No. 22-324

In the
Supreme Court of the United States

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

v.

CHRISTOPHER GARNIER, ET UX.,
Respondents.

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

Brief of Local Government Legal Center, National Association of Counties, National League of Cities, and the International Municipal Lawyers Association as *Amici Curiae* In Support of Neither Party

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INTEREST OF AMICI CURIAE[1]

The Local Government Legal Center ("LGLC") is a coalition of national local government organizations formed in 2023 that provides education to its members regarding this Court's decisions and their impact on local governments and officials. Furthermore, the LGLC advocates on behalf of its members in this Court's cases that affect local governments and officials. The National Association of Counties, the National League of Cities, and the International Municipal Lawyers Association are the founding members of the LGLC.

The National Association of Counties ("NACo") is the only national association that represents county governments in the United States. Founded in 1935, NACo serves as an advocate for county governments and works to ensure that counties have the resources, skills, and support they need to serve and lead their communities.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocates for 19,000 cities, towns, and villages, representing more than 218 million Americans.

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

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA's mission is to advance the development of just and effective municipal law and to advocate for the legal interests of local governments.

Here, Amici offer their perspective on why local governments and public officials need a clear and easily applicable state-action test to analyze the social media activity of public officials, and they offer one such proposal for the Court's consideration. Furthermore, Amici detail the impracticality and harmful effects of the state-action test used by the majority of circuits in the social media context, which this Court should reject.

SUMMARY OF ARGUMENT

The meteoric rise of social media presents a need for courts to identify when a public official's social media activity is state action versus private action. When public officials engage on social media as state actors, the First Amendment limits their ability to restrict the speech of other users. Yet, as private citizens, public officials have First Amendment rights of their own, including the right to control content posted on their social media accounts.[2] Given these varying First Amendment interests, local governments must also differentiate between private and state action, since they may be subject to liability for constitutional violations that result from their public officials' social media activity. However, distinguishing between a public official's private and governmental social media activity proves difficult when—like in the present case—a public official uses a single social media account to post both personal and governmental content.

The circuit courts that have proposed a state-action analysis for public officials' social media activity have failed to articulate a clear, easy-to-apply test for local governments and courts. Instead, the majority of circuits have utilized a content-driven analysis that yields inconsistent results and makes it impossible for local governments to protect themselves from liability. Amici propose a solution: a state-action test based on a public official's governmental authority to engage in

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[2] For the purposes of this brief, the term "social media account" encompasses any social media account, page, or profile.

social media activity. This test is similar to the one utilized by the Sixth Circuit, except that it focuses *entirely* on authority and lays out three clear scenarios in which state-action would exist. As Amici explain, such a test is consistent with this Court's precedent, easily administered, and protective of the First Amendment rights of public officials and citizens.

Amici's argument proceeds in four parts. Part I discusses the increased reliance on social media and the need for the Court to adopt a clear, workable test for state action in the social media context. Part II makes the case that this Court's state-action jurisprudence provides a vehicle for such a test. Part III proposes a state-action test focused on authority. Part IV explains the shortcomings of the appearance and purpose test used by the majority of circuits and urges this Court to reject such a test.

ARGUMENT

I. The increased reliance on social media presents a need for local governments to have a clear and practical test to determine whether a public official's social media activity constitutes state action.

Public officials—like many citizens—increasingly use social media to communicate with others.[3] These "digital platforms provide avenues for historically

[3] Circuit courts that have addressed the question presented have not defined the term "public official." For the purposes of this brief, the term "public official" includes local elected and appointed office holders as well as government employees.

unprecedented amounts of speech, including speech by government actors." *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring).

Citizens expect public officials to communicate through social media, particularly to provide news and updates. And the reliance on social media by local governments and their officials is only going to increase. Public meetings are streamed through social media, often with an opportunity for followers to react or comment. Emergency warnings and updates are transmitted through social media pages. Local governments use social media to communicate about local news or events, such as upcoming elections, new government initiatives, or safety reminders.

