No. 22-324

In the Supreme Court of the United States

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

v.

CHRISTOPHER GARNIER AND KIMBERLY GARNIER

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether and under what circumstances a school-board official engages in state action under the First and Fourteenth Amendments when the official blocks a member of the public from viewing or responding to posts on a social-media account.

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INTEREST OF THE UNITED STATES

This case presents the question whether and under what circumstances a school-board member's blocking of an individual from a social-media account constitutes state action under the First and Fourteenth Amendments. The United States has a substantial interest in the Court's resolution of that question. Federal government officials also use social-media accounts, and the same constitutional state-action analysis applicable to petitioners would apply to federal government officials and employees. See, *e.g.*, *Biden* v. *Knight First Amendment Institute*, 141 S. Ct. 1220 (2021). In addition, the Court's resolution of this case would have implications for the closely related question whether petitioners acted "under color of" state law within the meaning of 42 U.S.C. 1983 when they blocked respondents. See

Lugar v. *Edmondson Oil Co.*, 457 U.S. 922, 935 n.18 (1982). The United States has authority to bring criminal prosecutions under 18 U.S.C. 242, which makes it a criminal offense to act willfully and "under color of any law" to deprive a person of rights protected by the Constitution or laws of the United States. The decision in this case could affect that authority because the Court has interpreted "under color of" law to have the same meaning under Section 242 as it does under Section 1983. See *Lugar*, 457 U.S. at 928 n.9. The United States has participated as amicus curiae in previous cases raising state-action and color-of-law questions. See, *e.g.*, *Brentwood Academy* v. *Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001); *Georgia* v. *McCollum*, 505 U.S. 42 (1992); *Polk County* v. *Dodson*, 454 U.S. 312 (1981).

STATEMENT

1. Petitioners are or were elected members of the Poway Unified School District Board of Trustees. Pet. App. 55a, 59a.* Before they were first elected in 2014, petitioners created publicly accessible Facebook pages to promote their respective candidacies. *Id.* at 59a-60a; see C.A. E.R. 1859-1865, 1969-1979. Facebook is a social-media platform that enables accountholders to create online "posts" on which other users can comment. Pet. App. 63a. After being elected, petitioners used their public Facebook pages to post information about issues related to the school board. *Id.* at 60a. Petitioner O'Connor-Ratcliff also created a public account

* Petitioners' opening brief states (at 7 n.4) that petitioner Zane's term "expired in December 2022," but that petitioner O'Connor-Ratcliff's term "will not expire until December 2026."

on Twitter, another social-media platform, to "tweet" information about the school board. *Ibid.*; see *id.* at 70a.

Petitioners "testified that they intended their Facebook and Twitter pages to be used in a 'bulletin board' manner—providing one-way communication from themselves to their constituents." Pet. App. 60a. But petitioners also "used Facebook for interactive purposes by replying to comments on their posts from other constituents about [school-board] issues." *Ibid.* Petitioners alone created posts and responded to comments; no other school-district official or employee "regulated, controlled, or spent money maintaining any of [petitioners'] social media pages." *Id.* at 100a.

Respondents' children are students in the Poway Unified School District. Pet. App. 59a. Respondents posted many comments on petitioners' public Facebook and Twitter pages related to the school district. *Id.* at 73a. None contained profanity or threats of violence, but they were "often repetitious"; examples include making "the same comment on forty-two posts" on Facebook and "repeating the same reply 226 times" on Twitter. *Ibid.*; see, *e.g.*, C.A. E.R. 1134-1189.

Petitioners eventually "blocked" respondents from petitioners' public pages on Facebook and Twitter. See Pet. App. 76a-78a. Both Facebook and Twitter allow accountholders to block individual users on the platforms. See *id.* at 70a-73a. On Facebook, a blocked user can view the accountholder's posts but cannot comment on or react to those posts. *Id.* at 70a. On Twitter, a blocked user can neither view nor comment on the accountholder's public tweets while logged in, but can view the tweets when logged out. *Id.* at 72a-73a. Respondents filed suit under 42 U.S.C. 1983, alleging that the blocking violated their First Amendment rights of free

speech and to petition the government, as incorporated against the States by the Fourteenth Amendment, see Compl. ¶¶ 9-13.

2. The district court entered judgment in favor of respondents on their federal constitutional claims. Pet. App. 55a-97a. At summary judgment, the court held that petitioners were entitled to qualified immunity on respondents' claims for damages. See *id.* at 108a-110a. Following a bench trial, the court entered declaratory and injunctive relief against petitioners. See *id.* at 55a-97a.

As relevant here, the district court held that petitioners' conduct constituted "state action." Pet. App. 81a-83a; see *id.* at 110a-115a. "[M]ost rights secured by the Constitution are protected only against infringement by governments," *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149, 156 (1978), including those secured by the First and Fourteenth Amendments, see *Manhattan Community Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1928 (2019). Accordingly, those constitutional guarantees "can be violated only by conduct that may be fairly characterized as 'state action.'" *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 924 (1982).

