No. 22-324

IN THE

Supreme Court of the United States

MICHELLE O'CONNOR-RATCLIFF AND T.J. ZANE,

*Petitioner*s,

v.

CHRISTOPHER GARNIER AND KIMBERLY GARNIER,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners, elected members of the Poway Unified School District Board of Trustees, engaged in state action when they blocked two constituents from social media accounts that petitioners used primarily to communicate with the public about school district matters.

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INTRODUCTION

Petitioners T.J. Zane and Michelle O'Connor-Ratcliff ("together, 'the Trustees,'" Pet. App. 5a) are elected members of the Poway Unified School District Board of Trustees. They each operated public social media pages to communicate interactively with their constituents about important school district affairs. The Trustees concede that if the First Amendment applies to those pages, they violated respondents' constitutional rights when they blocked respondents from commenting on—and, in some cases, from even viewing—the Trustees' posts. *See* Pet. 11, 34. As this case comes to this Court, the Trustees' sole remaining argument is that they were somehow not acting under color of law. That argument does not warrant this Court's review.

STATEMENT OF THE CASE

A. Factual background

1. Respondents Christopher and Kimberly Garnier have lived much of their lives within the Poway Unified School District ("PUSD"). *See* Pet. App. 100a; Tr. 89.[1] Christopher holds a doctorate in education from the University of Southern California and previously served for nearly a decade as a combat helicopter pilot in the United States Marine Corps. Tr. 17-18. Kimberly has a master's degree in forensic criminal behavior. Both Christopher and Kimberly attended PUSD schools from kindergarten through twelfth grade, and their three children attended

[1] "Tr." refers to pages in the September 21-22, 2021, trial transcript, which is available on Bloomberg docket.

PUSD schools at the times relevant to this lawsuit. *Id.* at 87, 89.

The Garniers are civic-minded constituents who have regularly attended PUSD Board meetings and contacted members of the Board of Trustees to express their concerns regarding important topics such as mismanagement and racist bullying. *See* Tr. 19, 54-55, 90, 104-05, 144. For example, they were instrumental in bringing to light financial misconduct that resulted in the resignation and indictment of the District's former superintendent. *See id.* at 19, 54; Bob Ponting, *School Superintendent Accused of Stealing $345,000 Faces 7 Years in Prison*, Fox 5 San Diego (Jan. 29, 2018, 1:27 PM), https://perma.cc/E8R4-P2CG.

2. In California, school board members like the Trustees here are elected to govern a community's public schools. A school board is expected to "[i]nform and make known to the citizens of the district, the educational programs and activities of the schools therein." Cal. Educ. Code § 35172(c). Maintaining "responsive[ness] to the values, beliefs and priorities of their communities" requires school board members to communicate regularly with their constituents. *See* Cal. Sch. Bds. Ass'n, *Governance and Policy Resources: Role and Responsibilities*, https://perma.cc/6ZA5-VLVV (last visited Dec. 5, 2022). At trial, the Trustees acknowledged the importance of this duty. *See* Pet. App. 61a. Zane testified that it is "part of the job" to listen to and address constituents' concerns, Tr. 113, and O'Connor-Ratcliff agreed that it is "important to be accessible and responsive to your constituents," *id.* at 163.

Traditionally, elected officials and constituents have communicated with one another through face-to-

face meetings, mailed surveys, bulletins, and the like. But as this Court has acknowledged, new social media platforms"provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Indeed, "[f]rom local county supervisors and state representatives to the President of the United States, elected officials across the country" use social media "to communicate with constituents and seek their input in carrying out their duties as public officials." Pet. App. 5a; *see also* Monica Anderson, *More Americans Are Using Social Media to Connect with Politicians*, Pew Research Center (May 19, 2015), https://perma.cc/M37A-KMLN.

3. Like many other elected officials, the Trustees maintained active presences on Facebook and Twitter and frequently used those platforms to engage in two-way communication with constituents.

Zane won election to the PUSD Board in 2014. Pet. App. 59a.[2] On Facebook, Zane has a "personal profile page" that is accessible only to "family and friends." *Id.* But Zane also has several public Facebook pages—that is, pages accessible to the public at large: one for his businesses, Tr. 117; one for a nonprofit, *id.*; and one for PUSD Board-related activity, Pet. App. 8a-9a. This case concerns only that final public page. Zane entitled the page "T.J. Zane, Poway Unified School District Trustee" and added a picture of a PUSD sign. *Id.* 8a-9a, 99a. In the page's "About" section, Zane declared that the page was "*the official page* for T.J.

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[2] Zane now serves as President of the Board of Trustees for PUSD. *About Us*, Poway Unified Sch. Dist., https://perma.cc/Y3YN-K6LT (last visited Dec. 11, 2022).

