No. 22-324

In the Supreme Court of the United States

MICHELLE O'CONNOR-RATCLIFF, ET AL.
Petitioners,

v.

CHRISTOPHER GARNIER, ET UX.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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QUESTION PRESENTED

Whether a public official engages in state action subject to the First Amendment by blocking an individual from the official's personal social media account, when the official uses the account to feature their job and communicate about job-related matters with the public but does not do so pursuant to any governmental authority or duty.

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the most essential qualities of liberty. Since 1999, FIRE has successfully defended the rights of individuals through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate expressive rights under the First Amendment. *See, e.g.*, Br. of FIRE as *Amicus Curiae* in Supp. of Pet'r, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); Br. of FIRE as *Amicus Curiae* in Supp. of Pet'r, *Barton v. Texas*, 143 S. Ct. 774 (2023) (mem.).

FIRE regularly defends speakers whose expression has been censored by governmental social media accounts. For example, FIRE has successfully advocated for changes to restrictive social media policies at state universities. *See* Found. for Individual Rts. & Expression, *Wright State University: Facebook Comments Restricted During Faculty Union Strike* [https://perma.cc/6F8S-WQ5T]. And FIRE has collected and reported on public records from over 200 state colleges and universities, demonstrating that these public institutions widely restrict speech on social media sites. *See* Found. for Individual Rts. & Expression, *No Comment: Public Universities' Social Media Use and the First*

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel contributed money intended to fund preparing or submitting this brief.

Amendment, (Apr. 22, 2020) [https://perma.cc/3G4E-86WY] ("*No Comment*").

In June 2022, FIRE expanded its mission to protect First Amendment rights and a culture of free expression beyond the university setting to include society at large. *See*, *e.g.*, Found. for Individual Rts. & Expression, *The New York State Senate Blocks Critics on Twitter. That's Unconstitutional—and FIRE Calls on the Senate to Knock It Off,* (Aug. 18, 2022), [https://perma.cc/6NC2-7GEH]. In line with this expanded purpose, FIRE filed an *amicus* brief in this Court supporting the petitioner in *Lindke v. Freed*, No. 22-611, which presented a question closely related to the one at issue here.

INTRODUCTION

Petitioners in this case, trustees of a local school board, embraced social media to conduct their official business. They used their personal Facebook and Twitter[2] accounts to celebrate the school district's achievements, seek applications for position openings, share public safety alerts, and announce policy decisions. They took full advantage of the platforms' interactivity, soliciting comments and input from constituents regarding important board decisions.

[2] In July 2023, the social media website formerly known as Twitter was renamed "X." Jordan Valinsky, *Elon Musk Rebrands Twitter As X*, CNN, https://www.cbsnews.com/news/twitter-bird-logo-replacement-x-elon-musk/ (last updated July 24, 2023). Since the events at issue here occurred while X was still known as Twitter and the Ninth Circuit's decision uses the name "Twitter," FIRE uses "Twitter" to refer to the website in this brief.

Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1165 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 1179 (2023).

In this respect, board trustees Michelle O'Connor-Ratcliff and T.J. Zane followed the example set by public officials across the country. From the highest offices down to the most local, many officials have opted to conduct the public's business using the interactive features that are the defining characteristic of social media. Unfortunately, once the interactivity proved to be too much of a good thing, they also emulated the actions taken by some, to block user comments. Petitioners began by deleting or hiding comments posted by two active board critics, Christopher and Kimberly Garnier, claiming the posts were too lengthy and repetitive, before ultimately blocking them altogether.

Petitioners ask this Court to bless this exercise in viewpoint discrimination and to hold that social media accounts used for official business are "private speech." They argue that this holding is necessary to protect the "individual liberty" of the public officials involved, claiming they are merely exercising their own First Amendment rights. Pet. 25.

But public officials cannot skirt the First Amendment's prohibition on viewpoint discrimination by claiming the personal accounts on which they conduct government business lack a sufficient nexus to the state. Government officials do not exercise their personal free speech rights when they use social media accounts to conduct public affairs. When speaking "pursuant to their official duties," officials "are not speaking as citizens for First Amendment purposes." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

This case asks the Court to decide when government officeholders' "personal" social media accounts become "official" and therefore constitute state action subject to constitutional rules. In this regard, the Ninth Circuit's "purpose and appearance" test ensures that public officials like trustees O'Connor-Ratcliff and Zane play by the First Amendment's rules when they use social media to govern.