However, these are not necessarily one-way communications. Citizens also employ social media as a tool to direct grievances and concerns to their governments and officials. Government-affiliated pages have become fora for citizens to weigh in on and debate issues of public importance. Indeed, "[t]hese websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). As a result, courts have recognized that the social media activity of private citizens warrants First Amendment protection from government infringement. *See id.*

But social media also provides a vehicle for citizens to engage in harassing or threatening behavior directed toward public officials. In a 2021 study, local officials cited social media as the most common setting for

incidences of harassment or threats. Clarence E. Anthony, Tina Lee, Jacob Gottlieb, & Brooks Rainwater, Nat'l League of Cities, *On the Frontlines of Today's Cities: Trauma, Challenges and Solutions*, 12 (2021). Of the local officials surveyed, 79% reported social media as a place where they have experienced harassment, threats, or violence. *Id.*

Furthermore, as citizens, public officials have First Amendment rights of their own, including the right to speak on matters of public concern, *see Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006), and the right to post and delete content on their personal social media pages, *see Campbell v. Reisch*, 986 F.3d 822, 827–28 (8th Cir. 2021). But when public officials engage as *state actors* on social media, their actions are subject to constitutional limitations—including the First Amendment. *See Packingham*, 582 U.S. at 107. And because of the interactive nature of social media platforms, courts have held that governmental social media pages constitute public fora. *See, e.g.*, *Davison v. Randall*, 912 F.3d 666, 685 (4th Cir. 2019). Thus, if a public official's social media account is considered state action, then the First Amendment prevents the official from engaging in any viewpoint discrimination such as blocking users or deleting certain comments from their posts. *See id.* at 687–88.

Because of the First Amendment concerns presented by social media, it is necessary for courts to distinguish between personal and governmental social media activity. However, this distinction becomes difficult when public officials use the same social media account for both personal and governmental purposes.

Courts are left to grapple with difficult questions such as: What happens if a public official uses his personal Facebook account to both provide information related to his government position and share personal family photos? *See Lindke v. Freed*, 37 F.4th 1199, 1201 (6th Cir. 2022). Or, what if a public official continues using her Twitter campaign page after she is elected to then discuss matters related to her official position? *See Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1164 (9th Cir. 2022).

Several circuit courts have addressed this issue but have prioritized different factors in their analyses. *Compare, e.g.*, *Lindke*, 37 F.4th at 1203, *with Garnier*, 41 F.4th at 1171; *Campbell*, 986 F.3d at 827; *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 953 F.3d 216, 218 (2d Cir. 2020); *Davison*, 912 F.3d at 680–81. The current tests utilized by the circuits present challenges for local governments that need to monitor their public officials' social media activity to protect against liability. After all, if social media activity is deemed to be state action, then local governments may be liable for any constitutional violations that occur as a result. *See Brandon v. Holt*, 469 U.S. 464, 471 (1985) ("[A] judgment against a public servant in his official capacity imposes liability on the entity he represents. . .").

Without a clear, practical, and understandable test, local governments are left with difficult choices in order to avoid liability. At one extreme, they can try to shut down the speech of their own public officials, but they risk infringing on the First Amendment rights of the public officials as citizens. *See infra* Section III.B. Or,

at the other end, they can allow unrestricted social media activity that opens the door to potentially unbridled First Amendment liability. Without a clear test for determining when a public official's use of social media constitutes state action, local governments are left to guess where the line falls. Therefore, Amici posit that local governments need a workable state action test that allows them to minimize potential liability without sacrificing efficiency, resources, or the First Amendment rights of either their public officials or citizens.

II. This Court's state-action jurisprudence provides a vehicle for a clear and workable test in the social-media context.

Although social media is a relatively recent phenomenon, this Court's well-settled state-action precedent can still be applied to analyze a public official's social media activity.

The threshold question for any constitutional claim is whether the conduct complained of was undertaken by the government or a private actor. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). By "adher[ing] to the 'state action' requirement[,] . . . [this Court] avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936–37 (1982).

For a claim to satisfy the state action requirement, the "conduct allegedly causing the deprivation of a federal right" must be "fairly attributable to the State." *Id.* at 937. This Court's precedent has generally

required the satisfaction of two prongs: First, "the deprivation must be caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible," and second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* Under this test, a public official exercises state action when he "act[s] in his official capacity or . . . exercise[s] his responsibilities pursuant to state law." *West v. Atkins*, 487 U.S. 42, 50 (1988). However, a public official does not exercise state action when he "acts . . . in the ambit of his personal pursuits." *Screws v. United States*, 325 U.S. 91, 111 (1945).

In the context of social media, courts should begin with the assumption that public officials are engaging in private activity. Because any person can create a social media platform and post content, participating in social media in no way requires "the exercise of some right or privilege created by the State." *Lugar*, 457 U.S. at 923. Indeed, public officials are often engaged in "personal pursuits" on social media such as interacting with family and friends, *see Lindke*, 37 F.4th at 1201, campaigning for public office, *see Campbell*, 986 F.3d at 824–25, or exercising their rights as citizens to speak on matters of public concern, *see Garcetti*, 547 U.S. at 419.