Zane, Poway Unified School District Board Member, to promote public and political information." *Id.* 9a (emphasis added). At the time, Zane could also have chosen from numerous labels to categorize this page. Tr. 126. The labels included Public Figure, Politician, and Government Official. Zane chose "Government Official." Pet. App. 9a. On this public page, he listed his interests as "being accessible and accountable; retaining quality teachers; increasing transparency in decision making; preserving local standards for education; and ensuring our children's campus safety." *Id.*

In 2014, O'Connor-Ratcliff was elected to the PUSD Board of Trustees, and eventually became its president. Pet. App. 99a.[3] In addition to her personal Facebook profile (accessible only to an audience she chooses and not at issue in this case), O'Connor-Ratcliff has a public Facebook page and created a public Twitter page in 2016, after her election. *Id.* 6a-7a. Like Zane, O'Connor-Ratcliff labeled herself a "Government Official" in the "About" section of her public Facebook page. *Id.* 8a. On both Facebook and Twitter, she identified herself as "President of the PUSD Board of Education" and provided a link to her official PUSD email address. *Id.*

The Trustees made "posts" on Facebook and Twitter to share content regarding PUSD, Pet. 5, and to seek feedback, Pet. App. 39a. Their posts predominantly concerned District affairs, including reports of visits to PUSD schools and requests for

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[3] O'Connor-Ratcliff is no longer President but still serves as a Trustee for PUSD. *About Us*, Poway Unified Sch. Dist., https://perma.cc/Y3YN-K6LT (last visited Dec. 11, 2022).

students and community members to apply for positions with the PUSD Representative Board. *Id.* 9a. They informed constituents about PUSD's Local Control Accountability Plan ("LCAP"), solicited public feedback through surveys, and provided information about future community meetings related to the PUSD planning process. *Id.* 10a. The Trustees also announced hiring and firing decisions, reminded the public about upcoming PUSD Board meetings, and used their pages to alert constituents in real time to safety and security issues at PUSD schools. *Id.*

At the time of the conduct giving rise to this case, the Trustees' social media pages "were open and available to the public without any restriction on the form or content of comments" and without any guidelines for commenters to follow. Pet. App. 39a. Thus, any individual could write his or her own comments directly beneath the Trustees' posts or react to the Trustees' posts with a thumbs up, smiley face, or other available emoticon. *Id.* 7a. In their posts, the Trustees both "solicited feedback from constituents" and "responded to individuals who left comments" or reactions. *Id.* 39a; Tr. 186-88.

4. Because of a District rule largely precluding Board members from responding to constituents at in-person Board meetings, and because emails often went unanswered, the Trustees' social media pages were the best medium for interactive communication between constituents and Board members. So, like many other constituents, the Garniers engaged with the Trustees' social media pages. As Christopher put it, "I utilized the only resource that I had for communication and engagement, and that was through social media." Tr. 43.

The Garniers left comments exposing financial mismanagement by the former superintendent as well as incidents of racism. Kimberly testified that she posted on the Trustees' public pages because, in her words, "I have children of color in the District, and I don't want them going to school and seeing a noose or the profanity like that." Tr. 90. The Trustees have never disputed the importance of these concerns. The Garniers' comments never used profanity or threatened physical harm. Pet. App. 12a.

Social media platforms provide an account holder with multiple options for moderating content posted by others. Pet. 5. First, Facebook automatically truncates lengthy comments by leaving visible only a few lines of text; readers who want to see the full comment must use a "See More" option. *Id.* Second, Facebook account holders can manually delete or "hide" individual comments that they do not want on their pages. Pet. App. 69a. Third, Facebook account holders can implement word filters to prevent the posting of any comment containing words they specify. *Id.* 8a. And fourth, both Facebook and Twitter account holders can "block" particular users. On Facebook, a blocked user can neither comment nor react but can still view the page. *Id.* 70a. On Twitter, a block amounts to excluding a user from interacting with, or even viewing, the blocker's profile or posts. *Id.* 72a.

5. Only the last of those four mechanisms—blocking—is at issue in this case. In 2017, O'Connor-Ratcliff blocked both Garniers from her Facebook page and blocked Christopher Garnier from her Twitter

account. Pet. App. 12a. Zane also blocked the Garniers from his Facebook page. *Id.* [4]

Sometime after blocking the Garniers, the Trustees implemented Facebook's "word filter" feature on their pages. Pet. App. 13a. By filtering out any comment containing specific words—and Zane included words as common as "he, she, it, that, and, we, you," Tr. 116—the Trustees effectively "preclude[d] all verbal comments on their public pages." Pet. App. 13a. Viewers can now interact with the pages only through a set of preselected nonverbal reactions. *Id.* O'Connor-Ratcliff testified that she might turn off this filter at some point in the future to reconnect with constituent voices on her Facebook page. *See* Tr. 196.

B. Procedural history

After the Trustees blocked them, the Garniers filed suit in federal district court under 42 U.S.C. § 1983. As is relevant here, they alleged that the Trustees violated the First Amendment "by blocking them from exercising their free-speech and/or government-petitioning rights in a public forum, namely on their public social-media pages." Pet. App. 101a.[5]

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[4] Zane's Twitter account is not at issue in this case. Nor are the Trustees' decisions to delete some of the Garniers' comments.

[5] Section 1983 provides a cause of action against any person who, "under color of" law, deprives an individual of rights "secured by the Constitution." 42 U.S.C. § 1983. The "color of law" requirement for Section 1983 claims and the "state action" inquiry under the Fourteenth Amendment are functionally equivalent. Pet. App. 18a n.8; *see also Lugar v. Edmondson Oil*

Summary judgment. Based on undisputed facts, Pet. 7, the district court concluded that the Trustees engaged in state action when they blocked the Garniers, Pet. App. 110a-115a. Pointing to this Court's decisions in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001), and *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), the court explained that "[t]here is no single formula for determining state action," and therefore courts must look carefully at all the facts. Pet. App. 111a (citation omitted).