SUMMARY OF ARGUMENT

This Court should affirm the Ninth Circuit, because the "purpose and appearance" test prevents public officials from turning the social media platforms on which they voluntarily choose to conduct government business into tools of censorship.

Social media platforms in recent years are being used as essential tools of government. While in many cases these accounts are owned and operated directly by the government, in other instances, as here, public officials simply use their personal accounts to conduct official business. When the government operates an interactive forum, the constitutional rule is clear that it may not engage in viewpoint-based discrimination regarding citizens' posts. But if private accounts that are used for public business are exempt from this requirement, as Petitioners claim, it would open a massive loophole that would permit officeholders to silence their critics.

Petitioners' proposed approach is incorrect. When officials use personal accounts to boost their governmental profiles and conduct public business, they are acting "under color of state law," and their

actions are "fairly attributable to the state." *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935–37 (1982).

The Ninth Circuit, like most other courts that have addressed this issue, applied a holistic, fact-specific inquiry to determine whether an official's social media activity constitutes state action. *Garnier*, 41 F.4th at 1170–77; *see also Knight First Amend. Inst. v. Trump*, 928 F.3d 226, 235–36 (2d Cir. 2019), *reh'g denied*, 953 F.3d 216 (2d Cir. 2020), *vacated as moot sub nom. Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220 (2021); *Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019); *Campbell v. Reisch*, 986 F.3d 822, 825–26 (8th Cir. 2021); *But see Lindke v. Freed*, 37 F.4th 1199, 1201 (6th Cir. 2022), *cert. granted*, 143 S. Ct. 1780 (2023) (holding social media is considered state action only if it is part of an official's "actual or apparent duties"). As the Ninth Circuit explained, the state action inquiry encompasses "a process of sifting facts and weighing circumstances" to determine whether a "close nexus" exists between the state and an official's social media activity. *Garnier*, 41 F.4th at 1169. This analysis looks into how the official describes and uses the account, to whom features of the account are made available, and how others, including government officials and agencies, regard and treat the account.

Under this "purpose or appearance" approach, courts have correctly found that state action is present when a governmental official uses a social media platform for official purposes—and that the First Amendment does not permit that official to exclude persons from an otherwise open dialogue merely because they expressed views the official disfavors. This Court should uphold the decision below so that

government officials who choose to engage the public on social media cannot exclude citizens from "speaking and listening in the "modern public square." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017).

ARGUMENT

I. Allowing Government Officials to Censor Social Media Critics Betrays the First Amendment's Purpose and Undermines the Internet's Promise.

a. The internet has revolutionized the ways in which citizens interact with government leaders. Through the "vast democratic forums of the Internet," citizens "can petition their elected representatives and otherwise engage with them in a direct manner." *Packingham*, 582 U.S. at 98, 104–105 (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)). Each day, thousands of officials converse directly with their constituents and the public at large on social media platforms.

The government makes extensive use of social media through official websites and government-owned accounts. Federal agencies have registered more than 10,000 social media accounts with the U.S. Digital Registry.[3] The governors of each state use

[3] *U.S. Digital Registry*, Digital.Gov, https://digital.gov/services/u-s-digital-registry/ (last visited June 20, 2023) [https://perma.cc/FHQ9-SQ43].

social media to communicate with the public about their official duties.[4]

In many cases, social media play an important role in facilitating the day-to-day functioning of government. For example, city council members live-tweet minutes of public meetings,[5] mayors share videos and photos of themselves interacting with the community,[6] and city officials detail road closures.[7] Public universities also leverage social media to share news, make announcements, foster school spirit, point to resources, connect with alumni, and interact directly with students.[8] School board officials at the K-12 level are no exception. For example, the board of education overseeing the Easton Area School District in Pennsylvania maintains a Twitter account

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[4] *Governors' Social Media Accounts*, Nat'l Governors Ass'n, https://www.nga.org/governors/social/ (last visited June 19, 2023) [https://perma.cc/R8J6-R2SS].

