No.

In the Supreme Court of the United States

KEVIN LINDKE,
PETITIONER

v.

JAMES R. FREED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Courts have increasingly been called upon to determine whether a public official who selectively blocks access to his or her social media account has engaged in state action subject to constitutional scrutiny. To answer that question, most circuits consider a broad range of factors, including the account's appearance and purpose. But in the decision below, the court of appeals rejected the relevance of any consideration other than whether the official was performing a "duty of his office" or invoking the "authority of his office." App. 5a.

The question presented is:

Whether a public official's social media activity can constitute state action only if the official used the account to perform a governmental duty or under the authority of his or her office.

RELATED PROCEEDINGS

United States District Court (E.D. Mich.):

Lindke v. *Freed*, No. 2:20-cv-10872 (Sep. 27, 2021)

United States Court of Appeals (6th Cir.):

Lindke v. *Freed*, No. 21-2977 (affirming, June 27, 2022; denying rehearing en banc, Aug. 5, 2022)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued Page(s)

Statutes and Regulations

Rules

Legislative Materials

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-12a) is published at 37 F.4th 1199. The court's order denying rehearing en banc (App. 30a) is available at 2022 WL 3221937. The district court's opinion and order granting respondent James Freed's motion for summary judgment (App. 13a-29a) is published at 563 F. Supp. 3d 704.

JURISDICTION

The court of appeals entered judgment on June 27, 2022, App. 1a, and denied a timely petition for rehearing on August 5, 2022, App. 30a. On October 7, 2022, Justice Kavanaugh extended the time to file a petition for a writ of certiorari to and including January 2, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1983 of Title 42, United States Code, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTRODUCTION

Like the petition for a writ of certiorari in *O'Connor-Ratcliff* v. *Garnier*, No. 22-324 (filed Oct. 4, 2022), this case concerns the standard for determining whether a public official's social media use constitutes state action. Social media platforms like Facebook and Twitter have become ubiquitous. At the same time, "lawsuits against public officials for blocking social media users on non-governmental accounts have proliferated." Pet. at 28, *Trump* v. *Knight First Amend. Inst.*, No. 20-197 (Aug. 20, 2020). In resolving these cases, the courts of appeals have divided into two opposing camps. Heeding this Court's admonition that "a host of facts" are relevant to the state-action inquiry, *Brentwood Acad.* v. *Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001), most courts of appeals examine the totality of the circumstances. But in the decision below, the Sixth Circuit "part[ed] ways with [those] other circuits' approach," App. 12a, instead adopting a test that reduces the state-action inquiry to only two factors: whether the official was performing a "duty of his office" or invoking the "authority of his office," App. 5a. The Court should resolve this circuit conflict now, and this is the right case for doing so.

STATEMENT OF THE CASE

1. Respondent James Freed became the City Manager of Port Huron, Michigan, in 2014. App. 14a. Appointed by the Mayor and City Council, the Manager serves as the City's chief administrative officer. In this role, Freed assists the Mayor and Council by carrying out their policy vision; advising the City Council on finances and budget; coordinating the work of department heads

and other employees; and ensuring that all residents are equitably served. C.A. Rec. 1463.[*]

Like many public officials, Freed has connected with his constituents through Facebook, a social media platform that allows users to post content and engage with others online. As relevant here, Facebook offers two different products for content-sharing: "*Profiles*" are personal accounts designed for individuals to create and share content with their "friends"—*i.e.*, family, friends, and other chosen audience members. App. 2a. Facebook profiles are limited to 5,000 friends. *Ibid.* "*Pages*" allow public figures, artists, businesses, brands, organizations, and the like to communicate with their constituents or customers. C.A. Rec. 1152. Unlike profiles, Facebook pages are publicly accessible by design and cannot be made private by the user. App. 2a.

Freed originally maintained a Facebook profile. But when he hit the 5,000-friend limit, Freed converted his profile to a Facebook page that could be "followed" by any member of the public. *Ibid.* Freed's page classified him as a "public figure," *ibid.*, and his profile featured a picture of him wearing his city-manager pin, C.A. Rec. 1154; see App. 11a. In the section of his page identifying the page owner's contact information, Freed listed:

- www.porthuron.org as the page's website;
- CommunityComments@PortHuron.org as its email address; and
- City Hall as the associated physical address.

App. 2a.

[*] Citations to "C.A. Rec." refer to the Sixth Circuit "Page ID #." See 6th Cir. R. 28(a).