Looking to the facts in this case, the district court found that the Trustees' "Facebook pages were used 'as a tool of governance' because they were used to inform the public about [O'Connor-Ratcliff] and Zane's official activities, as well as information related to PUSD and the Board." Pet. App. 113a (citation omitted). "Their ability to post about district events they attended and share Board information was due to their positions as public officials within PUSD." *Id.* 115a. The court also pointed to the Trustees' solicitation of feedback from constituents as evidence that the Trustees had been acting under color of law. *Id.* 114a. Finally, it rejected the Trustees' argument that the pages involved only unofficial campaign activities, finding that the content "went beyond" sharing "information about their campaigns for reelection." *Id.*

Next, the court held that the interactive portions of the Trustees' social media pages were public fora subject to the First Amendment because the Trustees

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Co., 457 U.S. 922, 935 n.18 (1982). This brief therefore uses the terms interchangeably.

had posted "content related to their positions as public officials and had opened their pages to the public without limitation when they blocked the Garniers." Pet. App. 119a. Finally, the court granted qualified immunity to the Trustees on the Garniers' damages claim. *Id.* 108a.

The court then set the case for trial to address two questions: (1) whether the decision to block the Garniers had been content neutral or had been based on their viewpoints and (2) whether the blocking could be justified under the applicable First Amendment standard. Pet. App. 125a-128a.

Trial. The subsequent bench trial was conducted before a different district judge. *See* Tr. 5. He agreed with the summary judgment holding that the Trustees had acted under color of law because the Trustees "'could not have used their social media pages in the way they did but for their positions on PUSD's Board.'" Pet. App. 83a (citation omitted). On the remaining First Amendment issue, the court determined that the initial decision to block the Garniers was content neutral. *Id.* 85a. While that decision had been reasonable, the court held that after three years, the continued blocking was no longer permissible. *Id.* 89a. The court awarded the Garniers declaratory and injunctive relief. *Id.* 97a.

Appeal. The Ninth Circuit affirmed. Pet. App. 53a-54a. As is relevant here, the court held that the Trustees had acted under color of law when they blocked the Garniers. In reaching that conclusion, the Ninth Circuit drew from this Court's decisions in *West v. Atkins*, 487 U.S. 42 (1988), and *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001), and emphasized the context-specific

nature of the state-action inquiry. *See* Pet. App. 18a-19a.

"Given the fact-sensitive nature of state action analysis," the Ninth Circuit continued, "not every social media account operated by a public official is a government account." Pet. App. 28a (citation omitted). Here, however, the court "conclude[d] that, given the close nexus between the Trustees' use of their social media pages and their official positions, the Trustees in this case were acting under color of state law when they blocked the Garniers." *Id.* 20a.

The Ninth Circuit based its holding on the many ways in which the Trustees used their social media pages as tools for carrying out their official, elected duties. Pet. App. 25a. The Trustees used their pages "to communicate about, among other things, the selection of a new superintendent, the formulation of PUSD's LCAP plan, the composition of PUSD's Budget Advisory Committee, the dates of PUSD Board meetings, and the issues discussed at those meetings." *Id.* 24a (citations omitted). Moreover, the court considered the pages' sizeable audiences, the Trustees' repeated solicitation of feedback from constituents, and the Trustees' response to comments as evidence of the pages' official character. *Id.* 23a. The court also pointed to the Trustees' choices to identify and emphasize their "official" positions on their pages as evidence of state action. *Id.*

In short, the court held that the Trustees' pages were used for and dedicated to official PUSD business. Accordingly, the Trustees acted under color of law when they blocked the Garniers from those pages.

On the remaining First Amendment issues, the Ninth Circuit held that the interactive spaces of the Trustees' social media accounts were public fora. Pet. App. 36a-37a. Even if the decisions to block the Garniers had been content neutral—a proposition the court doubted, *id.* 42a—the blocking was not sufficiently narrowly tailored to satisfy the First Amendment. *Id.* 36a-37a, 43a. Accordingly, the Ninth Circuit concluded that the district court was "correct to grant the Garniers declaratory and injunctive relief." *Id.* 50a.[6]

REASONS FOR DENYING THE WRIT

The Trustees' argument for this Court's review abandons all but the threshold question of whether they acted under color of law when they blocked the Garniers from social media pages that the Trustees used to "communicate about job-related matters with the public." Pet. i. That question does not warrant this Court's attention. First, given the fact-intensive nature of the state-action inquiry, the handful of relevant appellate decisions do not actually reach conflicting outcomes. Second, the Trustees' singular focus on state action in the Question Presented makes this the wrong vehicle to address issues better dealt with under the substantive law of the First

[6] The Ninth Circuit rejected the Trustees' argument that the dispute was mooted by their subsequent implementation of word filters. Pet. App. 15a-16a. The court pointed to the Trustees' ability to return unilaterally to permitting comments, and O'Connor-Ratcliff's express contemplation of doing so. *Id.* 17a-18a; *see also* Tr. 162 ("I've changed the way I've used my page many times."). With respect to the Garniers' cross-appeal, which is not before this Court, the Ninth Circuit affirmed the district court's grant of qualified immunity. Pet. App. 50a-52a.

Amendment at a later date. Finally, the Ninth Circuit's decision was correct: When the Trustees blocked the Garniers, they were acting under color of law.

I. There is no conflict among the circuits.

The Trustees claim a 4-1 circuit split between the Second, Fourth, Eighth, and Ninth Circuits on one side and the Sixth Circuit on the other. Those courts all agree that the appropriate test is a fact-intensive inquiry into whether there is a sufficient nexus between the official's behavior and the state. The Trustees claim that the courts disagree because, on their telling, a majority of the circuits conduct an "appearance-and-purpose inquiry," Pet. 16 (capitalization altered), while the Sixth Circuit applies an "authority-or-duty test," *id.* 12 (capitalization altered). But in practice, the differences between those inquiries don't amount to anything. Given the same facts, every circuit will reach the same outcome.