Of course, even as a private individual, a public official's social media usage can constitute state action if there is "something more" that converts the private activity into governmental activity. *Lugar*, 457 U.S. at 939. In identifying whether private activity has "something more," the Court has employed a variety of

tests depending on the context. *Id.* And these cases share a prevailing theme: An otherwise private individual does not engage in state action unless he acts pursuant to authority created by the government. *See generally Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001); *West*, 487 U.S. 42.

The Court's decisions in *West* and *Brentwood* emphasize the role of authority in the state-action inquiry. In *West*, a private physician entered into a contract with the state to provide medical services within a public prison. *West*, 487 U.S. at 43–44. Despite the fact that the physician was not a typical "state employee," the Court held that he should nonetheless be considered a state actor because he was "authorized and obliged [by the state] to treat prison inmates . . . and [did] so clothed with the authority of state law." *Id.* at 55 (quotations omitted). The Court noted that it was only by virtue of this state authority that inmates received the physician's care, since inmates could not receive treatment from other physicians. *Id.* Thus, because the physician was "fully vested with state authority[,]" when he treated inmates, the Court considered him a state actor. *Id.* at 56.

Similarly, in *Brentwood*, the Court held that an otherwise private association engaged in state action due to its "pervasive entwinement of public institutions and public officials in its composition." *Brentwood*, 531 U.S. at 298. In its analysis, the Court focused on how that entwinement allowed the association's public members to "exercise the[ir own governmental] authority" on behalf of the association. *Id.* at 299. For example, the Court noted that the association was

almost entirely controlled by public schools and officials that directly benefited from the association's acts and that the association was largely financed by public school funds. *Id.* Because the association exercised governmental authority, the Court held it was a state actor. *Id.* at 298.

Both *West* and *Brentwood* emphasize the importance of governmental authority in the state-action analysis. Amici urge this Court to adopt a state-action test for social media focused on the authority of the actor to bind the government, consistent with its jurisprudence.

III. The Court should adopt a state-action test focused on authority.

In keeping with its precedent, the Court should adopt a state-action analysis that considers a public official's authority to engage in social media activity. Amici's proposed test—the "Authority Test"—provides clear guidelines for local governments to avoid liability without infringing on the First Amendment rights of their public officials or citizens.

A. The Authority Test utilizes a state-action analysis that considers a public official's authority to engage in social media activity.

Amici are not the first to suggest a state-action test in the social media context based on governmental authority. In *Lindke*, the Sixth Circuit recognized that authority was a significant factor to determine whether a city manager's use of a personal Facebook page constituted state action. 37 F.4th at 1203. Using what

it referred to as the "state-official" test, the Sixth Circuit determined that a public official's social media activity "may be state action when it (1) is part of an officeholder's actual or apparent duties or (2) couldn't happen in the same way without the authority of the office." *Id.* (quotations omitted). While the Authority Test utilizes parts of the factors identified in *Lindke*, it is distinct from the state-official test because it hinges solely on the question of authority. A test that focuses on both duty and authority is redundant. As explained below, a public official's duty is encompassed under the umbrella of their governmental authority.

The Authority Test recognizes three ways in which the government could authorize the operation of a social media account: (1) the government itself owns the social media account; (2) the government expressly authorizes a public official to create the social media account by law, regulation, or policy; or (3) the government allows a public official to utilize government resources to operate the social media account. The Authority Test requires analyzing the facts of a given case to determine whether the government has authorized the account in any of the three above-mentioned ways.

First, the Authority Test asks if the government owns the social media account—that is, whether the social media account belongs to the office, rather than to the office holder. *Lindke* dissected this quite simply: A social media account belonging to an office—such that "[w]hen the office switche[s] occupants, the [social media] page switche[s] hands" to the individual succeeding the office—"is always state action." *Id.* at

1204. However, a social media account belonging to the individual who holds the office, such that the official will take the social media account with him when he leaves office, is not necessarily state action. *See id.* The reasoning is simple. When the social media account belongs to a governmental office, it is state property. And when it is state property, it is "fairly attributable" to the state, so any social media activity is state action. *Id.* (quoting *Lugar*, 457 U.S. at 937).