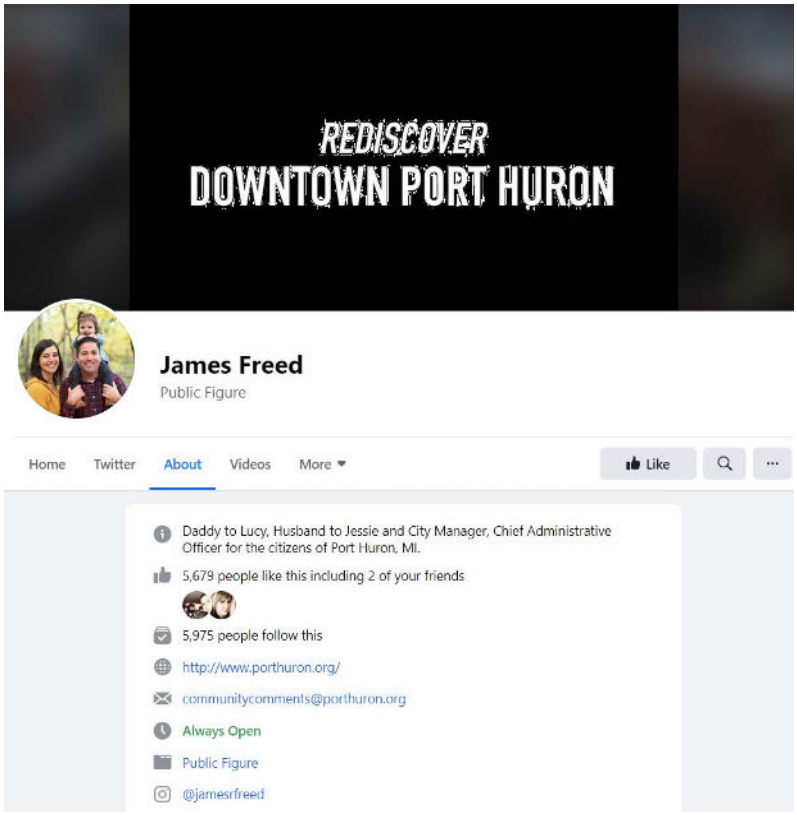

Fig. 1

Freed frequently used the page to post information about City programs, policies, and development initiatives. Examples include posts about the opening of a new city playground, fishing docks, and basketball courts, and the establishment of the Port Huron Office of Diversity, Equity & Inclusion. See App. 14a-15a; C.A. Rec. 1198. In these posts, Freed often used the words "we" and "us" to describe actions taken by the City. See, *e.g.*, C.A. Rec. 1154. Freed also shared personal posts on the page, including pictures of his family and dog, various

home-improvement projects, and passages of scripture. See, *e.g.*, App. 14a.

2. In March 2020, Freed began posting information about the COVID-19 pandemic, including county health data, social distancing recommendations, and updates on the City and State's public health responses. Among other things, Freed shared data and media releases from the county health department, App. 15a; C.A. Rec. 734; and press releases from his office summarizing Port Huron's use of federal grants to provide financial relief to residents, App. 15a; C.A. Rec. 1178. Freed also informed constituents of his own initiatives to reduce City staff and freeze hiring during the pandemic, C.A. Rec. 1163; posted photos of himself, the Mayor, and others social distancing, *id.* at 1165; and provided his own recommendations and thoughts on social distancing in town, see, *e.g.*, *id.* at 743; see also *id.* at 1166 (posting photos of county health officials, including "St Clair County's version of Dr Anthony Fauci").

Petitioner Kevin Lindke is a resident of Port Huron. *Id.* at 2. In March 2020, Lindke commented on Freed's Facebook page several times from three different Facebook profiles. App. 15a. Two of Lindke's comments criticized Port Huron's response to the COVID-19 pandemic. App. 15a-16a. On a photo that Freed had posted of the Mayor ordering takeout at a local establishment, Lindke commented that while City "residents [were] suffering," its leaders were eating at a "pricey" restaurant "instead of talking out to the community in th[e] . . . unprecedented time of the pandemic." *Ibid.* In another post, Lindke commented that Port Huron "deserves better." *Ibid.*

Freed responded by blocking each of Lindke's accounts, thereby denying Lindke access to his page. App. 15a. Freed also deleted Lindke's comments from his page. *Ibid.* Like Lindke, four other individuals had their

comments deleted or their accounts blocked by Freed. See App. 16a.