[5] Albuquerque City Council (@ABQCityCouncil), Twitter (May 2, 2023), https://twitter.com/ABQCityCouncil/status/1653253531443294209 (last visited Aug. 14, 2023).

[6] Mayor Bryce Ward (@mayorbryceward), Instagram (Dec. 15, 2022), https://www.instagram.com/p/CmNoOb-v4OI/ (last visited Aug. 14, 2023).

[7] City of Saint Paul – Government, Facebook (June 12, 2023), https://www.facebook.com/photo?fbid=569345462045121&set=a.168452565467748 (last visited Aug. 14, 2023).

[8] *See, e.g.*, University of Michigan, Facebook, https://www.facebook.com/UniversityOfMichigan/ (last visited June 20, 2023); LSU (@lsu), TikTok, https://www.tiktok.com/@lsu (last visited June 20, 2023); Arizona State University (@arizonastateuniversity), Instagram, https://www.instagram.com/arizonastateuniversity/ (last visited June 20, 2023).

celebrating student, teacher, and staff achievements.[9] And individual school board members use social media to share news about district-wide events and upcoming board meetings.[10] In such circumstances, there is no question that this use of official social media accounts to conduct official business constitutes state action.

In other instances, however, officials choose to use personal accounts to conduct their official duties. Former President Trump converted what began as a private Twitter account into "one of the White House's main vehicles for conducting official business." *Knight First Amend. Inst.*, 928 F.3d at 232. President Biden similarly uses his "personal" Twitter account to communicate with the public. The President regularly tweets about his positions on important public policy issues—ranging from gun control[11] to the cost of living.[12] The President's personal account, which he

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[9] Easton Area School District Board of Education (@BOE_EASD), Twitter, https://twitter.com/BOE_EASD.

[10] *See, e.g.*, School Board Member Luisa Santos (@luisasantosd9), Twitter, https://twitter.com/luisasantosd9; Cathy Nathan – Rochester Sch. Bd. (@cathynathansb), Twitter, https://twitter.com/cathynathansb.

[11] Joe Biden (@JoeBiden), Twitter (June 15, 2023), https://twitter.com/JoeBiden/status/1669411704537587712.

[12] Joe Biden (@JoeBiden), Twitter (June 14, 2023), https://twitter.com/JoeBiden/status/1669068188691185665.

established in 2007, has nearly 6 million more followers than the official POTUS account.[13]

Members of Congress and their staff also use personal social media accounts to conduct their public duties. The Pew Research Center found that the typical member of Congress maintains two accounts on each platform—one "official" account and another personal or campaign-related account.[14] Representatives Dan Crenshaw and Alexandria Ocasio-Cortez and Senator Cory Booker, for example, all use their personal Twitter accounts to communicate policy positions, comment on legislative matters and current affairs, and interact with other Twitter users. They also use these accounts to offer personal updates and general messages unrelated to their official duties.[15]

In each instance, the politicians' personal accounts have garnered significantly more followers than their official congressional accounts.[16] These examples

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[13] As of June 20, 2023, 37.2 million people followed the "personal" @JoeBiden account, while 31.3 people followed the official @POTUS account.

[14] *Id.*

[15] Dan Crenshaw (@DanCrenshawTX), Twitter, https://twitter.com/DanCrenshawTX (last visited Aug. 14, 2023) (1.2 million followers); Alexandria Ocasio-Cortez (@AOC), https://twitter.com/AOC (last visited Aug. 14, 2023) (13.3 followers); Cory Booker (@CoryBooker), https://twitter.com/CoryBooker (last visited Aug. 14, 2023) (4.7 million followers).