Next, the Authority Test queries whether the government expressly authorized the public official to establish the official social media account. As the Sixth Circuit recognized in *Lindke*, "the most straightforward instance of an actual duty is when the text of state law requires an officeholder to maintain a social-media account." *Id.* at 1203. Although *Lindke* called this a "duty," it is simply another version of authority: The text of a state law requiring an officeholder to maintain a social media account gives an officeholder the *authority* to do just that. Thus, the Authority Test asks whether there is a law, regulation, or policy that gives the public official the explicit authority to operate the social media account. In other words, "a [social media] page can constitute state action if the law itself provides for it." *Id.* The same would hold true if the social media account was authorized by, for example, a city ordinance, county regulation, or governmental policy.

Finally, the Authority Test examines whether the government supports the operation of the social media account by providing government resources. The *Lindke* court explained that the use of government

resources to maintain a social media account, even without any express authority, can still be an indication of an official using "the authority of [their] office" and therefore constitute state action. *Id.* at 1203. In the case where the social media account was created by the public official and is not state property, there is no immediate presumption that the account is "fairly attributable" to the state. *See id.* (quoting *Lugar*, 457 U.S. at 937). However, if the government provides its resources, or if a public official is *allowed* to use government resources to operate the account, then governmental services are "access[ed] by the authority of his office." *Id.* at 1205 (citations omitted). As this factor focuses on the *provision* of government resources, it protects against hypothetical governmental liability for a rogue official who improperly—and without authority—uses government resources to operate his social media account.

The Authority Test provides a logical, objective standard for local governments and courts alike to determine whether a public official's social media activity amounts to state action.

B. The Authority Test can be easily applied by local governments without infringing on the First Amendment rights of public officials or citizens.

The Authority Test allows local governments to save limited resources and avoid conducting fact-specific inquiries into the content of the social media accounts of their public officials. By focusing exclusively on governmental authority, the Authority Test turns on factors entirely within a local government's control.

This prevents local governments from having to monitor the unauthorized social media usage of its officials. Furthermore, the Authority Test provides three clear scenarios in which a public official's social media activity would constitute state action, granting local governments a degree of predictability as to when they might be exposed to liability.

In addition, since the Authority Test does not hinge on the content of posts on the social media accounts of public officials, the free speech rights of public officials remain protected. Under the proposed test, local governments would not be required to restrict their public officials' usage of social media. Thus, individual liberties and editorial control over speech on social media accounts would remain with the officials, leaving them, as private citizens, to act "in the ambit of their personal pursuits," *Screws*, 325 U.S. at 111, by exercising their constitutionally protected right to "speak[ ] as citizens about matters of public concern," *Garcetti*, 547 U.S. at 419. *See, e.g.*, *Halleck*, 139 S. Ct. at 1934. Furthermore, the test draws a clear line between private and governmental social media activity, which allows public officials to freely enjoy their rights as citizens when they engage as private actors on social media.

Finally, the Authority Test adequately safeguards the First Amendment rights of citizens interacting with public officials on social media. By protecting the rights of public officials to speak on matters of public concern, the Authority Test preserves the First Amendment interests of the public "in receiving the well-informed views of [public officials] engaging in civic discussion."

Garcetti, 547 U.S. at 419. Additionally, the test does not allow for a free-for-all of public official social media activity. Under the Authority Test, any time a public official engages in social media pursuant to his or her governmental authority, he is engaging in state action and is subject to constitutional limitations.

In sum, this Court should adopt a test that emphasizes authority as the principal factor to determine state action in the social-media context. Amici's proposed Authority Test is a pragmatic test that is consistent with this Court's precedent and protects First Amendment interests.

IV. The Court should reject the appearance and purpose test followed by the Second, Fourth, Eighth, and Ninth Circuits.

Despite this Court's state-action jurisprudence, the majority of circuit courts that have analyzed whether a public official's social media activity constitutes state action have failed to consider governmental authority. Instead, these circuits have employed some variation of the test first used by the Fourth Circuit in *Davison*, which is generally focused on two prongs: (1) the appearance of the social media page; and (2) its purpose. *See Garnier*, 41 F.4th at 1171; *Campbell*, 986 F.3d at 827; *Trump*, 953 F.3d at 218; *Davison*, 912 F.3d at 680–81. The application of these content-focused factors presents significant challenges to local governments and public officials.