The district court held that petitioners' blocking was state action because petitioners "could not have used their social media pages in the way they did but for their positions on [the school board]." Pet. App. 83a (citation omitted); see *id.* at 115a. The court reasoned that "the content of many of their posts was possible because they were 'clothed with the authority of state law.'" *Id.* at 83a (citation omitted); see *id.* at 114a-115a. The court also "adopt[ed] the reasoning and conclusions articulated" at the summary-judgment stage, *id.* at 83a, when the court (per a different district judge) had found that

petitioners "'swathed their social media pages in the trappings of their office'" by listing their positions as board members and identifying themselves as government officials, as well as by using (in the case of petitioner O'Connor-Ratcliff) a school-district email address and (in the case of petitioner Zane) a picture of a school-district sign, *id.* at 115a (brackets and citation omitted). "Because [petitioners] could not have used their social media pages in the way they did but for their positions on [the board]," the court concluded, "their blocking of [respondents] satisfies the state-action requirement." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-54a.

As relevant here, the court of appeals agreed that petitioners' blocking of respondents constituted state action. Pet. App. 18a-36a. The court applied what it called a "'nexus test,'" under which it asked whether "there is 'such a close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself.'" *Id.* at 20a (citation omitted). The court found such a "nexus" here because petitioners' "use of their social media accounts was directly connected to, although not required by, their official positions." *Ibid.* The court relied on three such connections, drawn from circuit precedent addressing when an off-duty state employee (such as a police officer) acts under color of state law. *Id.* at 22a-26a.

First, the court of appeals found that petitioners "'purported to act in the performance of their official duties' through the use of their social media pages" because "both through appearance and content, [petitioners] held their social media pages out to be official channels of communication with the public about the work of

the [school board]." Pet. App. 22a-23a (brackets, citation, and ellipsis omitted); see *id.* at 23a (observing that petitioners' pages identified them as government officials and listed, among other things, their official titles).

Second, the court of appeals found that petitioners' "presentation of their social media pages as official outlets facilitating their performance of their [school-board] responsibilities 'had the purpose and effect of influencing the behavior of others'" because they "actively solicited constituent input about official [school-district] matters." Pet. App. 23a-24a (citation omitted); see *id.* at 24a (observing that petitioners posted surveys and sought feedback from constituents, among other things).

Third, the court of appeals found that petitioners' "management of their social media pages 'related in some meaningful way' to their 'governmental status' and 'to the performance of their duties'" because their "use of social media to keep the public apprised of goings-on at [the school district] accords with the Board's power to 'inform and make known to the citizens of the district, the educational programs and activities of the schools therein.'" Pet. App. 24a (brackets and citations omitted); see *ibid.* (observing that petitioners posted information about issues discussed at board meetings, the selection of a new superintendent, the district's budget, and similar items "relat[ing] directly to [their] duties").

The court of appeals rejected petitioners' contention that "their use of social media did not constitute state action because the pages * * * were personal campaign pages designed only to advance their own political careers." Pet. App. 26a. The court found that petitioners' "posts about * * * school activities generally do not

read as advertising 'campaign promises' kept or touting their own political achievements," and that "[a]fter their election in 2014, [petitioners] virtually never posted overtly political or self-promotional material." *Ibid.* The court also gave no weight to the fact that the school district "provided no financial support or authorization for the pages" because that was not apparent to the public from petitioners' pages, which "did not contain any disclaimer that the 'statements made on this web site reflect the personal opinions of the author' and 'are not made in any official capacity.'" *Ibid.* (citation omitted).

SUMMARY OF ARGUMENT

A. State action subject to constitutional scrutiny generally requires the exercise of a right or privilege created by the government by someone who may fairly be described as a state actor. Being a public official is, however, neither necessary nor sufficient to engage in state action. A private entity might engage in state action when the government compels it to act; when it engages in joint action with the government; or when it carries out a traditional, exclusive public function. Conversely, because every public official is also a private person, state action exists only when the official exercises power that she possesses by virtue of her position or because she is clothed with government authority. This Court has consistently refused to set forth a comprehensive test for state action and has instead articulated different factors or tests applicable in different contexts.

One frequently recurring context is when the challenged conduct involves a denial of access to or use of property (including intangible property), such as refusing to serve a customer or excluding someone from a

forum. In that context, the existence of state action generally depends on whether the government itself owns or controls the property to which access has been denied. When *public* property is at issue, a denial of access by a public official generally will be state action; a denial by a private person may be state action depending on the degree of governmental involvement.

When *private* property—that is, property over which the government lacks ownership or control—is at issue, however, a denial of access will rarely be found to be state action. In the relatively rare circumstance of a denial of access to private property by a public official, courts should not find state action unless the official is invoking official powers or exercising a traditional and exclusive public function.

