NO. 22-324

IN THE
Supreme Court of the United States

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

v.

CHRISTOPHER GARNIER AND KIMBERLY GARNIER,
Respondents.

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

BRIEF OF MANHATTAN INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

ILYA SHAPIRO
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 20017
(212) 599-7000

CORTNEY C. THOMAS
BRIAN E. ROBISON
RUSSELL T. BROWN
BROWN FOX, PLLC
8111 Preston Rd.
Suite 300
Dallas, TX 75225
(214) 327-5000

JOHN J. BURSCH
Counsel of Record
RYAN L. BANGERT
JEREMY D. TEDESCO
CHRISTOPHER P. SCHANDEVEL
MICHAEL R. ROSS
MATHEW W. HOFFMANN
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, VA 20176
(616) 450-4235
jbursch@ADFlegal.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTEREST OF *AMICUS CURIAE*[1]

The Manhattan Institute (MI) is a nonprofit public-policy research foundation whose mission is to develop and disseminate new ideas that foster economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting the rule of law and opposing government overreach, including in the marketplace of ideas.

MI understands that, in our digital age, so much of the public discourse it seeks to enrich and influence occurs on social media. "Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind." *Packingham* v. *North Carolina*, 582 U.S. 98, 107 (2017). Social media presents the "principal sources for knowing current events . . . and otherwise exploring the vast realms of human thought and knowledge." *Id.* Indeed, social-media platforms offer the "most powerful mechanisms available to a private citizen to make his or her voice heard." *Id.* They *are* "the modern public square." *Id.*

And just like in the traditional public square, government cannot pick winners and losers on social media. The First Amendment "put[s] the decision as to what views shall be voiced" where it should be—"into the hands of each of us." *Cohen* v. *California*, 403 U.S. 15, 24 (1971). Indeed, "no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Id.* That same logic applies with equal force when government

---

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

officials censor speech while hiding behind the façade of private action. Officials cannot imbue their social-media profiles with the trappings of their offices and use them to communicate with their constituents, but then disclaim liability when they censor views they don't like. When state officials miss the mark, 42 U.S.C. § 1983 allows injured citizens to seek redress.

An overly constrained notion of state action would frustrate both the purposes of Section 1983 and MI's work to promote uninhibited debate on important issues. Government officials certainly retain their ability to speak on social media in their personal capacities, but they must be held accountable for preventing citizens from engaging them on issues of public debate that they raise on those accounts.

SUMMARY OF THE ARGUMENT

Public discourse has moved online. Social media now serves many of the same functions traditionally filled by parks, squares, and sidewalks. Government officials post about their work and interact with their constituents on issues ranging from the local—like preparing for a blizzard—to the national—like the nomination of a new FBI director.

This new online forum does not exempt government officials from the traditional safeguards that protect our public debate. The First Amendment ensures that expression vital to our representative democracy remains "uninhibited, robust, and wide-open." *Rankin* v. *McPherson*, 483 U.S. 378, 387 (1987). That means the government violates the Constitution when it censors viewpoints online no less than when it does so on the street.

But public officials are citizens with their own First Amendment rights; they can only violate the Constitution (and be held liable under Section 1983) when they act under color of state law. This Court's precedents chart the line between a public official's personal and public conduct by examining its *purpose* and *appearance*. Public-official conduct with a public purpose—such as discussing city pandemic policies—supports a state-action finding. And so does conduct clothed with state authority—such as a social-media profile that identifies its owner as a government official and provides government contact information.

The purpose-and-appearance test properly holds government officials responsible for actions attributable to the state while preserving personal freedoms. And on either end of the spectrum, the inquiry is straightforward. Official, state-action social-media profiles will operate under an official title; focus on government work; be open for public comment; typically use state resources; and may transfer from one officeholder to the next. Personal, non-state-action social-media accounts will remain personal. They will operate under an individual's name and remain under the individual's control; are typically not accessible by the general public; focus on personal matters; and do not employ state resources.