Lindke filed suit under 42 U.S.C. § 1983, alleging that Freed had violated the First Amendment by deleting his comments and blocking his accounts. The district court granted summary judgment for Freed, concluding that his Facebook activity was not state action and therefore was immune from First Amendment scrutiny. App. 21a-29a.

3. The Sixth Circuit affirmed. App. 1a-12a. Because Lindke had filed suit under Section 1983, the court explained, he would have to show that his federal rights were violated by someone acting "under color of any statute, ordinance, regulation, custom, or usage, of any State." App. 3a (quoting 42 U.S.C. § 1983). In other words, Lindke would have to show that Freed was "engaged in state action" when he deleted Lindke's posts and blocked Lindke from accessing his Facebook page. App. 3a.

Whether a public official is engaged in state action, the Sixth Circuit explained, depends on whether the official is "performing an actual or apparent duty of his office, or . . . could not have behaved as he did without the authority of his office." App. 5a (quotation marks omitted). And in the court's view, that will be the case if—but only if—the official's actions "are controlled by the government or entwined with its policies." *Ibid.* The court thus adopted what it called a "duty-or-authority test," under which a public official's social media activity is subject to constitutional scrutiny "only" where the activity was conducted in furtherance of governmental "duties" or invoked "state authority." App. 8a. "It's only then," the court concluded, "that his social-media activity is fairly attributable to the state." *Ibid.* (quotation marks omitted).

In adopting this test, the Sixth Circuit expressly "part[ed] ways with other circuits' approach to state

action." App. 12a. Those other circuits have considered a broader range of factors, including "a social-media page's purpose and appearance," such as where the public official's conduct conveys the "impression that the page operated under the state's imprimatur." App. 10a-11a (citing *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 (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)). In the Sixth Circuit's view, concern for the appearance of authority may be appropriate "in assessing when police officers are engaged in state action," but it rejected as "shallow" the analogy to the social media context. App. 11a. The court thus reaffirmed that its state-action inquiry in that context would instead focus solely "on the actor's official duties and use of government resources or state employees." App. 12a.

Applying its duty-or-authority test to Freed's conduct, the Sixth Circuit determined that Freed had not engaged in state action when he blocked Lindke's accounts and deleted Lindke's posts. On the duty prong, the Sixth Circuit explained that "no state law, ordinance, or regulation compelled Freed to operate his Facebook page." App. 8a; see *ibid.* ("[I]t wasn't *designated by law* as one of the actual or apparent duties of his office.") (emphasis added). And on the authority prong, the court explained, the page "did not belong to the office of city manager," nor did "Freed rely on government employees to maintain" it. App. 9a-10a. Since Freed's Facebook activity did not cross either of these "bright lines," the court concluded, "he was acting in his personal capacity—and there was no state action." App. 12a.

REASONS FOR GRANTING THE PETITION

The decision below creates a conflict with the approach of other courts of appeals to determining whether a public official's use of social media constitutes state action. This important question has arisen, and will continue to arise, with increasing frequency in the lower courts—and in this one. See *O'Connor-Ratcliff* v. *Garnier*, No. 22-324 (filed Oct. 4, 2022). The Sixth Circuit's test is irreconcilable with this Court's precedents and misconstrues the scope of Section 1983, the preeminent legal vehicle for holding public officials responsible for constitutional violations. This case presents a prototypical scenario in which the state-action question arises; was resolved solely on that basis; and involves no impediments to addressing the issue. The Court should grant the petition.

I. The Circuits Are Split on When a Public Official's Social Media Activity Constitutes State Action

Section 1983 provides a cause of action for violations of rights secured by the Constitution or laws of the United States committed by any person acting "under color of" state law. 42 U.S.C. § 1983. As this Court has recognized, "state employment is generally sufficient to render the defendant a state actor." *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 935 n.18 (1982). "If an individual is possessed of state authority and purports to act under that authority," therefore, "his action is state action." *West* v. *Atkins*, 487 U.S. 42, 56 n.15 (1988) (quoting *Griffin* v. *Maryland*, 378 U.S. 130, 135 (1964)).