B. Here, the school board indisputably lacks ownership or control over petitioners' social-media accounts; petitioners created their Facebook pages before taking office and they will retain exclusive control over those accounts when they leave. In operating those accounts, petitioners did not exercise any powers of their offices. Their power to block respondents, for example, flowed from their control over the account features offered by Facebook and Twitter, irrespective of their status as school-board members. Nor did petitioners engage in a traditional, exclusive public function. Communicating with the public about matters of public concern is a traditional governmental function—but it is not *exclusive* to the government.

That the content of petitioners' social-media pages reflected or derived from their governmental status is immaterial. The same could be said of any official's speech at a campaign rally or fundraising dinner, but that does not convert those quintessentially nongovern-

mental activities into state action. Likewise, that petitioners were in some sense doing their jobs is irrelevant. Whether a public official's conduct is within the scope of employment generally varies from jurisdiction to jurisdiction and does not dictate whether that conduct is state action for federal constitutional purposes.

C. In erroneously finding state action, the court of appeals relied on a multifactor test derived from its own precedent about when off-duty employees (such as police officers) act under color of law. That test is inapposite in this context, where the inquiry should turn on the nature of the property to which access has been denied. For example, whether the defendant acted under pretense of law or influenced the behavior of others might be relevant to contexts involving off-duty police officers who coerce cooperation by flashing their badges. Petitioners' solicitation of comments and feedback on their social-media pages, in contrast, did not coerce anyone into doing anything.

For the same reason, the court of appeals' reliance on the "appearance" or "trappings" of petitioners' social-media pages was misplaced. Those considerations might be relevant in the context of police officers because the public is obligated to obey officers, whom we identify by their appearance and trappings. That is one reason why it is a crime to impersonate an officer. Appearance does not, however, play the same role in the circumstances here. Nobody is required to obey a school-board member's request to comment on her Facebook posts, no matter how official-looking the page might appear.

D. As this Court has recognized, an overly expansive state-action theory would be especially troublesome in the First Amendment context. Subjecting large

amounts of the speech of government personnel to constitutional restrictions could both chill that speech and induce government employers to regulate the content of that speech more extensively. Those outcomes would undermine, not promote, First Amendment values.

At the same time, an expansive state-action theory would provide little benefit. Any speech found to be state action is arguably also government speech, to which constitutional speech constraints (including the ban on viewpoint discrimination) do not apply. And even if an official were found to have created a forum for debate, the official could permissibly impose reasonable content- and speaker-based restrictions in that forum, such as excluding anyone who made repetitive or nonresponsive comments. As a practical matter, therefore, the end result of much litigation would likely be the same as under a more constrained theory of state action.

ARGUMENT

A. Public Officials Who Deny Access To Private Property Engage In State Action Only If They Exercise Government Authority Or Perform A Traditional And Exclusive Public Function

1. The First Amendment's command "[t]hat 'Congress shall make no law abridging the freedom of speech, or of the press' is a restraint on government action, not that of private persons." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 114 (1973) (plurality opinion) (citation and ellipsis omitted); see *Manhattan Community Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1926 (2019) ("The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors."); *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 924 (1982) ("Be-

cause the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.'"). Similarly, 42 U.S.C. 1983 authorizes a cause of action to enforce constitutional guarantees only against persons who act "under color of" state law. Those limitations generally "converge" when, "as here, deprivations of rights under the Fourteenth Amendment are alleged." *American Manufacturers Mutual Insurance Co.* v. *Sullivan*, 526 U.S. 40, 50 n.8 (1999).

The distinction between state action and private conduct is vital to the correct application of the First Amendment, as incorporated against the States by the Fourteenth Amendment, and to the preservation of individual liberty. "[S]tate action requires *both* an alleged constitutional deprivation 'caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible,' *and* that 'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" *American Manufacturers*, 526 U.S. at 50 (citation omitted). Although those "two principles are not the same," they are interrelated and generally "collapse into each other" when the defendant is a public official rather than a private party. *Lugar*, 457 U.S. at 937.

2. Under those principles, being a public official is neither necessary nor sufficient to engage in state action. It is not necessary because "a private entity can qualify as a state actor in a few limited circumstances." *Manhattan Community Access*, 139 S. Ct. at 1928. Examples include "when the government compels the private entity to take a particular action" and "when the government acts jointly with the private entity." *Ibid.*

Those circumstances are less relevant in the context of this case.

Of more relevance here, "a private entity may be considered a state actor when it exercises a function 'traditionally exclusively reserved to the State'" or when the government has "outsourced one of its constitutional obligations to a private entity." *Manhattan Community Access*, 139 S. Ct. at 1926, 1929 n.1 (citation omitted). For instance, a private political party engages in state action when it conducts public elections, *Nixon* v. *Condon*, 286 U.S. 73, 84 (1932); see *Terry* v. *Adams*, 345 U.S. 461 (1953); a criminal defendant engages in state action when exercising peremptory challenges to exclude jurors, *Georgia* v. *McCollum*, 505 U.S. 42, 50-55 (1992); see *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 621-622 (1991) (same, for civil defendants); and a prison doctor engages in state action when treating prisoners, see *West* v. *Atkins*, 487 U.S. 42, 56 (1988); see generally *Manhattan Community Access*, 139 S. Ct. at 1929 (cataloging other examples).

