No. 22-324

In the Supreme Court of the United States

MICHELLE O'CONNOR-RATCLIFF, ET AL.,

Petitioners,

v.

CHRISTOPHER GARNIER, ET UX.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a public official engages in state action subject to the First Amendment by blocking an individual from the official's personal social-media account, when the official uses the account to feature his or her job and communicate about job-related matters with the public but does not do so pursuant to any governmental duty or authority.

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INTEREST OF AMICUS CURIAE

This Court has recently described social-media platforms as "the modern public square" that "for many are the principal sources for knowing current events, checking ads for employment, [and] speaking and listening." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). Recognizing this fact, "[p]ublic officials today routinely maintain social-media accounts for official, personal, and campaign use, and they address issues of public concern on all of them." *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 953 F.3d 216, 230 (2d Cir. 2020) (Park, J., dissenting from denial of rehearing en banc).

Public officials in Texas are no different: at every level of government, these individuals maintain presences on social-media websites as a means of campaigning, communicating with the public, and keeping in touch with family and friends. Disentangling their personal-capacity conduct on social-media platforms from their official-capacity conduct has proven to be a nettlesome undertaking, prone to litigation. *See, e.g.*, *Clark v. Kolkhorst*, No. 1:19-cv-00198 (W.D. Tex. filed Mar. 1, 2019); *Knight First Amend. Inst. at Columbia Univ. v. Paxton*, No. 1:21-cv-00307 (W.D. Tex. filed Apr. 8, 2021). Texas has a keen interest in this case because the Ninth Circuit's approach to state action, if adopted by this Court, may make the State responsible for conduct it has not sanctioned, may not endorse, and cannot control.

SUMMARY OF ARGUMENT

I. One of the basic features of our constitutional order is the principle that the Bill of Rights secures the liberties of individuals against *governmental* action—not the conduct of other indiviudals. *See* U.S. CONST. amend. XIV, § 1 ("No State shall ...."); *Manhattan Cmty.*

Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019). To the extent such rights are incorporated against the States via the Fourteenth Amendment, this foundational principle is reflected in the language of 42 U.S.C. § 1983, which provides a federal cause of action against those who deprive persons of their federal rights "under color of any statute, ordinance, regulation, custom, or usage[] of *any State*." *Id.* (emphasis added).

Because this bedrock principle requires courts to distinguish between governmental and private conduct, the state-action doctrine looks to what conduct is "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). That attribution requires a plaintiff to make two showings: (1) that the alleged malefactor is a state actor, and (2) that the deprivation of a federal right was "caused by the exercise of some right or privilege created by the [S]tate or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.*

The Ninth Circuit effectively abandoned the state-action test and the fundamental constitutional principle it seeks to implement. Although petitioners, as elected members of the Poway Unified School District Board of Trustees, are public officials, their challenged conduct—blocking respondents from commenting on their personal social-media pages—did not flow from the exercise of any right, privilege, or rule of conduct created or imposed by the State. True, these Facebook and Twitter pages discuss petitioners' current employment and activities. Many social-media accounts do. But the accounts were largely (if not entirely) created *before* petitioners were elected to public office, and petitioners may maintain them *after* they leave public service. No source of state authority required or authorized petitioners to

maintain social-media pages in their official capacities. Under this Court's precedent, petitioners' actions on these websites do not constitute "state action."

II. Rather than look for a source of authority for petitioners' actions under state law, the Ninth Circuit asked what the "appearance and the content" of a public official's social-media page might "signify[]" to the "public." Pet.App.26a. But such a free-form inquiry is irreconcilable with this Court's longstanding state-action precedent. If anything, it is reminiscent of the "reasonable observer" test for Establishment Clause challenges that the Court recently discarded as unprincipled and unworkable, *see Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022). If adopted here, the Ninth Circuit's test would blur, rather than clarify, the distinction between public officials' personal conduct and their official conduct. Such confusion is untenable in a world where the pervasive (yet somehow still growing) dominance of social-media platforms obscures the lines between public and private in a way that was unimaginable only a few years ago. In that environment, lower federal courts and public officeholders need an administrable test. Without one, the state-action doctrine could swallow the First Amendment freedoms it was designed (in part) to secure.

But the effects of the Ninth Circuit's erroneous state-action holding are more than just practical. They infect—and muddle—any analysis of respondents' First Amendment claim. Having concluded that petitioners engaged in state action when they blocked respondents from commenting on their personal social-media pages, the court of appeals immediately proceeded to analyze respondents' Free Speech Clause claim using this Court's forum-analysis precedents. Yet those precedents

are aimed at assessing the constitutionality of restrictions on public access to *government owned* property. As this Court is well aware, there is a pending dispute about the extent to which a State can even *regulate* social-media platforms like Facebook and Twitter, which are privately controlled but which offer services analogous to those provided by traditional common carriers. *See NetChoice, LLC v. Paxton*, No. 22-555 (U.S. pet. filed Dec. 15, 2022); *Moody v. NetChoice, LLC*, No. 22-277 (U.S. pet. filed Aug. 11, 2022). Whatever the outcome of that litigation, no one maintains that the State owns or controls the platforms in the way they do a public park or a state capitol building—making forum analysis a poor framework for considering the constitutionality of petitioners' actions.