A public official may nevertheless claim that he or she engaged in the challenged conduct solely in a *private*—rather than public—capacity. In that context, this Court has asked "whether there is a sufficiently close nexus between the State and the challenged action . . . so that the action of the latter may be fairly treated as that of the State itself." *Jackson* v. *Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

Where disputes involve a public official's use of social media—and, in particular, the official's decision to block the plaintiff's access to an account or delete content posted by the plaintiff—the courts of appeals have developed two vastly different approaches. Most courts have engaged in a totality-of-the-circumstances inquiry involving multiple factors, including whether the appearance or purpose of the social media account makes it fair to treat the official's use of the account as state action. But in the decision below, the Sixth Circuit "part[ed] ways with [those] other circuits' approach." App. 12a. The Sixth Circuit rejected the relevance of a social media account's appearance or purpose, instead relying solely on two factors: "the actor's official duties and use of government resources or state employees." *Ibid.*

A. Four Courts of Appeals Consider the Totality of the Circumstances, Including a Social Media Account's Appearance and Purpose

1. The Fourth Circuit was the first court of appeals to hold that a public official can act under color of state law when she blocks a constituent from her social media account. In *Davison* v. *Randall*, 912 F.3d 666 (4th Cir. 2019), the Chair of the county Board of Supervisors (Randall) created a Facebook page before she was sworn into office and then used it to communicate with constituents (as well as to post about "topics less closely related to her official activities such as her affection for the German language or pride in becoming an organ donor"). *Id.* at 673-74. When an "outspoken" county resident posted a negative comment about a town hall meeting, Randall deleted the post and temporarily blocked the resident's access to the page. *Id.* at 675-76.

In deciding whether "Randall acted under color of state law," the court stressed that "[t]here is no specific formula for determining whether state action is present,"

and that the relevant "criteria lack rigid simplicity." *Id.* at 679-80 (quotation marks omitted). The court accordingly deemed it necessary to consider "the totality of the circumstances surrounding Randall's creation and administration" of the Facebook page, mindful that "no one factor is determinative." *Id.* at 680. Among other things, the court noted, state action is "more likely" to be involved "[w]hen a defendant's status as a public official enabled her to execute a challenged action in a manner that private citizens never could have," or when the challenged action "occurs in the course of performing an actual or apparent duty of his office." *Ibid.* (cleaned up).

But the Fourth Circuit also considered additional factors, including two of particular note here. First, the court took into account the page's *appearance—i.e.*, whether Randall had "clothed the Chair's Facebook Page in the power and prestige of her state office." *Id.* at 681 (cleaned up). Second, the court looked at the page's *purpose—i.e.*, whether Randall had used the page "as a tool of governance." *Id.* at 680 (citation omitted).

The Fourth Circuit determined that both factors pointed to state action on the facts of the case. Randall had "clothed the page in the trappings of her public office," by listing her official title in the page's heading; listing her official contact information; providing links to the official county website; and posting about official activities in posts directed to her constituents. *Id.* at 680-83. Randall had also used the page "as a tool of governance," including "to inform the public about serious public safety events and to keep her constituents abreast of the County's" activities. *Id.* at 680 (quotation marks omitted).

Based on those considerations and others, see *id.* at 680-81, the Fourth Circuit ultimately determined that "the totality of the circumstances surrounding Randall's creation and administration of the Chair's Facebook Page and banning of Davison from that page" supported the

conclusion "that Randall acted under color of state law." *Id.* at 680.

2. Following *Davison*, other circuits have embraced its totality-of-the-circumstances approach to state action, including consideration of a social media account's appearance and purpose.

The Second Circuit applied that approach in *Knight First Amendment Institute* v. *Trump*, 928 F.3d 226 (2d Cir. 2019). In that case, then-President Donald Trump blocked certain users from the Twitter account that he had created and started using before holding office. *Id.* at 231-32. Like the Fourth Circuit in *Davison*, the Second Circuit emphasized that determining state action in the context of social media use is a "fact-specific inquiry" that requires consideration of multiple "factors," including: "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." *Id.* at 236.

Also like the Fourth Circuit, the *Knight* court considered the social media account's appearance and purpose. Regarding the account's *appearance*, the Second Circuit explained that the account was "presented by the President and the White House staff as belonging to, and operated by, the President." *Id.* at 235. And regarding its *purpose*, the court explained that "since becoming President[,] he has used the Account on almost a daily basis as a channel for communicating and interacting with the public about his administration." *Ibid.* (quotation marks omitted). Based on those considerations and others, see *id.* at 235-36, the court concluded that "the factors pointing to the public, non-private nature of the Account and its interactive features are overwhelming." *Id.* at 236.