First, the "appearance" factor considers whether the public official's social media page bears the "trappings of [their public] office"—i.e., whether the page includes

the public official's government title, whether it is designated as a "government official" page, whether it provides government contact information or links to government websites, or whether it includes other information related to the public official's government duties. *See Garnier*, 41 F.4th at 1174; *Campbell*, 986 F.3d at 825; *Davison*, 912 F.3d at 684; *see also Trump*, 953 F.3d at 231 (Park, J., dissenting). Under this analysis, if a social media page contains these "trappings," then it has been effectively "clothed . . . in the power and prestige of [the public official's] office," and is considered state action. *Davison*, 912 F.3d at 681 (citations omitted). Second, the "purpose" factor considers whether the public official uses her social media page as a "tool of governance" to carry out "actual or apparent duty of [her] office." *Id.* at 680. If the public official uses the page to post information related to her job or to solicit input from her constituents, then the page is state action.

Under the appearance and purpose test, whether a public official's social media activity is deemed state action is entirely dependent on the content of the social media page. The test is essentially a state action edition of the "duck" test: If it looks like state action, and quacks like state action, then it is probably state action. The problems with the appearance and purpose test arise from the fact that it considers whether a public official *appears* to have authority to operate the social media account without considering whether the public official *actually* exercises any authority.

This Court should reject the appearance and purpose test for the following reasons: First, the test leads to inconsistent results in similar factual scenarios. Second, the test is impractical for local governments and inconsistent with First Amendment principles. Finally, the test erroneously assumes that any public official has the authority to operate a social media page on behalf of the government.

A. The appearance and purpose test leads to inconsistent results.

A test focused on a social media page's appearance and purpose requires courts to analyze the content of a public official's social media page, which leads to differing results in similar factual scenarios.

For example, compare the Eighth Circuit's application of the appearance and purpose test in *Campbell* with the Ninth Circuit's application in *Garnier*. *Campbell* analyzed the Twitter page of a state representative, *see* 986 F.3d at 823–24, while *Garnier* analyzed the Facebook and Twitter pages of two school board trustees, *see Garnier*, 41 F.4th at 1163–64. In both cases, the public officials had originally created the social media pages to promote their campaigns for public office but continued using the pages to communicate with their constituents after election. *See Garnier*, 41 F.4th at 1163; *Campbell*, 986 F.3d at 823–24. The pages at issue in both cases bore the "trappings" of public office—they were categorized as a "government official" page, listed the titles of the public officials, and included information related to their government roles. *See Garnier*, 41 F.4th at 1174; *Campbell*, 986 F.3d at 827. Additionally, both the state

representative and the trustees maintained personal social media accounts separate from the accounts at issue. *See Garnier*, 41 F.4th at 1163; *Campbell*, 986 F.3d at 830 (Kelly, J., dissenting). Finally, the social media pages at issue in both cases contained a mix of posts about the public official's campaign for election as well as information regarding their official governmental duties. *See Garnier*, 41 F.4th at 1164; *Campbell*, 986 F.3d at 823–24. Despite these factual similarities, and despite applying the same principles from the *Davison* case, the circuit courts' analyses in *Campbell* and *Garnier* yielded opposite results: *Garnier* found state action, while *Campbell* did not. *See Garnier*, 41 F.4th at 1177; *Campbell*, 986 F.3d at 826.

The Ninth Circuit in *Garnier* determined that the trustees engaged in state action because they "routinely used their social media as a tool of governance" by posting content related to their official duties. 41 F.4th at 1176 (quotations omitted). And while the state representative in *Campbell* also used her account to provide information related to her official duties, *see* 986 F.3d at 828–29 (Kelly, J. dissenting), the majority held that these "occasional stray messages . . . [were] not enough to convert [the] account [into state action]," *id.* at 827. Thus, unlike *Garnier*, *Campbell* concluded that even after the state representative's election, campaign-related messages remained "the overall theme of [her] tweets" and therefore, the Twitter page was not state action. 986 F.3d at 826.

The holdings in these two cases illustrate how a content-driven analysis like the appearance and

purpose test requires courts to draw an arbitrary line between a personal social media account and a governmental social media account. This analysis wastes judicial resources by forcing courts to comb through the individual bios, posts, and comments of a public official's social media page. Additionally, it poses several questions that courts must answer with little guidance, such as whether the "trappings" of a social media page are more like that of an official account or a personal account—a difficult question since the "trappings of an official account . . . can quite obviously be trappings of a personal account as well." *Campbell*, 986 F.3d at 827. Or, "how many 'official' [posts] does it take to convert [a] 'personal' [page] into state action?" *Trump*, 953 F.3d at 228 (Park, J., dissenting). As evidenced in *Garnier* and *Campbell,* these questions are impossible to answer with consistency.

B. The appearance and purpose test is impractical for local governments and inconsistent with First Amendment principles.