In short, "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans* v. *Newton*, 382 U.S. 296, 299 (1966). So if a federal agency were to use someone's personal Facebook page (instead of a government website such as regulations.gov) to conduct notice-and-comment rulemaking, the accountholder's actions with respect to those posts and comments—including the blocking of a member of the public from viewing or commenting on the proposed regulation—would fairly be characterized as state action.

But merely being a public official is not sufficient to establish0 that the official has engaged in state action, for every public official is also a private citizen and not all actions taken by such a person require the exercise of "some right or privilege [or rule of conduct] created [or imposed] by the State." *American Manufacturers*, 526 U.S. at 50 (citation omitted); see *id.* at 51 (explaining that courts should "begin[] by identifying 'the specific conduct of which the plaintiff complains' ") (citation omitted). For example, although a public defender might engage in state action when making personnel decisions for the office, see *Branti* v. *Finkel*, 445 U.S. 507 (1980), she does not act under color of state law when representing an indigent defendant because "state office and authority are not needed" to perform that "essentially * * * private function," *Polk County* v. *Dodson*, 454 U.S. 312, 319 (1981). Similarly, the First Amendment's prohibition on viewpoint discrimination does not require a public official to share the stage with her political opponents at a campaign rally or fundraising dinner.

Instead, public officials engage in state action that is subject to constitutional scrutiny only when they exercise "power 'possessed by virtue of state law,' " such that their actions are "made possible only because [they are] clothed with the authority of state law." *West*, 487 U.S. at 49 (citation omitted). That standard is generally satisfied when a public official acts "in his official capacity" or "exercis[es] his responsibilities pursuant to state law." *Id.* at 50. In contrast, actions taken by officials "in the ambit of their personal pursuits"—that is, actions that require neither powers possessed by virtue of state law nor being clothed with the authority of state law—are "plainly excluded" from constitutional scru-

tiny. *Screws* v. *United States*, 325 U.S. 91, 111 (1945) (plurality opinion); see *United States* v. *Classic*, 313 U.S. 299, 326 (1941).

3. Determining whether any particular conduct is an exercise of government-granted authority or in the ambit of personal pursuits can be difficult, especially in the abstract. Cf. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 349-350 (1974) ("[T]he question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer.") (citation omitted); *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 574 (1974) (observing that "the Court has never attempted to formulate 'an infallible test for determining'" when conduct is state action) (citation omitted). For that reason, rather than set forth a unified or comprehensive test for state action, this Court "has articulated a number of different factors or tests," each to be applied "in different contexts." *Lugar*, 457 U.S. at 939.

This case does not require the Court to fashion a new test for state action because it arises in a frequently recurring context: The challenged conduct involves denying access to (or use of) property, such as refusing to serve a customer or excluding someone from a forum. In that context, the existence of state action depends critically on the nature of the property—specifically, whether the government itself owns or controls the property to which access has been denied.

When the government itself owns or controls the property—that is, when *public* property is involved—"the question of the existence of state action centers in the extent of the [government's] involvement in [the allegedly unconstitutional] actions by private agencies using public facilities, and in whether that involvement

makes the [government] 'a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.'" *Gilmore*, 417 U.S. at 573 (citation omitted). For example, this Court held that a restaurant located in a state facility had engaged in state action when it refused service on the basis of a customer's race because the lease terms made clear that the "State ha[d] so far insinuated itself into a position of interdependence with" the restaurant that it was effectively a "joint participant in the challenged activity." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961); see *Evans*, 382 U.S. at 301 (similar, where a nominally private park was "an integral part of the City of Macon's activities" and "municipal control had become firmly established"). In contrast, "the mere use" by a private group of public facilities such as "parks, playgrounds, athletic facilities, amphitheaters, museums, zoos, and the like" does not itself establish state action. *Gilmore*, 417 U.S. at 574. Thus, if a private group rented a picnic pavilion at a local park and excluded guests based on race, that would be unlikely to be state action.

When the government lacks ownership or control of the property to which access has been denied—that is, when it is *private* property—this Court has required a higher showing to establish state action. "Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use." *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 547 (1972); cf. *Manhattan Community Access*, 139 S. Ct. at 1931 n.3 (suggesting that even that

might not be sufficient). Therefore, absent governmental compulsion or joint action, see, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 171 (1970) (racially discriminatory exclusion is state action when "compelled by a statutory provision or by a custom having the force of law"), this Court has rarely found state action based on a denial of access to private property over which the government lacks ownership or control. And, of the two cases in which it did, one is factually obsolete and the other is no longer good law.

