Nos. 22-324, 22-611

IN THE
Supreme Court of the United States

MICHELLE O'CONNOR-RATCLIFF, ET AL.,
Petitioners,
v.
CHRISTOPHER GARNIER, ET UX.,
Respondents.

KEVIN LINDKE,
Petitioner,
v.
JAMES R. FREED,
Respondent.

On Writs of Certiorari to the
U.S. Court of Appeals for the Ninth Circuit and the
U.S. Court of Appeals for the Sixth Circuit

BRIEF OF THE NRSC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS IN NO. 22-324 AND RESPONDENTS IN NO. 22-611

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES

Page(s)

Cases

TABLE OF CITED AUTHORITIES

Page(s)

TABLE OF CITED AUTHORITIES

Page(s)

Statutes

Other Authorities

TABLE OF CITED AUTHORITIES

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

The NRSC (the National Republican Senatorial Committee) is the principal national political party committee focused on electing Republican candidates to the United States Senate. Its membership includes all incumbent Republican Members of the United States Senate.

The NRSC has a strong interest in these cases because its members use social media platforms to communicate with voters and advocate their own election to public office. "The First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office,'" *FEC v. Cruz*, 142 S. Ct. 1638, 1650 (2022) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)), and this robust constitutional protection for political speech means every candidate "has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election," *Buckley v. Valeo*, 424 U.S. 1, 52 (1976).

In contemporary political campaigns, social media platforms are one of the single most important places for candidates to exercise their core First Amendment rights. As in traditional venues, effective electoral advocacy on social media sometimes requires candidates to exclude messages they do not like. Just as candidates sometimes remove from their campaign rallies

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the NRSC or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

persons that are disruptive or displaying support for an opponent, candidates sometimes block from their social media communications users that are posting offensive, obnoxious, or discordant messages. In the judgment of these candidates, retaining such messages would fundamentally alter the content of their own message.

In deciding whether social media activity by a public official constitutes state action, this Court must respect and preserve the First Amendment rights of elected officeholders. Incumbent candidates must be permitted to shape their electoral advocacy on social media without fear that a costly court battle under a vague and unpredictable standard could hinder their campaign. So long as an officeholder's social media account is not operated pursuant to any governmental authority or duty, activity on the account is not state action.

SUMMARY OF ARGUMENT

The First Amendment safeguards the ability of a candidate to freely advocate his or her election to public office. Political speech occupies the highest rung in the hierarchy of First Amendment values, and protection for this essential freedom is foundational to our representative government.

Included within the freedom of speech is a principle of autonomy over one's own political message. Applied to a candidate for public office, this principle necessarily entails the right to exclude from electoral expression messages the candidate does not like.

That is why courts have permitted candidates to remove from their campaign events persons who are disruptive or who display support for other candidates or causes. And it is why courts have upheld decisions excluding from debates minor-party candidates the major-party candidates have chosen to reject. In such cases, courts recognize that compelling a candidate to include discordant or undesired expression in his own electoral and political communications would violate the First Amendment. And it has not mattered whether the candidate is an incumbent who could be said in some way to exercise the power of the state.

The same principles apply online. No less than in other places, candidates use social media to shape a political message. For an incumbent, an important part of a social media messaging strategy is often to remind voters about his or her job performance. At the federal level, officeholders typically maintain separate, non-government resourced social media accounts (in addition to any account that may be operated using government resources) and use these accounts for political purposes. When another user posts content on these accounts that is offensive, disruptive, or inconsistent with a candidate's political message, the candidate may delete that content or block the offending user from further participation. While this does not prevent the user from reposting the same content elsewhere, it does remove the content from the candidate's own page.

In determining whether social media activity by a public official constitutes state action, this Court must protect the First Amendment rights of elected

officeholders and should specifically recognize that incumbents often discuss their job performance for political reasons. Just as an incumbent candidate may hold a campaign rally that promotes his official accomplishments without transforming that event into state action, an incumbent candidate may also discuss his official acts on a non-government resourced social media page without that page becoming state action, either. And because these pages are not state action, the candidate can remove from his social media communications messages he or she does not like.