A. There is no conflict between the Sixth and Ninth Circuits.

1. The Trustees' asserted conflict turns entirely on the claim that the Ninth Circuit's decision here conflicts with the Sixth Circuit's decision in *Lindke v. Freed*, 37 F.4th 1199 (6th Cir. 2022). Pet. 12. It does not. The Sixth Circuit would agree with the Ninth Circuit that the Trustees here were acting under color of law.

The Sixth Circuit finds state action when a public official "'is performing an actual or apparent duty of his office,' or if he could not have behaved as he did 'without the authority of his office.'" *Lindke*, 37 F.4th

at 1203 (citation omitted). Thus, either duty or authority is sufficient. Here, we have both.

a. *Duty*. The Trustees were performing a duty of their office when they used social media accounts to communicate with, and solicit feedback from, constituents. Pet. App. 61a. As this Court has recognized, the "key to the very concept of self-governance through elected officials" is that those officials are "cognizant of and responsive to" public concerns and are "informed by" the "most unreserved communication with [their] constituents." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 227 (2014) (citation omitted). In contrast to the situation in *Lindke* where there was "no state law" mandating the official's conduct, 37 F.4th at 1205, members of the PUSD Board must "ensure that the district is responsive" and "involve[] the community" in decision-making. Pet. App. 24a-25a n.9 (quoting *Role of the Board*, BB 9000(a), Poway Unified Sch. Dist. (adopted Aug. 9, 2018), https://perma.cc/A3EH-7JYW). Board members have "a responsibility to involve the community in appropriate, meaningful ways." Cal. Sch. Bds. Ass'n, *School Board Leadership: The Role and Function of California's School Boards* at 6, https://perma.cc/3C24-CTYA (last visited Dec. 6, 2022).

The Trustees were well aware of this obligation and testified that receiving feedback from constituents is an important part of their governmental duties. Pet. App. 61a. O'Connor-Ratcliff emphasized the responsibility of a Board member "to be accessible and responsive to your constituents," Tr. 163, and Zane agreed that it is "part of the job," *id.* at 113. They both

chose social media to accomplish this critical function. Pet. App. 23a-24a.

Tellingly, the Trustees "solicited feedback from constituents through their posts" and "respond[ed] to constituent questions and comments." Pet. App. 10a. For example, O'Connor-Ratcliff posted that she "made some changes to the structure" of her Board meeting summaries after reading "some good comments" from constituents on her public Facebook page. *Id.* 11a (internal quotation marks omitted). Similarly, Zane posted on his public Facebook page an editorial regarding a District decision and asked his constituents for their thoughts. *Id.* Another time, Zane posted about "need[ing]" his Facebook following's "input" for the Board's budget plan, explaining that "[t]his is how District budget priorities are set for our schools." *Id.* 114a. And each of the Trustees made several posts affirmatively inviting constituents to fill out surveys related to budgeting and personnel decisions. *Id.* 9a-10a.

The Trustees argued below that their social media accounts were duplicative of "regular meetings at which the public can appear and provide comment" to the Board. Appellants' First C.A. Br. on Cross-Appeal at 23; *see also* Pet. App. 61a-62a. Put another way, the Trustees have acknowledged that when government officials systematically interact with their constituents on social media, they are just as engaged in the duties of their job as when they hear that same feedback at an in-person meeting. The Trustees' decision to operate public social media pages ostensibly open to all constituents differs decisively from simply "talking about [one's] job" when running

into neighbors at the hardware store or at church, *Lindke*, 37 F.4th at 1205.

Finally, whatever the Sixth Circuit says about the relevance of a social media page's appearance, it holds that an official's execution of "*apparent* duties" is state action. *Lindke*, 37 F.4th at 1205 (emphasis added). At the very least, the Trustees treated communicating with their constituents as a duty of their particular office. Zane denominated his page "*the official page* for T.J. Zane, Poway Unified School District Board Member," and both Trustees identified themselves as "Government Official[s]" despite the availability of other options. Pet. App. 9a (emphasis added). The Trustees therefore used the social media at issue here to carry out an apparent duty.

b. *Authority*. The California Education Code expressly authorizes school boards to "[i]nform and make known to the citizens of the district, the educational programs and activities of the schools therein." Cal. Educ. Code § 35172(c).

The Trustees were exercising this authority when they posted information about the Board's proposed budgetary plan, shared details about in-person community meetings discussing this plan, and reported on the plan that the Board adopted. Pet. App. 9a-10a. So too when they posted alerts about safety and security issues, including an active-shooter incident and an ongoing brushfire that led to a school's evacuation, *id.* 10a—information that they likely obtained before the general public by virtue of their positions on the Board, *cf. id.* 115a (suggesting that the Trustees' "ability to post about district events" was "due to their positions as public officials within PUSD").

Thus, the Trustees were using their authority to carry out the duty of informing and responding to their constituents when they operated the social media pages at issue in this case, and then blocked the Garniers from those pages. On these facts, the Sixth Circuit would find state action.

2. Conversely, the Ninth Circuit would agree with the Sixth Circuit that there was no state action in *Lindke*. The Ninth Circuit has been crystal clear that, "[g]iven the fact-sensitive nature of state action analyses, 'not every social media account operated by a public official is a government account.'" Pet. App. 28a (quoting *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019), *vacated as moot*, 141 S. Ct. 1220 (2021)). According to the Trustees, the Ninth Circuit finds state action when a public official's social media account "has an official appearance and serves the purpose of informing the public about official business." Pet. 12 (emphases omitted). In *Lindke*, the account at issue had neither an official appearance nor an official purpose.

