No. 22-324

In the Supreme Court of the United States

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

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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INTRODUCTION

A certiorari petition and opposition brief were recently filed in *Lindke v. Freed*, No. 22-611 (U.S.). Those briefs confirm both that the Ninth Circuit's decision in this case presents a square circuit split *and* that this case is a superior vehicle to resolve the question presented.

First, the *Lindke* briefs reinforce that there is a clear conflict among the circuits on the legal test for determining whether a public official's use of a personal social-media account constitutes state action, especially as applied to the facts in this case. Although the City Manager there, like the Garniers here, argued that the Sixth Circuit and the Ninth Circuit merely emphasized different formulations of the same "nexus" test, Lindke refuted that argument there just as the Trustees did here. In express contrast to the Ninth Circuit's standard, the Sixth Circuit held that the official's operation of the account must carry out a governmental "duty" or rely on governmental "authority"—*regardless of whether* the account has an official "appearance" or a job-related "purpose" in communicating with the public. Moreover, the Sixth Circuit expressly construed the elements of "duty" and "authority" *far more narrowly* than did the Ninth Circuit. It demanded that use of the account must either be required by the official's job or employ official resources, as otherwise the official is simply operating the account in a personal capacity. Tellingly, while the *Lindke* parties disagree about whether the Ninth Circuit would have found state action on the facts of their case, *neither of them disputes* that the Sixth Circuit would have rejected state action on the facts of *this* case.

Second, the *Lindke* briefs reveal that that case, unlike this one, suffers from serious vehicle problems. Critically, there is *no real controversy* between the parties there. The City Manager unpublished his Facebook page more than two years ago. Lindke's injunction claim is thus immaterial (if not moot), and his damages claim is foreclosed by qualified immunity given the circuit split that he himself identifies. In contrast, a substantial controversy persists between the parties here, as O'Connor-Ratcliff, who was re-elected last year to another four-year term, actively uses her Twitter and Facebook pages and would block abusive commenters like the Garniers if the Ninth Circuit is reversed. Furthermore, the City Manager in *Lindke* advances an *alternative ground for affirmance* that his page was more akin to a direct mailing list than a public forum, such that his blocking of Lindke did not substantively violate the First Amendment even if it were covered state action. This is yet another reason why resolution of the question presented is neither necessary nor sufficient to dispose of that case. In this case, though, it is undisputed that the state-action question is dispositive: it is essential to the Garniers' claim and the sole defense available to the Trustees in this Court.

Accordingly, the Court should grant certiorari in this case and hold *Lindke* pending a decision.

ARGUMENT

I. THE BRIEFS IN *LINDKE V. FREED* CONFIRM THAT THE NINTH CIRCUIT'S DECISION IN THIS CASE PRESENTS A SQUARE CIRCUIT SPLIT

As to whether a circuit conflict exists, the briefs in *Lindke* closely parallel the briefs in this case. Lindke identifies the same division of authority that the Trustees did, and the City Manager makes the same flawed attempts to minimize the divide that the Garniers did. Notably, though, the *Lindke* briefs show that the split is particularly clear on the facts presented here. Neither side disputes that the Sixth Circuit would have rejected state action in *this* case, whereas they do dispute whether the Ninth Circuit would have found state action in the less-common circumstances presented in *Lindke*.

A. Like the Trustees here, Lindke demonstrated that "the courts of appeals have developed two vastly different approaches" for assessing whether a public official's use of a personal social-media account constitutes state action. 22-611 Pet. 9. Whereas the Ninth Circuit (along with the Second, Fourth, and Eighth Circuits) "have engaged in a totality-of-the-circumstances inquiry involving multiple factors, including [the account's] appearance or purpose," the Sixth Circuit has "rejected the relevance of … appearance or purpose, instead relying solely on two factors: 'the actor's official duties and use of government resources or state employees.'" *Id.*; *see id.* at 9-16; *accord* 22-324 Pet. 12-18.

And like the Garniers here, the City Manager responded that all circuit courts "have applied a version of the 'nexus' analysis required by" this

Court's precedent, that any "differences" are "semantic" rather than "qualitative," and that the "judgments … are largely compatible." 22-611 BIO 10-12; *accord* 22-324 BIO 18-19. That response, however, is manifestly wrong, as Lindke and the Trustees have already illustrated. For example, the City Manager asserted that the Sixth Circuit "mere[ly] … declined to emphasize the 'appearance and purpose' factors," 22-611 BIO 12, but in reality the Sixth Circuit categorically rejected the relevance of those factors, as the Ninth Circuit subsequently recognized, *see* 22-611 Pet. 14-15; 22-324 Reply 3-4. Likewise, while the City Manager observed that the Ninth Circuit also considered the "duty" and "authority" factors, 22-611 BIO 12-13, 16-17, he overlooks that "the Sixth Circuit took a narrow[er] view of both criteria," 22-611 Pet. 14. Unlike the Ninth Circuit, the Sixth Circuit holds that a relevant duty exists only when the officer uses the account to satisfy state-law requirements, and that relevant authority exists only when state resources are used to operate the account. *See id.* at 14-15; 22-324 Pet. 12-15. In short, the difference in the legal standards is plain and fundamental.

