

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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

Petitioners, )

v. ) No. 22-324

CHRISTOPHER GARNIER, ET UX., )

Respondents. )  
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Pages: 1 through 117

Place: Washington, D.C.

Date: October 31, 2023

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6 CHRISTOPHER GARNIER, ET UX., )

7 Respondents. )

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10 Washington, D.C.

11 Tuesday, October 31, 2023

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13 The above-entitled matter came on for  
14 oral argument before the Supreme Court of the  
15 United States at 10:04 a.m.

16

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23 Petitioners.

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25 behalf of the Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-324, O'Connor-Ratcliff versus Garnier.

Mr. Mooppan.

ORAL ARGUMENT OF HASHIM M. MOOPPAN

ON BEHALF OF THE PETITIONERS

MR. MOOPPAN: Mr. Chief Justice, and may it please the Court:

Individuals who hold public office are still private citizens too. When acting in their personal capacity, they retain their First Amendment rights to decide who can participate in a community discussion that they host at their own property. They are thus free to block users from their personal social media pages, unless they chose to operate those pages in their official capacities instead.

The only principled and workable test to determine the capacity in which they acted is to ask whether they exercised any duties or authorities of their job. And the answer is plainly no where, as here, the state itself did not control or even facilitate their operation

1 of the pages. The officials thus wielded no  
2 greater rights or privileges than any other  
3 private citizen denying access to their own  
4 property.

5 The Ninth Circuit instead held that  
6 even if an official was not actually doing her  
7 job, state action exists so long as the pages'  
8 appearance made it look like she was.

9 But that type of reasonable observer  
10 inquiry is incapable of consistent application.  
11 It is also fundamentally misguided because the  
12 official's power to block does not invoke the  
13 pages' appearance at all.

14 Respondents alternatively insist that  
15 Petitioners were doing their jobs simply because  
16 they used the pages to communicate about their  
17 jobs. But that is the type of excessively broad  
18 job description this Court has repeatedly  
19 rejected. Because officials can operate such  
20 pages in either capacity, the state action test  
21 should require clear and objective evidence that  
22 is capable of differentiating between the two.  
23 That is essential to preserving the robust  
24 sphere of individual liberty the doctrine is  
25 meant to protect.

1 I welcome this Court's questions.

2 JUSTICE THOMAS: Counsel, if you had  
3 the exact same exchange here but from a -- an  
4 official site of the school board, would it make  
5 a difference?

6 MR. MOOPPAN: Yes, Your Honor. That  
7 would be state action because that would be  
8 exercising the power --

9 JUSTICE THOMAS: Okay. So let's  
10 assume that the official has discretion to  
11 either -- the option to either do this on the  
12 school site or -- the school board site or on  
13 the personal computer.

14 What's the difference in what the  
15 communication is?

16 MR. MOOPPAN: So, in your first  
17 hypothetical, the power that's being wielded is  
18 the power to exclude someone from government  
19 property. Just like if it was a government  
20 building, the power to block someone from  
21 entering main Justice is a -- is state action.

22 In the actual case, what is happening  
23 is being excluded from private property. And  
24 the power to exclude someone from private  
25 property is private.

1                   JUSTICE THOMAS: Well, let's -- let's  
2 talk about that just briefly. What if the --  
3 you can access the site remotely from  
4 Petitioners' computer at home, but it is the  
5 school board's site and it's not on the  
6 government's computer?

7                   MR. MOOPPAN: Well, the question is  
8 who controls the account. And in this case,  
9 it's undisputed that this is the account of --  
10 belongs to Petitioners in their individual  
11 capacity. It's an account that they created  
12 before they held office. It is an account that  
13 they will continue to hold after they leave  
14 office. So --

15                   CHIEF JUSTICE ROBERTS: Is this a  
16 site-by-site determination or a  
17 message-by-message? In other words, let's say  
18 you have, you know, a site that's used every now  
19 and then for what you might characterize as  
20 official announcements, but the rest of the time  
21 it's, you know -- you know, my -- my child got  
22 a, you know, blue ribbon or something like that.

23                   Do you say that, well, you look at  
24 each episode of blocking or whatever as -- as  
25 governmental because they use it for

1 governmental things from time to time, or do you  
2 say, well, they blocked them for this -- in  
3 other words, you go through the whole analysis  
4 with respect to each back-and-forth?

5 MR. MOOPPAN: So the specific conduct  
6 that's being challenged here is the blocking,  
7 and so the question is, is the blocking official  
8 action? In general, I think that that's going  
9 to be answered at a site-wide level. It's  
10 either a government account or it's a personal  
11 account. And that's true even if some of the  
12 speech could be viewed as official.

13 So if, for example, a government  
14 official made an official announcement that --  
15 at a campaign rally, the announcement, the  
16 speech, might be viewed as official in some  
17 sense. But that wouldn't convert the campaign  
18 rally into a government forum where there was a  
19 constitutional right to enter.

20 CHIEF JUSTICE ROBERTS: Well, I'm not  
21 sure I follow the -- the answer. But let's say  
22 -- what percentage of governmental blocking or  
23 back-and-forth do you have to have before you  
24 say, oh, the whole -- every -- every blocking  
25 episode should be quickly characterized as state



1 action?

2 MR. MOOPPAN: Well, so I don't think  
3 it turns on a percentage, Your Honor. In  
4 general, when a public official is using their  
5 personal property to engage in speech that they  
6 can engage in either capacity, the right way of  
7 thinking about that in general is that all of  
8 that speech is personal.

9 Now I concede that if --

10 CHIEF JUSTICE ROBERTS: I'm just --  
11 sorry. All of that -- all -- all of the speech  
12 on that site?

13 MR. MOOPPAN: Yes.

14 CHIEF JUSTICE ROBERTS: Okay.

15 MR. MOOPPAN: Because that is speech  
16 they can engage in in either capacity. Now I do  
17 agree that there are certain things that they  
18 could do on these pages that would be  
19 governmental and for which there was a right of  
20 access. So, for example, the SG's office used  
21 the example of doing notice-and-comment  
22 rulemaking on a social media page. That's, of  
23 course, inherently governmental, and if they're  
24 excluded from that, that would be state action.

25 And I would agree that that would be

1 true whether they used the page in general for  
2 notice-and-comment rulemaking or just once. But  
3 the question --

4 JUSTICE SOTOMAYOR: Counsel, I -- I'm  
5 having -- because I think the Chief has asked a  
6 very important question, let's break that down  
7 in examples, okay?

8 Facebook is somewhat easier because  
9 people can be blocked from commenting, but  
10 they'll still have access to looking at the  
11 information, all right? But let's assume that  
12 there's -- something went wrong with the city's  
13 website and the city is now asking the council  
14 member to post all of their evacuation programs  
15 and to have comments with respect to citizens  
16 who might need assistance. They've converted it  
17 into, basically, an official site.

18 So how does your test deal with that?

19 MR. MOOPPAN: So --

20 JUSTICE SOTOMAYOR: Because you said,  
21 if it's mixed personal and business, then it  
22 remains personal.

23 MR. MOOPPAN: Well, so, on that  
24 hypothetical, I would agree that would be state  
25 action. The way --

1 JUSTICE SOTOMAYOR: So the state would  
2 be responsible for any blocking that this  
3 individual had done of commenting people?

4 MR. MOOPPAN: Yes, but the critical  
5 reason why and why that follows from our test is  
6 because, in your hypothetical --

7 JUSTICE SOTOMAYOR: By the way, your  
8 -- is your test identical to the Sixth Circuit's  
9 duty and authority test or authority test, or --  
10 you use the words "control" or "facilitate,"  
11 which the Sixth Circuit didn't. So tell me  
12 what's the difference --

13 MR. MOOPPAN: So --

14 JUSTICE SOTOMAYOR: -- in what you're  
15 proposing.

16 MR. MOOPPAN: -- we think duty or  
17 authority is the right test. The hard question  
18 in these cases is figuring out whether you're  
19 exercising duty or authority. Control and  
20 facilitation is the way to figure that out. And  
21 that's the answer to your initial question. The  
22 way you know --

23 JUSTICE SOTOMAYOR: Well, the Sixth  
24 Circuit is much narrower. It -- it -- it  
25 defines -- it defines "duty" as something stated

1 by law.

2 But, frankly, in my experience,  
3 there's a lot of customary laws, customary  
4 actions that are not defined by law but are  
5 expected of government officials --

6 MR. MOOPPAN: Yeah. And we --

7 JUSTICE SOTOMAYOR: -- like telling  
8 the mayor to post this information.

9 MR. MOOPPAN: Right. So --

10 JUSTICE SOTOMAYOR: Nobody writes that  
11 in law, but --

12 MR. MOOPPAN: Right. We don't dispute  
13 that point, and I don't think the Sixth Circuit  
14 does either. But the critical point in your --

15 JUSTICE SOTOMAYOR: Oh, it does.  
16 It -- it -- it defines this much more narrowly.

17 MR. MOOPPAN: Your Honor, if they do,  
18 we don't agree with that.

19 JUSTICE SOTOMAYOR: Okay. That --

20 MR. MOOPPAN: But -- but the critical  
21 point is, in your hypothetical, how we know that  
22 that state action is control. Your example was  
23 the mayor told the city administrator do it. In  
24 the next case, the mayor couldn't have told the  
25 city administrator to do what on this page

1 because it's their personal property.

2 That's not what's happening in -- to  
3 go back to our case, there is no evidence in  
4 this case that anything --

5 JUSTICE SOTOMAYOR: So what do we do  
6 with what was then Twitter? I'm going to  
7 continue to call it Twitter because that's what  
8 it is here, okay?

9 (Laughter.)

10 JUSTICE SOTOMAYOR: What do we do with  
11 Twitter, where the blocking blocks, especially  
12 now, blocks access? Previously, you could still  
13 look at the Twitter account, you just couldn't  
14 post.

15 What happens now when, if you don't  
16 have your own Twitter account, you can't even  
17 look, and if you're blocked, you're not  
18 permitted to look?

19 MR. MOOPPAN: Again, it depends what  
20 you're being blocked from. And the critical  
21 point in these cases is that my clients, all of  
22 their speech was speech that they could perform  
23 in their individual capacity.

24 Under this Court's decision in Lane,  
25 even though they're government officials, they

1 have the right to speak about the government in  
2 their individual capacity.

3 JUSTICE SOTOMAYOR: Let me give you a  
4 --

5 JUSTICE ALITO: What if you -- what if  
6 you showed a Facebook page to a thousand people  
7 and 999 of them would think that this is an  
8 official page? Under your test, that wouldn't  
9 matter?

10 MR. MOOPPAN: That shouldn't matter,  
11 and I'll give you two reasons why it shouldn't.

12 So the first, the conceptual reason,  
13 is because the challenge here is they're  
14 challenging blocking. And my clients' power to  
15 block doesn't turn on the appearance.

16 And here's a hypothetical that I think  
17 will make that pretty clear. Imagine you're a  
18 police officer and you finish your shift, you're  
19 running late to pick up your kids from school,  
20 so you go running down the street still in your  
21 uniform and you push someone out of the way.

22 Everyone on the street probably  
23 assumes you're still doing your job and in hot  
24 pursuit of a felon, but that's not state action.  
25 You're acting in a purely personal capacity, and

1 your power to push someone out of the way  
2 doesn't turn on your uniform.

3 JUSTICE ALITO: Well, suppose the town  
4 man -- town manager has a page and the town  
5 manager puts the official seal of the town and  
6 says: This is the town manager's page. This is  
7 the place to look to find information about what  
8 the town manager is -- is doing, and this is the  
9 place to express your views on the important  
10 issues that come before the town manager.

11 And there's nothing personal on the  
12 page, but the -- the town manager doesn't use  
13 any public resources to create the page, and  
14 there's nothing in his job description that says  
15 that he has a duty to have such a page, and he's  
16 not relying on any special authority in creating  
17 this page.

18 MR. MOOPPAN: So --

19 JUSTICE ALITO: And you would say that  
20 in that instance, the town manager can block  
21 comments based on viewpoint? So the town  
22 manager can block anybody who expresses  
23 criticism of what the town manager is doing and  
24 thereby create the impression that everybody in  
25 town thinks the town manager is doing the right

1 thing?

2 MR. MOOPPAN: So with one possible  
3 caveat. In your hypothetical, when you said  
4 that this is the town manager's page, if he was  
5 saying, this is a page I'm running in my  
6 official capacity, then I wouldn't take that  
7 position. But by that -- that statement has  
8 substantive content behind it.

9 When you say this is the town  
10 manager's page in his official capacity, what  
11 you're essentially admitting is the town  
12 manager's boss could tell him what to do on the  
13 page. He's admitting at that point that it is a  
14 governmental page.

15 But, if instead, as I think your  
16 hypothetical was meant to suggest, he's just  
17 saying, I am the town manager, this is what I  
18 think, this is where you want to talk to me,  
19 that, under this Court's decision in Lane, is  
20 what any government official can do in their  
21 personal capacity.

22 JUSTICE JACKSON: But why would they  
23 --

24 JUSTICE KAGAN: So that means  
25 President Trump's Twitter account was also



1 personal?

2 MR. MOOPPAN: Yeah, I think that was a  
3 harder question, Your Honor, because there was  
4 in that case use of a government staffer to help  
5 him run the page.

6 JUSTICE KAGAN: Suppose that there  
7 wasn't. Suppose that, you know, he gave every  
8 indication of writing his tweets himself, and  
9 suppose he had also posted them, so there wasn't  
10 a staffer involved.

11 MR. MOOPPAN: Yes, Your Honor, then I  
12 think that he is engaging in his First Amendment  
13 rights under this Court's decision in Lane to  
14 talk about the government in his individual  
15 capacity.

16 JUSTICE KAGAN: But he seems to be  
17 doing, you know, a lot of government on his  
18 Twitter account. I mean, sometimes he was  
19 announcing policies.

20 Even when he wasn't, I mean, I -- I  
21 don't think a citizen would be able to really  
22 understand the Trump presidency, if you will,  
23 without any access to all the things that the  
24 President said on that account. It was an  
25 important part of how he wielded his authority.

1 And to cut -- to cut a citizen off from that is  
2 to cut a citizen off from part of the way that  
3 government works.

