IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

DEAN FOX **Plaintiff,** **v.** **REPRESENTATIVE JEREMY FAISON, State Representative, representing the 11th District of Tennessee House of Representatives, in his official capacity,** **Defendant.**	**No. 3:22-cv-00691** **Hon. Aleta A. Trauger**

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The Court should grant Plaintiff's motion for a preliminary injunction requiring Defendant to provide Plaintiff access to the "State Representative Jeremy Faison" Facebook page because deleting Plaintiff's comments and blocking Plaintiff from the page constitute impermissible viewpoint discrimination under the First Amendment. The irreparable harm to Plaintiff's rights can only be remedied by restoring full access to the page. Because "constituents and the public generally have an interest in receiving information through Faison's page," the balance of the equities and public interest weigh heavily in favor of granting the injunction. *See* Def.'s Resp. at 19 (internal quotation marks omitted); *see also Packingham v. North Carolina*, 137 S.Ct. 1730, 1735, 1737 (2017) (recognizing the First Amendment guarantees "all persons have access to places where they can speak and listen" and describing social media as the "modern public square").

I. Mr. Fox Is Likely to Succeed on the Merits of His First Amendment Claim

Mr. Fox is likely to succeed in his claim as Defendant misapplies *Lindke*'s state-official test, mischaracterizes the page as a private forum, and confuses the government speech standard.

A. Defendant Misconstrues *Lindke*'s State-Official Test

Defendant misapprehends the Sixth Circuit's "state-official" test—social media may be considered state action when the administration of the page is part of the official's "actual or apparent duties" or could not "happen in the same way without the authority of the office." *See Lindke v. Freed*, 37 F. 4th 1199, 1203–04 (6th Cir. 2022) (cleaned up). Determining whether a public official's action is fairly attributable to the state requires a nuanced assessment of the official's account, such that "[w]hen analyzing social-media activity, [the court will] look to a page or account as a whole." *See id.*

By myopically reading the "actual or apparent" duties prong of the state-official test to "focus[] on whether state law 'compelled' performance of the challenged action," Defendant makes the very mistake the *Lindke* court warned against: "losing the forest for the trees." *See id.*

at 1203; Def's Resp. at 8. State law compelling social media activity was simply the first, and "[p]erhaps most straightforward," example the *Lindke* court provided to establish state action on social media. *See id.* Using "state resources may also indicate that running a social-media account is [part of] an official's actual or apparent duty." *Id.* at 1204 (cleaned up).

Furthermore, the Sixth Circuit has held that tweets from Congressmembers' social media accounts were within their scope of employment, noting that certain political activities are "integral to a Congressmember's *duties* to communicate with their constituents and publicly discuss political matters." *See Does v. Haaland*, 973 F.3d 591, 602 n.4 (6th Cir. 2020) (emphasis added). New Mexico Representative Haaland's and Massachusetts Senator Warren's tweets concerning Kentucky citizens' activities in Washington D.C. were "calculated to serve the interests of Defendants' constituents." *Id.* at 594, 602. If tweets unrelated to a legislator's constituents are considered among a legislator's duties, certainly engaging with Tennessee residents about Tennessee legislation and offering his office's support are among Representative Faison's "actual or apparent" duties, *Lindke*, 37 F.4th at 1202–04, as he performs "legitimate errands" for his constituents, *see Haaland*, 973 F.3d at 602 (cleaned up).

Applying the "state-official test" requires an assessment of the specific "actor's official duties," and where duties diverge, so too may the result. *See Lindke*, 37 F.4th at 1206. Legislators have fundamentally different duties than city managers, thus Defendant's *Lindke* analogy is inapt. *See id.* at 1201; Def.'s Resp. at 6–8. The city manager in *Lindke* served as an administrative officer devoid of policymaking authority. Representative Faison, in contrast, holds legislative power as a member of the General Assembly, swearing in his Oath of Office "that [he] will not propose or assent to any bill, vote or resolution, which shall appear . . . injurious to the people." TENN. CONST. Art. X, § 2. He frequently uses his social media page in support of this oath—including making

legislative announcements, administering surveys, and offering his office's assistance—which is essential to his legislative duties. Compl. ¶¶ 32–33.