At a minimum, this Court should establish a clear test that ensures ambiguity does not chill protected speech. In some circuits, the test for state action is so amorphous and unpredictable that NRSC members and other candidates may refrain from exercising their First Amendment rights rather than risk expensive and potentially distracting litigation that could disrupt their campaign. This harms not only candidates, but society, which is deprived of a free and uninhibited debate on the issues and candidates that will shape our national future.

ARGUMENT

I. The First Amendment Safeguards The Right Of All Candidates To Freely Advocate Their Election.

The First Amendment safeguards the right of every candidate "to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election." *Buckley*, 424 U.S. at 52. In our representative system of government established by the Constitution, it is critical "that candidates have the

unfettered opportunity to make their views known so that the electorate may intelligently evaluate" the candidates. *Id.* at 52–53.

This is a chief end of the First Amendment. The Framers believed "public discussion is a political duty," *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), and so enshrined in the First Amendment a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) (internal quotation marks and citation omitted). Among scholars, "there is practically universal agreement that a major purpose of th[e] Amendment was to protect the free discussion of governmental affairs, of course including discussions of candidates." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (cleaned up); *see Snyder v. Phelps*, 562 U.S. 443, 452 (2011) ("speech on public issues occupies the highest rung of the hierarchy of First Amendment values" (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983))). Accordingly, this Court has often held that "[t]he First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Cruz*, 142 S. Ct. at 1650 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

For candidates, as for other citizens, the First Amendment embodies "the fundamental rule . . . that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). The same is true online. *303 Creative LLC v. Elenis*, 600

U.S. __, __ (2023) (No. 21-476, slip op., at 10). Since all speech involves choices about "what to say and what not to say," *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988), all speakers have a First Amendment right "not to propound a particular point of view," *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654 (2000).

This freedom permits a speaker to exclude from his or her own expression a political message he or she does not wish to convey. In *Hurley*, the Court affirmed a decision by a private entity to remove from its public parade a group of marchers with "a message it did not like." 515 U.S. at 574. That choice, the Court held, was firmly within the right of the entity "to shape its expression by speaking on one subject while remaining silent on another." *Ibid.* And it was "beyond the government's power to control." *Id.* at 575; *see also 303 Creative*, 600 U.S. at __ (slip op., at 8) ("[speakers] ha[ve] a First Amendment right to present their message undiluted by views they d[o] not share"); *Boy Scouts*, 530 U.S. at 656 ("The Boy Scouts has a First Amendment right to choose to send one message but not the other.").

The same principal applies in the electoral context. In *Sistrunk v. City of Strongsville*, 99 F.3d 194 (6th Cir. 1996), the Sixth Circuit held then-President George H.W. Bush could exclude from his "pro-Bush rally" non-disruptive protesters displaying "buttons and signs for Bill Clinton." *Id.* at 199. Applying *Hurley*, the court reasoned that compelling President Bush to admit persons expressing a message favoring Clinton would violate "the fundamental rule of protection under the First Amendment, that a speaker has

the autonomy to choose the content of his own message." *Id.* at 200 (citation omitted).[2]

Similar reasoning appears to be at work in decisions involving formal organized debates between political candidates. Pursuant to objective criteria established in agreements with the major-party candidates, debate organizers often exclude minor-party candidates from their debates. The D.C. Circuit has denied these minor-party candidates injunctive relief, explaining that "if th[e] court were to enjoin the [organizers] from staging the debates or from choosing debate participants, there would be a substantial argument that the court would itself violate the [organizers'] First Amendment rights." *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (per curiam) (citing *Hurley*); *see also Johnson v. Comm'n on Presidential Debates*, 869 F.3d 976, 981 (D.C. Cir. 2017) (citing *Perot*). That is because participation of minor-party candidates would undermine the message that they are not competitive options.