4 MR. MOOPPAN: So a couple things about  
5 that, Your Honor. The first is President Trump  
6 could have done exactly the same thing from  
7 Mar-a-Lago or a campaign rally. If he gave  
8 every one of those speeches at his personal  
9 residence, it wouldn't somehow convert his  
10 residence into government property.

11 And in terms of people being cut off  
12 from it, people don't have a right to access  
13 other people's personal property. The blocking  
14 here doesn't turn on --

15 JUSTICE KAGAN: I have to say that  
16 seems a little bit, you know, to focus on the  
17 wrong end of the stick, if you will. I mean,  
18 the fact that it was his personal property seems  
19 neither here nor there. If, really, he was  
20 doing government on it and wielding his  
21 authority on it and announcing policy on it and  
22 -- and -- and, you know, it was part of the way  
23 government operated.

24 MR. MOOPPAN: So here's why I don't  
25 think that's quite right, Your Honor. Imagine

1 he had put on his page a clear disclaimer, this  
2 is my page that I'm using in my personal  
3 capacity to talk about the government. This is  
4 not an official page. Every single word on that  
5 Twitter account could have been the same because  
6 he's allowed --

7 JUSTICE JACKSON: Right. But why --  
8 why shouldn't we -- why shouldn't we require  
9 that then if you're right? In other words, it  
10 seems to me the problem that we're having is,  
11 even if we agree with you that government  
12 officials can operate in their personal capacity  
13 and in their official capacity, why should they  
14 get to choose whether or not they're doing one  
15 or the other without, say, making a clear  
16 disclaimer or making it clear to people that  
17 this is actually happening in their personal  
18 capacity?

19 MR. MOOPPAN: So I'll give you two  
20 reasons, one conceptual and one practical.

21 The conceptual reason is because the  
22 First Amendment generally doesn't compel speech.  
23 It generally protects against compelled speech.

24 JUSTICE JACKSON: Yeah, but you -- you  
25 can't have it both ways. I mean, you know, to

1 the extent that we know and we agree with you  
2 that the person can operate in one or the other,  
3 I don't understand why it would necessarily be a  
4 compulsion to have them do so clearly.

5 MR. MOOPPAN: So, here, because what  
6 is basically being said is, if everyone agrees  
7 my clients could have said this in their  
8 individual capacity and had First Amendment  
9 rights to do so, but they will lose those rights  
10 unless they put up a disclaimer, that is  
11 basically saying --

12 JUSTICE JACKSON: No, no, no. I'm not  
13 saying they lose the right, right? You can --  
14 you can go down Row A or Row B. You -- you have  
15 the freedom to do that.

16 The question in this case is, how do  
17 we know which you have chosen?

18 MR. MOOPPAN: Right. And so the  
19 disclaimer is essentially a condition that is  
20 being required to go down Row A rather than Row  
21 B. That is an odd thing to say that the First  
22 Amendment of its own force compels.

23 Let me also give you a practical  
24 reason why this isn't the right way to think  
25 about it. You're setting up a trap for the

1     unwary. There are lots of government officials  
2     in this country. They are probably not all  
3     going to read this Court's decision. And if you  
4     adopt a rule that the only way they can exercise  
5     their rights under Halleck to exclude people  
6     from their personal property is to include a  
7     disclaimer, some of those people aren't going to  
8     do it and they're going to lose their First  
9     Amendment rights.

10                   And that's the exact opposite of how  
11     the First Amendment normally works. This Court  
12     normally adopts presumptions and rules that  
13     protect the First Amendment, that set up  
14     prophylactic boundaries to ensure that you don't  
15     inadvertently lose your rights through --

16                   JUSTICE KAGAN: Well, there -- there  
17     --

18                   JUSTICE BARRETT: Mr. Mooppan --

19                   JUSTICE KAGAN: This is a case where  
20     there are First Amendment interests on both  
21     sides. I mean, just as there may be First  
22     Amendment interests in protecting the private  
23     speech of government employees, there are also  
24     First Amendment interests in -- in -- in  
25     enabling citizens to access the important parts

1 of their govern -- of their government.

2 MR. MOOPPAN: Right. But --

3 JUSTICE KAGAN: That's what makes  
4 these cases hard, is that there are First  
5 Amendment interests all over the place.

6 MR. MOOPPAN: Well, but the difficulty  
7 is, as Justice Jackson said, it is entirely in  
8 my clients' control whether these pages are used  
9 in their individual capacity or their official  
10 capacity. So whatever First Amendment interest  
11 is on the other side, it's extraordinarily weak  
12 because all we had to do is put up a disclaimer  
13 and their right goes -- completely evaporates.

14 So, on the one hand, you would be  
15 adopting a rule that every government official  
16 in this country runs the risk of inadvertently  
17 losing control over their property because they  
18 didn't put up a disclaimer.

19 On the other hand, you have a  
20 disclaimer. Then our clients are still blocked  
21 and everything else happens exactly the same.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Justice Thomas?

25 Justice Alito?

1 JUSTICE ALITO: Is the act that is at  
2 issue in this case what the person who owns the  
3 Facebook page says, or is the act that is at  
4 issue the forum, so to speak, that is created by  
5 enabling comments?

6 MR. MOOPPAN: The act that's being  
7 challenged is the blocking from the page.

8 JUSTICE ALITO: So it's the forum, so  
9 to speak?

10 MR. MOOPPAN: Well, the specific act  
11 that's being challenged is being blocked from  
12 the page. How you characterize the page,  
13 whether you view it as a forum or not, is partly  
14 a underlying merits question.

15 JUSTICE ALITO: Well, no, it could be  
16 a private forum. It could be some sort of a --  
17 of a public forum.

18 MR. MOOPPAN: Sure.

19 JUSTICE ALITO: And the First  
20 Amendment issues on the other side are the free  
21 speech issues of the people who are blocked.

22 MR. MOOPPAN: Right. But they don't  
23 have any First Amendment interest in accessing  
24 private property. That's this Court's decision  
25 in Halleck. And since this is a private

1 account, there is no question that this is not  
2 owned by the government or controlled by the  
3 government, and it's entirely in my clients'  
4 plenary power whether to open it up to the  
5 public.

6 That's why I don't think they -- if  
7 you have any interest, they have very minimal  
8 interest, and it's one that could be wiped out  
9 with a disclaimer. And there are a lot of good  
10 reasons why the Court shouldn't require that.

11 The other thing I will say about a  
12 disclaimer, though, Your Honor, is, if there is  
13 concern about confusion, the right place to do  
14 that is by the state regulating. Un- -- rather  
15 than this Court adopting as a rule of  
16 constitutional law that the First Amendment, of  
17 its own force, somehow requires a disclaimer,  
18 the much better way to handle this is the State  
19 of California, if they think there's a problem,  
20 if they think people are confused, they can  
21 regulate. They can regulate my clients because  
22 they're a government employer. My clients are  
23 government employees. The state has broad power  
24 to regulate in that capacity.

25 And that's the way to deal with this



1 issue if there's confusion. And that's  
2 especially true because, to go back to a point I  
3 made earlier, the blocking doesn't turn on the  
4 confusion. My clients will be able to block  
5 them whether or not they were confused about the  
6 page, just like the officer running down the  
7 street.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Sotomayor?

10 JUSTICE SOTOMAYOR: You keep saying  
11 that what matters is that this user, both a  
12 personal user and a government user, could do  
13 the same thing equally. I know that's important  
14 to the government as well.

15 But I don't know why that matters,  
16 meaning, if the issue -- and it seems that what  
17 it's devolving down in this conversation is  
18 whether this particular act in this context is  
19 government action or not, not whether the  
20 account is personal or business. Whether the  
21 account is personal or business may inform  
22 whether we have to take a second step or not.

23 So, if it's a personal account, then  
24 you have to figure out whether it's being  
25 used -- and I think you said that --

1 facilitated, being used for government business.  
2 That was the government's example of, if a  
3 private account starts doing notice-and-comment  
4 on legislation, that process is governmental,  
5 isn't it?

6 MR. MOOPPAN: Yes, Your Honor.

7 JUSTICE SOTOMAYOR: So let's assume a  
8 mayor says, I'm setting up a hotline for  
9 emergencies on my Facebook or Twitter, and if  
10 you have an emergency, call that hotline, and I  
11 will use the power of my office to set in motion  
12 government response for your emergency.

13 Seems to me that that's government  
14 action, isn't it? He's -- the -- the state is  
15 facilitating by the duties it's given him his  
16 ability to put government resources into action.

17 MR. MOOPPAN: The response to that  
18 phone call is undoubtedly government action.  
19 Whether setting up the phone call is depends.  
20 So take, for example, Mayor Bloom --

21 JUSTICE SOTOMAYOR: So, if he  
22 routinely uses or responds to those calls in an  
23 official way, that process doesn't become  
24 government action?

25 MR. MOOPPAN: Well, imagine --

1 JUSTICE SOTOMAYOR: He could exclude  
2 Muslims, Jews, whoever he wanted to exclude,  
3 blacks, whatever, women, because that's a social  
4 account?

5 MR. MOOPPAN: Imagine if Mayor  
6 Bloomberg, as an act of charity to the City of  
7 New York, had set up in his personal capacity a  
8 phone message or an Internet system like that.  
9 He paid for it out of his own pocket, no  
10 government resources were used for it, no one in  
11 the State of New York could tell him how to run  
12 that because it was his own personal phone  
13 exchange. That would be personal capacity  
14 action.

15 JUSTICE SOTOMAYOR: But why isn't that  
16 -- isn't that account facilitating his duties as  
17 the mayor? He's using it to now put the  
18 resources of the government to use as mayor.

19 MR. MOOPPAN: No. He, like any other  
20 private citizen, is helping people contact the  
21 government. Any private citizen has the ability  
22 to do that. And the question of whether the  
23 government -- a government official is acting in  
24 the capacity of a government official --

25 JUSTICE SOTOMAYOR: Not every private

1 individual has the ability to put the mechanisms  
2 of government into effect.

3 MR. MOOPPAN: Right. That's on the  
4 back end. I conceded that the back-end response  
5 would clearly be state action.

6 JUSTICE SOTOMAYOR: Well, the --

7 MR. MOOPPAN: My only point is that  
8 the front-end --

9 JUSTICE SOTOMAYOR: -- the problem I  
10 have is that it's all intertwined.

11 MR. MOOPPAN: I don't think so, Your  
12 Honor, because, again, you can have that exact  
13 same phone system set up by some wealthy donor,  
14 and that clearly wouldn't be state action. That  
15 would be private charitable giving to help the  
16 government run better. And just like as this  
17 Court held in Lane, a government official could  
18 be still acting in their individual capacity  
19 even when they're speaking about information  
20 they learn as part of their job. That doesn't  
21 mean that they're doing their job.

22 The way to figure out whether they're  
23 doing their job is to figure out whether they're  
24 using government resources, whether the  
25 government can control what they're doing,

1 whether they're doing something that only the  
2 government can do. None of that is true here.

3 And to the contrary, these pages, the  
4 user names of the pages are campaign slogans,  
5 because my clients were elected officials who  
6 have to run for reelection. So what they were  
7 doing is what incumbent officials all over the  
8 country do as a regular matter. They talk to  
9 their constituents to show what a good job  
10 they've been doing and why they should be  
11 reelected.

12 JUSTICE SOTOMAYOR: Well --

13 CHIEF JUSTICE ROBERTS: Justice --

14 JUSTICE SOTOMAYOR: -- I don't know  
15 why they have personal accounts too then.

16 MR. MOOPPAN: That's to --

17 JUSTICE SOTOMAYOR: If it was a  
18 personal account, they could have done both  
19 things.

20 MR. MOOPPAN: That's to talk to their  
21 friends and family without letting every person  
22 in town talk to them. The better point, I  
23 think, Your Honor, is they don't have a campaign  
24 account other than these ones. So, if this  
25 isn't their campaign page --

1 JUSTICE SOTOMAYOR: But they don't say  
2 it's their campaign page.

3 MR. MOOPPAN: Well, the user --

4 JUSTICE SOTOMAYOR: They say it's  
5 their page as X official of Y city.

6 MR. MOOPPAN: So I'll say two things  
7 about that, Your Honor.

8 First of all, since the user names of  
9 the pages, Moore for PUSD and Zane for School  
10 Board, are both campaign slogans, that's a  
11 pretty good indicia that it is a campaign page.

12 Another good indicia of the fact that  
13 it's a campaign page is that they didn't have  
14 another campaign page. So they would either  
15 have to be the only two officials in America who  
16 decided not to have a social media page when  
17 they were running for reelection, or these were  
18 those pages.

19 JUSTICE SOTOMAYOR: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?

21 JUSTICE KAGAN: So I guess just to  
22 press on this a little bit and going back to  
23 Justice Thomas's original question so I can make  
24 sure I understand the answer to it, there's a  
25 person and they become a school board member,

1 and they set up a private account, so they're  
2 not using a preexisting account. They set up a  
3 private account.

4 And the only thing on this account are  
5 things related to the school board. So it has,  
6 you know, we're having a meeting, the agenda,  
7 the resolutions, the meeting times, the minutes,  
8 job postings, official reports, whatever. All  
9 school board business.

10 And there's also some commentary, you  
11 know, the board would like to know what you  
12 think about this, I would like to know what you  
13 think about this, so please come to the meeting,  
14 and, indeed, please give your comments to me on  
15 this page about what you think of Agenda Number  
16 3 -- Agenda Item Number 3 at our next meeting.

17 And that's the content of the page.  
18 State action or not?

19 MR. MOOPPAN: No state action because  
20 that is speech that an individual could do in  
21 their private capacity and there's no objective  
22 evidence, not through any resources or anything  
23 else, that they're being done through control.  
24 Everything you just said could happen in my  
25 clients' backyard. Everything you just said

1 could happen if my clients went to church and  
2 asked their fellow congregants, hey, I have a  
3 difficult issue coming up next week, what do you  
4 think I should do.

5 JUSTICE KAGAN: And when you say the  
6 control, I mean, I guess -- I mean, there are  
7 some officials where there's a -- a -- a -- a  
8 kind of line of command, but, you know, a -- a  
9 school board member, well, they're a school  
10 board member. They -- they are the control.