Campaign and mixed-use accounts fall in between these two ends. Campaign pages generally remain personal by focusing on campaign business and not including official titles or posts on behalf of government bodies or officeholders. But campaign pages and other mixed-use accounts blending personal and official business trigger purpose-and-appearance scrutiny on a post-by-post basis to balance public accountability with the free-speech rights of all speakers.

A state-action finding triggers First Amendment forum analysis. Just like in the traditional public square, discourse happens in the interactive portions of government officials' social-media pages. These interactive spaces are publicly accessible and invite constituents to comment on government matters. By opening these areas to public comment, the government makes them either designated or limited public forums. That means—at the very least—that the government cannot pick winners and losers in the marketplace of ideas by discriminating based on viewpoint. But the government also does not lose all control over the forums it creates. It may impose reasonable restrictions on public discourse consistent with the purpose of the individual social-media forum.

This Court should apply its purpose-and-appearance test for state action and affirm the judgment of the Ninth Circuit. That test hews closely to precedent and shows which actions can be fairly attributed to the state. It provides the twin benefits of holding public officials accountable for online censorship that is fairly attributable to the government while preserving their freedom to voice their own personal views. And it ensures that dialogue in the modern public square remains exactly as it should be: uninhibited, robust, and equally open to all.

ARGUMENT

I. This Court distinguishes public officials' public and private actions by looking to the purpose and appearance of their conduct.

Our founders created a "government of the people, by the people, [and] for the people." Abraham Lincoln, Gettysburg Address (Nov. 19, 1863). Government

officials—no less than private citizens—are part of the "people." And that doesn't change when they assume public office. Just like the rest of us, government officials still have personal pursuits. They "visit[] the hardware store," "chat[] with neighbors," and "attend[] church services." *Lindke* v. *Freed*, 37 F.4th 1199, 1205 (6th Cir. 2022), *cert. granted*, 143 S. Ct. 1780 (2023).

But by assuming public office, they also assume public responsibilities. On a fundamental level, that means they must follow the Constitution, including the First Amendment's prohibition against "abridging the freedom of speech." U.S. Const. amend. I. And when they fall short, the people have the power to hold them accountable for any actions taken "under color of" state law. 42 U.S.C. § 1983.

But because these officials do not shed their status as members of the "people" when they take office, courts must decide when their conduct "is fairly attributable to the State." *Filarsky* v. *Delia*, 566 U.S. 377, 383 (2012) (cleaned up). Only then can courts decide whether their conduct violated the Constitution.

In this way, the state-action doctrine balances the need to hold government actors accountable for their constitutional violations while still "preserv[ing] an area of individual freedom by limiting the reach of federal law." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

This Court's decisions separating the public actions of government officials from what those same officials do as private citizens provides the proper framework for deciding this case and its companion. Cases examining when private actors can become state actors may shed some light on the inquiry. *E.g.*,

Brentwood Acad. v. *Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295–96 (2001). But when state officials are involved, the analysis changes. *Contra Lindke*, 37 F.4th at 1203 (conflating the "state-official test" with the "nexus test" traditionally applied to private actors). Government officials are *presumed* to be state actors: "state employment is generally sufficient to render the defendant a state actor under our analysis." *Lugar*, 457 U.S. at 935 n.18. Private actors receive the opposite presumption: a "private party" lacks the "apparent authority" of "the weight of the State." *Id.* at 937.

For that reason, a public-versus-private-property approach—one that merely looks to who owns the account, the government or a private citizen—oversimplifies the analysis and misses the point of the state-action doctrine. *Contra* Pets.' Br. 23–24; SG Br. 20. When a public official "purports to act" under state authority, he takes "state action." *Griffin* v. *Maryland*, 378 U.S. 130, 135 (1964). "It is irrelevant that he might have taken the same action had he acted in a purely private capacity." *Id.*

The proper inquiry asks whether the official (1) exercised "power . . . by virtue of state law," and (2) was "clothed with the authority of state law." *United States* v. *Classic*, 313 U.S. 299, 326 (1941). In other words, to distinguish between an official's public and private actions, the Court examines (1) the conduct's *purpose* (whether exercising power given by state law to achieve a public end), and (2) its *appearance* (whether acting while clothed with the authority of state law). *See Polk Cnty.* v. *Dodson*, 454 U.S. 312, 318 (1981); *Griffin*, 378 U.S. at 135. And that analysis requires a fact-specific inquiry. *Griffin*, 378 U.S. at 135.

