.3d at 359. It stems from our recognition that public officials aren't just public officials—they're individual citizens, too. And it tracks the Supreme Court's guidance as to public officials and state action. *See West*, 487 U.S. at 50 ("[A] public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law."). These questions make sense in our context—they speak to whether Freed ran his Facebook page in his official or his personal capacity.

Though we haven't explained before how the state-official test fits within the Supreme Court's framework, it is simply a version of the Supreme Court's nexus test. Under the nexus test, the ultimate question is whether a defendant's action "may be fairly treated as that of the State itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). To answer that question, we analyze whether his action is "entwined with governmental policies" or subject to the government's "management or control." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)).

The state-official test mirrors these questions. Whether an official acts pursuant to his governmental duties or cloaked in the authority of his office is just another way of asking whether his actions are controlled by the government or entwined with its policies. *Compare Waters*, 242 F.3d at 359–60 (applying the state-official test to a city alderman's actions), *with Chapman*, 319 F.3d at 834–35 (applying the nexus test to an off-duty sheriff's deputy's actions). In short, the state-official test is how we

apply the nexus test when the alleged state actor is a public official.

B.

Thus, we turn to social media. When analyzing social-media activity, we look to a page or account as a whole, not each individual post. That's because to answer our cornerstone question—whether the official's act is "fairly attributable" to the state—we need more background than a single post can provide. Looking too narrowly at isolated action without reference to the context of the entire page risks losing the forest for the trees.

When does a public official run his Facebook page as an official? *See Waters*, 242 F.3d at 359. And when is a page a personal pursuit beyond section 1983's ambit? *See Stengel*, 522 F.2d at 441. Despite the new context, the answers to these questions remain rooted in the principles of our state-official test. 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." *Waters*, 242 F.3d at 359. Consider some examples.

Perhaps the most straightforward instance of an actual duty is when the text of state law requires an officeholder to maintain a social-media account. That is, a page can constitute state action if the law itself provides for it. So if Cincinnati decided that its residents would benefit from a public-safety Facebook page run by the police chief, it could pass a law directing the chief to operate such a page. Maintaining that page would then be one of the police chief's actual duties—and thus, state action. See id. This fact pattern fits neatly within the text of section 1983; the public official operates the social-media page "under color of [a state] statute, ordinance, [or] regulation." 42 U.S.C. § 1983.

The use of state resources may also indicate that running a social-media account is an official's "actual or apparent duty." *Waters*, 242 F.3d at 359. Take an example involving state funds. A city councilwoman is given a budget for community outreach efforts. She spends some of that budget to pay for her account on a paid social-media platform, or for paid features (like ads) on a free platform. Here, her use of state funds to pay for the account suggests that operating the account is within her job duties—and thus, state action.

State action may also arise from the use of state authority. For instance, some social- media accounts belong to an office, rather than an individual officeholder. When that's true, the account is "fairly attributable" to the state because it's state property. *Lugar*, 457 U.S. at 937. After all, the public official can operate the account only because of his state authority.

For an example, imagine there's an official Facebook account for the Governor of Kentucky titled @KentuckyGovernor. The current governor, John Doe, now operates the @KentuckyGovernor page. But a few years ago, his predecessor, Jane Smith, used that handle. That's because it belongs to the governor's office, not the individual officeholder. When the office switched occupants, the @KentuckyGovernor page switched hands. Since an individual is entrusted with that page only while he's governor, it's available only under the authority of the office. And operating the page counts as state action.

By contrast, a Facebook page called @JohnDoe belongs to Doe-the-citizen—not Doe- the-governor. That page will belong to Doe even after he leaves office—it's his, not the governorship's. While the office's account is always state action, the officeholder's may not be.

A page may also draw on an officeholder's authority over government staff. 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. After all, that governor could only hire those employees on the government's dime, and direct them to operate her Facebook page, because she holds the authority of her office. And what's more, directing her employees to operate the page makes it one of the employees' job responsibilities—which further supports finding state action.

In all these instances, a public official operates a social-media account either (1) pursuant to his actual or apparent duties or (2) using his state authority. *Waters*, 242 F.3d at 359. It's only then that his social-media activity is "fairly attributable" to the state. *Lugar*, 457 U.S. at 937. Otherwise, it's personal and free from scrutiny under section 1983.

C.