Likewise, because "blocking" a speaker from a Facebook or Twitter account is arguably itself a form of expressive conduct, the Ninth Circuit's conclusion that petitioners both acted as the State and violated the First Amendment rests uneasily alongside this Court's government-speech precedents. After all, if petitioners are speaking as the government, the First Amendment's forum-based restrictions do not apply to them. At the very least, if the Ninth Circuit is right that public officials' actions on their personal social-media accounts constitute government action, then the lower courts will have to figure out how that conclusion interacts with the rules regarding government speech. The Ninth Circuit's disregard of such thorny First Amendment questions demonstrates why its "I know it when I see it" approach to identfying state action in the digital sphere should not stand.

ARGUMENT

I. A Public Official's Operation of a Personal Social-Media Webpage Does Not Constitute State Action Without Some State-Conferred Authority.

Although this case presents a novel question about how the First Amendment's Free Speech Clause restricts public officials' use of social-media websites, its resolution turns on application of longstanding principles establishing that to have state action, it is insufficient to merely have a state actor. "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom," but that citizen remains a human being with his or her own rights protected by (among other things) the First Amendment. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). As a result, the state-action doctrine requires that the *conduct* resulting in the alleged deprivation of a federal right be "fairly attributable" to the State, including that it be undertaken pursuant to a source of state authority. *Lugar*, 457 U.S. at 937. The Ninth Circuit was correct that, as elected members of a public-school board, petitioners are state actors. That is undisputed. It is also insufficient. Because the Ninth Circuit's analysis did not adequately consider whether petitioners acted pursuant to state authority, its ruling cannot be squared with this Court's unchallenged precedent.

A. The state-action doctrine serves to preserve the individual liberty of not only private citizens but also those who serve them in state government.

For decades, the Court has recognized that the state-action doctrine reflects "a fundamental fact of our political order," *id.* at 937: "that 'most rights secured by the

Constitution are protected only against infringement by governments.'" *Id.* at 936 (quoting *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156 (1978)). The First Amendment's Free Speech Clause is no exception; it forbids "*governmental* abridgment of speech," but not "*private* abridgment of speech." *Halleck*, 139 S. Ct. at 1928.

This "fundamental fact," *Lugar*, 457 U.S. at 937, requires courts to distinguish governmental conduct from individual conduct, which is why this Court developed the state-action doctrine. *Halleck*, 139 S. Ct. at 1928. That doctrine also helps courts identify claims that are cognizable under 42 U.S.C. § 1983, which provides a federal cause of action for plaintiffs alleging the violation of a federal right, privilege, or immunity by any person acting "under color of any statute, ordinance, regulation, custom, or usage[] of any State." As this Court has put it, "if a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, that conduct [is] also action under color of state law and will support a suit under § 1983." *West v. Atkins*, 487 U.S. 42, 49 (1988) (internal quotation marks omitted).

But the doctrine also serves an additional purpose: it recognizes that "public officials aren't just public officials—they're individual citizens, too." *Lindke v. Freed*, 37 F.4th 1199, 1203 (6th Cir. 2022). This recognition has at least two components: *First*, because public officials have independent agency and may not act under (or even comply with) the directions of the State, this Court has long held that "acts of officers in the ambit of their personal pursuits" that do not involve a "misuse of power possessed by state law" are not attributable to the State. *Screws v. United States*, 325 U.S. 91, 109, 111 (1945) (internal quotation marks omitted). *Second*, public officials also have civil rights—including "First Amendment

rights"—that "may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency," *Branti v. Finkel*, 445 U.S. 507, 517-18 (1980); *see also Elrod v. Burns*, 427 U.S. 347, 367 (1976) (plurality opinion), but that do not disappear entirely just because the individual has entered into the service of the public, *see Hous. Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1260-61 (2022).

"Careful adherence to the 'state action' requirement" thus serves two vital functions in our constitutional order: it "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar*, 457 U.S. at 936. It likewise "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Id.* As a result, "[e]xpanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise." *Halleck*, 139 S. Ct. at 1934. But "[b]y enforcing th[e] constitutional boundary between the governmental and the private, the state-action doctrine protects a robust sphere of individual liberty." *Id.* at 1928.