As to purpose, a public official's conduct will not meet the state-action threshold when it serves "essentially a private function, traditionally filled by [a private actor], for which state office and authority are not needed." *Polk Cnty.*, 454 U.S. at 319. For example, a public defender serves a private purpose while representing her client because she "works under canons of professional responsibility that mandate [her] exercise of independent judgment on behalf of the client" and remains "free of state control" in that representation. *Id.* at 321–22. But when the same public defender makes "hiring and firing decisions on behalf of the State," she serves a public purpose and thus is a state actor. *Id.* at 325 (summarizing *Branti* v. *Finkel*, 445 U.S. 507 (1980)).

As for appearance, when an official "possessed of state authority . . . *purports to act* under that authority, his action is state action." *Griffin*, 378 U.S. at 135 (emphasis added). Thus, this Court has recognized as a state actor a deputy sheriff who "wore a sheriff's badge and consistently identified himself as a deputy sheriff rather than as an employee of the [private] park" where he worked when he ordered civil-rights protesters to leave the park and then arrested and initiated prosecutions against them. *Id.* In that case, statements in the amended warrant indicating that the sheriff had acted as "an 'agent' of the park" had "little, if any, bearing on the character of the authority" the sheriff had "initially purported to exercise." *Id.* What mattered was how his authority appeared to those he arrested.

II. The purpose and appearance of a public official's social-media account determines state action.

On either end of the spectrum, the purpose-and-appearance test yields determinate results. Official social-media accounts bear the government body's or official's title, focus exclusively on government work, are open for public comment, typically use state resources, and may transfer from one officeholder to the next. They are therefore fairly attributable to the state. Conversely, personal accounts are listed under an individual's name rather than his or her official title, remain under the individual's control even after his or her term has expired, are often not publicly accessible, focus almost exclusively on personal matters, and do not use state resources. They are not state action.

In the middle lie campaign and mixed-use accounts. A campaign account will generally remain personal because it exists to support personal election efforts. But it may become a conduit of state action if, while in office, the account adopts the characteristics of an official account. Courts presented with a mixed-use account blending personal communications and official business should employ a granular post-by-post approach. The granular approach comports with precedent examining the specific function of the government official at issue, ensures that the state-action doctrine does not swallow an official's individual freedom, and prevents officials from circumventing the First Amendment by occasionally using a personal account to facilitate a public debate about government issues while censoring disfavored views.

A. Official social-media accounts are state action.

When a government body or public official uses an official social-media account, the account's purpose and appearance prove state action. These accounts (1) use the government body's name or official's title; (2) focus on government work; (3) are open for public comment; (4) typically use state resources; and (5) may transfer from one officeholder to the next.

First, official profiles operate under the name of the government body, like the Department of Justice,[2] or the officeholder's title, *see Lindke*, 37 F.4th at 1204 ("official Facebook account for the Governor of Kentucky titled @KentuckyGovernor" is state action). It may even be identified as an "official" account.[3]

Second, these profiles focus on the body or official's work and thus become "an organ of official business." *Campbell* v. *Reisch*, 986 F.3d 822, 826 (8th Cir. 2021). They "announce matters related to official government business"—like policy changes or judicial nominees. *Knight First Amend. Inst.* v. *Trump*, 928 F.3d 226, 236 (2d Cir. 2019), *vacated as moot sub nom Biden* v. *Knight First Amend. Inst.*, 141 S. Ct. 1220 (2021). And they may serve "as a channel for communicating and interacting with the public about" the government's work. *Id.* at 235; accord *Garnier* v. *O'Connor-Ratcliff*, 41 F.4th 1158, 1171 (9th Cir. 2022); *Felts* v. *Vollmer*, No. 4:20-cv-00821, 2022 WL 17546996, at *9 (E.D. Mo. Dec. 9, 2022) (finding state action in account posting government links and other "official activities").

---

[2] Justice Department, https://twitter.com/TheJusticeDept.

