UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIAN MARCUS RAVEN, Plaintiff, v. KIM SAJET, Director, National Portrait Gallery, Defendant.	Civil Action No. 22-2809 (CRC)

MOTION TO DISMISS

Defendant Kim Sajet, in her official capacity as Director of the National Portrait Gallery, moves to dismiss Plaintiff's Complaint, ECF No. 1, pursuant to Federal Rules of Civil Procedure 12(b)(6). The grounds for this motion are set forth in the accompanying memorandum in support. Plaintiff Julian Marcus Raven, who is proceeding *pro se*, is advised that if the Court determines that this motion is well-founded, the case may be dismissed if Plaintiff fails to respond in a timely manner.[1] *See Fox v. Strickland*, 837 F.2d 507, 509 (D.C. Cir. 1988); *see also* LCvR 7(b).

Respectfully submitted,

Dated: April 8, 2024
Washington, D.C.

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[1] Pursuant to Local Civil Rule 7(b), a memorandum of points and authorities in opposition to the motion is due within 14 days of the date of service or at such other time as the Court may direct.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIAN MARCUS RAVEN,

Plaintiff,

v.

KIM SAJET, Director, National Portrait Gallery,

Defendant.

Civil Action No. 22-2809 (CRC)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS

Defendant Kim Sajet ("Sajet"), in her official capacity as Director of the National Portrait Gallery ("Gallery"), moves to dismiss the complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6). In *Lindke v. Freed*, 144 S. Ct. 756, 766 (Mar. 15, 2024), the Supreme Court held that a government official's social media activity is attributable to the government only when "the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media." *Id.* The Court rejected the approach adopted by the Ninth and other Circuits, which emphasized the social media account's official appearance. *See id*. at 767–68; *O'Connor-Ratcliff v. Garnier*, 144 S. Ct. 717 (Mar. 15, 2024). Regarding the second prong of the *Lindke* test, the Supreme Court stressed that a social media account containing a disclaimer that the account is personal or expresses personal views is "entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal." *Lindke*, 144 S. Ct. at 769.

Plaintiff Julian Raven's ("Raven') complaint fails the *Lindke* test because it contains a screenshot showing that the Twitter account from which Raven was blocked contained a

conspicuous disclaimer: "All opinions expressed are my own." Compl. ¶ 31. Even construing the complaint liberally, the *pro se* complaint fails to allege facts sufficient to overcome the "heavy presumption" that the Twitter account was private, thus failing to meet the second prong of the *Lindke* test. The complaint also lacks any allegations concerning the first prong of the *Lindke* test. Therefore, Defendant Sajet respectfully requests that the Court dismiss the complaint.

RELEVANT FACTS AND PROCEDURAL HISTORY

The Court is familiar with the relevant facts. *See* Op. & Order, ECF No. 10, at 1-2 (D.D.C. July 5, 2023). Sajet is Director of the Gallery. Compl. ¶ 9. She has a Twitter account, @KimSajet. *Id*. ¶ 1. Screenshots in the complaint show that the handle has somewhere between 972 to 1,495 followers. *Id*. ¶ 31. A screenshot in the complaint also shows that the account includes the disclaimer, "All opinions expressed are my own." Compl. ¶ 31. Raven, however, alleges that this Twitter account is a public forum. *Id*. ¶¶ 1, 36. According to Raven, Sajet "uses the account to make formal Smithsonian announcements, report on meetings, upcoming shows and general Smithsonian information etc." *Id*. ¶ 3. When "[m]embers of the public acknowledge and respond to Defendant's @KimSajet twitter handle" they "simultaneously" include "the official @smithsoniannpg handle[.]" *Id*. ¶ 34.

Raven complains that Sajet blocked him because of a single September 1, 2022, tweet directed at @KimSajet. Compl. ¶ 1. As a result, Raven was allegedly "prevented or impeded from viewing the National Gallery Director's tweets, from replying to the tweets, from viewing the discussions associated with the tweets, and from participating in those discussions." Compl. ¶ 4. According to Raven, this constitutes "viewpoint-based exclusion" and violates Raven's First Amendment rights. Compl. ¶¶ 5, 40-42. Raven seeks declaratory and injunctive relief requiring Sajet to unblock him. Compl. ¶ 5.