B. State action is present only where a public official's conduct is undertaken pursuant to a source of state authority.

To preserve this balance, the essence of the state-action doctrine has always been that "the conduct allegedly causing the deprivation of a federal right" must "be fairly attributable to the State." *Lugar*, 457 U.S. at 937. This Court has articulated a "two-part approach to this question of 'fair attribution.'" *Id.* The Ninth Circuit correctly stated one part: "the party charged with the deprivation [of a federal right] must be a person who may fairly be said to be a state actor." *Id.* But perhaps more

fundamentally, the other part requires that "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the [S]tate or by a person for whom the State is responsible." *Id.* (listing this requirement first). This Court has "repeated[ly] insiste[d] that state action requires *both*" prongs to be met before state action will be found. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999).

1. Many of the Court's key state-action cases have focused on whether "a private entity can qualify as a state actor." *Halleck*, 139 S. Ct. at 1928. That prong of the two-prong test is not disputed here: because petitioners are both elected members of the Poway Unified School District Board of Trustees, Pet.App.6a-7a, they "may fairly be said to be [] state actor[s]" for purposes of the state-action requirement and section 1983. *Lugar*, 457 U.S. at 937; *see Sullivan*, 526 U.S. at 51 ("All agree that the *public officials* responsible for administering the workers' compensation system . . . are state actors"). Indeed, "it is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment. The actions of local government are the actions of the State." *Avery v. Midland Cnty., Tex.*, 390 U.S. 474, 480 (1968) (footnote omitted).

Nevertheless, understanding these cases is vital to discerning where the Ninth Circuit went astray. *See infra* Part II.A. In each of the cases addressing this prong of the state-action test, "a private party ha[d] taken the decisive step that caused the harm to the plaintiff, and the question [wa]s whether the State was sufficiently involved to treat that decisive conduct as state action." *NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988). The Court has emphasized that this can happen in only "a few

limited circumstances," including: (1) when the government clothes a private entity with the authority to "perform[] a traditional, exclusive public function," *Halleck*, 139 S. Ct. at 1928; (2) when the government imposes a duty or otherwise "compels the private entity to take a particular action"; (3) "when the government acts jointly with the private entity," *id.*; (4) where a private entity acts alone, but it is so closely tied to the State that the private entity's act is effectively "that of the State itself," *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176 (1972)); and (5) when the private actor "is 'entwined with governmental policies,' or when government is 'entwined in [its] management or control,'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (quoting *Evans v. Newton*, 382 U.S. 296, 299, 301 (1966)).

But this Court has never suggested, as the Ninth Circuit did here, that this element of the state-action test could be satisfied if a private actor merely took some action that might "signify[]" to the "public" state involvement. Pet.App.26a-27a. This case affords the Court the opportunity to hold that similar principles govern when the question is whether a public official's actions in her *private* capacity may be attributed to the State.

2. To distinguish the official acts of a public official from her personal acts for purposes of the state-action doctrine, this Court created the other half of the state-action test: whether "the deprivation [of a federal right] [is] caused by the exercise of some right or privilege created by the State." *Lugar*, 457 U.S. at 937. In doing so, the Court recognized that "state employment is generally sufficient to render the defendant a state *actor*," *id.* at 935 n.18 (emphasis added), but that alone is

"insufficient to establish that a public [official] acts under color of state law," *Polk County v. Dodson*, 454 U.S. 312, 321 (1981).

To avoid making state action a question about an individual's *status* as a public official, instead of an inquiry into what that person *did*, the Court has always looked to whether a challenged action reflects the exercise of state authority or the performance of a state duty. For example, this Court has found state action in circumstances where the defendant has enforced a "state statute," *Sullivan*, 526 U.S. at 50, or a "procedural scheme created by [a] statute," *Lugar*, 457 U.S. at 941. And the Court has indicated that state action may be present when an individual enforces "regulations" or even "rule[s] of conduct imposed by the State," *Blum v. Yaretsky*, 457 U.S. 991, 1004, 1009 (1982). Likewise, in the context of section 1983, the Court has explained that the "[t]he traditional definition of acting under color of state law requires that the defendant in a § 1983 action *have exercised power 'possessed by virtue of state law* and made possible only because the wrongdoer is clothed with the authority of state law.'" *West*, 487 U.S. at 49 (emphasis added) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

Stated differently, "generally, a public employee acts under color of state law while acting in his official capacity or *while exercising his responsibilities pursuant to state law*." *Id.* at 50 (emphasis added). Ultimately, the overriding inquiry is whether the defendant's conduct "entail[s] functions and obligations" that are "dependent on state authority." *Dodson*, 454 U.S. at 318.