[3] *Id.* ("Official DOJ Twitter account").

Third, official accounts allow the general public to view and comment on the content they post. The ability of constituents to comment on posts factors into the forum analysis, *infra* Part III, but it also indicates an official profile. Government officials use public social-media accounts to "provide[] information to the public" and "solicit[] input from the public on policy issues." *Davison* v. *Randall*, 912 F.3d 666, 680 (4th Cir. 2019). Official accounts appear to be—and are—"official channels of communication with the public about the work" of the pertinent government actor. *Garnier*, 41 F.4th at 1171.

Fourth, official accounts are often run by government employees at the government's expense. A "tech-savvy governor['s]" use of the "state's payroll" to hire "a social-media team to manage her online presence" supports the conclusion that such presence is state action. *Lindke*, 37 F.4th at 1204.

Fifth, these accounts may transfer from one officeholder to the next. For example, the "@POTUS" and "@WhiteHouse" accounts "are official government accounts" such that "the President and members of the White House administration will not retain control over those accounts upon leaving office." *Knight*, 928 F.3d at 235 n.6. Such accounts further the public purpose of the office.

In sum, governments use official accounts for official business—not "private functions." *Polk Cnty.*, 454 U.S. at 319. The purpose and appearance of these accounts, as revealed by the above factors, show that they exercise power under state law and are clothed in state authority, making them "fairly attributable" to the state.

Applying these factors, the Ninth Circuit correctly held the social-media profiles here to be state action. The officials "identified themselves on their Facebook pages as 'government official[s],' [and] listed their official titles in prominent places on both their Facebook and Twitter pages." *Garnier*, 41 F.4th at 1171. One published her government email address, and the other, a school-district board member, identified his Facebook page as "the official page" for him "to promote public and political information." *Id.* Both officials "regularly posted about school board meetings, surveys related to school district policy decisions, the superintendent hiring process, budget planning, and public safety issues." *Id.* And the officials separated these publicly accessible accounts from "their private Facebook pages." *Id.* at 1163. As the Ninth Circuit put it, "the pertinent factors all indicate that [the officials] unequivocally cloaked their social media accounts with the authority of the state." *Id.* at 1173 (cleaned up).

B. Personal social-media accounts where no official business is conducted are just that: personal, non-state action.

Personal social-media accounts reside on the opposite end of the spectrum. These accounts (1) operate under an individual's name and remain under the individual's control even after his or her term has expired; (2) are typically not accessible by the general public; (3) focus almost exclusively on personal matters; and (4) do not employ state resources. Generally speaking, then, they would not cross the line into the domain of state action.

First, a personal account is in an individual's name and stays with the individual. "[A] Facebook page called @JohnDoe" evinces that it "belongs to Doe-the-citizen—not Doe-the-governor." *Lindke*, 37 F.4th at 1204. "That page will belong to Doe even after he leaves office—it's his, not the governorship's." *Id.* These accounts do not prominently identify the holder as a government official, nor do they provide government email addresses or website information. *See Garnier*, 41 F.4th at 1171 (official social-media profiles identified state actors as "'government official[s],' listed their official titles in prominent places on both their Facebook and Twitter pages, and, . . . included [an] official . . . email address").

Second, a personal social-media account often will restrict public access. An account can be "private," meaning only those whom the accountholder has "shared" it with will have access. *See Garnier*, 41 F.4th at 1163. A private account indicates the owner has reserved it for "family and friends"—not government business. *Id.* What's more, the existence of both a private account and a publicly accessible account for an official sharpens the divide between personal and public function. There is little reason to have two separate accounts—unless one exists for the government official as an official. *See id.* (government officials had "private Facebook pages" apart from their official social-media profiles).