Start with the page's appearance. The personal Facebook page at issue in *Lindke* belonged to James Freed, the city manager of Port Huron, Michigan. 37 F.4th at 1201. More than seventy percent of his posts were entirely personal—for example, wishing his wife a happy anniversary or sharing photos of him with his dog or with his daughter at a father-daughter dance. Br. of Defendant-Appellee at 6-7, *Lindke v. Freed*, 37 F.4th 1199 (6th Cir. 2022) (No. 21-2977). Even the few items he posted that went beyond family matters did not create the appearance of an official page. He did not use Facebook to make original public announcements, did not direct his posts to city

residents, did not use the page to request feedback, and did not hold Q&A sessions with constituents. *Id.* at 8-9. Instead, Freed shared only information that was already announced, publicly available elsewhere, and posted by other private citizens. *Id.*

Moreover, Freed "did not hold out his page as an official channel of governmental communication." *Lindke v. Freed*, 563 F. Supp. 3d 704, 712 (E.D. Mich. 2021). And he had only one page. *Lindke*, 37 F. 4th at 1201. Freed's conduct contrasts sharply with what the Trustees did here. They created separate pages to address issues connected with PUSD, Pet. App. 6a; indeed, Zane denominated his page "the official page for T.J. Zane, Poway Unified School District Board Member," *id.* 8a.

Nor did Freed's use of social media have an official purpose. While the district court in this case found that Zane and O'Connor-Ratcliff used their pages to interact with constituents, *see supra* pp. 8-9, the district court in *Lindke* agreed that Freed "neither intended his Facebook page to be an official City Manager page nor wanted an official City Manager page." *Lindke*, 563 F. Supp. 3d at 712. As for the question whether Freed was engaged in carrying out the responsibilities of his job, the district court found that "[e]ven if Freed's official responsibilities included sharing information with City residents, his Facebook page did not 'principally address[]' those responsibilities." *Id.* at 713 (alteration in original) (citation omitted). In light of the *Lindke* district court's findings, the Ninth Circuit, like the Sixth, would find no state action on Freed's part.

Lest there be any doubt, the Ninth Circuit's decision in *Naffe v. Frey*, 789 F.3d 1030 (9th Cir.

2015), shows that the Ninth Circuit will decline to find state action where, as in *Lindke*, there is a lack of official appearance and purpose. As in *Lindke*, the defendant in *Naffe* was a government official who maintained a social media presence—there, a Los Angeles County prosecutor who had a personal blog and related Twitter page. *Naffe*, 789 F.3d at 1033. As in *Lindke*, the content on the page sometimes reflected the defendant's job—there, by drawing on "his experiences as a Deputy District Attorney." *Id.* at 1038. But, as in *Lindke*, much of what was posted in *Naffe* (for example, commentary on "conservative politics and liberal media bias") had nothing to do with the defendant's official job. *Id.* at 1033. The Ninth Circuit held that the defendant's social media presence was not "sufficiently related to his work" to constitute state action, *id.* at 1038, leaving no doubt that it would find the same for Freed's page.

3. That leaves the Trustees clinging to the Ninth Circuit's statement that it "decline[d] to follow the Sixth Circuit's reasoning." Pet. 15 (quoting Pet. App. 35a). But this Court "reviews judgments, not opinions," *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), and there is no conflict between the judgments of the Sixth and Ninth Circuits.

Taken in context, the Ninth Circuit was simply explaining its disagreement with the Sixth Circuit on a subsidiary point—namely, whether "off-duty [police] officer cases are instructive as to analysis of other state employees' conduct, including in the arena of social media." Pet. App. 36a. Disagreement between the courts about the usefulness of looking to analogous cases does not a conflict make. After all, whether the

Ninth Circuit looks at cases involving off-duty police officers does not determine whether it finds state action. In *Naffe*, for example, the court discussed those cases but nonetheless found no state action. 789 F.3d at 1036-37.

That the judgments of the Sixth and Ninth Circuits are compatible is unsurprising, as both courts performed the "nexus" analysis that this Court has required. *Compare Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001), *with Lindke*, 37 F.4th at 1203, *and* Pet. App. 19a-20a. That nexus analysis understandably focuses on the facts of each case. *See Brentwood*, 531 U.S. at 295-96.

What is left of the Trustees' argument is a yearning for courts to use identical language in explaining their decisions. But whether a court discusses the appearance and purpose of an official's action or discusses his authority or duty, it will arrive at the same conclusion as to whether there has been state action. In the end, there will "not be much practical difference between" these "different verbal formulations." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994). Each remains the "equivalent[] of the standard this Court [has already] articulated." *Id.*

B. There is no other conflict among the courts of appeals.

The Trustees agree that the Ninth Circuit is in accord with all other courts of appeals on the test for state action in social media cases. *See* Pet. 16. Since the decision below does not in fact conflict with the

Sixth Circuit, that should be the end of the matter. There is no split at all.

To be sure, the courts of appeals have reached different conclusions about the presence of state action based on the particular facts of the case before them. The Fourth Circuit in *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019), and the Second Circuit in *Knight*, 928 F.3d 226, held that the defendants before them had engaged in official action when they blocked the plaintiffs from the social media site at issue. And the Eighth Circuit in *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021), concluded that the defendant in that case had not acted under color of law. But the reason for their different conclusions lies in the particular facts of each case. As the Second Circuit explained, "not every social media account operated by a public official is a government account." *Knight*, 928 F.3d at 236. And the Eighth Circuit in *Campbell*, even though it found no state action, aligned itself with the Second Circuit in *Knight*, stating that the state representative's Twitter account was "the kind of unofficial account" that the Second Circuit "envisioned" would not constitute state action. 986 F.3d at 826.