[16] *Compare supra* note 15, *with* Rep. Dan Crenshaw (@RepDanCrenshaw), Twitter, https://twitter.com/RepDanCrenshaw (last visited Aug. 14, 2023) (692,200 followers); Rep. Alexandria Ocasio-Cortez (@RepAPC), Twitter, https://twitter

illustrate the overlap between a state-sanctioned social media account and "personal" accounts.

b. Much like their counterparts, trustees O'Connor-Ratcliff and Zane use the accounts they created before taking office to facilitate their public service. *Garnier*, 41 F.4th at 1164. They "clothed their pages in the authority of their offices and used their pages to communicate about their official duties," yet "contend their use of social media did not constitute state action." *Garnier*, 41 F.4th at 1158, 1172. On that basis, Petitioners assert they have a "right" to selectively ban comments they dislike.

The Garniers posted comments on the trustees' social media accounts to express concerns about the school superintendent's alleged misconduct and issues concerning race relations within the school district. *Id.* at 1166. These posts "did not use profanity or threaten physical harm," but trustees O'Connor-Ratcliffe and Zane didn't like the length and frequency of the posts, so they tried a number of tactics to mute the Garniers. They first deleted and hid the comments before finally blocking them entirely. *Id.* at 1165–66.

Unfortunately, these censorial actions also emulated those of other politicians. Officials spanning the political spectrum, from former President Trump to Representative Ocasio-Cortez, have used the

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.com/repaoc (last visited Aug. 14, 2023) (777,100 followers); Sen. Cory Booker (@SenBooker), Twitter, https://twitter.com/SenBooker (last visited Aug. 14, 2023) (197,100 followers).

blocking functions of social media to deny access to critics and vanish unfavorable comments.[17]

They are joined by state and local officials. Former Alabama Secretary of State John Merrill used his personal Twitter account to perform his official duties yet blocked a number of accounts for tweets "that were directed at him and that concerned election law, criticized him, or included comments with which he disagrees." *Fasking v. Merrill*, No. 2:18-cv-809-JTA, 2023 WL 149048, at *2–6, *18 (M.D. Ala. Jan. 10, 2023), *dismissed as moot*, *Fasking v. Allen*, No. 2:18-cv-809-JTA, 2023 WL 2655863 (M.D. Ala. Mar. 27, 2023). Several members of the Wisconsin legislature blocked critics from their personal Twitter accounts for, among other things, "crude comments on Wisconsin politics," and "tweets of an inappropriate and unprofessional nature." *One Wis. Now v. Kremer*, 354 F. Supp. 3d 940, 948–49 (W.D. Wis.) (cleaned up). And former Maine Governor Paul LePage, who used his personal Facebook page to support his office, deleted posts and blocked users from a progressive group.[18]

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[17] Charlie Savage, *Trump Can't Block Critics From His Twitter Account, Appeals Court Rules*, N.Y. Times (July 9, 2019), https://www.nytimes.com/2019/07/09/us/politics/trump-twitter-first-amendment.html [https://perma.cc/YWN2-83X2]; Sasha Ingber, *Alexandria Ocasio-Cortez Is Sued Over Blocking Twitter Followers*, NPR (July 12, 2019), https://www.npr.org/2019/07/12/741038121/alexandria-ocasio-cortez-is-sued-over-blocking-twitter-followers [https://perma.cc/5QLJ-MYXB].

[18] Scott Thistle, *Settlement ends blocking of critical comments on pro-LePage Facebook page*, Portland Press Herald (Dec. 10, 2018), https://www.pressherald.com/2018/12/10/lepage-team-

c. Public officials who use their social media accounts to conduct public business while claiming a "private" right to avoid criticism betray the First Amendment's guarantee of free expression and undermine its essential purpose of facilitating democratic rule. Speech concerning public affairs "is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). The First and Fourteenth Amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Those who choose to run for public office—and especially those who invite constituent dialog on their social media platforms—must accept the fact that hearing their critics comes with the job. "Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government." *Id.* "[H]arsh criticism . . . is a price our people have traditionally been willing to pay for self-governance." *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring).

Many public officials may honestly believe that the criticism heaped upon them is ill-informed or misguided, and they may well have good reason to think so. But this cannot justify culling the comments

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settles-lawsuit-over-facebook-blocking/ [https://perma.cc/5634-PFJJ].

(or commenters) they dislike. "American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism, but the freedom to speak foolishly and without moderation." *Baumgartner v. United States*, 322 U.S. 665, 674 (1944).