Under the appearance and purpose test, any public official's personal social media page might be transformed into state action by the individual's actions alone. Thus, in order to avoid liability, local governments must exercise control over their officials' personal social media pages to ensure they do not contain the "trappings" of their government office or could be considered a "tool of [the public official's] governance." *See Davison*, 912 F.3d at 680–81.

But, unlike a private actor, a local government cannot "leverage the employment relationship to

restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti*, 547 U.S. at 419. An appearance and purpose state-action test makes it impossible for local governments to protect themselves from liability without potentially infringing on the free speech rights of the public officials.

For example, to avoid liability under the appearance and purpose test, a local government may enact a policy that prohibits public officials from including the "trappings" of their government office on their social media page, such as their government title, government contact information, or any identification as a public official. Or, to avoid a public official's page being deemed "a tool of governance," a local government might forbid employees from posting information about their official job duties. But these solutions might at the same time infringe on a public official's right to speak "as a citizen addressing matters of public concern," *Id.* at 417, which includes the right to do so on social media. *See, e.g.*, *Bland v. Roberts*, 730 F.3d 368, 384–89 (4th Cir. 2013).[4]

Another option a local government might consider in order to avoid liability is to prohibit its public officials from blocking any users or deleting comments on social media. But this Court has recognized that the First Amendment prohibits "[f]orcing free and

[4] Additionally, it would be nearly impossible to train local officials to avoid including the "trappings" on their social media page or to avoid using the page as a "tool of governance," given the lack of clarity surrounding how these two prongs of the appearance and purpose test should be applied. *See supra* Section IV.A.

independent individuals to endorse ideas they find objectionable." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018). Thus, a policy that forces public officials to allow and keep content on their personal pages against their wishes infringes on their First Amendment right to be free from compelled speech. *See id.* Furthermore, under this policy, public officials would be unable to protect their accounts from being "overrun with harassment, trolling, and hate speech." *Trump*, 953 F.3d at 231 (Park, J., dissenting). By leaving public officials with "the unappetizing choice of allowing all comers or closing the platform altogether," such a policy would inevitably result in less speech. *Halleck*, 139 S. Ct. at 1931.

Thus, an appearance and purpose state-action test leaves a local government with two undesirable options: It can do nothing and risk liability for potential First Amendment violations committed by its public officials on social media; or, it can attempt to control the social media activity of its public officials and risk liability for violating the public officials' First Amendment rights.

C. The appearance and purpose test erroneously assumes that any public official has authority to operate a social media page on behalf of the government.

Under the appearance and purpose test, any public official's personal social media page can be transformed into state action—regardless of whether he had actual authority to do so. The assumption that every public

official has the authority to operate an official social media account misunderstands the power structure of local governments. Take the Ninth Circuit's decision in *Garnier* as an example. There, two elected members of the school board of trustees were each able to unilaterally engage in what the court determined was state action and create a public forum using their personal Facebook and Twitter pages. *Garnier*, 41 F.4th at 1170–71. However, in reality, the trustees did not have *individual* authority to make any decisions on behalf of the school board or the local government. Instead, the school board could engage in state action only by acting *collectively*. The appearance and purpose test effectively bestows authority on public officials that does not otherwise exist.

Another hypothetical further illustrates this issue. Consider the personal Facebook profile of a sanitation worker for a city. Now imagine that, without any authorization from the City, the sanitation worker designated the page as a "government page," included the title "official sanitation worker for the City," and made various posts providing public information regarding his sanitation duties including trash collection schedules and recycling guidance. Under the appearance and purpose test, a court could conclude that the sanitation worker's use of the social media page rose to the level of state action.

By focusing on the *appearance* of authority, rather than *actual* authority, the appearance and purpose test essentially allows Courts to step into the shoes of local governments and delegate authority where it does not

exist.[5] This test is neither workable nor predictable, and the Court should reject it.

CONCLUSION

In sum, the appearance and purpose test is an unworkable state-action test in the social media context that would unnecessarily invite First Amendment infringements and create liability. Instead of relying on a content-driven analysis that is difficult to apply, this Court should adopt a clear and workable test, like the Authority Test, thereby limiting local government liability while protecting the First Amendment rights of public officials and citizens.

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[5] While the question presented here deals solely with whether state action is present, Amici also note that an appearance and purpose state-action test is inconsistent with this Court's precedent regarding the creation of a public forum. The Court has held that "[t]he government does not create a public forum by inaction . . . but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Yet, under the appearance and purpose test, any public official can create a public forum on a personal social media page despite the lack of authority to do so.

Respectfully submitted,

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