Following the Second Circuit's decision, Judge Park (joined by Judge Sullivan) dissented from the denial of

rehearing en banc. *Knight First Amend. Inst.* v. *Trump*, 953 F.3d 216, 226-31 (2d Cir. 2020). Rather than consider the totality of the circumstances—including the Twitter account's appearance and purpose—Judge Park would have narrowed the inquiry to asking whether President Trump had exercised "special powers possessed by virtue of law when blocking users" and whether his actions were "made possible only because he was clothed with the authority of law." *Id.* at 227 (cleaned up). Because President Trump "could block users from that account before assuming office," Judge Park argued, he "was not a state actor when he blocked users from his personal account." *Ibid.* This Court later vacated the Second Circuit's opinion as moot after President Trump left office. See *Biden* v. *Knight First Amend. Inst.*, 141 S. Ct. 1220 (2021).

3. The Eighth Circuit applied a similar approach in *Campbell* v. *Reisch*, 986 F.3d 822 (8th Cir. 2021). There, a state representative (Reisch) had created a Twitter account upon announcing her candidacy and then, once in office, used it to promote her reelection. *Id.* at 823-24. Without definitively resolving the appropriate standard, see *id.* at 825, the court held that Reisch's Twitter use did not qualify as state action. Even after her election, the court explained, Reisch "used [Twitter] overwhelmingly for campaign purposes," such that "her post-election use of the account" was quite "similar to her pre-election use." *Id.* at 826. And the "trappings" of the account—which included a stray reference to her district and her role as its representative—were far too "equivocal" to support a contrary conclusion. *Id.* at 827 (quotation marks omitted).

4. Most recently, the Ninth Circuit adopted a totality-of-the-circumstances approach in *Garnier* v. *O'Connor-Ratcliff*, 41 F.4th 1158 (9th Cir.), pet. for cert. pending, No. 22-324 (filed Oct. 4, 2022). There, members of a school district's board of trustees had "created public Facebook

and Twitter pages to promote their campaigns for office" and, after they were elected, used them "to inform constituents about goings-on" and to "solicit input" from and "communicate with parents." *Id.* at 1163. Two parents of children in the school district repeatedly posted critical comments on the trustees' pages; the trustees responded by deleting or hiding the parents' comments and eventually blocking them entirely. *Ibid.*

In determining whether the trustees' social media activity counted as state action, the Ninth Circuit agreed with other courts of appeals that the inquiry "is a process of sifting facts and weighing circumstances," where "[n]o one fact can function as a necessary condition across the board." *Id.* at 1169 (quotation marks omitted). The court accordingly considered a wide variety of factors, including that the trustees had "purported to act in the performance of their official duties" and that the trustees' activity "related in [a] meaningful way to their governmental status." *Id.* at 1171 (cleaned up).

Like other courts of appeals, moreover, the Ninth Circuit also took into consideration the "appearance" of the trustees' social media accounts and the "function" to which they had been put. *Id.* at 1169-70. Quoting the Second Circuit's decision in *Knight*, the Ninth Circuit explained:

> [C]ourts should look to considerations such as "how the official describes and uses the account," "to whom features of the account are made available," and how members of the public and government officials "regard and treat the account."

Id. at 1173 (quoting *Knight*, 928 F.3d at 236). Based on these factors—and "all these attributes of the Trustees' social media pages"—the Ninth Circuit determined that the trustees had engaged in state action. *Ibid.*

B. The Sixth Circuit Stands Alone in Applying a Duty-or-Authority Test

In the decision below, the Sixth Circuit expressly "part[ed] ways with other circuits' approach to state action" in the context of a public official's social media activity. App. 12a. Instead of looking at the totality of circumstances—as every other circuit does—the Sixth Circuit opted to "focus" only on two considerations: "the actor's official duties" and his or her use of "government resources or state employees." *Ibid.* The Sixth Circuit also specifically disclaimed the need to "examin[e] a page's appearance or purpose." *Ibid.*; see App. 10a (rejecting "approach" that "several other courts have used" that takes into account "a social-media page's purpose and appearance").