11 What -- what -- why do you need  
12 somebody, like, insisting on the content?

13 MR. MOOPPAN: Well, it's a --

14 JUSTICE KAGAN: They are the state.

15 MR. MOOPPAN: Well, so they are state  
16 officials, but they could be acting in either  
17 capacity. And the reason control matters is  
18 it's a way of disentangling the two. If your  
19 boss can tell you what to do, then we know  
20 you're acting as an official. If your boss  
21 can't tell you what to do, if when the boss  
22 tells you what to do that's subject to First  
23 Amendment balancing, then we know you're acting  
24 as a personal capacity. I think it's clearer in  
25 the next case, where it's the city administrator



1 who has a boss. He's got a mayor.

2 Now you're right that in my case, the  
3 school board officials, there's limited  
4 oversight above them. But that's just a matter  
5 of positive state law. Imagine if the State of  
6 California had a czar of official web pages.  
7 All California official web pages are regulated  
8 by the czar. He says, put up the state motto,  
9 do this, that, and the other thing, and don't do  
10 these other things.

11 No one would think that that guy could  
12 tell my clients what to do on these pages.

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Gorsuch?

16 JUSTICE GORSUCH: Just curious on your  
17 side of the v in both cases, we have a profusion  
18 of possible tests to choose among. You've  
19 offered one, the Solicitor General has offered  
20 another, the Sixth Circuit has a slight  
21 variance.

22 You've now had time to stew on this  
23 case for a number of months and think about it.  
24 What's your best advice for us on your side of  
25 the v, what test you'd propose?

1           MR. MOOPPAN: So I continue to think  
2           that the best test is that to look to duties and  
3           authorities and to say that if duties -- if  
4           there is neither the exercise of duty nor  
5           authority, that's not state action. That's all  
6           you need to do to resolve this case.

7           Now that raises the further question  
8           of: Well, how do you know whether there are  
9           duties and authorities? At that point, we're  
10          not talking about a test. We're talking about  
11          how to implement the test. And I think the  
12          things that the Court should be looking at are  
13          objective indicia that are capable of  
14          disentangling the two capacities.

15          So things like the use of resources,  
16          the exercise of supervision, the exercise of  
17          exclusive duties, those are things that will  
18          help you figure out is this actually exercising  
19          duties and authorities of your office or is it  
20          instead exercising your First Amendment rights  
21          under Lane to talk about the government but not  
22          as the government.

23          JUSTICE GORSUCH: And how does that  
24          test interact with Griffin in your view?

25          MR. MOOPPAN: So, in Griffin, the

1 officer was exercising the authorities of his  
2 office. He was a deputy sheriff. He was  
3 wearing a badge. And he arrested someone as the  
4 deputy sheriff.

5 JUSTICE GORSUCH: So that's an  
6 authority case --

7 MR. MOOPPAN: That is an authority  
8 case.

9 JUSTICE GORSUCH: -- in your scheme?

10 MR. MOOPPAN: And the counter-example  
11 is the hypothetical I gave earlier. A police  
12 officer in full uniform runs down the street,  
13 pushes someone out of the way, but he's doing it  
14 to pick up his kid. That may look like he's  
15 doing his job, but he's not doing his job and  
16 he's not invoking his power.

17 That would not be state action.  
18 There's no lower court that would find state  
19 action in a case like that. Lower courts have  
20 rejected state action in much closer cases than  
21 that.

22 JUSTICE GORSUCH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Kavanaugh?

25 JUSTICE KAVANAUGH: Just to press a

1 little bit on how you would apply the test, so  
2 I'm assuming that the information that would be  
3 posted is not also posted on a government site,  
4 so it's only posted on the personal site. This  
5 picks up a little bit on some of Justice Kagan's  
6 hypotheticals.

7 But suppose the city manager on the  
8 personal site says, we have new recycling rules,  
9 you have to use a blue bin, has to be at the  
10 curb, will be picked up on Wednesdays. If you  
11 have any questions, contact me. That's only on  
12 the personal site, not on the official site.

13 Is that state action?

14 MR. MOOPPAN: There might well be an  
15 argument there because, in that point, I assume  
16 that there is a duty as a state official to  
17 announce the rules, right? People need to know  
18 what the rules are.

19 JUSTICE KAVANAUGH: Okay.

20 MR. MOOPPAN: And if you're --

21 JUSTICE KAVANAUGH: So that's very  
22 important. I'm going to stop you there because,  
23 when you described how to implement the test in  
24 response to Justice Gorsuch, you said resources,  
25 supervision, and exclusive duties.

1                   So this is really important, I think,  
2                   because a lot of what local officials do is  
3                   announce rules. Is announcing rules state  
4                   action?

5                   MR. MOOPPAN: Not in and of itself.

6                   JUSTICE KAVANAUGH: Okay. Well, we've  
7                   got to --

8                   MR. MOOPPAN: Because --

9                   JUSTICE KAVANAUGH: You -- you said --

10                  MR. MOOPPAN: Right.

11                  JUSTICE KAVANAUGH: -- the local  
12                  officials around the country need guidance.  
13                  That is definitely true.

14                  MR. MOOPPAN: I agree with that.

15                  JUSTICE KAVANAUGH: So --

16                  MR. MOOPPAN: So what I --

17                  JUSTICE KAVANAUGH: -- announcing  
18                  rules is part of what they do. They need a  
19                  clear answer. What's the answer?

20                  MR. MOOPPAN: So I think the clear  
21                  answer is, if this is the only place they are  
22                  announcing that rule, then that's going to be  
23                  state action.

24                  JUSTICE KAVANAUGH: Okay. So  
25                  announcing you can't park on the even-numbered

1 side of the street during snowstorms, that's the  
2 same?

3 MR. MOOPPAN: Yeah, but --

4 JUSTICE KAVANAUGH: State action?

5 MR. MOOPPAN: -- but, importantly, the  
6 -- the start of your question --

7 JUSTICE KAVANAUGH: If it's only -- if  
8 it's only --

9 MR. MOOPPAN: Right.

10 JUSTICE KAVANAUGH: Yeah. No, I'm  
11 assuming --

12 MR. MOOPPAN: It is perfectly fine to  
13 announce it officially and then amplify that  
14 message on your personal page.

15 JUSTICE KAVANAUGH: So a lot of this  
16 will depend on whether it's reposting or  
17 exclusive posting, I think --

18 MR. MOOPPAN: I agree.

19 JUSTICE KAVANAUGH: -- on the  
20 announcing of rules, okay.

21 MR. MOOPPAN: Yeah.

22 JUSTICE KAVANAUGH: What about  
23 notices, announcing notices? Okay, it's  
24 snowing, schools are closed tomorrow, and it's  
25 only on the personal site.

1 MR. MOOPPAN: Again, Your Honor, I --

2 JUSTICE KAVANAUGH: That's not a rule,  
3 but it's a notice.

4 MR. MOOPPAN: I think, in general, if  
5 what is being -- the question, to take a step  
6 back, is whether you're exercising a duty of  
7 your office, and those sort of things --

8 JUSTICE KAVANAUGH: That's not good  
9 enough for the local officials who need  
10 guidance.

11 MR. MOOPPAN: I agree, Your Honor.  
12 And so what -- what I'm trying to think through  
13 on hypotheticals like that is, is it fair to say  
14 that that is the exercise of a duty. And so, if  
15 it's the announcement of something that you have  
16 an obligation to inform the citizenry of, then,  
17 yes, I agree.

18 And that might be, if it's a rule or  
19 you can have a lot of different things, I just  
20 don't want to go so far as to say that anytime a  
21 government official tells the public anything,  
22 that is state action, because that's too far,  
23 because there are lots of things that the  
24 government official could be telling the public  
25 purely in his personal capacity.

1                   But, for most of the hypotheticals I  
2 think you were asking me in the line of  
3 questions you were about to ask, yes, if you're  
4 telling people things about the rules of the  
5 road of the government, things that as a  
6 governmental matter you have a duty to disclose  
7 because you can't just spring rules on people or  
8 tell people -- not tell people things they need  
9 to know in their official capacity, then, if  
10 that's the only place you announce that, is your  
11 government account, then I assume that that's  
12 likely going to be a very strong indicia that  
13 you're using the account for government  
14 purposes.

15                   JUSTICE KAVANAUGH: Your personal --

16                   MR. MOOPPAN: If I could say one last  
17 thing?

18                   JUSTICE KAVANAUGH: -- personal  
19 account you meant?

20                   MR. MOOPPAN: Sorry, personal account.

21                   JUSTICE KAVANAUGH: Yeah, yeah.

22                   MR. MOOPPAN: One way of knowing that  
23 is, in those hypotheticals, almost certainly  
24 your boss could tell you what to do in there,  
25 right? If --



1 JUSTICE KAVANAUGH: Well, you are the  
2 boss to get back to I think Justice Kagan's  
3 point.

4 MR. MOOPPAN: So, in -- on these -- in  
5 this case, yes. Not in the next case. In the  
6 next case, the mayor is the boss.

7 JUSTICE KAVANAUGH: And last -- last  
8 one. Just reminders, a reminder about there  
9 have been a lot of thefts and burglaries in  
10 the -- in the neighborhood. Lock your cars. If  
11 you're going away for a few days --

12 MR. MOOPPAN: Right. See --

13 JUSTICE KAVANAUGH: -- tell the  
14 police.

15 MR. MOOPPAN: -- that's --

16 JUSTICE KAVANAUGH: And it's only on  
17 the personal site.

18 MR. MOOPPAN: Right. That's the line  
19 I was trying to -- that sort of speech is  
20 something you could do, any private citizen can  
21 do it, and government officials don't have any  
22 duty to do that.

23 They could do that in their official  
24 capacity. So, for that sort of speech, you're  
25 going to need something more. You're going to

1 need to see that they're either, like, using  
2 staffers to prepare it or their bosses are  
3 telling them to do it, but the speech by itself  
4 isn't going to be enough for something like  
5 that.

6 JUSTICE KAVANAUGH: So I think you've  
7 distinguished announcing rules if it's only on  
8 the personal site from notices of government  
9 information, and that's kind of fuzzy. And  
10 reminders would not be. Is that --

11 MR. MOOPPAN: I think that's right,  
12 Your Honor. Look, again, to say --

13 JUSTICE KAVANAUGH: That's the kind of  
14 practical information that people are going to  
15 need, I think.

16 MR. MOOPPAN: I hope so if this Court  
17 adopts the right test of duties and authorities.

18 JUSTICE KAVANAUGH: All right. Thank  
19 you.

20 (Laughter.)

21 CHIEF JUSTICE ROBERTS: Justice  
22 Barrett?

23 JUSTICE BARRETT: So, Mr. Mooppan,  
24 when you were having this colloquy with Justice  
25 Kavanaugh, you all were talking post by post.

1 The Chief Justice asked you at the start, are we  
2 looking at this as whose account is it or are we  
3 looking at specific actions. It kind of sounded  
4 to me when you were talking to Justice Kavanaugh  
5 that your position, which I kind of understood  
6 your initial position to be no, we're looking at  
7 the account, but which is it?

8 MR. MOOPPAN: So I think it's true  
9 that you're looking at the account and the  
10 blocking, but as I told the Chief Justice at the  
11 very end of our colloquy and now with Justice  
12 Kavanaugh, if you use the account even in part  
13 for what is an exclusive governmental duty to  
14 give notice to the public or engage with the  
15 public, I agree at that point it's going to be  
16 state action.

17 The reason why I think it's important  
18 to think about this at the account level is  
19 there's a lot of speech that might be -- speech  
20 that might be viewed as official but isn't an  
21 official duty to provide information to people  
22 in, like, the hypotheticals Justice Kavanaugh  
23 was asking me.

24 And so a way of differentiating the  
25 two, announcing, for example, that I'm going to

1 sign a bill, announcing I'm going to appoint a  
2 judge, those sort of things are things you could  
3 do in a -- even if you view those as official in  
4 some sense, that doesn't mean that you're using  
5 the property where you make that speech in an  
6 official capacity. You can engage in that type  
7 of speech at a campaign rally, at a church, in  
8 your backyard, and --

9 JUSTICE BARRETT: So we are kind of  
10 looking post by post, I think?

11 MR. MOOPPAN: If you're talking about  
12 exclusive duties, I agree.

13 JUSTICE BARRETT: Okay. And -- and I  
14 have a question about this word "duty." So what  
15 is the point of talking about both duty and  
16 authority? Because it seems to me that duty,  
17 and this kind of runs throughout the brief,  
18 sometimes it's described as obligations.

19 You described it just now as an  
20 exclusive government duty, a requirement, that  
21 appears sometimes in the briefs, but sometimes  
22 there are things you have the authority to do as  
23 a government official that you're not required  
24 or obligated to do.

25 So it seems to me that if you have the

1 authority to do them, something that you have a  
2 duty to do is just a subset of authority.

3 So why are we talking about duty?

4 MR. MOOPPAN: So, look, I think -- I  
5 think you're right that duties and authorities  
6 sometimes are flip sides of the same coin in  
7 general and that you can have exercises of  
8 authority that are permissive but not required.  
9 So I agree with all of that.

10 I think authority does add something  
11 beyond duty. I think what it's helpful most for  
12 is things like the use of staffing, the use of  
13 resources, things like that that don't really  
14 directly go to the question of is it duty or --  
15 but it is the wielding of authority.

16 Now that sort of thing is relevant for  
17 two reasons. One, it's good evidence that  
18 you're wielding a duty or authority if you're  
19 using government resources or staffing. And,  
20 two, it's possible that at least in some cases  
21 the mere use of those resources alone could be  
22 state action.

23 JUSTICE BARRETT: See, I mean, I  
24 guess, I just think using the word "authority"  
25 -- I mean, I get in the -- in the Sixth Circuit

1 case that's what the opinion seems to be --  
2 that's -- that's the -- I don't know -- that's  
3 the value of authority, I think, in the Sixth  
4 Circuit opinion, but it just seems to me like a  
5 weird way to describe it.

6 I think of it more as evidence, right?  
7 I mean, am I losing a whole lot if I don't want  
8 to use the word "duty" and if I just say  
9 authority? Maybe that would pick up some of  
10 that stuff that you're talking about anyway?

11 MR. MOOPPAN: I don't think you're  
12 losing a lot. I think you could frame it either  
13 way. As I said, I think they are flip sides of  
14 the same coin.

15 JUSTICE BARRETT: Okay. You were  
16 talking a lot about property, which is the  
17 government's focus. So you've articulated the  
18 test. As Justice Gorsuch said, we have lots of  
19 articulations on offer on your side of the v.