So how does this play out here? Under these criteria, Freed's Facebook activity was not state action. The page neither derives from the duties of his office nor depends on his state authority. In short, Freed operated his Facebook page in his personal capacity, not his official capacity. Walking through the examples above shows why.

First, no state law, ordinance, or regulation compelled Freed to operate his Facebook page. In other words, it wasn't designated by law as one of the actual or apparent duties of his office. Nor do government funds show Freed operated the page in his official capacity. Facebook is a free social-networking site; Freed pays no fees to maintain his page. And there's no evidence he ever ran ads or any other paid content through Facebook, let alone using government funds. Thus, there's nothing to suggest operating the page was Freed's official responsibility.

Lindke disagrees, arguing that Freed maintained the page as part of his "job duties/powers as City Manager." Appellant Br. 29. Though he identifies no state law or even practice tasking Freed with social-media activity, Lindke points out that Freed believes "regular communication with local businesses and residents is essential to good government." R. 28-14, Pg. ID 1467. And Facebook is one avenue to fulfill this "essential" task of communicating with constituents.

This argument proves too much. 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. If Port Huron's list of city-manager responsibilities mentioned operating a Facebook page to tell residents about city initiatives, that might be a different story. But Freed's own off-handed reference to "regular communication" can't render *every* communication state action.

Next, Freed's page did not belong to the office of city manager. Freed created the page years before taking office, and there's no indication his successor would take it over. Indeed, it would make little sense for the new city manager to take over a page titled "@JamesRFreed1." Lindke says little to contest this, noting only that if Freed takes a job with another city, his page's Port Huron connections "would be of no value" in that new role. Appellant Br. 39. So, he speculates, Freed might give the page to his replacement. But if, as Freed contends, his Facebook page was personal, the "value" of his Facebook ties bears little relation to his job title. And regardless, Freed created his page before he took office. It belonged to him before he was city manager, and we have no reason to believe it will change hands if he leaves his post. So this avenue for state action doesn't apply.

Nor does Freed rely on government employees to maintain his Facebook page. Freed is the page's only administrator—none of his staff have access to it. And there'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. Lindke argues that some photos Freed posted "would be impossible for Freed to have done himself," and thus concludes that government employees must be taking his photos. *Id.* at 25. But even if that's true, such minimal involvement isn't enough to transform a personal page into an official one. 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." *Waters*, 242 F.3d at 259. Indeed, his staff would likely do this even if Freed didn't have a Facebook page. Plus, even if staff took photos at Freed's direction, that would be de minimis help—not enough to render the page state action. So staff support can't prop up Lindke's claim, either.

Lindke presents no other reason Freed's Facebook activity relates to his job duties or depends on his state authority. Instead, he argues that we should find state action where "the presentation of the account is connected with the official's position." Appellant Br. 35. And understandably so—several other courts have used that approach, focusing on a social-media page's purpose and appearance. *See, e.g.*, *Knight First Amend. Inst. v. Trump*, 928 F.3d 226, 234–36 (2d Cir. 2019), *vacated as moot sub nom. Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1220–21 (2021); *Davison v. Randall*, 912 F.3d 666, 680–81 (4th Cir. 2019); *Campbell v. Reisch*, 986 F.3d 822, 826–27 (8th Cir. 2021); *Charudattan v. Darnell*, 834 F. App'x 477, 482 (11th Cir. 2020) (per curiam).

Drawing on those opinions, especially the Second Circuit's analysis in *Knight First Amendment Institute v. Trump*, Lindke claims that Freed used the "trappings of an official, state-run account" to give the impression that the page operated under the state's imprimatur. 928 F.3d at 231. *But see Knight First Amend. Inst. v. Trump*, 953 F.3d 216, 226 (2d Cir. 2020) (Park, J., dissenting from denial of rehearing en banc).

In support of this argument, Lindke points to Freed's use of a city address, email, and website on the Facebook page, along with a profile photo featuring Freed wearing his city- manager pin and his frequent use of "we" and "us." But these "trappings" weren't the only facts the Second Circuit relied on in *Knight*. Indeed, that opinion emphasized the "substantial and pervasive government involvement with, and control over," President Trump's Twitter account. *Knight*, 928 F.3d at 235. No official account directs users to Freed's page, as the White House's Twitter account did in that case. *Id.* And as discussed above, there's no evidence Freed used government employees to maintain the account, as President Trump did there. *Id.* So even on Knight's terms, the presentation-based factors Lindke identifies might not be enough.