In applying its duty-or-authority test, moreover, the Sixth Circuit took a narrow view of both criteria. On the duty side of the test, the Sixth Circuit explained that social media activity qualifies "when the text of state law requires an officeholder to maintain a social media account." App. 6a. As an example, the court hypothesized a law "directing the chief [of] police to operate" a Facebook page. *Ibid.* In that scenario, "[m]aintaining that page would . . . be one of the police chief's actual duties." *Ibid.*

Social media activity qualifies as the "use of state *authority*" if a "public official can operate the account *only* because of his state authority." *Ibid.* (emphasis added) That is true, for instance, where the account "belong[s] to an office, rather than an individual officeholder," *ibid.*, or where a public official "direct[s]" his or her subordinates "to operate her Facebook page," thus "mak[ing] it one of the employees' job responsibilities." App. 8a. But the plaintiff must show that the public official was able to engage in the challenged

social media activity "only . . . because she holds the authority of her office." *Ibid.*

The Sixth Circuit then applied this stringent test to Freed's page, holding that his activity on it did not constitute state action. The court relied on the fact that "no state law, ordinance, or regulation compelled Freed to operate his Facebook page," App. 8a; that the page "did not belong to the office of city manager," App. 9a; and that Freed did not "rely on government employees to maintain" it, App. 10a. In sum, the court concluded, Freed's "page neither derives from the duties of his office nor depends on his state authority." App. 8a. The court thus ascribed no weight to any other consideration, such as the page's "presentation" (including the fact that the page listed the City's email address, website, and physical address), App. 11a, or Freed's use of the page to "communicat[e] with constituents," App. 9a.

Also of note, the Sixth Circuit discussed—but rejected—Lindke's attempt to rely on "factors" commonly used "in assessing when police officers are engaged in state action." App. 11a. The Sixth Circuit dismissed that analogy as "shallow." *Ibid.* Whereas a police officer's "*appearance* actually evokes state authority," the court opined, a public official like Freed "gains no authority by presenting himself as a city manager on Facebook." App. 11a-12a.

In *Garnier*, by contrast, the Ninth Circuit pointedly "decline[d] to follow the Sixth Circuit's reasoning." 41 F.4th at 1177. "Although the uniform of a police officer carries particular authority," the Ninth Circuit explained, that is merely a matter of degree; asking whether a governmental officer has "self-identified as a state employee and generally purported to be a state officer at the time of the alleged violation" can be equally "instructive [in an] analysis of other state employees' conduct." *Ibid.* (cleaned up). Indeed, the Ninth Circuit concluded that

"the line of precedent *most similar*" to cases like this one "concerns whether off-duty governmental employees are acting under color of state law." *Id.* at 1170 (emphasis added). It accordingly chose instead to "follow the mode of analysis of the Second, Fourth, and Eighth Circuits," not that of the Sixth Circuit. *Id.* at 1177.

II. This Case Is an Ideal Vehicle for Reviewing This Important Question

The standard for determining whether a public official's use of social media constitutes state action is an issue of substantial legal and practical significance, and this case is perfectly suited for addressing it.

A. As this Court has noted, social media is "perhaps the most powerful mechanism[] available to private citizens to make [their] voice[s] heard." *Packingham* v. *North Carolina*, 137 S. Ct. 1730, 1737 (2017). Politicians and public officials have increasingly begun "us[ing] personal accounts to promote their official activities," *Knight*, 953 F.3d at 230 (Park, J., dissenting), a trend that is likely only to accelerate. Public officials and courts need clarity regarding how to determine whether a public official's social media use constitutes state action. See Pet. Reply at 1, *Trump* v. *Knight First Amend. Inst.*, No. 20-197 (Oct. 6, 2020) ("[T]he issues presented here are proliferating in cases around the country.").

B. This case is ideally postured for the Court to address the correct test for determining whether a public official's conduct on social media constitutes state action. Not only was the issue raised and passed upon below, it was the sole issue on which the court of appeals' judgment rested. App. 12a. There is accordingly no question that the state-action dispute was outcome-determinative, nor any impediment to this Court's ability to decide it.

In addition, the decision below created the circuit split, and it takes by far the most restrictive view of state

action of any court of appeals to address the issue. As a result, review in this case would give this Court's ruling maximal effect: Either the Court will affirm the Sixth Circuit's highly restrictive position that the *only* relevant factors are authority or duty, thereby overturning the law in four other circuits; or else the Court will hold that other factors must also be considered, necessitating reversal of the decision below.

C. The same issue is currently pending before the Court in *O'Connor-Ratcliff* v. *Garnier*, No. 22-324 (filed Oct. 4, 2022). For several reasons, this case is a better vehicle than that one.