On February 10, 2023, Sajet moved to dismiss the complaint pursuant to Federal Rules of Civil Procedure ("Rules") 12(b)(1) and 12(b)(6). Mot. to Dismiss, ECF No. 5. The Court denied that motion without prejudice and stayed the case pending the Supreme Court's resolution of *O'Connor-Ratcliff* and *Lindke* "[i]n the interest of promoting judicial economy and avoiding unnecessary discovery and litigation." Op. & Order, ECF No. 10, at 1, 5.

In its Order and Opinion, this Court discussed the differing approaches of both the majority and minority Circuit Courts at the time. *Id*. at 3-4. The majority approach, the Court noted, "[l]ooks to whether the account has an official appearance and serves a governmental purpose such that the account carries the authority of the state." *Id*. at 3. The minority approach "[f]inds state action only if the public official's managing of the account is done 'pursuant to his actual or apparent duties' or 'using [the official's] state authority[.]'" *Id*. at 4. The Court observed that "the complaint would likely survive a motion to dismiss under the majority approach," but "unlikely to satisfy the minority approach, however, as Raven has not alleged facts to suggest that managing the social media account is Sajet's duty as director or that she relies on government resources or employees to manage it." *Id*. at 4-5. Finally, the Court ordered that Sajet respond to the complaint within 30 days after the Supreme Court's rulings in those cases. *Id*.

On March 15, 2024, the Supreme Court decided those cases. *See Lindke*, 144 S. Ct. 756; *O'Connor-Ratcliff*, 144 S. Ct. at 717. Sajet now timely renews her motion to dismiss.

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of a complaint." *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). To avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation omitted). "A claim crosses

from conceivable to plausible when it contains factual allegations that, if proved, would allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (citations and quotations omitted). A court must "draw all reasonable inferences from those allegations in the plaintiff's favor," but not "assume the truth of legal conclusions." *Id*. "In determining whether a complaint fails to state a claim, [a court] may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [a court] may take judicial notice." *Hurd v. District of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017) (quoting *EEOC v. St. Francis Xavier Parochial Sch*., 117 F.3d 621, 624 (D.C. Cir. 1997)).

Because Plaintiff appears *pro se*, his complaint is "liberally construed" and "held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). The ultimate standard remains the same, however. The plaintiff "must plead 'factual matter' that permits the court to infer 'more than the mere possibility of misconduct.'" *Atherton v. D.C. Off. of Mayor*, 567 F.3d 672, 681-82 (D.C. Cir. 2009) (quoting *Iqbal*, 556 U.S. at 679).

ARGUMENT

The First Amendment of the U.S. Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech[.]" U.S. Const. amend. I. "The First Amendment prohibits only *governmental* abridgment of speech; it does not prohibit *private* abridgment of speech." *Zukerman v. Postal Serv.*, 567 F. Supp. 3d 161, 171 (D.D.C. 2021) (Cooper, J.) (emphasis in original) (internal quotation marks omitted). As this Court stated previously, this case turns on "whether a public official engages in state action by blocking a critic from interacting with a personal social media account used to share government-related information." Op. & Order, ECF No. 10, at 3. As shown herein, applying the principles recently

articulated by the Supreme Court, Sajet did not engage in state action when, on September 1, 2022, she blocked Raven from accessing her personal @KimSajet Twitter account.

In *Lindke*, the Supreme Court held that a government employee's speech is attributable to the government "only if the official (1) possessed actual authority to speak on the [government's] behalf, and (2) purported to exercise that authority when he spoke on social media." *Lindke*, 144 S. Ct. at 766. While the Court in *Lindke* interpreted the First Amendment within the context of 42 U.S.C. § 1983, *id.* at 764, the purpose of section 1983 is to give private individuals a cause of action against State officials to redress federally guaranteed rights. *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). Because the substantive rights remain the same, irrespective of the basis for the Court's jurisdiction, the holding in *Lindke* on what constitutes government action in the context of social media blocking is controlling in this case. Notably, in reaching its holdings in *Lindke* and *O'Connor-Ratcliff*, the Court specifically rejected the majority approach advanced by the Ninth and other Circuits. *O'Connor-Ratcliff*, 144 S. Ct. at 718.[1] Ultimately, the test adopted by the Court is closer to the framework followed by the minority approach.