The first case was *Marsh* v. *Alabama*, 326 U.S. 501 (1946), which held that a private corporation that owned a "company town" had engaged in state action when it prohibited distribution of religious literature on a sidewalk. See *id.* at 506. The Court has since emphasized, however, that *Marsh* involved the unusual "economic anachronism" of a company town, and has explained that its holding there relied on the principle that a State "could not permit a corporation to assume the functions of a municipal government and at the same time deny First Amendment rights." *Central Hardware*, 407 U.S. at 545-546; see *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 561 (1972) (explaining that *Marsh* "involved an economic anomaly of the past").

The other case was *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), which held that a shopping center had engaged in state action when it sought to eject pro-union picketers from its parking lot. See *id.* at 316-317. The Court has since expressly overruled *Logan Valley* and rejected its core rationale that opening up private property to the public subjects the property to constitutional constraints on state action. *Hudgens* v. *NLRB*, 424 U.S. 507, 518 (1976); see *PruneYard Shopping Center* v. *Rob-*

ins, 447 U.S. 74, 81 (1980); *Lloyd*, 407 U.S. at 561-563. As the Court observed in *Central Hardware*, the mere fact that privately owned property is "'open to the public'" is insufficient to convert the use of that property into state action subject to the First and Fourteenth Amendments, especially given that "[s]uch an argument could be made with respect to almost every retail and service establishment in the country." 407 U.S. at 547. The government is unaware of other decisions by this Court holding that a denial of access to private property over which the government lacks ownership or control can constitute state action absent governmental compulsion or joint action.

The Court's hesitation to find state action in that context extends to cases in which the private property at issue is intangible. Cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1003 (1984) (explaining that the Fifth Amendment applies equally to tangible and intangible property); *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819, 830 (1995) (First Amendment applies equally to physical and "metaphysical" forums). For example, a federally licensed broadcaster does not engage in state action when it refuses to sell airtime based on the putative customer's viewpoint when "the Government is [neither] a 'partner' to the action of the broadcast licensee * * * nor is it engaged in a 'symbiotic relationship' with the licensee, profiting from the invidious discrimination of its proxy." *Columbia Broadcasting*, 412 U.S. at 119 (plurality opinion) (citation omitted). Similarly, an operator of public-access channels does not engage in state action when it refuses to carry certain programming. See *Manhattan Community Access*, 139 S. Ct. at 1929. And a federally chartered corporation that has been granted exclusive use

of a trademark does not engage in state action when it seeks to enforce that statutory right of exclusion. See *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U.S. 522, 542-547 (1987). As this Court has put it, "Benjamin Franklin did not have to operate his newspaper as 'a stagecoach, with seats for everyone.'" *Manhattan Community Access*, 139 S. Ct. at 1931 (citation omitted).

4. Putting those principles together makes some categories of cases relatively easy to resolve. When a *private* entity denies access to *private* property over which the government lacks ownership or control, and it is not acting jointly with the government or under governmental compulsion, it almost certainly has not engaged in state action, absent highly unusual circumstances (such as the now-obsolete "company town" scenario in *Marsh*, *supra*). Conversely, when a *public* official denies access to *public* property, that almost certainly is state action.

Those two situations—private–private and public–public—are likely to be the most common permutations because, as a practical matter, a defendant can usually deny access only to property that she owns or controls. A private entity is generally not in a position to deny someone access to public property; and a public entity will rarely have the opportunity to deny access to private property over which the government lacks ownership or control. Cf. *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 394-395 (1995) (holding that Amtrak was a government agency, thus necessarily implying that a billboard it owned and operated was public property); *San Francisco Arts & Athletics*, 483 U.S. at 543-544 (holding that the U.S. Olympic Committee was

not a government entity and that its exclusive trademark was thus private property).

The more difficult cases are those where one factor is public and the other private: either when a private entity denies access to public property or when a public official denies access to private property over which the government lacks ownership or control. In addressing the former situation, this Court has emphasized the degree of governmental involvement in the private defendant's conduct. See *Gilmore*, 417 U.S. at 573 (asking whether the government's involvement is so great as to make it a "joint participant") (citation omitted); *Evans*, 382 U.S. at 301 ("an integral part"); *Burton*, 365 U.S. at 725 ("a position of interdependence").

This Court does not appear to have squarely addressed the latter situation. Nevertheless, the principles set forth above can be applied, and they reinforce each other. For example, when a denial of access involves indisputably private property over which the government lacks ownership or control, that weighs in favor of finding that the public official is acting in her private capacity—which in turn should cause courts to require her conduct to be much closer to the exercise of a traditional, exclusive public function (as would be required of a private entity) before finding state action. Conversely, if the official is carrying out her official duties or exercising the powers of her office, the more likely it is that the government has "outsourced" one of its obligations to be discharged using that ostensibly private property (as in the hypothetical example of using a privately controlled social-media account to conduct notice-and-comment rulemaking). *Manhattan Community Access*, 139 S. Ct. at 1929 n.1.