1. Before addressing the state-action question in *O'Connor-Ratcliff*, the Court would first have to determine whether that case is moot. The plaintiffs there originally sought damages as well as declaratory and injunctive relief. 41 F.4th at 1166. But the Ninth Circuit determined that, although the defendant state officials had violated the First Amendment, they were nevertheless entitled to qualified immunity, *id.* at 1183-84; and the plaintiffs have not sought review of that determination.

As a result, the dispute in *O'Connor-Ratcliff* continues to present a live controversy only insofar as the Ninth Circuit's constitutional ruling will affect the defendant state officials' social media use prospectively. But the defendants have already altered their social media use in light of the litigation, including by using restrictive word filters on their Facebook pages to effectively eliminate the ability of the public to offer comments other than emoticons. See *id.* at 1167-69 (discussing defendants' mootness argument based on their use of word filters); see also Defs.' C.A. Br. at 38, 2021 WL 3239213 (9th Cir. July 23, 2021). ("Defendants discovered these tools and accomplished their original purpose of creating bulletin boards by using word filters extensively to block all

comments."). In opposing certiorari, the *O'Connor-Ratcliff* plaintiffs assert that they have "never challenged the use of word filters," and that the dispute accordingly "does not have a present-day effect on the [defendants'] primary conduct," although they do not go so far as to argue that the case is moot. Br. in Opp. at 21, *O'Connor-Ratcliff* v. *Garnier*, No. 22-324 (Dec. 13, 2022).

In order for the declaratory and injunctive relief granted in *O'Connor-Ratcliff* to have continuing effect, moreover, the defendants there would need to remain governmental officials—and hence subject to the Ninth Circuit's ruling on the First Amendment obligations of state officials. Should the defendants leave office at any point before this Court has an opportunity to decide the case, a serious question of mootness would arise. See *Biden* v. *Knight First Amend. Inst.*, 141 S. Ct. 1220 (2021) (vacating as "moot" the Second Circuit's decision, which involved only declaratory relief, after President Trump left office).

In this case, by contrast, Lindke has sought "nominal, actual, and punitive damages" in addition to declaratory and injunctive relief. App. 18a. Lindke's ongoing request for damages means that a live controversy will persist regardless whether Freed leaves office before this litigation is resolved. See *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 796 (2021).

2. Certain features of *O'Connor-Ratcliff* also make it atypical of litigation in this area. The defendant state officials in that case blocked the plaintiffs' access to their social media accounts only after the plaintiffs had started making "quite lengthy" and "frequently repetitive" posts to the accounts:

> For instance, Christopher Garnier posted nearly identical comments on 42 separate posts O'Connor-Ratcliff made to her Facebook page. On one occasion,

> within approximately ten minutes Christopher Garnier posted 226 identical replies to O'Connor-Ratcliff's Twitter page, one to each Tweet O'Connor-Ratcliff had ever written on her public account.

41 F.4th at 1166. Yet in seeking this Court's review, the defendants have chosen to *concede* that if their social media use is subject to constitutional scrutiny, the plaintiffs had a First Amendment right to make these posts. See Pet. at 11, *O'Connor-Ratcliff* v. *Garnier*, No. 22-324 (Oct. 4, 2022).

The posture in which this case arises, by contrast, is more typical of disputes involving state officials who restrict access to their social media accounts by members of the public. Freed blocked Lindke after only two critical comments, both of which were substantive, topical, and civil. App. 15a-16a. Thus, while the state-action question is dispositive here, as it is in *O'Connor-Ratcliff*, the substantive First Amendment question remains a live issue only in this case. That posture, in addition to being more representative of litigation in this area, would allow the Court to consider aspects of the First Amendment standard alongside the state-action inquiry, should it determine that doing so was appropriate.

III. THE DECISION BELOW IS WRONG

In adopting a test that limits the inquiry to two factors—authority or duty—the Sixth Circuit ignored this Court's state-action precedents and their reasoning. As a result, the Sixth Circuit has given Section 1983's "under color of" requirement a construction that is too broad in some scenarios and too narrow in others.

First, the Sixth Circuit's state-action test defies this Court's instruction that courts must consider the totality of the circumstances. As this Court has explained, "the question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits

of no easy answer." *Jackson* v. *Metro. Edison Co.*, 419 U.S. 345, 349-50 (1974). Indeed, "[w]hat is fairly attributable [to the state] is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). For that reason, "no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient." *Id.* at 295.