20 What is the difference, what's the  
21 daylight between the government's position and  
22 your position, you know, their focus on is this  
23 private property that the public official is  
24 inviting you onto, you know, the test that they  
25 propose, versus the authority, duty, control

1 test that you do?

2 MR. MOOPPAN: So I don't actually  
3 think there's any daylight between our  
4 positions, though you can ask my friend. I --  
5 they've obviously emphasized property as sort of  
6 this initial gating mechanism --

7 JUSTICE BARRETT: Uh-huh.

8 MR. MOOPPAN: -- whereas we view the  
9 fact that it's private property as quite  
10 relevant to determining are you exercising  
11 duties or authorities of your office.

12 But, at the end of the day, I think  
13 the cases all sort of cash out the same way.  
14 Whether you apply our framework or theirs, you  
15 essentially end up in a spot where, if you're  
16 using a private account and you're not  
17 exercising an exclusive governmental function  
18 and you're not using government resource and the  
19 government can't control it, then you're -- you  
20 should understand that to be exercise -- acting  
21 in your personal capacity because personal --  
22 people have the right as government officials to  
23 talk about their jobs in their personal  
24 capacity, and you should assume that when they  
25 do that on their own personal property, they're

1 acting in their personal capacity.

2 JUSTICE BARRETT: Okay, last question.  
3 At the beginning of your argument, you referred  
4 to unless someone is choosing to use their  
5 Facebook account, Twitter account, whatever, in  
6 their official capacity. And Justice Kagan's  
7 questions were getting to some of this.

8 I think it's very difficult when you  
9 have an official who can in some sense define  
10 his own authority. So I think, for a governor  
11 or, you know, President Trump, it's a harder  
12 call than someone like a police officer, who's a  
13 subordinate. Or I could -- you know, my law  
14 clerk could just start posting things and say  
15 this is the official business of the Barrett  
16 chambers, right?

17 (Laughter.)

18 JUSTICE BARRETT: And -- and that  
19 wouldn't be okay. But if, you know, the -- that  
20 wouldn't be okay.

21 (Laughter.)

22 JUSTICE BARRETT: If, you know,  
23 Governor Newsom decides to do it, he has the  
24 authority to define the scope of his authority.  
25 I would have thought in your clients' context



1 they don't actually have full-ranging authority  
2 just as board members, right, unless the board  
3 said, we've taken a vote and you are the one  
4 who's our communications person, you are the  
5 point person on communications. Then you would  
6 look at a source of authority, but if in that  
7 context -- I mean, I guess it just kind of  
8 depends official by official.

9 I guess I'm not understanding in your  
10 specific, for your client, why there would be an  
11 argument even. It seemed like you were  
12 conceding a little bit in talking to Justice  
13 Kavanaugh about official announcements and that  
14 sort of thing. Would that be true for your  
15 clients?

16 MR. MOOPPAN: Look, I -- yes, I think,  
17 if my clients -- you know, if -- if, for  
18 example, there was a slush fund at the board to,  
19 you know, use money for doing your job and my  
20 clients used that money to, like, buy a Facebook  
21 account or use advertising on Facebook, I -- I  
22 don't think my clients would be acting in an  
23 ultra vires fashion, and I think that that would  
24 be exercising state action.

25 Now I do agree with you, Your Honor,

1 that on the control piece of using control as  
2 evidence of whether it's governmental or not, it  
3 becomes harder the higher up you go in the chain  
4 because it's harder to identify a superior who  
5 can tell you what to do.

6 But even take, for example, the  
7 Governor of California. Well, the Governor of  
8 California does have a boss. The boss is the  
9 people of the State of California, who could,  
10 for example, amend their constitution, and they  
11 could amend their constitution and say that even  
12 the Governor, when he's using -- exercising his  
13 official capacity, here's what he can and cannot  
14 say on a social media page.

15 And they certainly could not do that  
16 for this sort of page, for a page that he owned  
17 before he was the Governor, that he will own  
18 after he's the Governor, and that he uses only  
19 to say things that, under Lane, he has a First  
20 Amendment right to say in his individual  
21 capacity.

22 JUSTICE BARRETT: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Jackson?

25 JUSTICE JACKSON: So I guess I'm still

1 not clear why the onus isn't on the government  
2 official to be clear about the capacity in which  
3 they're operating. I mean, I take your point  
4 that you can have an individual who's a public  
5 official and they can operate in both worlds,  
6 official and also personal.

7 But, to the extent that we're having a  
8 problem or at least I'm having a problem, it's  
9 because we can't identify whether this  
10 particular action is occurring in one world  
11 rather than the other. And we've said in -- in  
12 lines of cases -- like the Pickering line of  
13 cases, we've recognized that even though public  
14 employees have a First Amendment right to speak,  
15 they can be limited in that ability to speak.

16 So it doesn't seem responsive to me at  
17 least for you to say: Well, they have a First  
18 Amendment right, so they have -- they bear no  
19 responsibility in making clear as to when they  
20 are operating personally versus officially. So  
21 can you just say more about that?

22 MR. MOOPPAN: Sure. I'll -- I'll try.  
23 I'll say three things.

24 So the first is, again, the conduct  
25 that they're objecting to is the blocking.

1 JUSTICE JACKSON: Right.

2 MR. MOOPPAN: They are -- this is not  
3 a case where they're complaining because they  
4 were confused, that they thought it was  
5 official, and if they had known it was official,  
6 something else would have happened. Everything  
7 in this case would have been exactly the same if  
8 that page was plastered with disclaimers.

9 JUSTICE JACKSON: Yeah, but -- but --

10 MR. MOOPPAN: So --

11 JUSTICE JACKSON: -- but it's not --  
12 no, I guess what I'm trying to understand is,  
13 when we isolate the blocking -- and you're  
14 right, that is the claim -- we have to think  
15 about, as Justice Kagan pointed out, the  
16 implications of that on the First Amendment  
17 rights of the people who want to see the page.

18 So what's happening is they're being  
19 blocked from either commenting or seeing the  
20 information that's being posted on this  
21 particular page. And when the official says,  
22 but that particular page is my private page and  
23 I'm operating in a private capacity, then I  
24 suppose we have one set of answers. But, if we  
25 believe that that page is actually operating as

1 the official government page and the person is  
2 being blocked, we might have a different set of  
3 answers.

4 So the question is, with respect to  
5 the blocking, is it happening in a personal or  
6 an official capacity, and why wouldn't it be the  
7 -- the public official's responsibility to say,  
8 if you're on this page and you're either seeing  
9 or not seeing things, understand this is a  
10 personal repository of information?

11 MR. MOOPPAN: Right. So, again, I  
12 guess what I would say, Your Honor, is, if you  
13 concede that my clients could have done this in  
14 their personal capacity with disclaimers, the  
15 question is where in the Constitution are they  
16 obligated to put up the disclaimer if they want  
17 to maintain those rights.

18 JUSTICE JACKSON: If they want us to  
19 believe that they're doing it in their personal  
20 -- I mean --

21 MR. MOOPPAN: Well --

22 JUSTICE JACKSON: -- how else are we  
23 supposed to know?

24 MR. MOOPPAN: Well --

25 JUSTICE JACKSON: I mean, that's just

1 one set of questions.

2 MR. MOOPPAN: -- to be fair, they've  
3 got the burden of proof. They are the  
4 plaintiffs in this case. They are the ones who  
5 are arguing it's state action. So the burden  
6 should be on them to show the opposite, not on  
7 my clients to disprove it.

8 The second point I would make --

9 JUSTICE JACKSON: So -- so you're  
10 saying that a public official can just make a  
11 decision sub silentio about which world they're  
12 operating in, not let anybody know, and it would  
13 be the burden on whoever is saying that you are  
14 violating my constitutional rights to determine  
15 that you were actually operating in the -- the  
16 -- the official capacity?

17 MR. MOOPPAN: Yeah, in a case like  
18 this, where there's no objective indicia that  
19 they were doing it in their governmental role,  
20 there's no staffing, there's no resources,  
21 there's no control.

22 JUSTICE JACKSON: What about the page,  
23 the way it looks, the way -- this is the other  
24 argument, right?

25 MR. MOOPPAN: Everything about this

1 page's appearance is equally consistent with a  
2 campaign page. That's exactly what happened in  
3 the Eighth Circuit. A page that looked no  
4 different than our page, the justices -- judges  
5 just split, saying, well --

6 JUSTICE JACKSON: Okay. Can I just  
7 ask one more question? I'm sorry. Justice  
8 Sotomayor came up with a private hotline example  
9 to seek emergency help that I thought was really  
10 interesting. I hadn't thought of it before.

11 And I understood you to say that the  
12 response, the government rushes to your house as  
13 a result of getting the communication, would be  
14 official action. But I guess I'm not clear as  
15 to the blocking that would occur by the -- by  
16 the official from people that they didn't like  
17 with respect to a page that was designated as  
18 this is the opportunity to call for government  
19 help. I'm creating this Facebook page so that  
20 people can have a straight-through hotline to  
21 government resources.

22 The person, I guess, is saying, this  
23 is a private page, so I can block, you know,  
24 Latinos. I don't want any Latinos on this page,  
25 says the person. Is that a problem? I mean, is

1 that state action or not state action?

2 MR. MOOPPAN: I would think -- if  
3 that's all there is, I would say it's not  
4 because a private citizen could set up that  
5 exact same page. Here -- this is a page to get  
6 you access to government officials.

7 JUSTICE JACKSON: But, if they did,  
8 wouldn't -- wouldn't that implicate all the  
9 lines of cases where we talk about or we think  
10 about whether or not a private citizen is  
11 actually acting in a way that's fairly  
12 attributable to the state? I mean, we don't  
13 just stop at saying, oh, a private citizen --

14 MR. MOOPPAN: And I don't think any of  
15 those tests would be met. The -- you know, if  
16 we --

17 JUSTICE JACKSON: The one about joint  
18 action between the private party and the state,  
19 the Brentwood Academy line, where you're looking  
20 at is this facilitating the -- the -- the -- a  
21 state service, you think would not apply?

22 MR. MOOPPAN: I don't think -- again,  
23 if a purely private citizen, just think, you  
24 know, a wealthy person in the city, said, I want  
25 to make it more easy for people to call and get



1 access to government things and sets up a page  
2 like that, that's not joint action. He's acting  
3 wholly independent of the government.

4 JUSTICE JACKSON: All right. Thank  
5 you.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 Mr. Joshi.

9 ORAL ARGUMENT OF SOPAN JOSHI  
10 FOR THE UNITED STATES, AS AMICUS CURIAE,  
11 SUPPORTING THE PETITIONERS

12 MR. JOSHI: Mr. Chief Justice, and may  
13 it please the Court:

14 We agree with Petitioners that duty  
15 and authority is the right way to figure out in  
16 what capacity a -- a public employee defendant  
17 is acting, but we think the Court should focus  
18 on the subset of cases involving a denial of  
19 access to property.

20 In those cases, if the defendant is  
21 exercising an official duty to provide access,  
22 like hosting an official school board meeting,  
23 of course, that's state action. It doesn't  
24 matter where it happens.

25 But, for other kinds of duties, and

1 most important, where it's ambiguous, where it's  
2 the kind of thing a private citizen could do but  
3 also within a broad description of the  
4 official's responsibilities, there, we think the  
5 nature of the property should be all  
6 dispositive. So, if the defendant denies access  
7 to government property, probably state action.

8           If the defendant denies access to her  
9 own personal property, she's probably acting in  
10 her capacity as a private property owner, not as  
11 an agent of the state. And that framework,  
12 especially insofar as it provides a default rule  
13 for hard cases, we think, is more consistent  
14 with the state -- with the purposes of the state  
15 action doctrine, will resolve these cases today  
16 and others like them, and will avoid the need  
17 for this Court to set forth a one-size-fits-all  
18 broader duty and authority test of -- of broader  
19 applicability.

20           I welcome the Court's questions but  
21 happy to talk about --

22           JUSTICE THOMAS: What exactly is the  
23 property? The contract talks about terms of  
24 services, I guess, with -- I'm not a Facebook  
25 person, but I assume it -- they would not

1 consider this service a property.

2 So what exactly is a property?

3 MR. JOSHI: Well, I think the  
4 property, it's a form of virtual property. But  
5 it is the account. You can post speech on  
6 there. You can have conversations on there.  
7 You can open it up to -- to everyone or just to  
8 friends. It is a form of -- of virtual  
9 property.

10 It's like a virtual -- I -- I hate to  
11 use the word "forum" because that term is sort  
12 of overloaded in this context, but it's a --  
13 it's a virtual forum of sorts.

14 It's no different from, say, a hotel  
15 that offers its ballrooms for rent to people and  
16 you might sign a contract and have terms of  
17 service. But, when you take that hotel, you  
18 have a certain degree of control. You have one  
19 of the sticks in the bundle of property sticks  
20 and you can choose who gets invited, what you do  
21 there. This is just a virtual space of the same  
22 sort.

23 JUSTICE THOMAS: So did -- would you  
24 -- just to follow up, do you think that you have  
25 to take into consideration the role of the -- of

1 the provider, Facebook, too, since they can also  
2 evict you from this room that you're in or this  
3 account?

4 MR. JOSHI: Yeah, so not in these  
5 cases. And I -- I agree that there are some  
6 really difficult questions as to the extent of  
7 ownership and control over this virtual property  
8 as between Facebook and Twitter and Petitioners  
9 in this case.

10 But what should be undisputed and is  
11 undisputed is that the Poway Unified School  
12 District has absolutely no ownership or control  
13 over these pages, and that's the relevant  
14 question for the state action question in these  
15 cases.

16 JUSTICE ALITO: What if -- excuse me.  
17 What if something that looks an awful lot like  
18 an official event but is not labeled as such is  
19 held on private property?

20 MR. JOSHI: I think the question in  
21 these cases is the constitutional one of state  
22 action. This Court has often said the  
23 Constitution deals with substance, not shadows.  
24 And I think these sorts of appearances are the  
25 kind of shadows that shouldn't matter to the

1 substantive question of whether, to use  
2 Petitioners' test, you know, it is an actual  
3 official duty and authority being exercised on  
4 that property.

5 And I think this Court has rejected,  
6 to the extent Your Honor is invoking reasonable  
7 observer kind of tests, this Court has rejected  
8 in a variety of contexts, most recently in the  
9 Coach Kennedy case.