Representative Faison also misapplies the standard for state authority, the other means to satisfy the state-official test, arguing that "merely communicating with constituents does not require the use of state authority or create state action." *See* Def's Resp. at 10. In fact, Defendant's use of his official page to solicit and receive legislative input from his constituents demonstrates that administering the page is part of his duties as a state representative and could not happen in the same way without the authority of his office, thereby constituting state action under the state-official test. *See Lindke* 37 F. 4th at 1203–04; Compl. ¶¶ 32–33. Because operating the page is state action, deleting Mr. Fox's constitutionally protected speech and blocking Mr. Fox from the page based on the opinions expressed in his posts is impermissible viewpoint discrimination.[1] *See Lindke* 37 F. 4th at 1203–04; *Davison v. Randall*, 912 F.3d 666, 687 (4th Cir. 2019).[2]

Representative Faison admits that his legislative staff—who report to him by virtue of his position as a member of the Tennessee General Assembly and are funded with taxpayer dollars—have access to his page. *See* Faison Decl. ¶ 19. Although "to the best of [his] knowledge," his staff members have not posted on the official page, the very act of granting access to his staff demonstrates that the page's operation is intertwined with Representative Faison's duties as a state legislator and could not happen in the same way without the authority of his office. *See Lindke* 37 F. 4th at 1203; Faison Decl. ¶ 19. Relatedly, Faison does not disclaim the use of other government resources, such as state-funded technology like a computer or cell phone, to access this platform.

B. Defendant's Page is a Public Forum, and Viewpoint Discrimination Does Not Constitute Government Speech

[1] Facebook verified *Defendant's page* because he is a state representative. *See* Def's Resp. at 9.
[2] Defendant erroneously suggests that the Sixth Circuit categorically rejected other circuits' analyses of state action on social media. *See Lindke*, 37 F. 4th at 1206; Def.'s Resp at 7.

Representative Faison's official Facebook Page is a public forum, as "[t]he Supreme Court never has circumscribed forum analysis solely to government-owned property." *See Davison*, 912 F.3d at 682–83 (discussing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985)). Nor does this analysis apply exclusively to physical spaces. *See Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 843 (6th Cir. 2000) (internal citation omitted). While internet forums may "fit into the public forum category," social media platforms are, at minimum, "designated public forum[s]" because "the government intentionally opens a nontraditional public forum for public discourse." *See id.* (cleaned up); *see also Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 626 (2d Cir. 2005) ("Speech in a designated public forum is entitled to the same constitutional protection as that extended to expression in a traditional public forum.") (cleaned up). Public forums exist, even in private spaces, when government officials designate the platform for "expressive activities." *See Cornelius*, 473 U.S. at 803; *see also Davison*, 912 F.3d at 682–83.

Social media comments, like Mr. Fox's, are not government speech because they are not the government's "own expressive conduct." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009). Representative Faison has not "actively shaped or controlled" the comments posted on his Facebook page. *See Shurtleff v. Boston*, 142 S.Ct. 1583, 1590 (2022). Instead, private commentors had full expressive control over the content of messages posted; and because Facebook comments are unambiguously attributed to their authors, no member of the public could reasonably "interpret [the comments] as conveying some message on [] [Faison's] behalf." *See Pleasant Grove*, 555 U.S. at 471; *see also Knight First Amend. Inst. v. Trump*, 928 F.3d 226, 239 (2d Cir. 2019). In removing Mr. Fox's comments and page access, Representative Faison sought "to regulate private expression," not speak for himself. *See Shurtleff*, 142 S.Ct. at 1589.

II. The Balance of Equities and Public Interest Strongly Favor Granting the Injunction

Mr. Fox acted promptly to restore his First Amendment rights by engaging counsel, repeatedly attempting to resolve this matter prior to litigation, and timely filing his Complaint. *See* Compl. ¶¶ 48–52. Plaintiff's rights continue to be violated every day that he cannot engage in public discourse on the "State Representative Jeremy Faison" page. *See Tenn. State Conf. of NAACP v. Hargett*, 420 F.Supp.3d 683, 711 (M.D. Tenn. 2019). This severe harm can only be remedied by restoring Plaintiff's ability to participate in political discussions with other citizens on the public forum.[3] *See* Def.'s Resp. at 18. Defendant's interests do not outweigh this harm to Plaintiff, as Representative Faison could easily restore Plaintiff's access to the page and there is no risk Plaintiff's comments would be attributed to Faison.

Furthermore, it is in the public interest that other citizens hear dissenting views about elected officials. *See Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). Restricting expression from particular locations effectively restricts expression entirely. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) ("Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven."). Restoring Mr. Fox's access and requiring Representative Faison "to abide by the U.S. Constitution, sooner rather than later, vindicates the public interest in rule by law." *See Bongo Prods., LLC v. Lawrence*, 548 F.Supp.3d 666, 687 (M.D. Tenn. 2021).

III. Conclusion

For the foregoing reasons, Plaintiff respectfully requests the Court to grant his motion for a preliminary injunction.

[3] Defendant's response includes other examples of First Amendment–protected comments from Plaintiff that are not currently visible on Faison's page, which have been hidden or removed, suggesting a pattern of misconduct and potential additional liability. *See Watts v. United States*, 394 U.S. 705, 708 (1969) (protecting "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.") (cleaned up).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I filed the above document using the Court's CM/ECF system on October 25, 2022, which electronically served a copy to all counsel of record:

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