In sum, the freedom of speech safeguards a candidate's ability to advocate "without legislative limit on

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[2] Though seldom litigated, candidates frequently remove from their events persons who express a contrary message. *See, e.g.*, Dan Merica, *Man wearing Trump T-shirt protests at Sanders rally*, CNN (Jan. 2, 2016), https://tinyurl.com/3u9fxd46 (reporting that man wearing Trump T-shirt was "escorted out by [Senator] Sanders' staff"); Kerry Picket, *AOC townhall descends into shouting match among constituents*, Washington Times (May 27, 2023), https://tinyurl.com/5n96j6sw (reporting man displaying Cuban and American flags was "escorted out of the room" after shouting at "town hall hosted by Rep. Alexandria Ocasio-Cortez").

behalf of his own candidacy," *Cruz*, 142 S. Ct. at 1650 (quoting *Buckley*, 424 U.S. at 54), and to control his own political message. As in traditional venues, effective electoral advocacy on social media sometimes requires candidates to exclude messages they do not like or that they find offensive or disruptive. The same principles must apply online in order to protect candidates' right to exercise "appropriate editorial discretion" over their message. CA9 Pet. Br. 30–33 (citations and quotations omitted).

II. Nearly All Candidates Use Social Media To Advocate Their Election.

A. Social Media Is An Essential Campaign Tool.

Social media is an important place for candidates to exercise their First Amendment rights. "While in the past there may have been difficulty in identifying the most important places . . . for the exchange of views, today the answer is clear." *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). In a contemporary political campaign, the place to be heard "is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular." *Ibid.* (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

That campaigns have embraced social media is not surprising. When Abraham Lincoln debated Stephen Douglas in hopes of becoming the junior senator from Illinois, he successfully leveraged the new technologies of his day—the telegraph and the railroad—to send his message across the Nation with then-stunning speed. *See generally* Allen Guelzo, *Lincoln and Douglas: The Debates that Defined America* (2008).

Although Lincoln lost his senatorial race, the popularity he gained later catapulted him to the presidency.

In the twentieth century, "television, radio, and other mass media" replaced the telegraph and the railroad as the "indispensable instruments of effective political speech." *See Buckley*, 424 U.S. at 19. Candidates who mastered these mediums were often rewarded with victory. *See* Michael Barone, *Our Country: The Shaping of America from Roosevelt to Reagan* (1990). Those who did not faced defeat. *E.g.*, Andrew Martin, *How Sweat Cost Richard Nixon the 1960 Election,* Medium (Nov. 7, 2020), https://tinyurl.com/yz3nsyhn.

The end of the millennium heralded the beginning of advocacy online. In 1996, Bob Dole and Bill Clinton launched the first federal campaign websites. *See* Katie Harbath and Collier Fernekes, *A Brief History of Tech and Elections: A 26-Year Journey* 1 (Sept. 28, 2022), https://tinyurl.com/5dfcxbm7. The Internet has played an important role in every election cycle since.

Today, social media platforms are often the most important online venues for political campaigns. Like other social media users, candidates "upload messages, videos, and other types of content, which others on the platform can then view, respond to, and share." *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206, 1216 (2023). Using these tools, candidates hope to disseminate their political message and drive voter engagement.

In 2020, elections for the U.S. Senate and U.S. House featured dramatic increases from 2016 in both the number of lawmakers' online posts and the frequency of audience engagement. Pew Research Center, *Charting Congress on Social Media in the 2016 and 2020 Elections* 4 (Sept. 30, 2021), https://tinyurl.com/mvc3snff. Members of both major political parties shared tens of thousands more posts and received orders of magnitude more engagement from other social media users compared with the previous election cycle. *Ibid.*

This trend will only continue. Some candidates have announced their campaigns primarily or exclusively through social media. *See* Ryan Saavedra, *DeSantis Event 'By Far The Biggest Ever' Held On Twitter Spaces, $1+ Million Raised In First Hour*, The Daily Wire (May 24, 2023), https://tinyurl.com/yhun27tk. Others are using digital tools to augment more traditional approaches. *See* Catherine Garcia, *2024 Senate races to watch*, The Week (May 9, 2023), https://tinyurl.com/24nnzrtr.

Changes in the way Americans consume audio and visual content are also driving campaigns to emphasize social media. Some campaigns are using social media to distribute professionally produced promotional videos that, decades ago, would more likely have been seen on linear television. *See* Phil Vangelakos, *The digital video revolution is just beginning for modern political campaigns*, The Hill (Mar. 26, 2023), https://tinyurl.com/ya9uauwh. Others are embracing formats for self-produced content to connect with voters in innovative ways. *See* Marianne Levine,

Ted Cruz's new gig: Top podcaster, Politico (Jan. 27, 2020), https://tinyurl.com/4zcnwfm8.