Likewise, the First Amendment does not permit blocking comments because of unfavorable viewpoints. *Matal v. Tam*, 582 U.S. 218, 243 (2017). This Court has long held that viewpoint discrimination is "an egregious form of content discrimination," and when government targets "particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995).

When government actors use social media accounts to effectuate their public service, they are acting as the state. "Having opted to create a [social media] account . . . and benefit from its broad, public reach," public officials should not be permitted to "divorce themselves from its First Amendment implications and responsibilities as state actors." *One Wis. Now*, 354 F. Supp. 3d at 954. For if they "are permitted to pick and choose" who they want to receive feedback from on their social media accounts, "the path is cleared for a regime of censorship under which full voice can be given only to those views which meet with the approval of the powers that be." *Knight First Amend. Inst.*, 953 F.3d at 221 (statement of Parker, J.) (quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 563 (1975)).

Such an outcome not only betrays basic First Amendment principles, it repudiates the promise of cyberspace, and "social media in particular" as one of "the most important places . . . for the exchange of views." *Packingham*, 582 U.S. at 104.

II. The Ninth Circuit Was Correct in Holding Public Officials Engage in State Action When They Use Social Media Accounts as Tools of Governance.

A. Public officials act as agents of the government, not private citizens, when they conduct public business on social media.

The Ninth Circuit correctly held that the Petitioners acted under color of state law when they blocked the Garniers from their social media accounts. *Garnier*, 41 F.4th at 1170. Officials engage in state action when they conduct public business on social media, regardless of if they do so on a personal account or a government-owned one.

Government officials are not exercising their personal free speech rights when they choose to use their social media accounts to conduct public affairs. *E.g.*, *Campbell*, 986 F.3d at 826 ("A private account can turn into a governmental one if it becomes an organ of official business."). A citizen "who works for the government" undoubtedly has a constitutionally protected right to speak as a citizen "about matters of public concern," but when speaking "pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti*, 547 U.S. at 419–21. The relevant question is whether the official has chosen to use his or her social media site

to conduct government business. *West v. Adkins*, 487 U.S. 42, 50 (1988) ("a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law").

This Court has addressed various contexts in which officials pursue their official duties and thus are considered to be acting "under color of state law." *Lugar*, 457 U.S. at 928 ("'[U]nder color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."). When a government official uses his social media account to conduct public business, the main issue to consider is whether the actions are "fairly attributable to the State." *See id.* at 937; *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). No single factor is dispositive, *id.*, and courts will examine the "totality of the circumstances" to determine if the challenged action bears "a 'sufficiently close nexus' with the State to be 'fairly treated as that of the State itself.'" *Rossignol v. Voorhaar*, 316 F.3d 516, 525 (4th Cir. 2003) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). *See Skinner v. Ry. Lab. Execs. Ass'n.*, 489 U.S. 602, 614–15 (1989).

Under this analysis, an official's conduct is more likely to amount to state action when it "occurs in the course of performing an actual or apparent duty of his office." *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995). The most important question for a government official's social media account is whether it has been used as a "tool of governance." *Campbell*, 986 F.3d at 825. If so, there can be little doubt that the official is engaged in state action.

Of course, government officials have the right to use social media without being encumbered by constitutional obligations. *Id.* at 826 ("not every social media account operated by a public official is a government account") (quoting *Knight*, 928 F.3d at 236). But when they choose to use personal accounts to conduct public affairs and take advantage of social media's defining feature of interactivity, they are engaged in state action.