3. A straightforward application of these principles resolves this case in favor of petitioners. Respondents have alleged that their rights to freedom of expression

were violated when petitioners blocked them from posting comments on petitioners' Facebook and Twitter pages after respondents began posting repetitive comments. Pet.App.11a-15a. Because petitioners' actions in blocking respondents from commenting further on their Facebook or Twitter pages were not "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state," *Lugar*, 457 U.S. at 937, respondents cannot meet this essential element of the state-action test.

Far from exercising a "right or privilege created by the State"—whether by state statute, regulation, or rule of conduct—petitioners' actions are no different than those that can be taken by millions of other citizens. As Judge Oldham recognized in *NetChoice*, Facebook and Twitter have turned themselves into modern-day common carriers because they are "communications firms[] [that] hold themselves out to serve the public without individualized bargaining[] and are affected with a public interest." *NetChoice, LLC v. Paxton*, 49 F.4th 439, 473 (5th Cir. 2022) (Oldham, J.), *petition for cert. filed* (U.S. Dec. 15, 2022) (No. 22-555). It is no more surprising that public officials utilize communication services through Facebook or Twitter than that they use cell-phone services provided by Verizon or AT&T. And a public official's refusal to accept incoming communications on a personal Facebook or Twitter page is no more state action than declining to take a phone call on a personal cell phone would be—even if that official occasionally uses the same phone to place work-related calls.

The facts of this case support this common-sense conclusion. Most of the Facebook and Twitter accounts at issue were undisputedly created *before* petitioners ran for office. Pet.App.6a, 7a-8a. Moreover, the Poway

Unified School District exercises no control over, or access to, petitioners' social-media pages, and petitioners may continue to maintain ownership over these accounts even after they have left public office. *Id.* at 26a. Thus, the "right or privilege" for petitioners to create these social-media pages and block certain users was "created" by Facebook or Twitter—not the State. *See Knight*, 953 F.3d at 227 (Park., J., dissenting from denial of rehearing en banc). And "[b]ecause Twitter is privately owned and controlled, a public official's use of its features involves no exercise of state authority." *Id.*

As a result, when petitioners blocked respondents from commenting on their social-media pages, they were neither "exercis[ing] power 'possessed by virtue of state law'" nor "exercising [their] responsibilities pursuant to state law." *West*, 487 U.S. at 49-50. Rather, they were acting "in the ambit of their personal pursuits." *Screws*, 325 U.S. at 111. There was thus no state action, foreclosing a claim under section 1983.

II. The Ninth Circuit's Appearance-and-Content Test Should Be Rejected As Practically And Legally Unworkable.

To reach its contrary conclusion, the Ninth Circuit began by identifying "four different criteria, or tests, used to identify state action": the "public function test," the "joint action test," the "compulsion test," and the "nexus test." Pet.App.19a-20a. In the Ninth Circuit's view, "the satisfaction of any one" of those tests is "sufficient to find state action, so long as no countervailing factor exists." *Id.* at 19a. The court of appeals observed that it had "never addressed whether a public official acts under color of state law by blocking a constituent from a social media page," but it considered the "nexus" test to "most closely fit[] the facts." *Id.* at 20a. It found such a

nexus based on "the appearance and the content of the [social-media] pages," *id.* at 23a, 26a, on which petitioners identified themselves as government officials, *id.* at 22a-23a, and discussed their official activities, *id.* at 23a-26a. And "given the close nexus," that it thought existed between petitioners' "use of their social media pages and their official positions," the court found that petitioners must have been "acting under color of state law when they blocked" respondents. *Id.* at 20a.

But the court of appeals' approach cannot be squared with this Court's longstanding precedent—which, as already noted, creates a single two-part test, not four disparate but unitary inquiries. It is also unworkable in practice, would dramatically expand the scope of the state-action doctrine, and is in considerable legal tension with other significant strands of this Court's First Amendment case law.

A. The Ninth Circuit's approach misapplies this Court's precedent.

1. The Ninth Circuit's approach to the question of state action was flawed from its inception. It ignores—or possibly misunderstands but certainly fails to apply—the two-part framework that has been a central component of this Court's state-action jurisprudence for at least four decades. *See Lugar*, 457 U.S. at 937. Instead, the Ninth Circuit conflated tests for determining whether the *defendant* is a state actor with the standard for whether the challenged *action* was taken in the defendant's official capacity. *See* Pet.App.19a-20a; *see also Lugar*, 457 U.S. at 939 (citing *Jackson*, 419 U.S. 345). As noted above (at 5, 11-12), the former is not in dispute in this case. Petitioners are state actors. This case turns entirely on whether their *actions* were taken in their public or private capacities.