B. Tellingly, despite denying the circuit split, the City Manager never asserted, much less attempted to show, that the Sixth Circuit would have found state action on the facts of this case. *See* 22-611 BIO 7-18. He thus tacitly admitted the reason that this Court's intervention is warranted: the Ninth Circuit's judgment in this case turned on its decision not to follow the Sixth Circuit's legal rule in *Lindke*, because the facts here do not even arguably satisfy that test. *See* 22-611 Pet. 15-16; 22-324 Reply 5-7.

The City Manager's silence on this critical point is all the more conspicuous because he argued at length that even the Ninth Circuit would *not* have found state action on the facts of his case. *See* 22-611 BIO 14-18. Although Lindke took the opposite position and the Trustees share that view, *see* 22-611 Pet. 12-13, 21; 22-324 Reply 7-9, the disagreement just underscores why this case presents the circuit conflict more squarely than *Lindke*. Here, there is no serious dispute that the difference in the legal standards was decisive on the facts presented. By contrast, on the facts in *Lindke*, it is possible that this Court might conclude that state action is lacking under *either* side of the split, which makes *Lindke* a worse vehicle to resolve the conflict. *Contra* 22-611 Pet. 16-17 (erroneously asserting that the Court's disagreement with the Sixth Circuit's test would "necessitat[e] reversal of [*Lindke*]").

Finally, and relatedly, Lindke is wrong that his "case presents a prototypical scenario in which the state-action question arises." *Id.* at 8. In all the circuit court cases *except* his, the officials used their personal accounts *predominantly* to communicate with the public *about their jobs*.[1] It is thus the City

[1] *See Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1171 (9th Cir. 2022) (content "overwhelmingly geared toward providing information to the public about the PUSD Board" (cleaned up)); *Davison v. Randall*, 912 F.3d 666, 674 (4th Cir. 2019) (posts "principally addressed her official responsibilities"); *Knight First Amend. Inst. v. Trump*, 928 F.3d 226, 235 (2d Cir. 2019) (tweets "on almost a daily basis as a channel for communicating and interacting with the public about his administration" (cleaned up)); *cf. Campbell v. Reisch*, 986 F.3d 822, 826 (8th Cir. 2021) (tweets "overwhelmingly for campaign purposes" to convey that official remained "the right person for the job").

Manager whose social-media activity was "atypical of litigation in this area," *id.* at 18, as he *primarily* posted about *purely personal matters* such as his family life, while also sometimes re-sharing publicly available information related to his job from a Facebook page featuring some of the official trappings of his job.[2] To be clear, that specific factual aspect of the case was immaterial to the Sixth Circuit's rejection of state action under its stringent legal test, *see* 22-324 Reply 5-7, and it also would not have stopped the Ninth Circuit from finding state action under its looser legal standard, *see id.* at 7-9. Nevertheless, it would be prudent for the Court to consider and resolve the question presented in a mine-run case like this, rather than an outlier case like *Lindke*.

II. THE BRIEFS IN *LINDKE V. FREED* CONFIRM THAT THIS CASE IS A SUPERIOR VEHICLE TO RESOLVE THE QUESTION PRESENTED

In addition to presenting the circuit split more squarely, this case is a much cleaner vehicle. Although Lindke tried to throw some dirt, none of his objections has any merit, and each of them applies with much greater force to his own case.

A. Lindke primarily questioned whether this case is moot in light of the Trustees' use of word filters on their Facebook pages. 22-611 Pet. 17-18. Like the Garniers, however, Lindke "d[id] not go so far as to argue that th[is] case is moot," *id.* at 18, no doubt because he too cannot refute the Ninth Circuit's

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[2] *See Lindke v. Freed*, 37 F.4th 1199, 1201 (6th Cir. 2022); *see also* 22-611 BIO 14-15, 17-18; 22-324 BIO 16-17.

analysis of why the controversy persists, *see* 22-324 Reply 11. Most obviously, "whatever changes the Trustees may have made to their Facebook pages, such changes would not affect Christopher Garnier's claim against O'Connor-Ratcliff for blocking him from her Twitter page," as there is no other way for her to "restrict public comments on her Twitter page." 22-324 Pet.App. 16a; *see* @MOR4PUSD, https://twitter.com/MOR4PUSD (last visited Mar. 13, 2023). More fundamentally, she also would like to regain her right to "remove the word filters from [her] Facebook page[] and again open [it] for verbal comments from the public" while blocking abusive commenters like the Garniers. 22-324 Pet.App. 17a; *see* https://www.facebook.com/mor4pusd (last visited Mar. 13, 2023). And while Zane's term has expired, O'Connor-Ratcliff was re-elected last year for a four-year term, *see* https://ballotpedia.org/Michelle_O%27Connor-Ratcliff (last visited Mar. 13, 2023), so Lindke has no realistic basis to speculate that she might leave office before the Court decides this case next year, *see* 22-611 Pet. 18.