The Trustees are therefore mistaken to claim that the different bottom lines in these cases suggest an "inconsistent application of the appearance-and-purpose approach." Pet. 18. Rather, the decisions show that the lower courts are properly conducting the "necessarily fact-bound inquiry" that the state-action analysis demands. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

II. This is the wrong case to address the regulation of social media communications between constituents and public officials.

The Trustees claim that this case warrants review because the Ninth Circuit's holding on state action threatens the constitutional rights of public officials and their ability to "exercise editorial control" over speech on their personal social media pages. Pet. 25 (citation omitted); *see also id.* 26. They are incorrect. At this point, the Trustees have very little at stake. And their deliberate decision to abandon their substantive First Amendment arguments and to gamble everything on a Question Presented restricted to state action, *see id.* 11, 34, prevents this Court from addressing concerns about officials' use of social media in the most sensible way. So not only is this the wrong case for this Court's review, but it comes at the wrong time.

1. The Trustees are simply wrong to claim that the decision below threatens *their* First Amendment rights or "the liberty of individuals holding public office to control the manner in which they use their *personal* social-media accounts," Pet. 19 (emphasis added); *see also id.* 25-26.

At this point, the stakes of this case for the Trustees are vanishingly small. The Trustees are currently moderating their Facebook pages with word filters that essentially prevent everyone, including the Garniers, from commenting on their posts except through a nonverbal reaction. *See* Pet. App. 16a; Tr. 136, 160-62. The Garniers never challenged the use of word filters, and that issue is not before this Court. The outcome here thus does not have a present-day effect on the Trustees' primary conduct. Moreover,

because they received qualified immunity, Pet. App. 50a, the Trustees face no personal financial liability for their decision to block the Garniers.

More fundamentally, the decision below has no impact on how "*personal* social-media accounts" are used. Pet. 19 (emphasis added). The question here is only whether the accounts are in fact personal. The Ninth Circuit emphasized that "not every social media account operated by a public official is a government account." Pet. App. 28a (citation omitted). In this case, for example, both Trustees can—and did—create personal accounts, Pet. 6; Pet. App. 6a, on which they can say what they want and exclude whom they wish. The Garniers did not—and could not—challenge being blocked from those accounts. *See* Pet. App. 101a n.3.

Accordingly, the Trustees' concern that the decision below would allow the District to "*mandate* what they say and do not say" on their personal pages is illusory. Pet. 26. The District cannot require that Board members say something in their personal capacity—either on their personal websites or anywhere else for that matter. As for whether the Board can forbid its members from saying certain things in their personal capacity, that is a question of First Amendment law that has nothing to do with social media pages.

2. The Trustees' choice of a narrow Question Presented makes this case an exceptionally bad vehicle for addressing concerns about the ability of public officials to "exercise editorial control over speech and speakers" on their platforms, Pet. 25 (citation omitted). Those concerns are best addressed through the First Amendment doctrine that they have

expressly asked this Court not to address, *id.* 11, 34, and not through state-action doctrine.

By deliberately omitting any discussion of substantive First Amendment law, the petition obscures the many tools available to officials who want to exercise editorial control over their social media pages, or even over social media pages expressly required, funded, or operated by government agencies. Thus far, these tools have been sufficient to halt the "parade of horribles" that the Trustees forecast, Pet. 26, where public officials must either accept online anarchy or abandon social media altogether, *see id.* 4, 25. These tools make it unnecessary for this Court to tinker with state-action doctrine.

This case illustrates as much. For example, government actors can "restrict[] public interaction with their Facebook pages to the use of Facebook's non-verbal reaction icons," like the Trustees did with word filters. Pet. App. 41a. Neither the Ninth Circuit nor the Garniers question the correctness of this decision.

Officials who take this approach can thereby prevent any sort of "harassment, trolling and hate speech." Pet. 4 (citation omitted). At most, critics can respond by clicking an angry reaction emoticon. Pet. App. 40a. And even if the Trustees are left "powerless to filter" these emoticons, Pet. 4, this Court has more pressing matters to address than protecting elected officials from such de minimis criticism.

If the Trustees want at some future date to reengage with their constituents in the interactive sections of their pages, they may, consistent with the decision below, "establish[] and enforce[] clear rules of

etiquette for public comments on their pages" and delete comments that run afoul of the rules they decide to implement. Pet. App. 48a. Those individualized deletions are "[n]ot onerous." Tr. 121. In fact, the Trustees did previously delete some of the Garniers' comments, Pet. App. 5a, and "testified that [doing so] took only a few seconds," *id.* 47a; *see also* Tr. 121. This "easily available alternative" impacts less speech and "entirely accomplishe[s] the same goal" as completely blocking the Garniers. Pet. App. 47a (citation omitted).

Moreover, nothing in the decision below prevents government actors from blocking particular constituents entirely if those constituents persist in posting comments that violate a fair set of time, place, and manner restrictions. But this case offers the Court no opportunity to articulate what such rules would be, or what kind of forum an official is operating on social media.

If this Court's intervention becomes necessary at some later point, it can then address the First Amendment and state action issues together. State-action doctrine standing alone is too blunt an instrument with which to address the concerns that the Trustees raise. After all, if blocking constituents from social media pages like the Trustees' is not state action, it would be perfectly permissible for the Trustees to block Christopher Garnier because he is Black or because he posted several messages reflecting his religious beliefs. It is the First Amendment, not state-action doctrine, that allows courts to distinguish between blocking spammers and blocking individuals for invidious reasons.