Attempting to use the "nexus test" to determine whether a state actor is acting in an official capacity at any given time is like measuring an object's mass with a ruler. The information it provides is not irrelevant, but it is ultimately not the right tool. After all, the "nexus test" was designed to assess situations where the alleged malefactor is some form of heavily regulated entity. *E.g.*, *Pub. Util. Comm'n of D.C. v. Pollack*, 343 U.S. 451, 462 (1952). Under such circumstances, "[t]he true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine" whether "there is a sufficiently close nexus between the State and the challenged action *of the regulated entity*" so that the entity's action "may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351 (emphasis added). Here, there is no regulated entity from which to judge a nexus. The action at issue is that of a public official. Moreover, even if the two circumstances were analogous, it does not answer the ultimate question because even where such a close relationship exists, that does not necessarily mean that every single action performed by the private entity is fairly attributable to the State.

2. Likely due to its misconception of the proper analytical framework, the Ninth Circuit gave short shrift to the key question: whether petitioners' conduct in blocking respondents from their social-media pages was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the [S]tate." *Lugar*, 457 U.S. at 937. To the extent the court of appeals addressed this question at all, it did so with a brief nod to a California statute giving the "governing board of any school district" the authority to "[i]nform and make known to the citizens of the district[] the

educational programs and activities of the schools therein," Pet.App.24a (quoting Cal. Educ. Code § 35172(c)), and with its conclusion that the "appearance and the content" of petitioners' social-media pages as a whole would "signify[]" state action to the "public," *id.* at 26a-27a. But neither constitutes a "right or privilege created by the State, or a rule of conduct imposed by the [S]tate" that supplied authority for petitioners to block respondents from commenting on their personal social-media pages. *Lugar*, 457 U.S. at 937.

First, consider section 35172 of the California Education Code. As a "state statute," *Sullivan*, 526 U.S. at 50, section 35172 has the virtue of being a "right or privilege created by the State," *Lugar*, 457 U.S. at 937. But it imposes an obligation on the *board* of a school district, Cal. Educ. Code § 35172(c)—not individual members, who may not be aligned with the governing body on any given issue. Even apart from that, because application of this provision was not the "cause[]" of respondents' alleged First Amendment injuries, it is not the proper focus of the state-action analysis. *Lugar*, 457 U.S. at 937. That is, although this statute permits school boards—as a whole—to provide information to the public about "the educational programs and activities of the schools therein," Cal. Educ. Code § 35172(c), it does nothing to authorize or require *individual trustees* to maintain social-media accounts, let alone to grant them the power to block individual users.

Had petitioners blocked respondents from commenting on an official account of the Poway Unified School District Board of Trustees, this case would present a much closer state-action question, as section 35172 does authorize the Board to take communicative action as a collective unit. But the social-media accounts at issue

here were undisputedly the *personal* accounts of individual Trustees, Pet.App.6a-8a, through which petitioners have a First Amendment right to speak on matters of "public concern," *Garcetti*, 547 U.S. at 417.

Second, petitioners cannot be linked to a "right or privilege created by the State" just because the "appearance and the content" of their social-media pages identified petitioners' governmental positions and discussed official business, which might "signify[]" state action to the "public." *See* Pet.App.26a-27a. To start, this Court has squarely held that "[t]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech." *Lane v. Franks*, 573 U.S. 228, 240 (2014). Moreover, this Court's state-action test does not turn on hypothesizing about what a member of the public might subjectively surmise from reviewing a particular webpage, but rather on an objective inquiry into whether the defendant inflicted the alleged deprivation of a federal right while exercising "a right or privilege created by the State or by a rule of conduct imposed by the [S]tate." *Lugar*, 457 U.S. at 937.

To change course now would be to put the state-action requirement in considerable tension with this Court's recent First Amendment precedent, which rejects a freewheeling First Amendment test designed to approximate the views of a hypothetical "reasonable observer." *See Kennedy*, 142 S. Ct. at 2427. Although the state-action doctrine and the merits of the First Amendment inquiry are legally separate inquiries, they should not be entirely divorced from each other. Because public officials are "individual citizens, too," *Lindke*, 37 F.4th at 1203, it makes little sense to hold the State responsible for an action that the individual performing the act is

legally privileged to perform. *Cf., e.g.*, *West*, 487 U.S. at 49 (discussing the role of the state-action doctrine in determining liability for private acts).