Nonetheless, the factors Lindke points to resemble the factors we consider in assessing when police officers are engaged in state action. That is, Lindke's focus on the page's appearance seems akin to considering whether an officer is on duty, wears his uniform, displays his badge, identifies himself as an officer, or attempts to arrest anyone. *See Kalvitz v. City of Cleveland*, 763 F. App'x 490, 496 (6th Cir. 2019).

But the resemblance is shallow. In police-officer cases, we look to officers' appearance because their *appearance* actually evokes state authority. *Cf. Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (finding

state action when a defendant exercises a "right or privilege created by the State" (citation omitted)). We're generally taught to stop for police, to listen to police, to provide information police request. And in many cases, an officer couldn't take certain action 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. So in those cases, appearance is relevant to the question whether an officer could have acted as he did without the "authority of his office." *Waters*, 242 F.3d at 359. Here, by contrast, 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.

That's why we part ways with other circuits' approach to state action in this novel circumstance. 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. As explained above, these anchors are rooted in our circuit's precedent on state action. And they offer predictable application for state officials and district courts alike, bringing the clarity of bright lines to a real-world context that's often blurry.

But our state-action anchors are missing here. Freed did not operate his page to fulfill any actual or apparent duty of his office. And he didn't use his governmental authority to maintain it. Thus, he was acting in his personal capacity—and there was no state action.

* * *

James Freed didn't transform his personal Facebook page into official action by posting about his job. Instead, his page remains personal—and can't give rise to section 1983 liability. We affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEVIN LINDKE,
Plaintiff,

v.

JAMES R. FREED,
Defendant.

Case No. 20-10872

HON. MARK A. GOLDSMITH

OPINION & ORDER
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Dkt. 23)

This matter is before the Court on Defendant James Freed's motion for summary judgment (Dkt. 23), which has been fully briefed and will be decided without oral argument. *See* E.D. Mich. LR 7.1(f)(2); Fed. R. Civ. P. 78(b). As discussed fully below, the Court grants the motion because Freed's actions in deleting comments by Plaintiff Kevin Lindke on Freed's Facebook page and later blocking Lindke from the page were not state action that required him to conform to constitutional strictures.

I. BACKGROUND

Lindke brings this action under 42 U.S.C. § 1983 against Freed, alleging that Freed violated Lindke's First Amendment rights by deleting Lindke's comments on the

Facebook page that Freed operated and by blocking him from the page. Compl. ¶¶ 52, 57 (Dkt. 1).

Since 2014, Freed has been the City Manager of Port Huron. Freed Dep. at 9 (Dkt. 23-2). Both before and after becoming City Manager, Freed maintained a Facebook page titled "James Freed" under the username "James.R.Freed1." *Id.* at 6–9; Freed Facebook Page (Dkt. 23-3). The "About" section of Freed's Facebook page identified Freed as a "public figure." Freed Facebook Page. It included a link to the City of Port Huron's website and a City email address. *Id.* It also described Freed as "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI." *Id.*

Freed's Facebook posts were frequently personal in nature, in that they depicted Freed's family life. For example, Freed regularly posted pictures of his family and their activities. *See, e.g.*, James.R.Freed1 Facebook Page Posts at 2, 12, 25, 80, 86, 127, 165–166, 180 (Dkt. 28-6) (featuring photos of Freed's daughter, wife, and dog). Freed also shared updates on home-improvement projects, photos of outings with friends, and scenic photos of downtown Port Huron. *See, e.g.*, *id.* at 127, 171, 172, 192, 209. He occasionally shared Biblical verses. *See id.* at 14, 24.

In addition to these personal posts, Freed shared information about City programs, policies, and actions. For instance, he shared information about community development initiatives. *See, e.g.*, *id.* at 79, 146, 178 (sharing information regarding installation of a new playground, reconstruction of a boat launch, and new basketball courts).

Beginning in March 2020, Freed began to post about the COVID-19 pandemic and the City's response to it. Most of the information that he posted originated elsewhere. For instance, he shared COVID-19 data and

press releases from St. Clair County Health Department. *See, e.g.*, *id.* at 3, 6, 31. He also posted press releases that were distributed by the Office of the City Manager. *See id.* at 22, 26 (sharing a press release on the City's use of federal funds as part of a COVID-19 relief effort and a press release regarding an executive order issued by the Governor of Michigan).