These are just a few examples that illustrate how candidates are using social media for electoral advocacy. In a contemporary political campaign, social media platforms are perhaps the single most important place for a candidate to exercise his or her First Amendment right to connect with voters, supporters, and the public.

B. Incumbents Discuss Their Jobs On Social Media To Persuade Voters To Reelect Them.

For candidates, communicating on social media is not an end in itself. At bottom, candidates seek to persuade their fellow citizens that they are suitable to hold public office and that they merit electoral support. *Buckley*, 424 U.S. at 14–15; *see Bennett*, 564 U.S. at 736–40.

For officeholders, a persuasive electoral message will often invoke the conduct of their official duties. After all, most "elections are fundamentally a referendum on the incumbent," Guy Molyneux, *The Big Five-Oh*, The American Prospect (Oct. 1, 2004), https://prospect.org/article/big-five-oh/, so voters' perceptions about how they have handled their current governmental responsibilities are likely to inform their choice on election day. Incumbents know this instinctively, and they want to provide voters with information to improve their prospects of victory.

The Eighth Circuit saw this clearly in *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021). There, an individual claimed a state legislator violated his First

Amendment rights when she blocked him on Twitter for criticizing "the conduct of her office." *Id.* at 825 (citation omitted). Although the court agreed that the legislator had used her account to discuss her official responsibilities, it recognized the legislator's principal goal was "to promote herself and position herself for more electoral success down the road" by communicating to voters that "she's the right person for the job." *Id.* at 826. Citing *Hurley*, the Eighth Circuit recognized this goal was part of the candidate's "own First Amendment right to craft her campaign materials" by excluding "a message on her Twitter page that she d[id] not wish to convey." *Id.* at 827.

The Ninth Circuit missed this. Although that court acknowledged that "elected officials across the country increasingly rely on social media . . . to promote their campaigns," CA9 Pet. App. 5a, it devalued these First Amendment activities by holding unlawful two elected school board members' blocking of critical comments on Facebook and Twitter, *id.* at 50a. According to the Ninth Circuit, analysis of the accounts' contents revealed them to be "state action" because, in its view, the school board members communicated about their conduct more as "government officials" than "campaigner[s] for political office." *Id.* at 32a (citation omitted); *see id.* at 22a–27a.

The Second Circuit and Fourth Circuit have similarly erred. Like the Ninth Circuit, these courts have wrongly discounted the political and electoral interests that drive a candidate to talk about his government job. As a result, these courts have viewed references to "official titles" and "official duties" as indicia of state action, *Knight First Amend. Inst. at Columbia*

Univ. v. Trump, 928 F.3d 226, 231 (2d Cir. 2019), *cert. granted, judgment vacated sub nom. Biden v. Knight First Amend. Inst. At Columbia Univ.*, 141 S. Ct. 1220 (2021); *see Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019), without giving appropriate weight to an incumbent candidate's need to communicate about his official acts to persuade voters that his conduct in office merits future electoral support.

For incumbents, performance in office is a critical campaign issue. Therefore, an elected official's discussion of official actions on social media frequently reflects campaign advocacy.

C. At The Federal Level, Incumbents Typically Maintain Separate Social Media Accounts.

In addition to electoral advocacy, officeholders may use social media to perform official acts. For example, a legislator might use a social media platform to facilitate constituent service.

Federal law requires separation. Federal government resources may not be used for private purposes. 31 U.S.C. § 1301. Likewise, the Antideficiency Act prohibits private defrayment of government expenses. *Id.* §§ 1341–1342.

In Congress, the Legislative Branch Appropriations Act prohibits members from using unofficial office accounts to defray official expenses. 2 U.S.C. § 503(d); *see* U.S. Senate, Comm. on Rules and Admin., Standing Rules of the Senate, S. Doc. No. 113-18, at 61 (2013), *available at* https://tinyurl.com/j39t7nt4. Accordingly, if, for example, a U.S. Senator decides to serve constituents through a

social media platform, the Senator must establish an "official" social media account and use only government resources (e.g., staff, information, photos) to operate that account.