Indeed, Lindke is the proverbial stone-throwing man living in a glass house, because it is his case that does not present any real controversy between the parties. As the City Manager explained, he "unpublished" his Facebook page around October 2020 "because he had no interest in maintaining a personal page he could not manage." 22-611 BIO 4. Moreover, he "has not operated it for almost three years" now, including *after* the district court and the Sixth Circuit both held that he *could* manage the page as he wished. *Id.* at 20. There is thus a serious prospect that the City Manager's blocking of Lindke

"cannot reasonably be expected to recur." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 100 (2013). Tellingly, the district court rejected mootness *solely* on the ground that Lindke also sought damages. 22-611 Pet.App. 18a. But qualified immunity indisputably bars Lindke's damages claim given the very circuit split that he himself has identified. *See Wilson v. Layne*, 526 U.S. 603, 618 (1999) (applying immunity where, as here, "a split among the Federal Circuits in fact developed on the question [presented]" "[b]etween the time of the events of th[e] case and [this Court's] decision"). And the City Manager has made clear that he will defend his judgment in this Court on these grounds. *See* 22-611 BIO 19-20.

Accordingly, while *Lindke* is not entirely moot, it is not an appropriate vehicle for this Court to grant discretionary review and decide an important constitutional question. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("[A]bandonment [of the challenged conduct] is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice."); *Pearson v. Callahan*, 555 U.S. 223, 237, 242 (2009) (where "it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right," courts may decide the immunity question without resolving the merits question). There is also a risk that "the briefing" may be "inadequate" where a specific legal issue does not ultimately matter to a party, *Pearson*, 555 U.S. at 239, and that risk is acute in *Lindke* given the City Manager's relatively perfunctory defense of the Sixth Circuit's test, *compare* 22-611 BIO 21-24, *with*

22-324 Pet. 18-33. The Court should decide the state-action question where that has a real "effect on the outcome" of an ongoing controversy (as in this case), rather than serving as "an essentially academic exercise" in a functionally moot dispute (as in *Lindke*). *See Pearson*, 555 U.S. at 237; *see also Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (stressing the importance of "a concrete factual context conducive to a realistic appreciation of the consequences of judicial action").

B. Lindke also asserted that this case is "atypical" as the Trustees have "chosen" to limit their petition to the threshold state-action question, whereas the City Manager in his case asserts a "substantive First Amendment" defense even if his social-media activity were deemed governmental. 22-611 Pet. 18-19. But Lindke cannot turn his lemon of a petition into lemonade: in contrast to his case, the procedural posture of this case is unique only in the sense that it presents a uniquely clean vehicle to decide the cert-worthy state-action question.

For vehicle purposes, it is a vice, not a virtue, that the City Manager in *Lindke* raises the "alternate ground[] for affirmance" that his Facebook page was more "akin to a direct mailing list" than a "public for[um]" with "back-and-forth conversations." 22-611 BIO 19-20. Even if the operation of such a page were deemed state action, it at most would be "a nonpublic forum," *see id.*, if not government speech to a selected audience, *see Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 280-83 (1984). The City Manager may continue to "defend [his] judgment on [that] ground" even though it was not "relied upon,

rejected, or even considered by the District Court or the Court of Appeals." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009). So Lindke is wrong that "the state-action question is dispositive" in his case, and he does not and cannot argue that the alternative First Amendment question is *itself cert-worthy*. 22-611 Pet. 19. The circuit split concerns when a public official's social-media activity should be deemed governmental rather than private, *not* what standards apply to governmental accounts. And there is at least a risk that this Court may skip past the state-action question in *Lindke* if it concludes the City Manager is clearly correct that he satisfied the First Amendment's substantive commands regardless.

No such risk exists in this case. The Trustees have expressly limited their petition to the threshold state-action question. 22-324 Pet. i, 11; *see Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) ("[W]e ordinarily do not consider questions outside those presented in the petition for certiorari."). And state action is an essential element of the Garniers' sole claim for relief. 22-324 Pet. 7 & n.1, 19-20. So resolution of that question here will be decisive.

It is no surprise that the City Manager in *Lindke* throws up so many alternative grounds for affirmance. He won below, apparently does not even want to operate his long-defunct Facebook page, and thus does not seem to care whether or how this Court resolves the circuit split on the state-action question. By contrast, the Trustees lost below, emphasize the importance of the state-action question, and have perfectly teed it up by narrowing their defense. The better vehicle is clear: this case, not *Lindke*.

CONCLUSION

The Court should grant certiorari in this case and hold *Lindke* pending a decision.

March 14, 2023

Respectfully submitted,

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