B. A totality-of-the-circumstances test is practically unworkable in the increasingly digital world.

Apart from being irreconcilable with this Court's precedent, the Ninth Circuit's focus on the appearance and content of social-media pages is unworkable in practice and, if adopted, would usher in a dramatic expansion of the state-action doctrine and a concomitant contraction of public officials' engagement with the public. The court of appeals' test is striking in its subjectivity: the court described how "[m]any of the Trustees' posts did concern workaday visits to schools and the achievements of PUSD's students and teachers," which the court acknowledged "could promote the Trustees' personal campaign prospects." Pet.App.26a. But the court faulted petitioners because their posts "do not read as advertising 'campaign promises.'" *Id.* Because petitioners did not—in the court's view—sufficiently "tout [the Trustees'] own political achievements" or post enough "overtly political or self-promotional material," the court concluded that they "effectively 'display[ed] a badge' to the public signifying that their accounts reflected their official roles as PUSD Trustees." *Id.*

At no point did the court explain how the tens—if not hundreds—of thousands of public officials who use social media to communicate were to tell when they had posted enough "overtly political" material on their personal pages to keep them personal. If an individual has one Facebook account on which she posts about *both* her children's soccer games and her duties as a school-board member, is the signaling factor to the public judged by

the entire feed, or just those posted comments relating to her school-board status? Is whether something is "overtly political" judged by the perspective of a suburban soccer mom or a seasoned campaigner? Does the test take into account the role of user preferences in the algorithms of what posts by public officials their constituents see? The Ninth Circuit did not say. It did not even tell district courts within the Ninth Circuit what portion of the "public" the webpage would have to send such a signal to in order for section 1983 liability to attach.

By adopting a test that is inherently fact-bound and incapable of principled application, the Ninth Circuit has once again endorsed an approach that will "'invite[] chaos' in lower courts, le[a]d to 'differing results' in materially identical cases, and create[] a 'minefield' for legislators." *Kennedy*, 142 S. Ct. at 2427 (quoting *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 768-69 & n.3 (1995)).

Due to the indeterminacy of the Ninth Circuit's test, public officials have no way of knowing what type of activity on social-media pages will lead to their personal pages being deemed official accounts. This puts them to a Hobson's choice: be among the few social-media users *never* to discuss any work-related matters on their social-media pages, or let those pages be overrun with harassment, profanity, and irrelevant or extraneous content. Those concerns are not hypothetical, as evidenced by the very facts of this case. One of the respondents here "[o]n one occasion, within approximately ten minutes . . . posted 226 identical replies to [one of the petitioners'] Twitter page, one to each Tweet [she] had ever written on her public account," and "nearly identical comments on 42 separate posts [petitioner] made to her Facebook page." Pet.App.12a. Faced with such a choice,

many public officials may opt to close down their accounts completely, as one of the petitioners here did. *See* Petitioners' Br. 7 n.4, 13. The net result of this dramatic expansion of the state-action doctrine would be to *discourage* public officials from engaging in speech with their constituents.

Apart from the public officials themselves, local governments may now suddenly find themselves in an impossible situation. Because public officials (and especially public employees) have First Amendment rights, it is far from clear that local governments can forbid their employees to discuss work on their social-media accounts. *Cf. Kennedy*, 142 S. Ct. at 2423-32; *Lane*, 573 U.S. at 235-42. If they do not, however, local governments will be on the financial hook for actions that public officials take on their personal social-media pages—now deemed to be "state action"—if that activity can be characterized as in some sense "related" to their "governmental status or to the performance of [their] duties." Pet.App.25a-26a; *see generally Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 689-90 & n.53 (1978). State officials may similarly find themselves on the receiving end of federal-court injunctions policing how they can and cannot utilize their personal social-media accounts. *See, e.g.*, *Campbell v. Reisch*, No. 2:18-cv-4129, 2019 WL 3856591, at *5 (W.D. Mo. Aug. 16, 2019), *rev'd*, 986 F.3d 822 (8th Cir. 2021).

Taken together, the upshot of adopting the Ninth Circuit's unprincipled approach to questions of state action would be just what this Court cautioned against a few Terms ago: "expand[ing] governmental control while restricting individual liberty and private enterprise." *Halleck*, 139 S. Ct. at 1934. The Court should not allow for that.

C. Treating public officials' actions on a personal social-media account as state action is legally unworkable in the light of other First Amendment precedent.

The Ninth Circuit's state-action analysis is not faulty just on its own terms. By greatly expanding the state-action doctrine—and therefore the scope of potential First Amendment liability, *id.*—it also runs headlong into numerous areas of this Court's existing First Amendment case law. For example, the Ninth Circuit suggested that petitioners could have avoided the state-action problem at issue here by appending a "disclaimer" to their social-media pages specifying that the page was operated in those officials' personal capacity. Pet.App.26a. Or, it opined, petitioners could have avoided the First Amendment problem the court later found by promulgating "clear rules of etiquette for public comments on their pages." *Id.* at 48a. Perhaps these policy prescriptions are good practice. But can they be imposed on public officials as a matter of law consistent with the First Amendment? The Ninth Circuit appears to have given no thought to such knotty questions, which are bound to proliferate should its free-form state-action analysis become the law of the land.