The decision below contravenes those principles—both by turning two particular factors into "necessary condition[s] across the board for finding state action," *ibid.*, and by excluding consideration of all other factors. According to the Sixth Circuit, a public official's social media activity constitutes state action "only" where the activity "derives from the duties of his office" or "depends on his state authority." App. 8a. The court also specifically disclaimed the relevance of all "other" considerations, such as "a social-media page's purpose and appearance." App. 10a. By thus reducing the complicated and context-dependent state-action inquiry to a narrow formula, the Sixth Circuit imposed on the inquiry precisely the type of "rigid simplicity" that this Court has warned against. *Brentwood Acad.*, 531 U.S. at 295.

Second, the Sixth Circuit's rule runs counter to the historical meaning of the key statutory phrase: "under color of law." As this Court has explained, that phrase is not limited to circumstances where the state official's conduct *in fact* was "authorized by state law." *Griffin* v. *Maryland*, 378 U.S. 130, 135 (1964). Rather, it also includes situations where the official "*purport*[*ed*] to act" in a governmental role. *Ibid.* (emphasis added); accord *West* v. *Atkins*, 487 U.S. 42, 49, 56 n.15 (1988). In such cases, state action is present even though the public official "might have taken the same action had he acted in a purely private capacity

or . . . the particular action which he took was not authorized by state law." *Griffin*, 378 U.S. at 135.

Indeed, Section 1983 was designed with precisely that scenario in mind—where ostensibly private conduct was imbued with unwarranted authority by the false "pretense" of governmental endorsement. *Evans* v. *United States*, 504 U.S. 255, 279 (1992) (Thomas, J., dissenting) (describing the "definite and well-established meaning at common law" of "'under color of office'"). Congress enacted Section 1983's predecessor, the Ku Klux Klan Act of 1871, 42 Cong., ch. 22, 17 Stat. 13, to combat the Klan's reign of terror, which included episodes in which the involvement of public officials acting outside the confines of the law had lent additional force to ostensibly private conduct. See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. 320 (1871) (statement of Rep. Stoughton). Given that context, the majority of circuits are correct that the state-action inquiry must take account of whether a public official has "clothed" her conduct "in the trappings of her public office." *Davison*, 912 F.3d at 683.

In the context of social media, that means a court must consider whether public officials have "present[ed] . . . their social media pages as official outlets facilitating their performance of their [official] responsibilities." *Garnier*, 41 F.4th at 1171. Freed's Facebook use fit that bill: His page claimed Port Huron's official website, email address, and City Hall address; and Freed used the page to communicate with constituents and announce official policies, repeatedly posting about City business from the point of view of the government. See *supra* pp. 3-5. This "pretense" of officialdom was no accident. Freed's social media use was designed to convey that his page was an official communication outlet for the City, with the "purpose and effect of influencing the behavior of others." *Garnier*, 41 F.4th at 1170 (quotation marks omitted).

Finally, the Sixth Circuit's test is also *too broad* in certain respects, because it treats satisfaction of either criteria (duty or authority) as automatically sufficient to establish state action. Yet this Court has warned that no particular circumstance should be treated as "absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." *Brentwood Acad.*, 531 U.S. at 295-96.

This Court's cases illustrate the point. In *Polk County* v. *Dodson*, 454 U.S. 312 (1981), the Court considered whether a public defender "acts 'under color of state law' when representing an indigent defendant in a state criminal proceeding." *Id.* at 314. The public defender's conduct satisfied *both* of the Sixth Circuit's criteria: The public defender had been "assigned" to represent the defendant by a county official, thereby "acting to fulfill a state obligation," *id.* at 318, 322 n.13 (quotation marks omitted); and she "work[ed] in an office fully funded and extensively regulated by the State," *id.* at 322 n.13 (citation omitted).

Yet this Court found neither fact sufficient. Instead, relying on the public defender's "function" as an advocate for a private citizen, the Court concluded that she had not acted under color of state law. *Id.* at 319. The Court's focus on the public defender's "function"—overriding the relevance of her governmental duties and authority in that particular context—shows why a totality-of-the-circumstances approach is preferable to the Sixth Circuit's rigid two-factor test. It also further validates the circuit majority's view that the inquiry should take into consideration the "purpose" for which a social media account is used. *Garnier*, 41 F.4th at 1171 (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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