Third, personal accounts focus on personal—not government—pursuits. When they use the "modern public square" to "gain access to information and communicate with one another about it on any subject that might come to mind," government officials engage in private activities. *Packingham*, 582 U.S. at 107. Just like everyone else, officials can use social

media to "debate religion and politics with their friends and neighbors or share vacation photos." *Id.* at 104. And mere job talk about a government position does not create state action. There is a dispositive difference between "self-promotional" talk about a recent raise or a discussion of a position's long hours and using social media "to communicate about . . . official duties." *See Garnier*, 41 F.4th at 1172. The former reflects personal concerns while the latter holds the "social media pages out to be official channels of communication with the public about the work of the [official]." *Id.* at 1171. An official account focuses on the official business of the government office or position and promotes the public office and public interests more generally. *Id.* at 1172. Whereas a personal account concerns and promotes the individual's "career[]." *Id.*

Fourth, personal accounts will not include those run by state-funded social-media teams, nor those funded by government resources. Rather, they will remain controlled and curated by the individual.

These factors separate personal conduct from state action, making accounts "personal and free from scrutiny under section 1983." *Lindke*, 37 F.4th at 1204. They also fortify individual liberty. Most government workers do not interact with constituents or the public at large, so they do not run their accounts as "organ[s] of official business." *Campbell*, 986 F.3d at 826. And that is especially true for lower-level employees. *Cf. Rankin*, 483 U.S. at 390–91 (When "an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal."). Meanwhile, public officials can easily operate separate personal and public accounts.

C. Election campaign profiles typically remain personal but can become official accounts.

Private citizens campaigning for office have personal social-media accounts. "[I]t seems safe to say that someone who isn't a public official cannot create an official governmental account." *Campbell*, 986 F.3d at 826. And being elected doesn't "magically alter [an] account's character." *Id.* An official can keep interacting with her campaign while in office "to promote herself and position herself for more electoral success down the road." *E.g.*, *id.* But as this case proves, a campaign account *can* "evolve into something different . . . if it becomes an organ of official business," *Campbell*, 986 F.3d at 826; *accord Garnier*, 41 F.4th at 1172 (state action when "[a]fter their election," officials "virtually never posted overtly political or self-promotional material," instead focusing on "official District business or promot[ing] the District generally"). Once again, purpose and appearance will be dispositive.

An account focused on campaign-related topics—even if it belongs to an elected official—is private conduct. Campaign pages share many of the same qualities as purely personal accounts. To remain personal, they should not use official titles or post on behalf of government bodies or officeholders. *Charudattan* v. *Darnell*, 834 F. App'x 477, 482 (11th Cir. 2020) (per curiam). Instead, they should discuss the campaign, publish photos of campaign events, tout endorsements, present the candidate's background and philosophy, and seek donations and other support. *See id.* Any discussion of official work should be for campaign purposes: "to create a favorable impression of [her] in the minds of her constituents."

Campbell, 986 F.3d at 827. In sum, an official should use a campaign account "to convince her audience to support her election bid." *Id.* at 826.

Campaign accounts *are* likely to be publicly accessible and discuss an official's work. *See id.* But those factors do not by themselves transform a private campaign page into an official social-media account. To avoid confusion, elected officials should clearly describe their purpose in using the page. One way is to use a "disclaimer that the statements made on this web site reflect the personal opinions of the author and are not made in any official capacity." *Garnier*, 41 F.4th at 1172 (cleaned up); *see also Charudattan*, 834 F. App'x at 479. A disclaimer cannot override other purpose-and-appearance factors that make an account state action, but it can show to the public the official's private campaign purpose.

Officials also can implicitly separate their campaign pages from their duties. A campaign page "does not convert itself into an official page just because the candidate chooses a handle that reflects the office she is pursuing" or because she "posts a photo of herself working at the job she was elected to perform and hopes to be elected to perform again." *Campbell*, 986 F.3d at 827. So a candidate can post about her work "to create a favorable impression of [her] in the minds of her constituents." *Id.* But such posts should *not* focus on official business, such as "announcing an appointee" or "coordinating [the] county's response to a blizzard." *Id.* The page should instead focus on campaign topics like "provid[ing] information on [the] local political party's annual chili supper and Lincoln Day banquet." *Id.*.

D. Courts should assess mixed-use accounts post by post.

Mixed-use profiles present the most difficult scenario for a state-action analysis. Officials may use their accounts to "feature[] a medley of posts" ranging from family photos to "administrative directives" issued as a government official. *Lindke*, 37 F.4th at 1201. Such accounts may also identify the account holder as "Daddy," "Husband," *and* "City Manager." *E.g.*, *id.* When courts are presented with such profiles, they should employ a more granular approach by assessing each post individually within the context of the page as a whole.