Both before and during the pandemic, Freed posted links to and offered brief commentary on news articles that reported on recent City actions. *See, e.g.*, *id.* at 7 (linking to a news story on the financial impact of the pandemic on Port Huron and the resulting furloughs of city employees); *id.* at 27 (linking to an article on food trucks in Port Huron); *id.* at 128 (linking to a news story about the creation of the City of Port Huron Office of Diversity, Equity & Inclusion); *id.* at 153 (linking to an article on construction of a trail in Port Huron).

Freed is the only individual who operated the Facebook page, and he was the only one who could post to the page. Statement of Material Facts (SOMF) ¶ 9 (Dkt. 23); Counter-SOMF ¶ 9 (Dkt. 28). However, members of the public, including Lindke, could "like" a post or "comment" on one—as long as they were not blocked from the page. Freed Dep. at 12.

Lindke alleges that he commented on Freed's Facebook page between four and six times from three different profiles that he operated, and that Freed deleted the comments and blocked the accounts. Lindke Dep. at 23 (Dkt. 28-11). Lindke testified that two of the comments he made questioned and criticized the response of Port Huron government officials, including Freed, to the COVID-19 pandemic. *Id.* at 33, 35. In response to a March 2020 post that featured a photo of Freed and the mayor of Port Huron picking up food from a restaurant, Lindke commented something to the effect of "residents are suffering" and "instead of [city leaders being] out talking

to the community and being that face of the community in this," they were at an expensive restaurant. *Id.* at 33. And on one of Freed's posts about the City's response to the pandemic, Lindke commented that the response was "abysmal" and that "the [C]ity deserves better." *Id.* at 35. Lindke does not remember the precise content of his other comments, but he testified that they similarly related to his concerns about the way the City and Freed were dealing with the pandemic. *Id.* In addition, four other individuals testified that Freed deleted their comments on Freed's posts that were critical of Freed or the City's actions on different issues. DeWitt Dep. at 8–9 (Dkt. 28-7); St. John Dep. at 8, 10 (Dkt. 28-8); Woodley Dep. at 6 (Dkt. 28-9); Pecar Dep. at 6 (Dkt. 28- 10).[1]

Lindke brings this action against Freed in both his official and individual capacities, seeking declaratory and injunctive relief as well as monetary damages. Compl. ¶ 62. He alleges that Freed violated the First Amendment when he deleted "unfavorable or politically disadvantageous comments from the traditional public forum consisting of the Facebook [p]age" that Freed maintained (Count I). *Id.* ¶ 52. He further alleges that Freed violated the First Amendment when he "purposely and intentionally blocked . . . Lindke and several others from being able [to] communicate by 'commenting' on the traditional public forum" consisting of Freed's Facebook page solely due to their viewpoint (Count II). *Id.* ¶ 57.

II. MOTION STANDARDS

A motion for summary judgment under Federal Rule of Civil Procedure 56 shall be granted "if the movant

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[1] One of these individuals resides in Port Huron. DeWitt Dep. at 5. One does not reside there; however, she has friends who reside there, and she visits there. Woodley Dep. at 5. One often works in Port Huron. Pecar Dep. at 8. And one has no connection to Port Huron but knows Lindke through a Facebook group that Lindke runs. St. John Dep. at 6.

shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists when there are "disputes over facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[F]acts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The moving party may discharge its burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

III. ANALYSIS

Freed seeks summary judgment on several grounds, including the grounds that (i) the claims for declaratory and injunctive relief are moot, given that Freed has not used his Facebook page in nearly one year, and (ii) he was not engaged in state action when he deleted Lindke's comments and blocked Lindke from his Facebook page. Mot. at 8–15, 24–25.

Because mootness is a threshold issue, the Court briefly discusses the justiciability of Lindke's claims before turning to the issue of state action. As fully explained below, the Court agrees that Freed was not engaged in state action when he deleted Lindke's comments on his Facebook page and blocked Lindke from the page. Because this finding is dispositive of Lindke's claim, the Court need not confront Freed's other arguments for summary judgment.

A. Justiciability

Federal courts have "no authority to render a decision upon moot questions or to declare rules of law that cannot affect the matter at issue." *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 530 (6th Cir. 2001). "Simply stated, a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (punctuation modified). Mootness is determined by "examining whether an actual controversy exists between the parties in light of intervening circumstances." *Fleet Aerospace Corp. v. Holderman*, 848 F.2d 720, 723 (6th Cir. 1988).