10 I mean, I think maybe to a reasonable  
11 observer, a lot of people would have thought  
12 that that coach was acting in his official  
13 capacity. But the Court didn't rely on  
14 reasonable observers. At least as it saw the  
15 facts, it said --

16 JUSTICE ALITO: Well --

17 MR. JOSHI: -- we're going to delve  
18 into the facts and figure out exactly --

19 JUSTICE ALITO: -- let's say in a --  
20 in a small town the population is bitterly  
21 divided over an issue, let's say it's whether  
22 they're going to close down their elementary  
23 school and send the children to another school  
24 25 miles away to save money, and the mayor is in  
25 favor of closing down the school.

1                   So the mayor holds a meeting on -- on  
2 public property and everybody can go and express  
3 their views. And after that meeting, the mayor  
4 says: Well, that didn't go well. The -- there  
5 was an awful lot of opposition expressed to  
6 this. Let's have another meeting, and this time  
7 we're going to have it on my farm, and I'm going  
8 to post people at the entrance, and we're going  
9 to exclude the people who were -- who spoke  
10 vociferously and articulately against my  
11 proposal.

12                   Is that allowed?

13                   MR. JOSHI: So, with -- if I  
14 understand --

15                   JUSTICE ALITO: And the mayor's not  
16 running for reelection. He's term-limited, so  
17 this is not a -- a campaign event.

18                   MR. JOSHI: So, if -- if I understand  
19 it and if I can assume that when he does it on  
20 his farm, he's not using any government  
21 resources.

22                   JUSTICE ALITO: Right, right.

23                   MR. JOSHI: The security guards are  
24 paid out of his own pocket.

25                   JUSTICE ALITO: Right, right.

1                   MR. JOSHI:  Totally fine, I think.  
2           Again, and then let me further assume that the  
3           vote of the people on this farm meeting is not  
4           somehow, like, conclusive, they don't actually  
5           have the authority, he's just taking their views  
6           into account.

7                   It's no different than elected  
8           officials anywhere or government officials  
9           anywhere who choose to speak only to Republicans  
10          or only to Democrats in order to get views on  
11          what they ought to do when they exercise their  
12          official duties.  No one thinks that that's  
13          state action.

14                  And I understand you can think of a  
15          lot of odious behavior by government officials  
16          being discriminatory in whom they speak to and  
17          whom they listen to, but, at the end of the day,  
18          the Constitution does not prohibit even odious  
19          behavior by private citizens.

20                  And I want to return here now to a  
21          point that Mr. Mooppan said, which I really do  
22          think is maybe one of the most important points  
23          in this case, which is that a lot of the scare  
24          hypotheticals that the other side gives about  
25          public officials behaving badly if you narrow

1 the state action doctrine can be taken care of  
2 by their government employers or by the state  
3 through statutes.

4 The government has employer -- as  
5 employer has much greater leeway to regulate  
6 than government as sovereign. And so this Court  
7 has decided a number of cases in which  
8 government employees acting in their private  
9 capacities can nevertheless be regulated by  
10 their employers.

11 And so, if you're worried that there's  
12 not a code of conduct for government officials  
13 on how they comport themselves in their  
14 personal/private capacities, such a code of  
15 conduct is better if it comes from the  
16 government employer as the state.

17 JUSTICE KAGAN: Mr. Joshi --

18 JUSTICE BARRETT: Counsel --

19 JUSTICE KAGAN: -- did -- did -- the  
20 questions that Justice Kavanaugh was asking Mr.  
21 Mooppan, do you agree with Mr. Mooppan's answers  
22 to all those questions, announcements of rules,  
23 policies, what have you?

24 MR. JOSHI: Yeah, I think that's  
25 basically right. If the duty is to provide



1 access, so if there is a duty to say you must  
2 promulgate this information or  
3 notice-and-comment, for example, which means you  
4 must --

5 JUSTICE KAGAN: No, no, no, no, no,  
6 no, no. I mean, it's -- it's not like there's a  
7 duty that says you -- you have to announce the  
8 road closures. They're just you -- you know,  
9 you're in charge of road closures, and you think  
10 it would be a good idea if citizens knew about  
11 them, so you're announcing the road closures on  
12 your site.

13 MR. JOSHI: Yeah, and if there's not a  
14 specific duty to announce the road closure,  
15 which I gather is what you're saying, then, if  
16 you choose to do it on your own site, that's  
17 exactly the sort of thing where we think the  
18 nature of the property --

19 JUSTICE KAGAN: Okay. That's not Mr.  
20 Mooppan's answer. Mr. Mooppan said that as long  
21 as there wasn't a government site where the road  
22 closures were being announced, that that would  
23 be state action.

24 MR. JOSHI: If there's a duty to  
25 announce those. I took as you framed it --

1 JUSTICE KAGAN: There's not a duty to  
2 announce. You're in charge of road closures and  
3 you think it would be a very good idea if people  
4 understood where the road closures were.

5 MR. JOSHI: Yeah, and it's -- again,  
6 I -- I don't want to speak for Mr. Mooppan, but  
7 that sounds like the kind of thing that a  
8 private citizen could do.

9 Let me give you an example closer to  
10 the school board case. There are often --

11 JUSTICE KAGAN: Well, why -- why don't  
12 we do my example, because how are you going to  
13 know --

14 (Laughter.)

15 JUSTICE KAGAN: -- where the road  
16 closures are? I mean, now you're -- you're  
17 being -- I thought that we were starting off  
18 from a point of, if -- if the only place that  
19 somebody can know where the road closures are is  
20 on your private site, Mr. Mooppan said that was  
21 state action. I was going to go on from there,  
22 but you seem to be contesting that.

23 MR. JOSHI: I -- I guess our view is  
24 that if there's a specific duty to make that  
25 information available and I --

1 JUSTICE KAGAN: There's not a specific  
2 duty, Mr. Joshi.

3 MR. JOSHI: Then --

4 JUSTICE KAGAN: Duties don't work like  
5 that. You're in charge of road closures.  
6 That's your duty, to be in charge of road  
7 closures.

8 MR. JOSHI: And if you are not  
9 obligated to -- to talk about road closures and  
10 tell the public about road closures, if you do  
11 it on your private site, then I think that  
12 you're -- you are probably acting in your  
13 personal capacity.

14 Now I agree there may be duties to  
15 inform, and, in those cases, if the only place  
16 you do it is on your personal site, that may  
17 well be state action, whereas, if you do it on  
18 both sites, it wouldn't be.

19 JUSTICE SOTOMAYOR: Six of the --

20 JUSTICE KAVANAUGH: If you --

21 JUSTICE SOTOMAYOR: The Sixth Circuit  
22 seems to think that the duties have to be  
23 written. But many duties are customary,  
24 meaning, no, you're right, I think, if you're in  
25 charge of road closures, I have very little

1 doubt that there's a written law that says you  
2 must inform the public. But that is what  
3 everybody does. It's what tradition and -- and  
4 process has always provided for.

5           You're suggesting that that would not  
6 be taken into account?

7           MR. JOSHI: No, not at all. Quite the  
8 opposite. We agree that customs can define the  
9 duties. I think I was just saying --

10           JUSTICE SOTOMAYOR: So you don't agree  
11 with the Sixth Circuit's narrow view that it has  
12 to be a written duty?

13           MR. JOSHI: We do not agree with the  
14 Sixth Circuit's view that it has to be written  
15 down. We agree that customs can inform what the  
16 duties are of an office. It's just, if there is  
17 a duty to inform, then the discharge of that  
18 duty will be state action no matter where it  
19 takes place. But where there's doubt about it,  
20 if what you're doing is denying access to  
21 personal property, we ought to think you're  
22 acting in your capacity as a private property  
23 owner, not as an agent of the state.

24           CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Justice Thomas?

2 Justice Alito?

3 JUSTICE ALITO: Would it be practical  
4 to require or adopt a rule that puts a lot of  
5 pressure on public officials to separate their  
6 Facebook pages, just to take that example? So  
7 the official can have a -- a personal profile.  
8 The official can have a -- a -- a campaign page.  
9 The official can have an official page.

10 MR. JOSHI: Those all sound like  
11 wonderful things that a state government can  
12 impose in its capacity as an employer. I don't  
13 think this Court should impose it as a matter of  
14 federal constitutional law. And it certainly  
15 shouldn't be the case that the Constitution  
16 imposes that kind of precondition in order to  
17 exercise your personal constitutional rights.

18 JUSTICE ALITO: Mr. Mooppan said that  
19 would be unrealistic for -- that would be asking  
20 too much of a lot of public officials.

21 MR. JOSHI: I do think it would. I  
22 mean, take the example that Justice Jackson  
23 brought up with disclaimers. You know, you  
24 might think, well, all you need to do is put up  
25 a disclaimer and that's it. Well, how good a

1 disclaimer do you need?

2 JUSTICE ALITO: All right. Thank you.

3 MR. JOSHI: Does it have to be on  
4 every page? It's just going to chill speech.

5 JUSTICE ALITO: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Sotomayor?

8 JUSTICE SOTOMAYOR: That's all.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?  
10 Justice Gorsuch?

11 Justice Kavanaugh?

12 JUSTICE KAVANAUGH: To pick up on what  
13 Justice Kagan was asking, which -- about the  
14 road closures and announcements of rules,  
15 announcements of information and what have you,  
16 when I was discussing it with your friend, we  
17 were assuming that it wasn't also posted on the  
18 government's site, it was only posted on the  
19 personal site, and then asking, okay, when --  
20 where does it cross the line into governmental.

21 Why -- why does it matter that it's  
22 posted on the government site or not?

23 MR. JOSHI: I -- I guess the -- it  
24 would matter because that would inform, just as  
25 you look at the facts of the case, whether

1 you're acting in your personal capacity or in  
2 your official capacity, which metaphorical hat  
3 you're wearing. And if you discharge your duty,  
4 again, assuming there's a duty to inform the  
5 public about these things, if you've discharged  
6 a duty on the official site and then you're  
7 amplifying it on your personal site, odds are,  
8 when you do it on your personal site, you're  
9 doing it in your personal capacity.

10 But, if your boss tells you go, you  
11 know, inform the public about this road closure  
12 and the only place you do it is on your personal  
13 site, you're probably discharging your official  
14 duties.

15 JUSTICE KAVANAUGH: Okay. So it  
16 sounds like both of you would have in essence a  
17 safe harbor that if you're reposting information  
18 on your personal site, that that's probably not  
19 going to be considered governmental.

20 MR. JOSHI: Yeah. And -- that's  
21 exactly right. And I think -- you know, I take  
22 the point that the other side makes that that  
23 might be underinclusive in some cases, but I  
24 think that's better because that is the purpose  
25 of the state action doctrine, is to preserve an

1 area of individual freedom and not hold the  
2 state responsible for conduct it really can't  
3 control.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Barrett?

7 JUSTICE BARRETT: So going to Justice  
8 Kagan's questions about announcements, et  
9 cetera, if individual posts on a personal site  
10 can ever be state action because you have a duty  
11 to make announcements, is that a situation in  
12 which your property framework or the presumption  
13 is just defeated because it's a personal account  
14 and which you sometimes use for official  
15 purposes?

16 MR. JOSHI: That's right. As I  
17 mentioned at the outset, if the official duty or  
18 authority you're exercising is one that requires  
19 access, like notice-and-comment or an official  
20 --

21 JUSTICE BARRETT: Yeah.

22 MR. JOSHI: -- school board meeting  
23 where the public can speak, then, yes, that's  
24 state action no matter where you do it. And  
25 your blocking of someone from accessing that



1 particular action is going to be state action no  
2 matter where it occurs.

3 JUSTICE BARRETT: But the word "duty"  
4 is important to you. So I asked Mr. Mooppan  
5 about duty and authority. You -- you're really  
6 leaning on duty, and it seemed in your  
7 interchange with Justice Kagan that you saw a  
8 difference between duty and authority.

9 MR. JOSHI: Well, I think a duty --  
10 it's less obvious in these cases and more  
11 obvious in -- in the next case, where he's a  
12 subordinate with a supervisor.

13 So duty is important because you need  
14 to know is he actually discharging the thing  
15 he's supposed to do. An elected official like  
16 these school board members don't really have  
17 much in the way of those duties, but they do  
18 have authority. They can invoke the state's  
19 power to do something that someone who doesn't  
20 have the state power can't do.

21 And so, in that sense, duty and  
22 authority might be different. In Griffin, for  
23 example, that was a private security guard at  
24 the -- at the Glen Echo Park, but the reason he  
25 got his deputy sheriff certification was so that

1 he could make his arrests and his kicking out of  
2 the trespassers more effective. People listen  
3 to deputy sheriffs in a way they don't listen to  
4 a --

5 JUSTICE BARRETT: But that was  
6 authority, not duty, right? Because he --

7 MR. JOSHI: That was authority.

8 JUSTICE BARRETT: -- didn't have a  
9 duty --

10 MR. JOSHI: That's right.

11 JUSTICE BARRETT: -- to arrest anyone?

12 MR. JOSHI: That's right.

13 JUSTICE BARRETT: Okay.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Jackson?

16 JUSTICE JACKSON: So can I just go  
17 back to Justice Alito's hypothetical, which I  
18 thought was really good, and ask this question?  
19 Suppose the public meeting doesn't occur, so we  
20 have the mayor of the town and there's this  
21 controversial policy, and there is no public  
22 meeting to start because the mayor fears that  
23 there's going to be quite a bit of acrimony with  
24 people who want to come out differently than the  
25 mayor does.

1                   And so, instead of the public meeting,  
2                   the mayor says privately, I'm going to have a  
3                   meeting on my farm, or maybe he even announces  
4                   the meeting, but we're only letting in people  
5                   who are likely to agree with my view. Same  
6                   result? No state action in that situation?

7                   MR. JOSHI: I think probably no state  
8                   action in that situation. I think it's  
9                   something that government officials actually do  
10                  all the time. They might not want to meet with  
11                  even their own constituents who disagree with  
12                  them. They might speak only to Democratic Party  
13                  meetings and only take feedback from Democratic  
14                  Party donors. And, you know, the solution for  
15                  that, as I said, for elected officials might be  
16                  the voters.