In short, the lower court decisions leave the Trustees and other state actors with plenty of tools to

moderate content on their pages without running afoul of the First Amendment. The Trustees have in essence thrown away those weapons in order to demand that the Court protect them because they are unarmed. The Court should refuse that invitation.

3. Finally, the issue of constitutional constraints on an official's social media accounts is a textbook example of a situation where "further consideration" by the district courts and courts of appeals will enable the Court "to deal with the issue more wisely at a later date" if needed. *McCray v. New York*, 461 U.S. 961, 962 (1983) (opinion of Stevens, J., respecting the denial of certiorari).

The lower courts have only just begun grappling with the different factual scenarios that may give rise to questions about constitutional constraints on officials' use of social media. *See, e.g.*, *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019); *One Wis. Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. 2019). This Court would benefit from waiting for more decisions addressing a wider variety of fact patterns before deciding whether state-action doctrine needs further elaboration or whether First Amendment doctrine is the appropriate channel for addressing social media-related concerns.

III. The Ninth Circuit's state-action holding is correct.

The Ninth Circuit correctly applied this Court's precedents to hold that the Trustees acted under color of law when they blocked the Garniers on Facebook and Twitter. And contrary to the Trustees' arguments, the mere fact that this case involved being blocked on social media, rather than being excluded from a face-

to-face public meeting, should not change whether there was state action.

A. The Trustees acted under color of law.

The Trustees are wrong to assert that officials act under color of law only when the government "requires," "controls," or "facilitates" their speech. Pet. 31. "There can be no doubt at least since *Ex parte Virginia*, 100 U.S. 339, 346-47 [(1879)]," that public officials are held to act under color of law for purposes of Section 1983 whenever they are doing their jobs, regardless of whether the challenged action was expected, permitted, or even *forbidden*. *Monroe v. Pape*, 365 U.S. 167, 171-72 (1961); *see also Screws v. United States*, 325 U.S. 91, 111 (1945); *United States v. Classic*, 313 U.S. 299, 326 (1941).

Consequently, there can be state action in this case even if PUSD neither required, nor controlled, nor facilitated the Trustees' social media accounts. It is enough that the Trustees used their public social media pages as a primary way of interacting with their constituents—something that both California law and PUSD policy expect school board members to do. *See supra* pp. 2, 13-15. The absence of a specific mandate to use social media to carry out this core function does not alter the state-action analysis. After all, as this Court has explained, an official's chosen medium of communication to carry out official job functions is immaterial. "[A]n elected official communicate[s] an idea, slogan, or speech to her constituents, regardless of whether she communicates that idea, slogan, or speech during individual phone calls to each constituent or in a public square." *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 447 (2014). So too for

communicating those ideas in Facebook or Twitter posts.

Moreover, "[i]t is clear that under 'color' of law means under 'pretense' of law." *Screws*, 325 U.S. at 111. Thus, as the Ninth Circuit held, the Trustees engaged in state action when "they clothed their pages in the authority of their offices and used their pages to communicate about their official duties." Pet. App. 26a; *see also Classic*, 313 U.S. at 326; *West v. Atkins*, 487 U.S. 42, 49 (1988). It is hard to imagine a more convincing "pretense" than labeling a page "*the official page* for T.J. Zane, Poway Unified School District Board Member." Pet. App. 9a (emphasis added). And both Zane and O'Connor-Ratcliff clearly used their pages to communicate about their official duties. *See supra* pp. 3-5, 13-15. Indeed, the Question Presented itself acknowledges that they used the accounts at issue to "communicate about job-related matters with the public." Pet. i. This renders the Trustees' claim (Pet. 28) that no one would believe the pages were "governmental rather than personal" farfetched at best.

The presence of state action here is particularly clear because of the distinctive character of this case. Most of this Court's state-action decisions have involved the question whether a formally private entity should nonetheless be subjected to constitutional constraints that limit only government action. *See, e.g.*, *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2021); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001); *West*, 487 U.S. at 49, 51; *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). In those cases, the starting point is an absence of state action.

This case, by contrast, involves the question whether elected officials can escape constitutional constraints by framing their treatment of constituents in a public forum as purely private behavior. Pet. i. They cannot.

B. The Trustees' other arguments for the absence of state action are unpersuasive.

1. The Trustees claim that there is no state action here because private corporations created the "blocking" mechanisms at issue. *See* Pet. 22. Since all users can block accounts on Facebook and Twitter, the Trustees argue that their blocking of the Garniers exercised no power created by the state. *See id.*

This argument proves too much. After all, even if PUSD had outright directed the Trustees to maintain social media accounts, paid for their internet service, and permitted them to use PUSD staff to help prepare their posts, the Trustees' ability to block constituents from those pages would still be based on the proprietary technology that Facebook and Twitter provide to every account holder. But that fact surely would not transform state action into private conduct. It does not do so here either.

This Court's precedent confirms this analysis. Even when individuals *could* have acted in a private capacity, they nevertheless engage in state action when they possess and purportedly act under state authority. In *Griffin v. Maryland*, 378 U.S. 130 (1964), for example, a deputy sheriff ejected plaintiffs from a private amusement park. *Id.* at 132. Maryland argued that the deputy sheriff—"subject to the control and direction of park management" at the time in question—functioned in a private capacity because his

authority to oust derived from the park's right to control its property. *Id.*

This Court rejected that argument, explaining that "[i]f an individual is possessed of state authority and purports to act under that authority, his action is state action." *Griffin*, 378 U.S. at 135. "It is irrelevant," the Court continued, "that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law." *Id.*

So too here. It is irrelevant that the Trustees—like all social media users—used tools provided by Facebook and Twitter. Unlike the overwhelming majority of social media users, the Trustees possessed state authority and purported to act under that authority when operating their public pages; it was while operating those pages that they ejected the Garniers. *See* Pet. App. 6a, 28a-29a.