In addition to seeking declaratory and injunctive relief, Lindke seeks nominal, actual, and punitive damages. Compl. ¶ 62. Even if Lindke's claims for declaratory and injunctive relief were moot on the theory that Freed no longer operates the Facebook page, Lindke's claim for damages is sufficient to save the case from mootness. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021) (holding that a claim for nominal damages can keep an otherwise moot case alive); *Hood v. Keller*, 229 F. App'x 393, 400 (6th Cir. 2007) (finding that a claim for damages was not rendered moot simply because the claims for declaratory and injunctive relief no longer presented a live controversy). Consequently, the Court proceeds to discuss the substantive arguments in Freed's motion for summary judgment.

B. State Action

Section 1983 affords a plaintiff relief from constitutional violations committed by state actors. *See West v. Atkins*, 487 U.S. 42, 48 (1988). To state a claim under § 1983, a plaintiff must allege that (i) he or she was deprived of a right secured by the Constitution and laws of the United States, and (ii) the deprivation was committed by a "person acting under color of state law."

Redding v. St. Eward, 241 F.3d 530, 532 (6th Cir. 2001) (punctuation modified).[2] Accordingly, a threshold issue is whether Freed was acting under color of state law when he deleted Lindke's comments on his Facebook page and blocked Lindke from the page. Whether an individual acted under color of state law is a question of law for the Court's determination. *See Neuens v. City of Columbus*, 303 F.3d 667, 670 (6th Cir. 2002).

1. Under Color of State Law

"The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988) (punctuation modified). To implicate § 1983, a state actor's conduct must "occur[] in the course of performing an actual or apparent duty of his office" or be such "that the actor could not have behaved as he did without the authority of his office." *Waters v. City of Morristown, Tenn.*, 242 F.3d 353, 359 (6th Cir. 2001).

Not every action that a state actor undertakes occurs under color of state law. *Id.* Simply because Freed is a public official and maintains a Facebook page does not mean that his operation of the page is action taken under color of state law. Instead, the "key determinant" is whether the state actor "intends to act in an official capacity or to exercise official responsibilities pursuant to state law," or otherwise abuse the official's state-sanctioned authority. *Id.* When analyzing the action of a public official, "[i]t is the nature of the act performed . . . which determines whether the [official] has acted under

[2] The United States Supreme Court has explained that the analysis for § 1983's "under color of law" requirement is the same as the analysis for the Fourteenth Amendment's state-action requirement. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982).

color of law." *Stengel v. Belcher*, 522 F.2d 438, 441 (6th Cir. 1975).

When state officials act "in the ambit of their personal pursuits," they do not act under color of state law. *Screws v. United States*, 325 U.S. 91, 111 (1945). Therefore, "private conduct, outside the course or scope of [a state official's] duties and unaided by any indicia of actual or ostensible state authority, is not conduct occurring under color of state law." *Waters*, 242 F.3d at 359. Rather, the conduct allegedly causing the deprivation of a federal right must be "fairly attributable to the State." *Lugar*, 457 U.S. at 937.

Though the United States Court of Appeals for the Sixth Circuit has developed three tests for determining the existence of state action in a § 1983 case,[3] it has explained that all of the criteria contained in the three tests "boil down to a core question": whether "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.'" *Brent v. Wayne Cnty. Dep't of Human Servs.*, 901 F.3d 656, 676 (6th Cir. 2018) (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001)). The Supreme Court has cautioned that there are no "readily applicable formulae" for finding such a close nexus. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961).

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[3] These include (i) the public function test, under which a private party is deemed a state actor if he or she exercises powers that are "traditionally exclusively reserved to the state," *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992); (ii) the state-compulsion test, under which the state can be held responsible for a private decision when it "exercise[s] such coercive power or provide[s] such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state," *id.*; and (iii) the substantial nexus test, *Romanski v. Detroit Entertainment, LLC*, 428 F.3d 629, 636 (6th Cir. 2005).

Rather, the distinction between private and state action is a "necessarily fact-bound inquiry" that is determined on a case-by-case basis. *Lugar*, 457 U.S. at 939.