Indeed, one does not even need to look at hypotheticals to see the problems that the Ninth Circuit's expansive interpretation of "state action" will cause: its merits analysis shows what a hopeless muddle it causes to treat petitioners as engaged in state action when they block respondents from commenting on their social-media pages. Specifically, after the Ninth Circuit concluded that petitioners acted as the State when they blocked respondents from posting on their personal social-media pages, the court of appeals proceeded to analyze

respondents' free-speech claims under this Court's "forum analysis" precedents. *See* Pet.App.37a-38a. But it is far from clear that those precedents, which aid in the assessment of restrictions on access to *government-controlled property*, apply in the context of assessing restrictions on access to *privately controlled* social-media platforms like Facebook and Twitter.

To the contrary, the social-media platforms have argued in other cases before this Court that speech by their users is actually in some respect the speech or expressive conduct of the *platforms* themselves. *E.g.*, Petition for Writ of Certiorari at 12-20, *NetChoice v. Paxton*, No. 22-555 (U.S. Dec. 15, 2022) ("Cert. Petition"). That raises questions about how to determine *whose* expression is really at issue. In this instance, the expression at issue would seem to be petitioners', not Facebook's or Twitter's. But if petitioners were acting as state actors at the time, then "blocking" respondents may have been the speech of the Poway Unified School District Board of Trustees and not subject to forum analysis at all.

Although the Free Speech Clause issue is not presented by—and should not be resolved in—this case, the Court should nevertheless reverse the Ninth Circuit's judgment in order to prevent that court's erroneous state-action analysis from creeping into other areas of law.

1. This Court's forum-analysis framework is a poor fit for assessing public officials' use of social media.

a. To start, the Ninth Circuit was wrong to reflexively apply this Court's forum-analysis precedents just because it concluded that state action was in play. Pet.App.37a-38a. These precedents derive from the recognition that "[e]ven protected speech is not equally

permissible in all places and at all times," and that "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985). As a result, this Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of *its property* to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Id.* at 800 (emphasis added).

Under these precedents, "the extent to which the Government can control access depends upon the nature of the relevant forum." *Id.* And this Court has identified "three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Id.* at 802. "Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id.* at 800. Likewise, "when the Government has intentionally designated a place or means of communication as a public forum[,] speakers cannot be excluded without a compelling governmental interest." *Id.* But nonpublic fora stand on different footing: access "can be restricted as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* (internal quotation marks omitted).

Sifting through these three options, the Ninth Circuit concluded that petitioners' Facebook and Twitter pages

fit most comfortably within the second category and therefore constituted a "designated public forum." Pet.App.37a-41a. The court of appeals reasoned that petitioners' "social media pages were open and available to the public without any restriction on the form or content of comments." *Id.* at 39a. It noted that petitioners even sometimes "solicited feedback from constituents through their posts and responded to individuals who left comments." *Id.* And it concluded that petitioners' use of a feature on Facebook that filtered out comments with certain words did not change the ultimate character of the forum. *Id.* at 40a-41a. From there, the court determined that petitioners' blocking of respondents from commenting on their Facebook and Twitter pages neither served a significant governmental interest nor was narrowly tailored. *Id.* at 43a-50a.

b. The Ninth Circuit's conclusion ignored this Court's warning that "[h]aving first arisen in the context of streets and parks, the public forum doctrine should not be extended in a mechanical way to . . . very different context[s]." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672-73 (1998). Forum analysis cannot be easily analogized to petitioners' actions on their private Facebook and Twitter pages for the same reason that petitioners' conduct here was not state action: the State neither authorized nor controlled the activity.

Put another way, this Court has adopted forum analysis for a particular purpose: "assessing restrictions that the government seeks to place on the use of *its property*." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (emphasis added) (quoting *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992)). The central focus is discerning the degree of a plaintiff's "right of access to *public property*," if any. *Perry Educ.*

Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 44 (1983). Thus, it is "government-controlled spaces" that are the object of the analysis. *Mansky*, 138 S. Ct. at 1885.

But social-media websites like Facebook and Twitter are not "government-controlled spaces" akin to parks and sidewalks. *See Knight*, 953 F.3d at 227 (Park, J., dissenting from denial of rehearing en banc). "Because Twitter is privately owned and controlled, a public official's use of its features involves no exercise of state authority." *Id.* Either Facebook or Twitter—not petitioners—"controls the platform and regulates its use for everyone," *id.*, subject to state or federal regulations like those at issue in the *NetChoice* litigation. *See generally NetChoice*, 49 F.4th at 439; *see also Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring) (indicating that social-media platforms may be regulated by States as common carriers). Petitioners have no ability to ensure—and thus should have no liability for not providing—access to Facebook or Twitter.