B. Petitioners' Blocking Of Respondents Was Not State Action

Under the foregoing principles, derived from this Court's precedents, petitioners' blocking of respondents from their social-media accounts was not state action. This case represents the fourth combination discussed above: Public officials have denied access to private property over which the government lacks ownership or control. Although some cases presenting that situation can be difficult to resolve, this case is relatively straightforward. Petitioners' Facebook and Twitter accounts indisputably are private property. The Facebook accounts were created before either petitioner took office; indeed, petitioners used those accounts to promote their respective candidacies for the school board. See Pet. App. 59a-60a; see C.A. E.R. 1859-1865, 1969-1979. And petitioners will continue to exercise exclusive control over their accounts even after they are no longer members of the school board. So unlike the official Poway Unified School District accounts (facebook.com/PowayUnified and twitter.com/poway unified), which are public property to which restricting access generally would constitute state action, the social-media accounts at issue in this case are purely private property over which the school district lacks ownership or control.

Nor can it be said that in using those nongovernmental accounts to communicate with constituents, petitioners were performing a traditional, exclusive public function. Democratically accountable officials of course have a long tradition of communicating with the public about matters of public concern. But the Court has explained that "to qualify as a traditional, exclusive public function within the meaning of [this Court's] state-

action precedents, the government must have traditionally *and* exclusively performed the function." *Manhattan Community Access*, 139 S. Ct. at 1929. When public officials communicate with the public, they do not "exercise[] 'powers traditionally *exclusively* reserved to the State.'" *Id.* at 1928 (emphasis added; citation omitted). Quite the contrary. The First Amendment expressly *prohibits* the government from reserving such powers to itself. And others—including nonincumbent candidates for public office, members of the media, and private citizens—also communicate with the public about the work of public officials and employees.

Petitioners' operation of their Facebook and Twitter accounts thus does not constitute "the exercise of some right or privilege created by the State." *American Manufacturers*, 526 U.S. at 50 (citation omitted). Instead, any right or privilege that petitioners have to operate those accounts—including to block respondents—flows from their personal ownership or control of the relevant Facebook and Twitter accounts (per the terms of service and functionality provided by those companies), irrespective of their status as members of the school board.

For the same reason, petitioners cannot "*fairly* be said" to have been state actors when they blocked respondents. *American Manufacturers*, 526 U.S. at 50 (emphasis added; citation omitted). Although petitioners were public officials, their power to operate their personal social-media accounts was neither a "power 'possessed by virtue of state law,'" nor one that was "made possible only because [petitioners were] clothed with the authority of state law." *West*, 487 U.S. at 49 (citation omitted). Nor were petitioners acting in their official capacities to "exercise[] [their] responsibilities

pursuant to state law" when they blocked respondents. *Id.* at 49-50. Instead, like many public officials, petitioners simply sought to inform their constituents about their work—in part to further their own careers—and they chose to use their personal social-media pages as one communications channel.

To be sure, the *content* of the communications on petitioners' social-media pages reflected their unique status as school-board members, and they prominently identified themselves as such (including by listing their official positions and other trappings, such as O'Connor-Ratcliff's official school-district email address). See Pet. App. 23a. But the same could be said of speeches delivered at campaign rallies, press conferences on their own front lawns, or fundraising dinners at local restaurants. Excluding respondents from those sorts of communicative events, when held on properties over which the government lacks ownership or control, would not be state action. Cf. *Biden* v. *Knight First Amendment Institute*, 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring) ("[G]overnment officials who informally gather with constituents in a hotel bar can ask the hotel to remove a pesky patron who elbows into the gathering to loudly voice his views."). That conclusion should not change simply because the private property at issue here is virtual rather than physical.

Nor does it matter that when communicating with their constituents using social media, petitioners were in some sense "doing their jobs." Br. in Opp. 26. For one thing, communicating with constituents is also an essential part of the quintessentially private, nongovernmental task of seeking reelection. Cf. J.A. 31 (undisputed fact that petitioner O'Connor-Ratcliff "believes that she is 'always running for public office,' even

after being elected") (citation omitted). And as this Court has observed in a related context, "the 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).

More to the point, whether a public official's conduct is within the scope of her employment is distinct from whether the conduct is state action. The scope-of-employment concept, which finds its roots in the common law and varies from jurisdiction to jurisdiction, is often used to determine whether an employer or other principal is vicariously liable for the torts of its employees or agents. See, *e.g.*, *Kolstad* v. *American Dental Association*, 527 U.S. 526, 543-545 (1999); *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 756-757 (1998). State action, by contrast, concerns the applicability of certain constitutional provisions.

There is no sound basis to conclude that the answer to one of those inquiries should dictate any particular answer to the other. Governments are free to redefine the principles governing the scope of employment to suit their individual policy preferences, but the reach of federal constitutional provisions is not so malleable. For example, a State might define any unlawful or unauthorized act to be outside the scope of employment, but an officer who uses excessive force against an arrestee has still engaged in state action. Cf. *Screws*, 325 U.S. at 107-110 (plurality opinion). Conversely, a State might generously choose to expand the scope of employment to include the purely private actions of its agents, but that does not correspondingly expand what is *constitutionally* attributable to the State.