While neither the Supreme Court nor the Sixth Circuit has yet analyzed the meaning of state action in the context of deleting comments from a social media page or blocking people from a social media page, the Second and Fourth Circuits, as well as several district courts, have recently addressed the issue. *See, e.g.*, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019); *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019); *Charudattan v. Darnell*, 510 F.Supp.3d 1101 (N.D. Fla. 2020), *aff'd*, 834 F. App'x 477 (11th Cir. 2020). These opinions serve as useful guides in this case. Thus, the Court relies on them in conducting its analysis.[4]

2. State Action as Applied to Operating Social Media Pages

a. Factors for Assessing State Action

When an individual claims—as Lindke does—that a public official violated the First Amendment by deleting that individual's comments from a social media page or blocking that individual from the page, public officials often contend that their social media accounts are merely personal, not governmental, in nature. Courts have approached this argument by examining whether the public official acted under color of state law in maintaining the social media account, thereby triggering First Amendment concerns.

A non-exhaustive list of factors that courts have considered in making this determination include: (i) how the public official describes and uses the page; (ii) how others, including government officials and agencies,

[4] While the Supreme Court vacated the Second Circuit's decision in Knight and remanded the case with instructions to dismiss it as moot, the case still provides helpful guidance on the state- action issue.

regard and treat the page; (iii) whether the public official is identified on the page with the public position he or she holds (such as through the title of the page or cover or profile photos); (iv) whether the public official uses the page to announce official business; (v) how the page is categorized (as either a "government official" or a "public figure"); (vi) whether the page includes governmental contact information; (vii) whether posts are expressly addressed to constituents; (viii) whether the public official solicits comments or invites constituents to have discussions on the page; (ix) whether the content posted relates to official responsibilities and business conducted in an official capacity; (x) to whom features of the page are made available; (xi) the use of government resources, including government employees, to maintain the page; (xii) whether creating the account is one of the public official's enumerated duties; (xiii) whether the account will become state property when the public official leaves office; and (xiv) whether the public official's social media activity takes place during normal working hours. *See Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021); *Knight*, 928 F.3d at 236; *Davison*, 912 F.3d at 680–681. As discussed below, analysis of these factors leads to the conclusion that Freed was not engaged in state action in maintaining the page, or in deleting Lindke's comments and blocking Lindke from the page.

b. Factors as Applied to Freed's Facebook Page

In his motion for summary judgment, Freed argues that Lindke cannot establish the state action necessary to sustain his § 1983 claims because Freed operated his Facebook page as a private citizen, not under his authority as City Manager, and there was no significant government involvement with the page. Mot. at 9. In response, Lindke relies on *Knight*, in which individuals brought a § 1983 claim after former President Donald

Trump blocked them from his public Twitter account because they criticized him or his policies. The Second Circuit held that Trump acted in a governmental capacity, not as a private citizen, in blocking them. 928 F.3d at 234–236. Lindke maintains that *Knight* is so analogous to the present case that if the Court replaced Freed for Trump and Facebook for Twitter, it would have essentially the same case. Resp. to Mot. at 2 (Dkt. 28). In fact, a comparison with *Knight* shows that the factors courts analyze in connection with social media accounts tip decidedly in favor of Freed.

In *Knight*, the Second Circuit determined that there was "uncontested evidence" of "substantial and pervasive government involvement with, and control over" Trump's Twitter account. *Id.* at 235. For instance, it noted that the public presentation of the Twitter account bore "all the trappings of an official, state-run account," as it used Trump's official title, "45th President of the United States of America," and had a header photo showing the former president engaged in official duties, such as signing executive orders, delivering remarks, and meeting with foreign dignitaries. *Id.* at 231. In addition, the former president and White House staff described the account as an official account for conducting official business, such as through Trump's reference to his use of the account as "modern day presidential." *Id.* at 235. White House staff also helped post tweets and maintain the account. *Id.* The court further emphasized that Trump used the account "on almost a daily basis as a channel with the public about his administration." *Id.* It explained that he used it to describe, defend, and "announce matters related to official government business," such as high-level staff changes, changes to major national policies, and foreign policy decisions; to assess the public's reaction to decisions or statements; and to engage with foreign leaders. *Id.* at 235–236. Further, the White House Press

Secretary described Trump's tweets as his "official statements," and the National Archives deemed them "official records" for purposes of archiving them. *Id.* at 231–232. Given that Trump "consistently used the Account as an important tool of governance and executive outreach," the court found that "the factors pointing to the public, non-private nature of the Account and its interactive features" were "overwhelming." *Id.* at 236. And because Trump acted in an official capacity when he tweeted, the court concluded that he also acted in an official capacity when blocking users. *Id.*

Freed's use of his Facebook page is markedly distinguishable from Trump's use of Twitter in several ways. First, unlike Trump, who relied on paid White House staff to help maintain his account, Freed testified that he did not use any governmental employees, resources, or devices in maintaining his Facebook page.[5] Mot. at 10; Freed Dep. at 18.