Conversely, the Senator may not impermissibly use government resources to operate a non-government social media account—such as a "campaign" or "personal" account. This means non-government social media accounts cannot be operated by Senate staff on Senate time, among other things. *See* U.S. Senate, *Internet Services and Technology Resources Usage Rules* (Nov. 9, 2015), https://www.senate.gov/usage/internetpolicy.htm; U.S. Senate, Comm. On Rules and Admin., Senate Manual, S. Doc. 117–1, at 106–109 (2022) (Standing Order of the Senate 71, Television and Radio Broadcast of Senate Proceedings), *available at* https://tinyurl.com/2p86mvyu.

Critically, these rules restrict the use of government resources but do not purport to otherwise restrict the content of a candidate's communications on a non-governmental social media account. Therefore, while a Senator may not expend official resources on a non-governmental account, he or she may use the non-governmental account to discuss the conduct of his or her office without violating Senate rules.

The result, at the federal level, is a system where elected officials maintain separate government and non-government accounts that, while operated independently, may discuss many of the same topics.

D. Candidates Moderate Social Media Communications To Shape Their Electoral Message.

Interactions in cyberspace are not all wholesome or conducive to political expression or advocacy. "[O]nline venues often serve as platforms for highly contentious or even extremely offensive political debate," Emily A. Vogels, Pew Research Center, *The State of Online Harassment* 5 (Jan. 13, 2021), https://tinyurl.com/bddrzxeh. According to a recent survey, "75% of targets of online abuse—equaling 31% of Americans overall—say their most recent experience was on social media." *Ibid.*

In some cases, bad behavior may involve "threats, harassing calls, intimidating and obscene emails, and even pornographic letters" transmitted online. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2381 (2021); *see ibid.* ("a technology contractor working at [an advocacy organization's] headquarters had posted online that he was 'inside the belly of the beast' and 'could easily walk into [the CEO's] office and slit his throat'"). More commonly, users post information that is obnoxious, distracting, or contrary to the intended message of the person hosting the page.

The record from the Ninth Circuit is illustrative. There, an individual posted repetitive comments to the social media accounts of elected school board trustee Michell O'Connor-Ratcliff. "On one occasion, within approximately ten minutes, Christopher Garnier posted 226 identical replies to O'Connor-Ratcliff's Twitter page, one to each Tweet [she] had ever written on her public account." CA9 Pet. App. 12a. Another time, he "posted nearly identical comments on

42 separate posts O'Connor-Ratcliff made to her Facebook page." *Ibid.*

The "comments did not use profanity or threaten physical harm." *Ibid.* Instead, they criticized "race relations in the [school district], and alleged financial wrongdoing by" a particular official. *Id.* at 11a. Frustrated with these themes and the repetitive nature of the comments, the trustee deleted the negative comments and eventually blocked the user. *Id.* at 12a.[3]

While details vary, similar events are playing out online across the country. In many cases, officials respond as they did below—that is, they delete or hide posts they do not like, and may block the user from making further posts on the official's account. Although these actions do not prevent the user from making similar comments on his or her own social media account(s), they prevent such comments from appearing on the candidate's account.

For an incumbent candidate, the ability to control the content on his non-government resourced social media account is critical to shaping his electoral message. In the judgment of many candidates, retaining messages they do not like would fundamentally alter the content of their own message. Just as in a traditional political or campaign venue the candidate might remove a person displaying a contrary message, they often do the same online by "blocking" or "deleting" a user or his posts. In so doing, a candidate

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[3] The Sixth Circuit case is similar. There, a city official blocked on Facebook a "disconcerted citizen" who replied to his posts about Covid-19. CA6 Pet. App. 3a.

exercises his First Amendment right "to exclude a message [he] d[oes] not like from the communication [he] cho[oses] to make." *Hurley*, 515 U.S. at 574.

III. The Test For State Action On Social Media Platforms Must Be Clear To Avoid Chilling Candidate Expression.

In addition to abridgments, the First Amendment restricts laws that "chill" protected speech. *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 670–71 (2004). In this way, the First Amendment both vindicates the silenced and shields the self-censoring who cannot "undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *see also Citizens United v. FEC*, 558 U.S. 310, 326 (2010).

The potential chilling effect should shape the result here. In *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019), the Court explained that "the state-action doctrine enforces a critical boundary between the government and the individual, and thereby protects a robust sphere of individual liberty." *Id.* at 1934. In "the speech context" in particular, this boundary requires clear lines so that "private entities' right to exercise editorial control over speech" is not chilled. *Id.* at 1932.