In the instant case, there is no question that the trustees' social media activity amounts to state action. Although they were not required to maintain social media, the trustees chose to do and ran the accounts in a manner "directly connected to . . . their official positions." *Garnier*, 41 F.4th at 1170. Not only did the trustees identify themselves as "government officials" on their pages, they also listed their official district email addresses. *Id.* at 1171. Trustee Zane even went to far as to identify his Facebook page as "the official page for T.J. Zane, Poway Unified School District Board Member, to promote public and political information." *Id.*

And the trustees "overwhelmingly" populated their feeds with information clearly related to their duties. *Id.* They shared news related to the Board's activities, school board meetings, budget planning, the search for a new superintendent, and public safety issues. *Id.* Further, the trustees invoked their "governmental status" to operate their pages in a manner that "had the purpose and effect of influencing the behavior of others." *Id.* at 1170 (quoting *Naffe v. Frey*, 789 F.3d 1030, 1037 (9th Cir. 2015). They invited the public to interact with them via social media, seeking feedback related to district

policy decisions and soliciting volunteers for Board committees. *Id.*

Ultimately, the trustees "clothed their pages in the authority of their offices and used their pages to communicate their official duties," and are therefore bound by the First Amendment's prohibition of viewpoint discrimination. *Id.* at 1172.

B. The Ninth Circuit's "purpose and appearance" analysis aligns with exsisting precedent.

This case presents a straightforward proposition: When does a public official's use of social media constitute government action? Every court to have considered the issue—save for one—has found the right balance by looking to the "purpose and appearance" of the respective websites. *See Knight First Amend. Inst.*, 928 F.3d at 235–36; *Davison*, 912 F.3d at 680; *Campbell*, 986 F.3d at 825–26.

Petitioners urge this Court to reject not only the reasoning of the Ninth Circuit below, but also that of the Second, Fourth, and Eighth Circuits which applied the "purpose and appearance" test for determining state action. Instead, it urges the Court to embrace the holding of the lone outlier, which held that a city manager had not acted under color of state law when he blocked citizens from his Facebook page. *Lindke,* 37 F.4th at 1201. Under the Sixth Circuit's approach, operation of a social media site should be treated as state action only where (1) it is part of an officeholders' "actual or apparent duties," or (2) it could not happen in the same way "without the authority of [the] office." *Id.* at 37 F.4th at 1203.

But the Sixth Circuit's analysis is too narrow. It focuses only on actions undertaken directly *by the state*, not actions taken "under color of state law," or actions that could be "fairly attributable to the state." This constrained conception ignores this Court's repeated admonitions that determining whether a given activity "is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer." *Jackson*, 419 U.S. at 349–350. The analysis may turn on a "host of facts" that address, among other things, whether ostensibly private action is "entwined with governmental policies," or when government is "entwined in [its] management or control." *Brentwood Acad.*, 531 U.S. at 296. *See Lugar*, 457 U.S. at 939.

The Sixth Circuit characterizes its test as an effort to bring "the clarity of bright lines" that "offer predictable application for state officials," *Lindke*, 37 F.4th at 1206–07, but it merely proffers the easy answers this Court has eschewed. True, the Sixth Circuit's approach does promise "predictable application for state officials"—but not in a good way. Officeholders would be able to use their "personal" social media accounts to conduct public business, as many have done. And so long as the accounts are not mandated, funded, or managed by state law, these officials could censor criticism without limit, free from any constitutional restraint. The Sixth Circuit's "actual or apparent duties" test gives government officials a blueprint for evading First Amendment review.

The better alternative is the "fact-specific inquiry" the Ninth and other circuits have used, which examines things like "how the official describes and

uses the account; to whom features of the account are made available; and how others, including government officials and agencies, regard and treat the account." *Knight*, 928 F.3d at 236. A fact-specific inquiry focuses on how public officials actually use their accounts based on easily understood factors. While there may be close cases where "occasional stray messages that might conceivably be characterized as conducting the public's business" are claimed to constitute state action, *Campbell*, 986 F.3d at 827, in most cases courts have had little difficulty in identifying when personal social media accounts are being used as "an official vehicle for governance." *See Knight*, 928 F.3d at 237; *Davison*, 912 F.3d at 683; *Garnier*, 41 F.4th at 1170 ("The Trustees' use of their social media accounts was directly connected to, although not required by, their official positions."). The decision below should be affirmed.

CONCLUSION

This Court should apply the well-established principles from its cases analyzing action taken under color of state law to public officials' use of social media accounts. By affirming the Ninth Circuit's decision, the Court ensures citizens can interact directly with public officials online without fear of viewpoint-based censorship.

August 15, 2023 Respectfully Submitted,

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