Second, unlike Trump and his White House staff, who regarded and presented the Twitter account as an official tool of executive outreach, Freed did not hold out his page as an official channel of governmental communication. *See* Freed Dep. at 10.

Third, Freed testified that he neither intended his Facebook page to be an official City Manager page nor wanted an official City Manager page. *Id.* at 18–19. He stated that he operated from the presumption that the page was personal, and he would not have operated a Facebook page if he could not use it as his personal

[5] Lindke claims that because Freed posted photos that others took of him, someone else must have helped him operate the page. Resp. to Mot. at 19–20. However, simply posting photos taken by others—as many people do on Facebook—does not establish that someone other than Freed maintained the page, or that any helper was a City employee, or that the employee was acting in that capacity while helping.

account or if he were required to allow all comments on the page. *Id.* By contrast, Trump regularly used the interactive features of his account "to understand and to evaluate the public's response to what he said and did." *Knight*, 928 F.3d at 236.

Fourth, Freed's page did not purport to be an official way of giving notice of City actions or by its nature serve to memorialize official acts. Freed's page did not claim to promulgate City policies but rather amalgamated and shared information that originated from other sources. For example, when Freed provided information from the Office of the City Manager, he did not make formal announcements through the page, but rather posted press releases that were distributed through the Office. *See, e.g.*, James.R.Freed1 Facebook Page Posts at 22 (sharing a press release about a COVID-19 relief package). He also shared information from departments within City government and news outlets. *See, e.g.*, *id.* at 3, 6, 153, 228 (sharing COVID-19 data from the St. Clair County Health Department and sharing links to news articles about efforts to make the City more bike-friendly and efforts to find taxpayer savings). These efforts at information sharing and brief commentary were hardly official acts.

In addition to *Knight*, Lindke invokes *Davison* to argue that Freed's Facebook page manifested the "trappings" of Freed's office. *See* Resp. to Mot. at 23. In *Davison*, the court held that the chair of a county board of supervisors, Randall, acted under color of state law when she blocked a constituent from her Facebook page. 912 F.3d at 681. It concluded that Randall "swath[ed]" the page "in the trappings of her office," as the page included her official title, designated her a government official, and included her county email address, her office telephone number, and a link to her county website. *Id.* at 680–681. Lindke urges a similar conclusion here, Resp. to Mot. at 18, pointing to the following: (i) Freed's page contained a

City email address and a link to the City's website, *id.*; (ii) Freed used the word "we," rather than "I" in some posts about City updates, *id.* at 19 n.6; (iii) Freed's account was "listed as registered to City Hall (rather than Freed's home)," *id.* at 18; and (iv) Freed used City time to post to the page and, by extension, City resources because under the City's internet policy, all data sent from or received within the City's internet system are City property, *id.* at 18–19.

Lindke's points are of de minimis significance. Freed's use of "we" in some posts hardly shows official trappings. The same can be said about the inclusion of a link to the City's website, as purely private individuals can include links to government websites on their pages. Lindke's other points are not supported or only negligibly so. The only evidence that Lindke points to in support of his claim that Freed posted on his Facebook page while serving and being paid as City Manager is one post that Freed made during normal business hours. 3/26/20 Facebook Post; Freed Dep. at 19. Lindke has also not demonstrated that Freed used City resources to maintain his page because he has not produced evidence showing that Freed posted to or monitored Facebook while connected to the City's internet system. And the inclusion of a City address does not indicate that the account belonged to or was "registered" to the City, or that the City had a hand in overseeing the account. Freed's page contrasts notably with City-operated Facebook pages that readily signaled their official governmental nature. For instance, the Facebook pages for the City's police department and parks and recreation department feature official titles and government emblems. *See* Department Pages (Dkt. 23-4).

At bottom, Lindke misses the forest for the trees in his reliance on *Davison*. Its conclusion about trappings of office focused far more on the functional purpose and

content of the website than the visual details of the Facebook page. The court considered the content of Randall's posts, emphasizing that most were expressly addressed to her constituents, that "the content posted has a strong tendency toward matters related to [Randall]'s office," and that only "a few posts addressed topics less closely related to her official activities," such as personal matters. *Davison*, 912 F.3d at 674, 680–681. Randall also encouraged constituents to use the page to participate in "back and forth conversations" about issues facing the county. *Id.* at 681. Accordingly, the page "principally addressed her official responsibilities." *Id.* at 674.