The dueling private and public nature of individual posts can make evidence of personal or official control more "equivocal." *Campbell*, 986 F.3d at 827. A public official may be engaging in state action by publishing certain posts, by engaging with constituents on those posts, and by limiting which of his constituents can engage with those posts and how. But the same official might *not* be engaging in state action with respect to other, more overtly personal posts, and thus might be entitled to greater control in limiting access to them. A post-by-post approach ensures proper respect for an official's individual liberty while not granting license to circumvent constitutional guarantees.

Precedent supports the post-by-post analysis. The state-employee status of a public defender does not establish per se state action. *Polk Cnty.*, 454 U.S. at 324–25. A public defender who "exercis[es] her independent professional judgment in a criminal proceeding" does not act under color of state law. *Id.* at 324. But one who makes personnel decisions on the state's

behalf does, as may one who "perform[s] certain administrative and possibly investigative functions." *Id.* at 325. That is, the public-employee status of the public defender does not determine the state-action requirement in all circumstances. Instead, the Court looks to the purpose and appearance of the particular action taken by the public defender.

Take *Lindke*. The city-manager defendant—Freed—mixed personal and official business posts. *Lindke*, 37 F.4th at 1201. The plaintiff—Lindke—criticized Freed's posts about city pandemic policies, which caused Freed to delete the critical comments and block Lindke from his page. *Id.* at 1201–02. Freed's page was public, he identified himself as a "public figure" and by his official title, and he listed the city's website and contact information. *Id.* at 1201.

After the district court granted Freed's motion for summary judgment and Lindke appealed, the Sixth Circuit tried to bring "the clarity of bright lines" to the case, but in the process, the court inadvertently blurred those lines. *See id.* at 1207. Essentially summarizing "a version of the Supreme Court's nexus text," the court stated that, when "analyzing social-media activity, [it] look[s] to a page or account as a whole, not each individual post." *Id.* at 1203.

Despite emphasizing the importance of "the context of the entire page," though, the court ultimately declined to consider either Freed's account as a whole or his individual posts. *Id.* Quite the opposite, "*[i]nstead of examining a page's appearance or purpose*," the court "focus[ed] on the actor's official duties and use of government resources or state employees." *Id.* at 1206 (emphasis added). And because the court found that "Freed did not operate

his page to fulfill any actual or apparent duty of his office," or "use his government authority to maintain it," the court held that "he was acting in his personal capacity—and there was no state action." *Id.* at 1207.

Adopting such a narrow duty-or-authority test would make it far too easy for government officials to flout the First Amendment rights of their constituents, as the other circuits seem to have recognized. *See id.* ("part[ing] ways with other circuits' approach to state action in this novel circumstance"). It would allow government officials to maintain mixed-use accounts with any appearance or purpose, to post any content to them, and to censor any speech on them however they saw fit—provided they stop short of "fulfill[ing] any actual or apparent duty of [their] office" or using their "governmental authority to maintain" the accounts. *Id.* at 1207. Such a deferential standard would encourage public officials to eschew official social-media accounts in favor of mixed-use accounts if they can ensure—regardless of how they appear—that such accounts are not required by state law, do not use state resources, do not arise from state authority, and do not use state staff. *See id.* at 1203–04.

Assessing the general purpose and appearance of the account as a whole without considering individual posts likewise falls short. A public official could still sprinkle in official content alongside private content and censor speech in response to the official content so long as the account stays mainly for personal use. Having insulated their online presence from the Constitution's oversight, public officials would be unaccountable for how they choose to limit or prohibit their constituents from engaging with them online.