True, users of those platforms may have some limited degree of control over the content that appears on their individual pages. But it is the platforms, not state or federal officials, that retain the ultimate "unrestricted authority to do away with" the forum entirely. *Biden*, 141 S. Ct. at 1221 (Thomas, J., concurring). This was starkly on display in the case of former President Trump: whereas Mr. Trump was sued for "block[ing] several people from interacting with his messages" on his Twitter account, Twitter later "removed him from the entire platform, thus barring *all* Twitter users from interacting with his messages." *Id.* (emphasis added).

Because social-media pages are not "government-controlled spaces" but instead privately controlled ones,

the platforms do not fit naturally within this Court's forum-analysis framework, which was designed to apply in cases involving restrictions on access to government property. The Ninth Circuit never grappled with this analytic difficulty; instead, it uncritically extended the forum-analysis framework to non-government-controlled spaces. Pet.App.37a-41a. That was error. *Cf. Forbes*, 523 U.S. at 672-73 (declining to extend forum-analysis precedents into "the very different context of public television broadcasting").

Such an error was, however, largely forced by the court of appeals' conclusion that public officials engage in state action by "present[ing] and administer[ing] these social media pages as official organs for carrying out their . . . duties." Pet.App.25a. By contrast, properly looking to state authorization or control before determining whether the challenged action—here, blocking respondents from posting on petitioners' personal social-media pages—is attributable to the State will prevent any need to address the question of whether a government official's use of a common carrier's service makes that common carrier subject to all of the traditional obligations of a public forum as a matter of constitutional law. *Cf. NetChoice*, 49 F.4th at 469-80 (explaining why such obligations may be imposed by statute).

2. The Ninth Circuit's First Amendment analysis is in tension with this Court's government-speech precedents.

The Ninth Circuit's holding that public officials engage in state action and violate the First Amendment when they block individuals from commenting on their social-media pages also stands in considerable tension with this Court's precedents holding that the First Amendment does not restrict the government's

expressive activity—particularly if the petitioners in *NetChoice* are correct that "blocking" a user from access to a forum is a form of First-Amendment-protected speech. *See* Cert. Petition, *supra* at 12-20.

a. This Court has long held that "[w]hen the government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009).

"That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech." *Walker*, 576 U.S. at 207. Indeed, "[t]he Constitution . . . relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks." *Shurtleff v. City of Boston, Mass.*, 142 S. Ct. 1583, 1589 (2022). As a result, "government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas." *Walker*, 576 U.S. at 207. And "[t]he First Amendment's Free Speech Clause does not prevent the government from declining to express a view." *Shurtleff*, 142 S. Ct. at 1589. "That must be true for government to work," *id.*: "'[i]t is not easy to imagine how the government could function if it lacked th[e] freedom' to select the messages it wishes to convey." *Walker*, 576 U.S. at 208 (citing *Summum*, 555 U.S. at 468).

b. The Ninth Circuit's holding that public officials engage in state action when they block users from commenting on their personal social-media pages and that

this conduct also violates the First Amendment is difficult to reconcile with these government-speech precedents. After all, if government officials are engaged in *state action* when they use their personal social-media pages, then presumably any expressive activity in which they are engaged is government—not private—speech, which is not subject to the First Amendment's strictures. As a result, to analyze respondents' claims it would seem necessary to determine whether "blocking" another user is a form of expression—which the Ninth Circuit did not do.

The Ninth Circuit appeared to sidestep this problem by alluding to a distinction between the "interactive portions of" petitioners' social-media pages where users could leave comments or other responses and other portions of the pages where only the government officials can speak. Pet.App.40a. But such "disaggregation of Twitter's features [is] wholly artificial—Twitter's own rules make no such distinction between 'individual tweets' and 'interactive spaces.'" *Knight*, 953 F.3d at 229 (Park, J., dissenting from denial of rehearing en banc). After all, public officials can comment on the interactive portions of their pages too. And besides, speech also includes certain "conduct that is inherently expressive," *Rumsfeld v. Forum of Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61, 66 (2006), which may include the right to exclude others from interfering with one's own message, *see Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995). The Ninth Circuit made no effort to address the complex questions about how this Court's expressive-conduct precedents interact with the government-speech doctrine that arise as a direct result of its state-action analysis.

Put another way, the Ninth Circuit "cannot have it both ways," *Knight*, 953 F.3d at 228 (Park, J., dissenting from denial of rehearing en banc): unless "blocking" a user is entirely conduct (which the platforms hotly dispute in *NetChoice*), either public officials' use of personal social-media pages constitutes state action and therefore implicates this Court's government-speech precedents, or else is it is not state action. Either way, respondents' claims against petitioners should have been dismissed.

* * *

In sum, the Ninth Circuit's approach to adjudicating questions of state action ultimately raises more questions than answers, and it complicates the analysis in related areas of law. Because the proper approach to questions of state action, *supra* at 9-12, would avoid entangling the lower courts in such nebulous inquiries, the Ninth Circuit's judgment should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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