That is not to say, of course, that the two concepts are completely unrelated; if the government requires its employees to maintain social-media pages as part of their job duties, or if public officials use government resources to maintain their social-media pages, their actions with respect to those pages will likely be both state action and within the scope of employment. See *Lindke* v. *Freed*, 37 F.4th 1199, 1203-1204 (6th Cir. 2022), cert. granted, No. 22-611 (Apr. 24, 2023). The point, instead, is that state action requires a public official to exercise a right or privilege created by the State—such as by acting in her official capacity to exercise responsibilities pursuant to state law—regardless of whether the State might view the conduct as within the scope of the official's job for purposes of vicarious liability or indemnification.

C. The Lower Court's Contrary Reasoning Is Unpersuasive

The court of appeals reached a contrary conclusion by drawing on its precedent addressing when an off-duty state employee (such as a police officer) acts under color of law. Pet. App. 21a-24a. Specifically, the court stated that an off-duty state employee acts under color of law when he "purports to or pretends to act under color of law," his actions "ha[ve] the purpose and effect of influencing the behavior of others," and the resulting harms are "related in some meaningful way either to the officer's governmental status or to the performance of his duties." *Id.* at 21a (brackets and citation omitted); see *Naffee* v. *Frey*, 789 F.3d 1030, 1037 (9th Cir. 2015).

Depending on the facts, that multifactor analysis might sometimes be an appropriate way to evaluate whether public officials exercised "power 'possessed by virtue of state law,'" such that their actions are "made possible only because [they are] clothed with the au-

thority of state law." *West*, 487 U.S. at 49 (citation omitted). But this Court has eschewed any comprehensive or rigid test for determining when state action exists, and has instead "articulated a number of different factors or tests in different contexts." *Lugar*, 457 U.S. at 939; see *Gilmore*, 417 U.S. at 574. The court of appeals' multifactor test is ill-suited to the context here, which involves the denial of access to intangible property (social-media pages). As explained above, in such situations, the appropriate inquiry should turn significantly on the public or private nature of the property at issue.

The court of appeals' multifactor test seems better suited to situations where a defendant exceeds her lawful authority in carrying out a "right or privilege [or rule of conduct] created [or imposed] by the State," *American Manufacturers*, 526 U.S. at 50 (citation omitted), such as when an officer uses excessive force in arresting a suspect. Indeed, the court's first factor—whether the defendant "purports to or pretends to act under color of law," Pet. App. 21a (brackets and citation omitted)—traces its language back to the plurality opinion in *Screws*, which involved precisely such a situation. See 325 U.S. at 111 (stating that "under 'color' of law means under 'pretense' of law").

In invoking that language, the plurality in *Screws* explained that the "officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective," and they had therefore "acted without authority only in the sense that they used excessive force in making the arrest effective." 325 U.S. at 111. Accordingly, the plurality explained, officers act under pretense of law whenever they "undertake to perform their official duties," regardless of "whether they hew to the line of their authority or overstep it." *Ibid.*

But that sort of "pretense" has no apparent relevance when, as here, petitioners did not engage in the challenged conduct (blocking respondents) as part of their official duties or as an exercise of a right or privilege created by the school board in the first instance. See pp. 20-24, *supra*.

The court of appeals' second factor, which asks whether the challenged conduct "had the purpose and effect of influencing the behavior of others," Pet. App. 23a (citation omitted), is likewise inapposite here. It is one thing for an off-duty police officer to use the power and prestige of her office (say, by flashing a badge or a service revolver) to *coerce* a citizen into acting in a way that facilitates the officer's unlawful conduct. It is another thing entirely to *encourage* citizens to give feedback on and engage with a social-media post. And the court's third factor, which asks whether the harms resulting from the challenged conduct "'related in some meaningful way'" to the defendants' "'governmental status' and 'to the performance of their duties,'" *id.* at 24a (brackets and citation omitted), is so open-ended as to be of little use.

Finally, to the extent the court of appeals relied on the "appearance" of petitioners' social-media pages, Pet. App. 23a, that too was unsuited to this context. To be sure, those sorts of "trappings" might be relevant in contexts involving police officers who exceed their lawful authority. But that is because the public is required to obey police officers, and "we look to officers' appearance because their *appearance* actually evokes state authority." *Lindke*, 37 F.4th at 1206; see, *e.g.*, *Griffin* v. *Maryland*, 378 U.S. 130, 135 (1964) (finding state action where the defendant "wore a sheriff's badge and consistently identified himself as a deputy sheriff rather

than as an employee of the park"). That is one reason why impersonating a police officer is a crime. See *e.g.*, 18 U.S.C. 912; D.C. Code § 22-1406 (Supp. 2023).