The complaint here fails the *Lindke* test and should be dismissed. Specifically, the complaint fails to plausibly allege state action because Sajet did not "purport" to exercise state authority when she managed the @KimSajet account and the account included a disclaimer that she expressed her own views. *See Lindke*, 144 S. Ct. at 767; Compl. ¶ 31.

First, "[a]n act is not attributable to [the government] unless it is traceable to the [the government's] power or authority. Private action—no matter how 'official' it looks—lacks the necessary lineage." *Lindke*, 144 S. Ct. at 767. Here, the complaint does not allege any facts that

[1] The Complaint cites and seemingly tracks *Knight First Amend. Inst. v. Trump*. *See* Compl. ¶¶ 4, 5, 32, 37, 38, 39 (citing 928 F.3d 226 (2d Cir. 2019)). The Supreme Court has now rejected that approach.

speak to whether managing the @KimSajet Twitter account was "actually part of the job" that the Gallery "entrusted [Sajet] to do." *Lindke*, 144 S. Ct. at 767. As this Court previously observed, "[R]aven has not alleged facts to suggest that managing the social media account is Sajet's duty as director[.]" Op. & Order, ECF No. 10, at 4-5. Whatever allegations the Complaint makes regarding the account's appearance, *see* Compl. ¶¶ 5-6, 14, or the purpose of the former and now non-existent @NPGDirector account, *id*. ¶¶ 27, 29-31, are irrelevant to the inquiry of whether Sajet was authorized to speak on the government's behalf because "the presence of state authority must be real, not a mirage." *Lindke*, 144 S. Ct. at 767. The complaint fails for this reason alone.

Second, even assuming Raven has sufficiently alleged facts to show that Sajet had the authority to manage a Twitter account on the Gallery's behalf, Raven must also establish that Sajet "purport[ed] to use" that authority when she managed the @KimSajet handle and blocked Raven from accessing that account. *Lindke*, 144 S. Ct. at 769 ("Generally, a public employee purports to speak on behalf of the State while speaking in his official capacity or when he uses his speech to fulfill his responsibilities pursuant to state law." (cleaned up)). That is because Sajet has a "choice about the capacity in which [she] choose[s] to speak." *See id*. After all, Sajet did not give up her own First Amendment rights when she assumed a government post. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022). Because Sajet "spok[e] in [her] own voice" when she blocked Raven, that activity does not constitute state action. *Lindke*, 144 S. Ct. at 769.

In *Lindke*, the Supreme Court instructed that the presence of a label or disclaimer entitles a government official to a "heavy (though not irrebuttable) presumption that all of the posts on [her] page [are] personal." *Id*. An example of a disclaimer deserving of such a heavy presumption is "the views expressed are strictly my own." *Id*. Here, the complaint shows a screenshot of the @KimSajet Twitter page that includes a conspicuous disclaimer: "All opinions expressed are my

own." Compl. ¶ 31. This disclaimer is nearly identical to the one the Supreme Court deemed sufficient; it unquestionably represents that Sajet uses the @KimSajet account to express her own views, not those of the Gallery. Under *Lindke*, Sajet is entitled to a "heavy" presumption that the @KimSajet account is her own, and not a government, account.

Further, the alleged facts stand in contrast to the public official in *Lindke*, who did not have a label or disclaimer on his account and therefore maintained an "ambiguous page." *See Lindke*, 144 S. Ct. at 770. Since there is a clear disclaimer in this case, there is no need to undergo "a fact-specific undertaking" of "the post's content and function." *See id*.