17                  JUSTICE JACKSON: Yeah.

18                  MR. JOSHI: And for appointed  
19                  officials and employees, the state as employer  
20                  can regulate that kind of behavior, even if it's  
21                  in its personal capacity the way --

22                  JUSTICE JACKSON: But it doesn't have  
23                  to do so specifically? I mean, can we believe  
24                  that, say, the mayor's duties include receiving  
25                  feedback from the public? If there was a duty

1 to get feedback from the public, I understand  
2 you to be saying that he would have to.

3 MR. JOSHI: Yeah, I --

4 JUSTICE JACKSON: That even if it was  
5 on his farm, he couldn't block people or it  
6 would be considered an official state action.

7 MR. JOSHI: I think it would have to  
8 be a pretty specific duty for that to constitute  
9 state action. I think, if the duty is too broad  
10 in general, like speak to constituents, I think  
11 that's exactly the kind of case that our  
12 heuristic, our test, has a lot of purchase,  
13 which is, if it's something that a private  
14 citizen can do, talk about a policy, get views  
15 on a policy, advocate for a policy, but also  
16 within a sort of broad conception of official  
17 responsibilities, then I think the nature of the  
18 property to which access had been denied really  
19 --

20 JUSTICE JACKSON: All right. One  
21 final question just as a sort of theoretical  
22 matter. Does the government have any concern  
23 about the potential privatization of government  
24 functions that could occur? I mean, I suppose  
25 I'm a little worried about city mayors deciding

1 to sort of shape the debate of the people in  
2 their community by having their meetings in --  
3 in private places so that others in the  
4 community can't comment.

5 Do -- that seems to me problematic as  
6 sort of a theoretical matter, but the  
7 government, I'm taking, says as long as the  
8 mayor chooses to do this on private property,  
9 then he can exclude whoever he wants because  
10 he's doing it in his personal capacity?

11 MR. JOSHI: Yeah, I mean, in the  
12 brick-and-mortar world, I'm not aware of this  
13 being a problem. And if it is a problem, I  
14 think it's best handled by the state, which can  
15 regulate its employees in ways that a state as  
16 sovereign cannot. And I think that's the best  
17 place to handle those concerns, not a rule of  
18 conduct from this Court as a matter of federal  
19 constitutional law.

20 JUSTICE JACKSON: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Ms. Karlan.

24

25

1 ORAL ARGUMENT OF PAMELA S. KARLAN  
2 ON BEHALF OF THE RESPONDENTS

3 MS. KARLAN: Mr. Chief Justice, and  
4 may it please the Court:

5 I have three points to make. First,  
6 the district court found as a factual finding  
7 based on Petitioners' own testimony that  
8 "receiving feedback from constituents is an  
9 important part of their duties as trustees."  
10 California law, both decisional and  
11 constitutional and statutory, the PUSD bylaws,  
12 to which I'll return in a moment, and the  
13 content and appearance of the page confirms that  
14 the finding -- the district court's finding that  
15 these pages were "used as a tool of governance."  
16 Because the trustees were doing their job when  
17 they maintained and then blocked Dr. and  
18 Mrs. Garnier from these pages, this case fits  
19 comfortably within this Court's declaration in  
20 West and Lugar that state employment is  
21 generally sufficient to render the defendant a  
22 state actor.

23 Second, the record in the district  
24 court contains O'Connor-Ratcliff's entire  
25 Facebook feed from the time she joined the --

1 the board through summary judgment. Of the  
2 hundreds of posts, I found only three that were  
3 truly non-job-related. Not only were the posts  
4 all related to her job as PUSD trustee, but the  
5 district court found that the content of many of  
6 the posts was possible only because, as a  
7 trustee, she was, in the district court's words,  
8 "clothed with the authority of state law."

9 For example, O'Connor-Ratcliff's  
10 official position was why she could enter into  
11 classrooms during instructional time all over  
12 the district, something that would get anybody  
13 who was a private citizen arrested. Not only  
14 did she use these pages to provide information  
15 about her official activities that was available  
16 nowhere else, but she frequently solicited  
17 feedback from the public on board-related issues  
18 and used the word "we" to do so.

19 And I'd like to direct the Court to  
20 page 48 -- 46, Note 12 of the red brief, where  
21 we cite the requirement by the board that you  
22 have a disclaimer if you're speaking in your  
23 personal capacity. She never put that  
24 disclaimer anywhere. Instead, she asked people  
25 to contact her using her official government

1 email account.

2           And, third, the pages at issue here  
3 are in no sense campaign pages. The district  
4 court rejected that argument on pages 114 to 115  
5 of the petition appendix. She did have a  
6 campaign website. That website had a personal  
7 email address, unlike her official email address  
8 here.

9           I welcome the Court's questions.

10           JUSTICE THOMAS: Ms. Karlan, the  
11 Petition -- Petitioners here and Respondents in  
12 the next case make much of the fact that if your  
13 broad definition of a state action is accepted,  
14 that it would actually reduce speech by public  
15 officials.

16           I'd like your reaction to that.

17           MS. KARLAN: No, it would not. No one  
18 has challenged the speech that was on these  
19 pages at all. If they're speaking as government  
20 officials, they have both the government's own  
21 protection, so, for example, there are a number  
22 of protections that go to government officials  
23 when they speak in their official capacity, plus  
24 they still have all of the First Amendment  
25 rights as a backup.



1                   And I think it's really important to  
2 note here that all we're talking about is the  
3 state action issue. And the idea that  
4 government officials are not going to want to  
5 talk about their jobs at all if you tell them  
6 it's state action just seems to me to be  
7 illusory.

8                   CHIEF JUSTICE ROBERTS: But I'm not  
9 sure about that. I mean, if it's a -- if it's  
10 characterized as a state action governmental  
11 site, then wouldn't anything they say be  
12 categorized as governmental speech on which the  
13 government could take a particular political,  
14 social, whatever, view?

15                   MS. KARLAN: Well, I think that it's  
16 actually perhaps a little more complicated than  
17 that, Mr. Chief Justice, because these are  
18 elected officials, and part of their duty is to  
19 talk about certain issues.

20                   And I think, if the government told  
21 them they're simply not allowed to talk about  
22 their position on what the board is taking or  
23 the like, that itself would violate at least the  
24 California constitution and arguably the federal  
25 Constitution as well.

1 CHIEF JUSTICE ROBERTS: Well, but just  
2 -- just to make sure I understand, you're --  
3 we're characterizing a particular site as  
4 whether it's governmental, a source of  
5 governmental authority or, you know, operated as  
6 a governmental duty, or private.

7 Now, if it's private, the people  
8 talking on it can say what they want. Their  
9 speech won't be limited. If it's governmental  
10 speech, you know, they have to do what the  
11 government tells them to do on that site.

12 MS. KARLAN: Well, I think the one  
13 thing that they do have to do, and I think this  
14 is fair, and there were a number of questions of  
15 the folks representing the Petitioners here,  
16 they do have to have a disclaimer here to say  
17 this is a personal site.

18 They did not have this disclaimer.  
19 Ms. O'Connor-Ratcliff instead says, if you want  
20 to contact me, contact me on my official  
21 government email account, which she's not  
22 allowed to use for personal or political  
23 purposes.

24 JUSTICE ALITO: Your test is --

25 JUSTICE KAGAN: What about the claim

1 -- sorry.

2 JUSTICE ALITO: Your test is whether  
3 government officials are doing their jobs,  
4 right?

5 MS. KARLAN: That's the starting  
6 point, and it -- it creates what I would say is  
7 a kind of rebuttable assumption that when a  
8 government official is doing her job, she is a  
9 state actor.

10 JUSTICE ALITO: All right. So the  
11 mayor is in the grocery store and is repeatedly  
12 approached by constituents. And the mayor  
13 listens to -- really doesn't want to be bothered  
14 but listens to supporters and people who are  
15 sympathetic to the mayor's program, but when  
16 somebody who is a known opponent approaches the  
17 mayor, the mayor says, look, please call my  
18 office.

19 Is the mayor doing his job when he's  
20 doing that?

21 MS. KARLAN: I -- I think the answer  
22 to that question, which is, I think, different  
23 than the answer I would give in our case, is  
24 that when they're clearly off duty, that is, you  
25 know, pushing the shopping cart down the aisle,

1       arguably, they're not doing their job.

2                   But, when they create an ongoing site  
3       like the site here, they maintain a forum, if  
4       you will, in which people can comment and people  
5       can talk to each other, they're not just talking  
6       to the mayor, then, yes, that would be state  
7       action.

8                   JUSTICE ALITO:   I mean, elected  
9       officials have told me they're always on call.  
10      They're always doing their job.  They're always  
11      being approached by constituents.

12                  MS. KARLAN:   But, if they say they're  
13      doing their job, then, yes, I would say the  
14      starting point is they're state actors.

15                  Now can they say, I don't want to talk  
16      to you right now, you know, the ice cream is  
17      melting?  Of course, they can, because that's  
18      not violating somebody's First Amendment rights.

19                  JUSTICE ALITO:   Well, yeah, but if  
20      they're discriminating on the basis of viewpoint  
21      and they're doing their job, then there's a  
22      problem, right?

23                  MS. KARLAN:   Arguably, yes.

24                  JUSTICE ALITO:   So --

25                  MS. KARLAN:   But that's why I was

1 saying that I think, when you are clearly off  
2 duty, you're not doing your job. Even if you  
3 say you're doing your job, you're not -- you're  
4 not acting in your official capacity.

5 But, here, there was a website. There  
6 was a Facebook page. The Facebook page says, if  
7 you want to talk to me, call -- you know,  
8 contact me at my official office.

9 JUSTICE ALITO: Well, what if she put  
10 all --

11 MS. KARLAN: And then --

12 JUSTICE ALITO: -- what if all of her  
13 posts were done in the evening? They were all  
14 done between midnight and 1 a.m. Is she on duty  
15 then? Is she doing her job then?

16 MS. KARLAN: Yes, in the same way that  
17 if you stay up until midnight and you're reading  
18 briefs at home, you're doing your job. You're  
19 under color of law. Nobody has a First  
20 Amendment right to come into your house, but, of  
21 course, you're a state actor.

22 JUSTICE KAGAN: Could we go back to  
23 what you said about disclaimers? Would a  
24 disclaimer turn this immediately into private  
25 action?

1 MS. KARLAN: No, but it would be a  
2 much harder case for my clients to win.

3 JUSTICE KAGAN: Why no?

4 MS. KARLAN: Well, because you could  
5 say on the top of your website, this is my  
6 personal website, but then be operating it as a  
7 tool of governance.

8 JUSTICE KAGAN: Yes. So that's my --  
9 if -- if -- if it's the same content and if you,  
10 in fact, are operating it as a tool of  
11 governance, but you have a disclaimer saying  
12 that you're not, that this is just you as a  
13 person.

14 MS. KARLAN: Well, I'm not sure that  
15 the Court wants to have a magic words test for  
16 state action. And so you would still, I think,  
17 have to look, but at least there, the public  
18 would know and -- and be able to take into  
19 account that you are not using this as a public  
20 website.

21 Here, I think putting the disclaimer  
22 there but then saying things like we want you to  
23 respond to our surveys on whether we should  
24 change the election system, we want you to  
25 respond to our survey, we are working hard,

1 she's not using "I."

2 And if you compare this to her  
3 campaign website, which is a website, not a  
4 Facebook page, there, she uses "I." Here, she  
5 uses "we." And, honestly, as Mark Twain said,  
6 the only people who should use "we" in the  
7 singular are royalty and people with tapeworms.  
8 And, you know, I don't think she's either of  
9 those.

10 (Laughter.)

11 JUSTICE BARRETT: Ms. Karlan, do you  
12 think you could win under the test proposed by  
13 the government and Mr. Mooppan? Because, I  
14 mean, I feel like you're talking about doing  
15 your job and it seems like you're saying that  
16 she's exercising the authority of her office,  
17 whereas the Ninth Circuit focused on this  
18 appearance and function test of the website, but  
19 it seems to me that you're saying she was doing  
20 something more.

21 MS. KARLAN: I think we obviously win  
22 under the Ninth Circuit test.

23 JUSTICE BARRETT: Sure.

24 MS. KARLAN: But I think we win even  
25 under the Sixth Circuit test because of the

1 duty. And I can -- if you want me to tick  
2 through the different places where in state law  
3 and board rules and the like are --

4 JUSTICE BARRETT: That's okay, because  
5 that was in your brief. So I -- I --

6 MS. KARLAN: Yeah.

7 JUSTICE BARRETT: But that's what made  
8 me think that you're saying it doesn't really  
9 matter, you would win under that test --

10 MS. KARLAN: Sure.

11 JUSTICE BARRETT: -- because she had  
12 the authority.

13 MS. KARLAN: Yeah. I think we win  
14 under every test except a strong version of the  
15 Solicitor General's test because, under that,  
16 because Facebook itself -- the Facebook account  
17 itself was not owned by the government, that's a  
18 hard test for us to win under.

19 Now we still do have our --

20 JUSTICE SOTOMAYOR: Well, but they've  
21 given -- they've given that up because they're  
22 talking about function really.

23 MS. KARLAN: Yeah.

24 JUSTICE SOTOMAYOR: Yeah.

25 MS. KARLAN: I kind of like to think



1 so.

2 JUSTICE SOTOMAYOR: Yeah. I mean,  
3 they said, if you do notice-and -- and-comment,  
4 whether you have other postings is irrelevant,  
5 you're looking at the function of what's  
6 happening, correct?

7 MS. KARLAN: Yeah.

8 JUSTICE SOTOMAYOR: So tell me how  
9 your test doing your job differs from the  
10 authority or duty test of the Sixth Circuit.

11 MS. KARLAN: Well --

12 JUSTICE SOTOMAYOR: What -- what --  
13 what -- do you --

14 MS. KARLAN: Yes.

15 JUSTICE SOTOMAYOR: Okay.

16 MS. KARLAN: Yes. I think the Sixth  
17 Circuit has a much narrower sense of what "duty"  
18 means and what "authority" means than we would  
19 say is encompassed in doing your job. As this  
20 Court --

21 JUSTICE SOTOMAYOR: I -- I agree with  
22 you on duty.

23 MS. KARLAN: Yes.

24 JUSTICE SOTOMAYOR: They require a  
25 written law on duty.

1 MS. KARLAN: Yes.

2 JUSTICE SOTOMAYOR: And the government  
3 has already conceded that you can't look just to  
4 written law. So let's take Justice Barrett's  
5 point that authority is doing most of the work  
6 and authority has a meaning. So go ahead.