The Sixth Circuit's test offers this clarity. In that circuit, an officeholder's social media activity is state action if it "derives from the duties of his office" or "depends on his state authority." CA6 Pet. App. 8a. But in the Ninth Circuit, assessing state action is "a process of sifting facts and weighing circumstances"

that is indeterminate and provides officeholders with very little practical guidance. CA9 Pet. App. 19a (quotation marks omitted).

To illustrate, imagine Senator Smith is up for reelection. The centerpiece of his campaign is his enacted legislation authorizing a federal loan for a Boy Rangers camp. *See Mr. Smith Goes to Washington* (Columbia Pictures 1939). Senator Smith frequently "tweets" about the loan to remind voters that it was his 25-hour filibuster that defeated an opposition plan to build a dam and flood the camp. When detractors reply with arguments about a shortage of drinking water in his western state, Senator Smith "hides" or "deletes" the posts, leaving only positive comments from his supporters.

Under the Sixth Circuit's test, the analysis would be straightforward. If Senator Smith used a non-governmental Twitter account and did not impermissibly employ government resources or staff in its operation, then the account would not derive from his official duties or depend on his official authority and would not be state action. *See* CA6 Pet. App. 8a. Senator Smith could thus exercise control over the content on his page without threat of protracted litigation.

Under the Ninth Circuit's amorphous test the result would be uncertain. Even if Senator Smith used a non-governmental Twitter account and did not employ government resources or staff in its operation, a court might determine that his identification of himself as a U.S. Senator, his discussion of the federal loan, or his posts about the filibuster were, under the facts and circumstance, state action. *See* CA9 Pet.

App. 22a–26a (citing as indicia of state action, *inter alia*, content about "official titles," "budget planning," "policy decisions," and "events which arose out of . . . official status"). Or it might not. *See Campbell*, 986 F.3d at 825–26 (applying a similar test but concluding the activity was campaign-related, not state action). Confronted with a potential litigation risk that could hinder his campaign, Senator Smith might cede control of his message to avoid "the costs of litigation and the risk of a mistaken adverse finding by the fact-finder." *Riley*, 487 U.S. at 794.

That result would be contrary to First Amendment principles. Political speech "occupies the highest rung in the hierarchy of First Amendment values," *Snyder*, 562 U.S. at 452 (citation omitted), and, in our system of government, "it is of particular importance that candidates have the unfettered opportunity to make their views known," *Buckley*, 424 U.S. at 52–53; *see Cruz*, 142 S. Ct. at 1650. Just as free and open debate on public issues would not exist if incumbent candidates were compelled to incorporate discordant or disruptive expression in their campaign rallies and other events, so too would it be threatened if candidates are not free on social media to control their own political and electoral messages. Under the First Amendment, the government can no more compel a candidate to permit a message he does not like on his non-government resourced social media page than it can compel him to place a sign for an opposition candidate in his front yard.

At a minimum, clarity is needed "to ensure that ambiguity does not chill protected speech." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54

(2012). Already, in some circuits, the test for state action is so unpredictable that NRSC members and other candidates may refrain from fully exercising their First Amendment rights rather than risk litigation that could disrupt their campaign. Indeed, an elected school board member in the Ninth Circuit case "decide[d] the juice is not worth the squeeze" and closed his public Facebook page. CA9 Pet. Br. 34; *see also id.* at 32 (highlighting potential "chilling effect"). This self-censorship harms not only the candidate, "but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Hicks*, 539 U.S. at 119; *see Buckley*, 424 U.S. at 14–15, 52–53.

This Court must protect the free speech rights of all candidates, including elected officeholders, by once again reinforcing "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Bennett*, 564 U.S. at 755 (internal quotation marks and citation omitted). The Court should therefore recognize that incumbents communicate about their jobs as a key and necessary part of their electoral advocacy and that they do not lose the ability to control their political message on social media when they discuss such matters. This principle must be set forth clearly so that electoral advocacy is not chilled.

CONCLUSION

The Court should affirm the decision of the Sixth Circuit and reverse the decision of the Ninth Circuit.

Respectfully submitted,

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