The complaint does not allege facts sufficient to overcome that presumption. Raven alleges that "[b]ecause of the way Defendant uses the @KimSajet Twitter account, it is a public forum under the First Amendment." Compl. ¶ 3. According to Raven, the account is "accessible to all, taking advantage of Twitter's interactive platform to directly engage" with others on Twitter "regarding the events and selections of art happening at the National Portrait Gallery." *Id*. But a private person "who provides a forum for speech is not transformed by that fact alone into a state actor." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 812 (2019). As the Supreme Court explained, providing "some kind of forum is not an activity that only governmental entities have traditionally performed." *Id*. This is especially true in the social media context, where Sajet operated a private account (@KimSajet) on an entirely private digital platform (Twitter). Sajet's Twitter account does not fall within any of the three recognized categories of public forum—traditional, designated, or non-public—because the government does not have a property interest in either Sajet's private Twitter account or Twitter. *See Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 322 (D.C. Cir. 2018). In any event, reposting tweets from the official Gallery Twitter account, Compl. ¶ 31, does not convert the @KimSajet account into a

public forum; rather, it is Sajet's exercise of her own First Amendment rights to speak about "information related to or learned through public employment." *See Lane v. Franks*, 573 U.S. 228, 236 (2014); *see also Lindke*, 144 S. Ct. at 769 n.2 (stating that, "a post that is compatible with either a 'personal capacity' or 'official capacity' designation is 'personal' if it appears on a personal page").

Raven also alleges that the Gallery established an account in 2013 under the handle @NPGDirector. Compl. ¶ 27. According to the Complaint, the @NPGDirector account previously contained links "to the Smithsonian Institution's proprietary claims to all the tweets and their images displaying the government's warning against copyright infringement." Compl. ¶ 27. The "former official @NPGDirector" account also allegedly "connect[ed] to the Terms of use page on the Official Smithsonian website[.]" Compl. ¶ 28. That account then became the @KimSajet account. Compl. ¶ 30. Even if true, these allegations do not overcome the "heavy" presumption of private speech in Sajet's favor because state action is assessed at the time of the alleged violation. *Campbell v. Reisch*, 986 F.3d 822, 824 (8th Cir. 2021). Here, the relevant date for evaluating Raven's claim is September 1, 2022, the date on which Sajet allegedly blocked Raven. Compl. ¶ 1. At that time, Sajet's Twitter handle was @KimSajet and her account conspicuously stated: "All opinions expressed are my own." *Id.* ¶ 31. Moreover, the Complaint itself alleges that on February 12, 2018, "the information surrounding ownership and purpose" of the Twitter page "transform[ed] and [began] to disassociate itself from the Smithsonian, claiming only personal opinions expressed" while still accurately describing Sajet's "official title and office." Compl. ¶ 31. Thus, the complaint concedes that at the time Sajet blocked Raven, the @KimSanjet Twitter account then was, and for at least four and half years prior had been, a private account.

In sum, Raven's complaint fails to allege facts sufficient to meet the *Lindke* test. Critically, the complaint shows the conspicuous disclaimer noting the private nature of the @KimSajet Twitter account. "Lest any official lose [their First Amendment] right[s], it is crucial for the plaintiff to show that the official is purporting to exercise state authority in specific posts." *Lindke*, 144 S. Ct. at 770. This Raven has not done. Even construing the complaint liberally, it does not allege facts sufficient to overcome the "heavy" presumption that the account was private. Therefore, Sajet blocking Raven was not state action, and the complaint fails for that reason.

CONCLUSION

For the foregoing reasons, Sajet respectfully requests that this Court grant Sajet's Motion to Dismiss and dismiss the complaint.

Dated: April 8, 2024
Washington, D.C.

Respectfully submitted,

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[PROPOSED] ORDER

ORDERED that Defendant's Motion to Dismiss is GRANTED. It is further

ORDERED that Plaintiff's Complaint, ECF No. 1, is DISMISSED without prejudice.

SO ORDERED.

Dated: _____

_____
CHRISTOPHER R. COOPER
United States District Judge

CERTIFICATE OF SERVICE

I certify that on April 8, 2024, that I caused a true and correct copy of the Motion to Dismiss and accompanying Memorandum of Points and Authorities in Support of Motion to Dismiss to be served upon Plaintiff via e-mail and first-class United States mail, marked for delivery to:

Julian Marcus Raven
105 Capital Street Apt. #302
Lynchburg, VA 24502

I also emailed that same date a copy of this filing to: info@julianraven.com

/s/ *Dimitar P. Georgiev*
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