7 MS. KARLAN: So, as I read authority  
8 in both the government's brief and the Sixth  
9 Circuit, they're treating authority as you're  
10 exercising some coercive control over a member  
11 of the public.

12 I take authority to be something quite  
13 different than that.

14 JUSTICE SOTOMAYOR: Give me a --

15 MS. KARLAN: So -- so the -- the --

16 JUSTICE SOTOMAYOR: You're going to  
17 have to explain that better.

18 MS. KARLAN: Okay. So, if -- if I  
19 understand the government's brief correctly,  
20 what the government says is, well, of course,  
21 even if you're using private property, if you're  
22 using it to coerce somebody, so on your private  
23 website, you said to somebody: You're fired,  
24 and that -- and -- and that has the force of  
25 law, that would be state action because you're

1 using an authority that only you have.

2 JUSTICE SOTOMAYOR: All right. But --

3 MS. KARLAN: Right. I -- I as a --

4 JUSTICE SOTOMAYOR: -- but they --

5 they --

6 MS. KARLAN: -- private citizen do

7 not.

8 JUSTICE SOTOMAYOR: -- admit that

9 notice-and-comment would not be coercing

10 someone, so --

11 MS. KARLAN: No, but I -- I mean, I --

12 I -- I take it what they're talking about there

13 is a particular kind of authority. Now some of

14 the posts here are because of her authority as a

15 state actor. The modal post on the site, I

16 would say, the thing that is most common on the

17 site, is that she goes and visits a classroom

18 with the superintendent or with a -- a principal

19 during instructional time.

20 The only reason she can ask to do

21 that, the only reason she has the power to do

22 that, is because of her official capacity. No

23 person could do that. No -- no member of the

24 public could do that.

25 JUSTICE SOTOMAYOR: And, presumably,

1 that's not put on the official site, whatever  
2 that might --

3 MS. KARLAN: The -- the -- the -- no,  
4 as far as we --

5 JUSTICE SOTOMAYOR: It -- it exists  
6 only on this site.

7 MS. KARLAN: As far as we know, the  
8 only place that you could go to find out about  
9 her class --

10 JUSTICE SOTOMAYOR: So, basically,  
11 your argument is that it facilitates.

12 MS. KARLAN: Yes.

13 JUSTICE SOTOMAYOR: Her government  
14 authority facilitates her doing a government  
15 function and permits her to video it and put --  
16 put it on the site?

17 MS. KARLAN: Yeah, I'm not sure how  
18 many videos there are, but, yes --

19 JUSTICE SOTOMAYOR: If you could  
20 answer --

21 MS. KARLAN: -- she has reports of  
22 them.

23 JUSTICE SOTOMAYOR: Okay.

24 JUSTICE KAGAN: But just if I could  
25 get you to say that in one bit, if you said, you

1 know, the right way to think about duty and  
2 authority if you want to use those words is  
3 what?

4 MS. KARLAN: The right way to think  
5 about duty is to look at the various -- various  
6 sources of state law that tell you what  
7 somebody's duty is. And, here, we've got the  
8 California constitution, the board bylaws --

9 JUSTICE KAGAN: Right, but stepping  
10 back from your case, which --

11 MS. KARLAN: Okay.

12 JUSTICE KAGAN: -- you know, I know  
13 you want to win your case and -- good.

14 MS. KARLAN: I do. I do.

15 (Laughter.)

16 JUSTICE KAGAN: But just stepping back  
17 and saying what's -- is -- does the Sixth  
18 Circuit have too narrow a view, I thought you  
19 were saying yes.

20 MS. KARLAN: Yes.

21 JUSTICE KAGAN: How is that true? Why  
22 is that true?

23 MS. KARLAN: Because the Sixth Circuit  
24 says, unless there's an affirmative command that  
25 obligates you to do the specific thing you are

1 doing in the specific form you are doing it,  
2 you're not doing your duty.

3 And we think that duty has a much  
4 broader conception. And I want to be clear --

5 JUSTICE KAGAN: Which is what?

6 MS. KARLAN: Which is you look to what  
7 does state law tell you what to do, what does  
8 history and tradition tell you what to do, what  
9 do the bylaws of your organization tell you to  
10 do? If there's a handbook, what does the  
11 handbook tell you to do?

12 And those things can be optional.  
13 They can be acting in your discretion. This  
14 Court has repeatedly said in a number of  
15 different contexts, going back to the MacDaniel  
16 case in 1833, if you're talking about really  
17 people with -- with important government jobs,  
18 it's not all going to be written down.

19 JUSTICE GORSUCH: Counsel, I -- I  
20 guess --

21 MS. KARLAN: Yeah.

22 JUSTICE GORSUCH: -- I'm -- I'm -- I'm  
23 a little confused as to what's at stake here  
24 because I hear you saying now it isn't a matter  
25 of appearances and whether a reasonable person

1 might make a mistake, which was kind of the  
2 Ninth Circuit's reasoning. It really does boil  
3 down to duties and authorities.

4 And you -- you -- you -- you're  
5 positing that those duties and authorities  
6 include beyond what's in a handbook and must  
7 take account of custom. But I had understood  
8 the Solicitor General to say exactly the same  
9 thing. So are we coalescing around a test that  
10 everybody more or less agrees on?

11 MS. KARLAN: Well, I want to be very  
12 clear. I was talking about duties and  
13 authorities in the context of Justice Barrett's  
14 question. We think that the appearance and  
15 function are also relevant to whether someone is  
16 engaged in state action.

17 I took her question to be, if you take  
18 the Sixth Circuit's verbiage --

19 JUSTICE GORSUCH: Yeah. Well, my --

20 MS. KARLAN: -- do you win the case?

21 JUSTICE GORSUCH: I'm asking, yeah,  
22 what's wrong with something like that? Is there  
23 a problem with it? I mean, it seems like --

24 MS. KARLAN: Well, I think --

25 JUSTICE GORSUCH: -- this discussion

1 --

2 MS. KARLAN: Yes.

3 JUSTICE GORSUCH: -- does seem like  
4 it's coalesced around an understanding of duties  
5 and authorities, and there's some discussion  
6 about how capacious that has to be. But,  
7 really, the discussion seems to me like you and  
8 the Solicitor General are on --

9 MS. KARLAN: Here -- here's the --

10 JUSTICE GORSUCH: -- all fours.

11 MS. KARLAN: -- here's the one thing  
12 that worries --

13 JUSTICE GORSUCH: What am I missing?

14 MS. KARLAN: Here's the one thing that  
15 worries me there, and it goes back to this  
16 Court's decision in Home Telephone & Telegraph  
17 in 1912 but also involves Monroe against Pape,  
18 which is lots of times people do things that  
19 they're forbidden to do in the course of their  
20 job and they are nonetheless acting under color  
21 of law.

22 JUSTICE GORSUCH: Sure.

23 MS. KARLAN: Yeah. So --

24 JUSTICE GORSUCH: We're all sensitive  
25 to --



1 MS. KARLAN: Yeah.

2 JUSTICE GORSUCH: -- Monroe versus  
3 Pape and the Griffin case --

4 MS. KARLAN: Yeah.

5 JUSTICE GORSUCH: -- and all of that,  
6 everybody is.

7 MS. KARLAN: Yeah.

8 JUSTICE GORSUCH: But, given that,  
9 would -- do you see any problem with what we've  
10 been articulating here and you have with Justice  
11 Kagan as -- as to any of that?

12 MS. KARLAN: I have no problems with  
13 the things I've said so far. I just think it's  
14 more capacious than just -- that -- that in  
15 trying to figure out whether someone is acting  
16 as a state actor, when you start with someone  
17 who's a government official -- and I think it's  
18 really important to remember that this Court has  
19 had in its entire history as far as I can tell  
20 about three or four cases where the question was  
21 whether a government official was a state actor,  
22 and in all of those cases except Polk County  
23 against Dodson, which was a case about public  
24 defenders, the Court said, of course, you're a  
25 -- you're a state actor if you're a government

1 official.

2           So I think the presumptions and the  
3 rules of thumb and the like operate a little bit  
4 differently here than they would operate in a  
5 case that involved someone who was clearly just  
6 a private actor and you're asking, can you push  
7 them over the line into being a state actor?

8           Here, we start with somebody who looks  
9 like a state actor, says email me on my  
10 government official account if you've got any  
11 questions, says I -- this is the official page  
12 of me, uses the photo and the like. And I do  
13 think all of that helps.

14           JUSTICE ALITO: Well --

15           JUSTICE BARRETT: But she had the --

16           JUSTICE ALITO: -- I understand you --  
17 I understand you want to win your case, as you  
18 said to Justice Kagan, but we have to be  
19 concerned about -- about the test. And I  
20 understand you to have said that you would  
21 define "duty" to include custom, a  
22 well-established custom.

23           And is it not a well-established  
24 custom for any elected public official to inform  
25 constituents about what he or she is doing? So,

1 if that's how you understand "duty," then are  
2 you not saying that anything that a -- an  
3 elected public official, let's leave it at that,  
4 tells constituents about what that person is  
5 doing falls -- constitutes state action?

6 MS. KARLAN: I think the starting  
7 point is, yes, they could rebut that. For  
8 example, talking -- you know, at Thanksgiving  
9 dinner, somebody says, pass the gravy, and you  
10 say, and I also passed a bill last month. Yes,  
11 that would be --

12 (Laughter.)

13 MS. KARLAN: -- that would be private,  
14 whereas -- whereas, when you set up -- and this  
15 is what the -- this is what the Ninth Circuit  
16 says on page 28a of the Pet. App., is the state  
17 action here is maintaining an ongoing site for  
18 the -- for the exchange of information.

19 JUSTICE ALITO: Well, I understand  
20 that, but what I'm -- my -- my -- what I'm  
21 getting from this is that you have taken the --  
22 the Sixth Circuit's test and the Petitioners'  
23 test and you have broadened it by defining  
24 custom -- by defining "duty" so broadly. And  
25 maybe this is right. But you have made it into

1 a very broad test, a very inclusive test.

2 MS. KARLAN: I think, if you want to  
3 use the words that the Sixth Circuit used as  
4 your guidance, you have to broaden, and our case  
5 would clearly fall on the side of --

6 JUSTICE ALITO: All right. Well --

7 MS. KARLAN: -- a viable state action.

8 JUSTICE ALITO: -- let me go back to  
9 -- to your wording --

10 MS. KARLAN: Yeah.

11 JUSTICE ALITO: -- and ask you to  
12 finish this sentence for me.

13 MS. KARLAN: Yeah.

14 JUSTICE ALITO: A public official is  
15 doing his or her job when?

16 MS. KARLAN: When, if you look at  
17 state law and you look at the bylaws, they  
18 presuppose that they will engage in precisely  
19 the kind of action that you're challenging.

20 Well, I have two last points.

21 JUSTICE KAVANAUGH: If you're -- if  
22 you're the White House press secretary and you  
23 have a dinner at your house and you invite over  
24 certain members of the press and not other  
25 members of the press because part of what you

1 think makes you a good press secretary is to get  
2 feedback and develop good relations with members  
3 of the media, is that state action?

4 MS. KARLAN: Can I take that question  
5 and -- and kind of flip it around and go  
6 backwards into it? There would be no  
7 constitutional claim by anybody, no meritorious  
8 constitutional claim that they have a right to  
9 come to your dinner.

10 JUSTICE KAVANAUGH: Someone who's  
11 excluded on the basis of viewpoint, so you're  
12 inviting friendly reporters or who you perceive  
13 to be friendly reporters.

14 MS. KARLAN: I think --

15 JUSTICE KAVANAUGH: Or comment --  
16 commentators?

17 MS. KARLAN: I -- I think that anybody  
18 who looked at just a dinner, as opposed to you  
19 don't allow people to show up at press briefings  
20 altogether, I would be prepared to say that  
21 there, you are enough off duty and you are  
22 clearly enough off duty because people --

23 JUSTICE KAVANAUGH: How about a  
24 regular meeting, no -- no food is served, but a  
25 regular meeting offsite, so not at the White

1 House, with certain members of the press and not  
2 others?

3 MS. KARLAN: I think the members of  
4 the press put us in a somewhat different  
5 position because already you're entitled to  
6 limit that in a variety of ways. But, if you  
7 had a public meeting -- for example, in  
8 California, a lot of our elected representatives  
9 have what they call sidewalk office hours, and  
10 they'll sit in the bank parking lot next to the  
11 farmers' market and they'll talk to anybody and  
12 they'll hand out stuff.

13 If they decided simply because they  
14 were sitting on the bank's parking -- bank's  
15 parking lot instead of in their office, I'm not  
16 talking to black people, I'm not talking to  
17 Muslims, I'm not talking to evangelicals, yes,  
18 they'd be engaged in state action, and, yes,  
19 they would be violating the Constitution.

20 JUSTICE KAVANAUGH: And a different  
21 tack now. On the reposting question I was  
22 asking your friends on the other side about, if  
23 you're -- a government agency issues a notice  
24 and you then repost it?

25 MS. KARLAN: Well -- well, our case is

1 not about particular posts at all.

2 JUSTICE KAVANAUGH: Just your thoughts  
3 on that issue if you have any. If you don't  
4 want to answer it --

5 MS. KARLAN: You know, I haven't --

6 JUSTICE KAVANAUGH: -- that's fine.

7 MS. KARLAN: -- I haven't given a lot  
8 of thought to it because it's not relevant to  
9 our case in particular, but I think --

10 JUSTICE KAVANAUGH: It's going to be  
11 very relevant to the opinion -- well --

12 MS. KARLAN: Yes. And --

13 JUSTICE KAVANAUGH: -- how this is  
14 interpreted and applied.

15 MS. KARLAN: -- and so what I would  
16 say is there, if what you're talking about is  
17 whether a particular post is state action or  
18 not, it may well be that simply reposting  
19 something isn't itself state action such that  
20 you could challenge your being -- your being --  
21 your having your comments to that post deleted.

22 But, if you were blocked altogether  
23 from a website on which they have invited the  
24 entire public to share across the public as well  
25 as with you what they think, then, yes, that

1 would be state action and it would be actionable  
2 under the First Amendment.

3 JUSTICE BARRETT: Ms. Karlan, do I --  
4 I just want to be sure that I'm clear about your  
5 position. In your test, your doing your job  
6 test, so you agree it seems like that the Ninth  
7 Circuit test of appearance and function is  
8 enough, you wouldn't go with that?