The instant case presents the reverse of the situation in *Davison*. The content that Freed posted had a "strong tendency" toward Freed's family life—rather than updates on City policies. *See, e.g.*, James.R.Freed1 Facebook page Posts at 1, 201, 208–209, 224, 232–244 (featuring photos of Freed's daughter, family, dog, home-improvement projects, and social outings). This contrasts with *Davison*, in which only a minority of posts addressed topics unrelated to Randall's official activities. Even if Freed's official responsibilities included sharing information with City residents, his Facebook page did not "principally address[]" those responsibilities. *See Davison*, 912 F.3d at 674. And Freed did not invite or solicit "back-and-forth" conversations with people through the page. Freed Dep. at 12.

Other aspects of Freed's page demonstrate its overwhelming personal nature and lack of official trappings. Freed's username was not connected to his government position. *See* Freed Facebook Page. The title of the page did not include his official title. *Id.* And it was not designated as a "government official" page. *Id.* Moreover, the page itself would not become state property when Freed leaves office, and the record does

not indicate that a city website embedded the page or displayed a link to the page. The cover photo—a still frame from a video that states, "Rediscover Downtown Port Huron"—does not reference his position as City Manager.[6] "Even if these can be trappings of an official account, they can . . . be trappings of a personal account as well." *Campbell*, 986 F.3d at 827; *see also Charudattan*, 510 F.Supp.3d at 1108–1109 (finding no state action when a sheriff created and administered a Facebook page for a private purpose, did not include her official title on the page, did not identify herself as a government official, and did not submit posts on behalf of the sheriff's office).

As Lindke suggests, *see* Resp. to Mot. at 20, a social media account initially used in a private capacity can transform into an official governmental one, *see Knight* 928 F.3d at 231, 234. "A private account can turn into a governmental one if it becomes an organ of official business." *Campbell*, 986 F.3d at 826 (holding that, even if a state representative's duties included communicating with constituents about legislation, her occasional engagement in those activities on her Twitter account was insufficient to "overshadow" the private nature of the page or turn the page into an instrument of official business). But there is no meaningful evidence that Freed referred to or treated his page as such.

Not every action taken by a public official is state action, and "not every social media account operated by a public official is a government account." *Knight*, 928 F.3d at 236. The Court finds that Freed's use of his Facebook

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[6] It is disputed which profile photo was used on Freed's page at the time that he deleted Lindke's comments and blocked Lindke. Freed asserts that the photo used was one depicting himself and his family, while Lindke alleges that another photo was used, which depicted Freed at a City office with a City lapel pin. Compare SOMF ¶ 8, with Counter-SOMF ¶ 8. But neither type of photo necessarily suggests that the page represents Freed in his official capacity.

page is distinguishable from what the court in *Knight* contemplated when it determined that former President Trump's use of Twitter was public. It is far closer to the social media activities of public officials found not to be state action in *Campbell* and *Charudattan*. As Freed argues, *see* Mot. at 9, this case lacks "substantial and pervasive government involvement with, and control over" the social media account, given the prevailing personal quality of Freed's post, lack of formal policy pronouncements, and absence of evidence that it was a tool for official governance, *Knight*, 928 F.3d at 235. In addition, under the factors outlined in *Davison*, Freed's management of the page cannot reasonably be treated as that of the City itself. Freed administered his Facebook page in a private, not public, capacity. And he was not engaged in state action when he deleted Lindke's comments and blocked Lindke from the page. As a result, his First Amendment claims fail.

IV. CONCLUSION

For the reasons stated above, the Court grants Freed's motion for summary judgment (Dkt. 23).

SO ORDERED.

Dated: September 27, 2021
Detroit, Michigan

s/Mark A. Goldsmith
MARK A. GOLDSMITH
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on September 27, 2021.

s/Jennifer McCoy
Case Manager

APPENDIX C

No. 21-2977

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 5, 2022
DEBORAH S. HUNT, Clerk

KEVIN LINDKE,
Plaintiff-Appellant,
v.
JAMES R. FREED, IN HIS OFFICIAL AND PERSONAL CAPACITIES,
Defendant-Appellee.

ORDER

BEFORE: GUY, THAPAR, and READLER, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Deborah S. Hunt, Clerk