2. More broadly, the fact that this case involves social media does not make it harder to establish state action. The Trustees chose to perform their official duties on a digital platform hosted by a third party, but that decision did not unbind them from the Constitution. "[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (citation omitted).

Where a government official carries out part of her official job functions using her private email, for instance, extensive case law holds that such

communications remain public records—even if a private corporation like AOL hosts the account in question. *See, e.g.*, *Competitive Enter. Inst. v. Off. of Sci. & Tech. Pol'y*, 827 F.3d 145, 146 (D.C. Cir. 2016); *City of San Jose v. Superior Ct.*, 389 P.3d 848, 851 (Cal. 2017); *Toensing v. Att'y Gen. of Vt.*, 178 A.3d 1000, 1002 (Vt. 2017); *see also* Michael D. Pepson & Daniel Z. Epstein, *Gmail.gov: When Politics Gets Personal, Does the Public Have a Right to Know?*, 13 Engage, J. Federalist Soc'y Prac. Grps., July 2012, at 5 (government employees using private email to discuss public matters engage in official business). Whether using personal email or social media, an official acts under color of law when he or she is carrying out the responsibilities of a public position.

3. The Trustees also argue that their actions do not fall under color of law because they were engaged in "personal pursuits," Pet. 22 (citation omitted), that (a) lacked government authorization and (b) involved private property, *see id.* 24. These arguments fail as well.

a. The Trustees are just wrong to suggest that presenting "the well-informed views of government employees" on public social media pages constitutes a "personal" pursuit unauthorized by the government Pet. 24-25 (citation omitted). To the contrary: Sharing views on District policy is an integral part of PUSD Board Members' jobs—something both Trustees admitted at trial. *See supra* p. 2.

The crux of the Trustees' argument rests on plucking favorable language from *Screws v. United States*, 325 U.S. 91 (1945). *See, e.g.*, Pet. 22. But the Trustees miss the forest for the trees: The Court held

that the official acted under color of law in that case. *Screws*, 325 U.S. at 111.

To be sure, when a public official engages in "personal pursuits," *Screws*, 325 U.S. at 111, he is not acting under color of law. But the Court in *Screws* found state action even though Sheriff Screws had acted out of a personal "grudge." *Id.* at 93. What mattered was that even though the sheriff's motivation might have been personal, he used his office to accomplish his goals. If anything, the Trustees here were engaged in *less* of a "personal pursuit" than Sheriff Screws was. They identify no motivation for having public social media pages to interact with the entire constituency of the PUSD other than doing their jobs as PUSD Trustees. *See* Pet. App. 25a-26a.

The Trustees' reliance on *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2021), is equally misplaced. The question in that case was whether a private corporation that hosted speech on public-access channels engaged in state action when it excluded a filmmaker from the channel. *Id.* at 1926. The situation here is decisively different: It concerns *public* officials who created public fora to inform their constituents and solicit their feedback.

The Trustees attempt to elide this important difference as an "immaterial distinction." Pet. 23. This Court should not be fooled. Neither Trustee operates public social media pages as "an individual who merely happen[s] to be a City official." *Id.* 24. If the connection between their position and their social media were truly fortuitous, the Trustees would have had no need for their public pages in the first place because their private profiles would have met their needs. *See* Pet. App. 6a, 59a-60a; *see also Lindke v.*

Freed, 37 F.4th 1199, 1201 (6th Cir. 2022) (explaining that the defendant city manager had only one Facebook page). Instead, the Trustees operated their official pages, "the content" of which "was overwhelmingly geared toward" PUSD business, Pet. App. 23a, *because* they are elected public officials with a desire and need to communicate with constituents. *See supra* pp. 2, 13-15.

b. The Trustees' final hypothetical—about a possible "townhall discussion" conducted on President Bush's ranch or at one of Governor Pritzker's resorts, Pet. 24—is even more contrived and less persuasive. To begin, the Trustees never even attempt to explain how elected officials conducting a town hall to discuss "past and future administration initiatives," *id.*, would *not* be doing their jobs, and therefore *not* be acting under color of law. Nor do they explain how, in the real world, the officials would conduct such a town hall without "rely[ing] on any governmental resources," *id.*, such as security or aides to provide background materials. A townhall meeting conducted by public officials is undeniably state action.

The Trustees' real argument is that the private land on which their hypothetical townhall occurs should not be treated as "a governmental forum" from which the landowning official cannot exclude members of the public he does not wish to invite. *See* Pet. 24. Even if that were so—a question on which the Garniers take no position—this petition should be denied. After all, the Trustees themselves trumpet that their petition "does not contest" the Ninth Circuit's decision regarding the nature of the forum here. *Id.* 11, 34.

The Trustees essentially ask this Court to "revise the meaning" of "under color of any law" to meet certain alleged "exigencies," *Screws*, 325 U.S. at 112-13, that arise from elected officials' use of social media. It is unclear if those exigencies even exist. But if they do, the way to meet them is not to distort state-action doctrine. Instead, it would be to clarify how public officials can manage social media fora in accordance with the First Amendment. The Trustees have expressly declined to ask the Court to perform that task here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 13, 2022