9 MS. KARLAN: I think that the function  
10 part of the Ninth Circuit's test, because they  
11 quote this language that the district court's  
12 findings made about this being a tool of  
13 government is the appearance and function. When  
14 they're talking about function, they're talking  
15 about are these people doing their job as the  
16 function of this is for them to do their job of  
17 getting --

18 JUSTICE GORSUCH: How about the  
19 appearance part?

20 MS. KARLAN: Well, the appearance is  
21 really helpful in figuring out what is the  
22 function.

23 JUSTICE GORSUCH: So the -- it boils  
24 down to the function in your mind?

25 MS. KARLAN: Yes.



1 JUSTICE GORSUCH: Okay.

2 MS. KARLAN: Yes.

3 JUSTICE KAGAN: But the function is  
4 sort of another word for duty in your sense,  
5 like a duty is a responsibility, is a function?  
6 They're all kind of tied up together?

7 MS. KARLAN: Yeah. Yes.

8 JUSTICE KAGAN: I mean, your -- your  
9 duty is to do your job and that's your function.

10 MS. KARLAN: And when you do your job,  
11 you're doing the function of -- of -- of being a  
12 trustee of the Poway School District.

13 JUSTICE BARRETT: Which brings us back  
14 to this is all a question of how broadly do we  
15 define "authority" or "duty"?

16 MS. KARLAN: I think you have to  
17 define it more broadly than Petitioners are  
18 suggesting.

19 JUSTICE BARRETT: Oh, no, I understand  
20 that. But I'm just saying that --

21 MS. KARLAN: Yes.

22 JUSTICE BARRETT: -- then is the nub  
23 of the case as you see it?

24 MS. KARLAN: Yes.

25 JUSTICE BARRETT: The case totally

1 boils down to how you define it?

2           And I asked the other side a bunch of  
3 questions about what work does duty do. It's  
4 all an authority. I think you would say, if I  
5 understand your position correctly, it's just  
6 about authority, we're not really looking at  
7 duties?

8           MS. KARLAN: No, we are looking at  
9 duty. That's exactly what I'm trying to say, is  
10 duty -- are you performing the duty of your job  
11 as a trustee? If you are, then you are  
12 presumptively a state actor. That's what the  
13 Court's statements in West and Lugar turn --  
14 turn to. So --

15           JUSTICE KAVANAUGH: You would say duty  
16 is -- having conversations with citizens is  
17 always part of your duties --

18           MS. KARLAN: Well, I -- I -- I --

19           JUSTICE KAVANAUGH: -- or almost  
20 always part of your duties, which converts every  
21 conversation you have or --

22           MS. KARLAN: No, I would say having  
23 some mechanism by which you can interact with  
24 your constituents is part of your duty -- is  
25 part of your duty.

1           And the board bylaws say this. They  
2 say in Bylaw 9010(a) the responsibility of board  
3 members in their role as community leaders is to  
4 participate in public discourse, and then they  
5 say board members have a responsibility to  
6 identify personal viewpoints as such and not as  
7 the viewpoint of the board.

8           And, here, what you have is both of  
9 the Petitioners using "we" and "our" when they  
10 talk about what the board is doing, and anybody  
11 who looks at that is going to think: This is an  
12 official website. It looks like an official  
13 website. It performs all the functions of an  
14 official website. There's no disclaimer  
15 anywhere. She has a separate campaign website.  
16 She uses her government email. All --

17           JUSTICE KAGAN: Now suppose there's an  
18 official website too and this, you know, partly,  
19 largely, entirely duplicates it. So this goes  
20 back to the question that Justice Kavanaugh was  
21 asking. How does that matter or does it matter?

22           MS. KARLAN: I -- I don't think it  
23 would matter if it was the website at issue  
24 here. And I really do urge you to take a look  
25 at ECF 3511, which has the entire feed from the

1 day she took office until the day of the summary  
2 judgment motion.

3 And I defy anyone to look at that and  
4 think this wasn't an official website. Indeed,  
5 when she wants to give you her personal opinion,  
6 she sends you a link to her campaign website.

7 JUSTICE KAGAN: And I take it that  
8 this is the crucial difference between you and  
9 the government, right, that they just say  
10 Facebook says it's her private property?

11 MS. KARLAN: Yeah.

12 JUSTICE KAGAN: And so it's not an  
13 official website by definition.

14 MS. KARLAN: Right.

15 JUSTICE KAGAN: And you're saying no.

16 MS. KARLAN: That's correct.

17 JUSTICE BARRETT: And I'm sorry to be  
18 hung up on this duty question, but what if the  
19 bylaws or the state law doesn't say it's your  
20 duty to communicate with constituents, give  
21 announcements, et cetera, but she decides, hey,  
22 constituent communication would be a good idea.  
23 This is the kind of like, well, the governor  
24 decides to do this, or the president decides to  
25 do this.

1           Is that not, even if it's not formally  
2           in her job description, and even if she's the  
3           first one to do it, so it's not custom, but we  
4           would say she has the authority to decide to be  
5           a mouthpiece for government.

6           Would you agree that that would be a  
7           test?

8           MS. KARLAN: Yeah. I -- I -- I -- if  
9           I can just say, it's a little complicated in our  
10          case because the board has specifically said she  
11          doesn't have the authority to speak for the  
12          board and that's why she's supposed to have a  
13          disclaimer.

14          But, if you're talking about a  
15          hypothetical of someone in another jurisdiction  
16          where there's nothing that says anything either  
17          way and she decides she has the authority, then  
18          it would come down to a question of, as a matter  
19          of state law, did she have that authority  
20          because, if she had that authority, then, yes,  
21          she would be a state actor.

22          Now most government workers, most  
23          government employees do not have the authority  
24          to speak for the government, and so it wouldn't  
25          be part of their duty to run a personal website,

1 and so, for most government officials, you know,  
2 if you're -- if you're the janitor or the school  
3 bus driver in Poway --

4 JUSTICE KAVANAUGH: Yeah, but that --  
5 I mean, that's making it too easy. There are  
6 vast number of government officials around the  
7 country at the local town, city level, so I  
8 don't think you can --

9 MS. KARLAN: Right, but I --

10 JUSTICE KAVANAUGH: -- minimize -- you  
11 can minimize this by saying, oh, it's not going  
12 to affect certain categories.

13 MS. KARLAN: No, but --

14 JUSTICE KAVANAUGH: It's going to  
15 affect a lot of people.

16 MS. KARLAN: But, at the very least,  
17 the other -- you know, the other side says here  
18 at the very least, you know, if the state wants  
19 to tell you not to do this, they can do that.  
20 And the answer here is the Poway School District  
21 told her not to do this, told her not to have a  
22 website that looked as if she was speaking  
23 officially, and this website did exactly that.

24 JUSTICE KAVANAUGH: Just on the custom  
25 question, to follow up on Justice Barrett, it's

1 usually I think, as you're describing it, going  
2 to be part of the custom of most of these jobs  
3 that are elected officials or appointed  
4 officials who have some authority to communicate  
5 with constituents.

6 MS. KARLAN: I don't think that that's  
7 necessarily true at all.

8 JUSTICE KAVANAUGH: When wouldn't it  
9 be true?

10 MS. KARLAN: It will be true for  
11 elected officials. It will be true for some  
12 government officials, but let me give you a  
13 hypothetical that I think will illustrate this.

14 So, if a public school teacher in  
15 Poway had a website that was communicating with  
16 the parents of children in her class, that would  
17 clearly be state action, and I think that would  
18 be true regardless of what she called the  
19 website.

20 If she then also wanted to talk about  
21 things like whether the board should be elected  
22 at large or by districts, which was a big issue  
23 here, or she wanted to talk about whether the  
24 schools were being mismanaged, which is  
25 something that for a while there was a real

1 problem, that would be her speaking in her  
2 personal capacity because that wouldn't be  
3 coming from her job and her duties as a -- as a  
4 school teacher.

5 So just to kind of wrap up, I think --  
6 JUSTICE KAGAN: Do you think -- this  
7 is -- a little bit anticipates the next case.  
8 If there were also some personal things on this  
9 site, how far does that take you? Can you  
10 dilute the site and turn it into non-state  
11 action by putting up your kids' pictures?

12 MS. KARLAN: I don't think one picture  
13 of your children turns something into not a  
14 state website. Here, I really do think, if you  
15 look at this website, you will find one picture  
16 of her children on Christmas, one picture of her  
17 children at some school-related event, one  
18 picture of her grandfather at -- on Veterans  
19 Day, and nothing else that is personal, that is  
20 clearly personal as opposed to coming out of her  
21 job.

22 You know, here's the thing to  
23 understand, and this goes back to something that  
24 Justice Kagan said earlier, which is there are  
25 First Amendment issues on both sides of this



1 case. And, here, the First Amendment provides a  
2 tremendous backstop for members of school boards  
3 and the like who want to regulate their sites.

4 There are rules about public forums,  
5 there are rules about time, place, and manner  
6 and the like, and they have a lot of control  
7 over what goes on on these websites.

8 But, if you decide the threshold state  
9 action question against my clients here,  
10 refusing to have -- find state action would have  
11 devastating consequences for the -- for the  
12 public because they would be denied access to  
13 the sites on which their officials are talking  
14 to them and asking for their reactions.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Justice Thomas?

19 Justice Alito?

20 Justice Sotomayor?

21 JUSTICE SOTOMAYOR: In some ways,  
22 you've complicated things.

23 MS. KARLAN: I'm sorry.

24 (Laughter.)

25 JUSTICE SOTOMAYOR: No, really,

1 because what we're being asked to find is  
2 whether the state was acting when these  
3 government officials turned off these sites.

4 So we're being asked to hold the state  
5 responsible for ultra vires activities because  
6 these officials were told specifically you're  
7 telling us now don't do this and they did it  
8 anyway.

9 MS. KARLAN: No, ma'am. Just as in --  
10 and we talk about this in -- in the red brief --  
11 in Monell, the Court said you can't hold the  
12 government responsible, the municipal government  
13 responsible, unless the unconstitutional action  
14 was pursuant to a policy.

15 But there was nonetheless a  
16 constitutional tort there for which individual  
17 government actors could be held responsible.

18 JUSTICE SOTOMAYOR: Okay, thank you.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?  
20 Justice Gorsuch?

21 JUSTICE GORSUCH: No, thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Kavanaugh?

24 Justice Barrett?

25 Justice Jackson?

1           Okay. Thank you, counsel.

2           MS. KARLAN: Great. Thanks.

3           CHIEF JUSTICE ROBERTS: Rebuttal?

4           REBUTTAL ARGUMENT OF HASHIM M. MOOPPAN

5                   ON BEHALF OF THE PETITIONERS

6           MR. MOOPPAN: Thank you, Your Honor.

7           So, first, on the appearance question,  
8 I -- you know, I think my friend said appearance  
9 is relevant in assessing whether there's duty or  
10 authority but basically gave up the notion that  
11 the Ninth Circuit adopted that you can use  
12 appearance as a freestanding trump over duty and  
13 authority. I think that concession is basically  
14 right because, otherwise -- the power to block  
15 doesn't come from the appearance, and I think  
16 she would have to concede my hypothetical where  
17 the police officer runs down the street in his  
18 uniform is not state action.

19           So then I think the action really does  
20 come to, how do we define "duty" and  
21 "authority"? And I think the fundamental  
22 problem with Ms. Karlan's submission is that  
23 she's defining it too broadly. She's doing  
24 exactly what this Court said in Kennedy, in  
25 Lane, you should not do, because you have to

1 recognize that government officials have the  
2 right to speak in their personal capacity about  
3 their jobs.

4           That's even true with -- about  
5 information they only learned because of their  
6 jobs. Ms. Karlan emphasized several times that  
7 my client spoke about stuff they learned in the  
8 classroom. That's this Court's decision in  
9 Lane. The square holding of Lane was that it  
10 was individual speech, not citizen -- employee  
11 speech, even though it was information learned  
12 while in office.

13           And the flip side of that problem is  
14 that if you treat this too broadly, the problem  
15 that this Court recognized in both Kennedy and  
16 Garcetti, and the Chief Justice adverted to  
17 this, if you treat this as duty and authority  
18 just because you're talking about your jobs,  
19 that means it's controlled by the state. It  
20 amounts to government speech, which means the  
21 state itself could tell individuals what to say  
22 on their pages.

23           And that's the harm with creating this  
24 sort of you have to have a disclaimer rule. If  
25 client -- if individuals don't put up a

1 disclaimer, all of a sudden, not only do they  
2 lose their right to exclude people from their  
3 pages, they have now opened themselves up to  
4 having the state itself tell them what to say on  
5 their page, not as a regulation, because I agree  
6 with the federal government that the state has a  
7 lot of power to regulate them as employees, but  
8 Ms. Karlan's position means that they could  
9 regulate them as such. They could tell them  
10 exactly what to do or say on the page. And that  
11 would be a serious First Amendment problem, and  
12 to say that the First Amendment does all of that  
13 because they didn't put up a disclaimer would, I  
14 think, turn the First Amendment on its head.

15           Finally, a few points about the facts  
16 of my case because I too would like to win for  
17 my clients.

18           (Laughter.)

19           MR. MOOPPAN: So the -- the first  
20 point I'll make is that if -- this is laid out  
21 in our reply brief -- if you look through the  
22 citations to the record, the only duty that my  
23 clients had to interact with the public was at  
24 their board meetings, which they complied with,  
25 and no one was ever blocked from that.

1                   Everything else is the same sort of  
2                   overbroad, "it's your duty to talk to people,"  
3                   that would cover campaign rallies, talking to  
4                   your neighbors at church, the stuff that cannot  
5                   possibly be viewed as governmental unless you  
6                   swallow individuals' -- individual First  
7                   Amendment rights.

8                   The last -- she suggested that the  
9                   page was somehow their duty. One of my clients  
10                  closed the page, just shut it down. No one  
11                  thinks he was acting in breach of his office, he  
12                  was in dereliction of duty.

13                  Your Honor, I see my time is up.

14                  CHIEF JUSTICE ROBERTS: Yes. Thank  
15                  you, counsel.

16                  The case is submitted.

17                  (Whereupon, at 11:45 a.m., the case  
18                  was submitted.)

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## Official - Subject to Final Review

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