Appearance does not, however, play the same role in the circumstances at issue here. Nobody is required to obey a school board member's request to comment on her Facebook posts, no matter how official-looking the page might appear. Petitioners' Facebook and Twitter pages made it abundantly clear that petitioners were school-board members, and that might well have enhanced the prestige of those pages or made them particularly attractive (and even unique) spaces for offering comments on school-board matters. But those trappings did not imbue petitioners' posts and tweets with the force of law or otherwise establish that petitioners were exercising a right or privilege created by the school board, or a traditional, exclusive public function, when they operated their private social-media accounts.

D. An Overly Expansive Theory Of State Action In This Context Would Undermine, Not Promote, First Amendment Values

As the analysis above indicates, this Court's precedents wisely reflect a limited theory of state action in this context. Whether particular conduct constitutes state action (or is under color of state law) determines the applicability of a variety of constitutional constraints. See, *e.g.*, *Manhattan Community Access*, *supra* (First Amendment); *Skinner* v. *Railway Labor Executives' Association*, 489 U.S. 602 (1989) (Fourth Amendment); *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952) (Fifth Amendment); *West*, *supra* (Eighth Amendment); *Blum* v. *Yaretsky*, 457 U.S. 991, 996 (1982) (procedural due process under Fourteenth

Amendment); *Griffin*, *supra* (equal protection under Fourteenth Amendment); *Nixon*, *supra* (Fifteenth Amendment). An appropriately limited state-action doctrine "'preserves an area of individual freedom by limiting the reach of federal law' and avoids the imposition of responsibility on a State for conduct it could not control." *NCAA* v. *Tarkanian*, 488 U.S. 179, 191 (1988) (citation omitted).

That salutary aim is especially important in the First Amendment context. This Court has explained that an overly expansive "theory of state action" "would be especially problematic in the speech context, because it could eviscerate certain private entities' rights to exercise editorial control over speech and speakers on their properties or platforms." *Manhattan Community Access*, 139 S. Ct. at 1932. The same holds true for public officials and employees like petitioners.

Moreover, subjecting large amounts of the speech of public officials and employees to constitutional restrictions could make those officials and employees less willing to speak in the first place. That sort of chilling effect would thus reduce, not enhance, free speech and public discourse. Indeed, in response to the district court's injunction and declaration in this case, petitioners have employed "word filters" that "as a practical matter" "preclude all verbal comments on their public pages" on Facebook. Pet. App. 13a. It is hard to see how, on balance, that promotes First Amendment values.

In addition, an overly expansive theory of state action in this context might well lead to overregulation of public employees' speech. As this Court has recognized, government "[e]mployers have heightened interests in controlling speech made by an employee in his or her

professional capacity." *Garcetti* v. *Ceballos*, 547 U.S. 410, 422 (2006). To say that the speech of a public employee on a personal social-media account constitutes state action—meaning that the speech is "fairly attributable to the [government]," *Lugar*, 457 U.S. at 937—would be to say that the government could regulate the content of that speech. See *Garcetti*, 547 U.S. at 422-423; cf. *Pickering* v. *Board of Education*, 391 U.S. 563, 573-574 (1968). And because many government employers are potentially exposed to liability whenever their employees engage in state action, see *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), the urge to regulate would be substantial. Again, it is difficult to see how that would promote First Amendment values.

At the same time, an expansive state-action theory would carry few if any benefits in this context because a plaintiff who is blocked from a public official's social-media account is unlikely to prevail under substantive First Amendment law even if he can show that the blocking constitutes state action. For example, when the government itself is doing the speaking, it may craft its own message and exclude others from the opportunity to present dissenting views. See *Shurtleff* v. *City of Boston*, 142 S. Ct. 1583, 1587, 1589 (2022). So if public-official defendants were to assert, as petitioners did here, that they intended to use their social-media accounts "in a 'bulletin board' manner—providing one-way communication from themselves to their constituents," Pet. App. 60a, and that assertion were credited, then a finding that the officials engaged in state action might well imply that the posts and tweets on their accounts (including the comments attached to the posts and tweets) constituted government speech outside the

reach of the First Amendment's speech constraints. See *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.").

Alternatively, even when the government creates a "forum" for debate, it has substantial latitude to impose reasonable speaker- or content-based restrictions on that forum. See *Minnesota Voters Alliance* v. *Mansky*, 138 S. Ct. 1876, 1885-1886 (2018). So if a factfinder determined that public-official defendants used their accounts to create a forum for public debate, then their blocking of other users for posting repetitious or nonresponsive comments, cf. Pet. App. 73a, would likely constitute a reasonable speaker- or content-based restriction. Moreover, anyone blocked by an official could easily create a new account and regain access to the forum, thereby mitigating any First Amendment injury.

The point here is not to engage in substantive First Amendment analysis, which is beyond the scope of the question presented in the petition for a writ of certiorari. See Cert. Reply Br. 2, 10. Instead, the point is that there is little to be gained, and much to be lost, by adopting an overly expansive theory of state action that would extend to the use of nearly every public official's private social-media account. As noted, that scenario would undermine, not promote, First Amendment values, and as a practical matter the end result of any litigation would likely be the same as under a more constrained theory of state action.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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