Conversely, a post-by-post approach solves those problems by reasonably balancing an official's interest in regulating discussion of his or her personal affairs with the public's interest in speaking freely on issues of public concern. If the Sixth Circuit in *Lindke* had reviewed the district court's summary-judgment order under such a test, it could have reached a clearer and better result. While the court should have *started* its analysis by considering the overall purpose and appearance of Freed's once-private, now-public Facebook account (which the court refused to do), it also should have considered the purpose and appearance of each post that Freed prohibited Lindke from engaging with after Freed blocked him from his page.[4]

The purpose and appearance of Freed's pandemic-policy posts—to inform constituents about licit and illicit conduct—considered within the context of the page's governmental identifications, made those posts state action. Freed made those posts from his position possessed by virtue of state law, clothed in the authority of that position, and with the purpose of communicating with his constituents. So those posts were state action. And the same goes for his attempt to limit access to them.

That doesn't foreclose Freed's ability to control his personal postings on the same page. He can still limit who can view his family photos and personal updates.[5] And he retains his "rights to exercise editorial

---

[4] Under this approach, plaintiffs would have the burden of identifying posts they contend are state action. Courts would not be required to sift through every post to carry that burden for them.

[5] For example, Facebook lets users tailor the audience for specific posts. *See* Facebook, *Control who can see posts on your Facebook timeline*, https://www.facebook.com/help/246629975377810.

control over speech and speakers on" his personal posts. *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1932 (2019).

For mixed-use accounts, that approach works better than "look[ing] to a page or account as a whole." *Lindke*, 37 F.4th at 1203. It's also more consistent with precedent. *See, e.g.*, *Polk Cnty.*, 454 U.S. at 324–25; *West* v. *Atkins*, 487 U.S. 42, 56 (1988). If the Sixth Circuit had followed this approach in *Lindke*, it could—and should—have found that Freed's efforts to block access to his posts in which he was performing part of his official role were state action.

Setting a clear purpose-and-appearance rule has the benefit of reducing mixed-use profiles. It will incentivize government officials to keep separate personal and official accounts, which will protect both them and the public. And it will encourage the use of disclaimers and other clear indicators of private use by public officials to separate campaigning from governing. A clear rule will allow officials to retain their individual liberty to voice their personal views while not depriving the public of the opportunity to participate in public debate. And that's exactly what the state-action doctrine should accomplish.

III. If a court finds state action, standard First Amendment forum analysis applies to any government restrictions on speech.

Once a court determines that a government official's social-media activity constitutes state action, standard First Amendment public-forum principles will apply to any resulting restrictions on speech. This doctrine is well-suited to govern public officials' social-media activity under this Court's precedent. It

sets clear guardrails that would prevent official government accounts from discriminatorily censoring private citizens' online speech. And it gives public officials some flexibility to place reasonable restrictions on the way the public interacts with their accounts, consistent with the account's purpose, provided they do not single out disfavored viewpoints on issues of public concern.

A. Forum analysis preserves free and uninhibited debate in the public square.

The public-forum doctrine "sharply circumscribe[s]" the "rights of the state to limit expressive activity" and applies "[i]n places which by long tradition or by government fiat have been devoted to assembly and debate." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The doctrine first developed in recognition of the special role that streets and parks have held as places for speech, assembly, and public debate. *See Hague* v. *Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

Today, the internet and social media have taken on a similar role as streets and parks, serving as significant hubs for public expression and debate. "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear." *Packingham*, 582 U.S. at 104. "It is cyberspace—the vast democratic forums of the Internet in general, and social media in particular." *Id.* (cleaned up).

Forum analysis links the character of the place where expression occurs to the permissible level of government regulation.

1. For *traditional public forums*, such as streets and parks, "the government may not prohibit all communicative activity," meaning that any content-based restrictions must survive strict scrutiny. *Perry*, 460 U.S. at 45. But the government may enforce "content-neutral [and] narrowly tailored" regulations of the "time, place, and manner of expression," *id.*, prohibiting, for example, loud events in residential areas provided that the regulations apply equally no matter the event's content or its viewpoint.

2. The public-forum doctrine does not end with the "traditional" public square—the government may also establish *designated public forums*, areas that "the state has opened for use by the public as a place for expressive activity." *Id.* The key difference from traditional public forums is that the government need not create and need not keep open designated public forums. Otherwise, the rules governing speech restrictions for designated public forums are the same: "Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Id.* at 46.

3. The government may also create *limited public forums* by "reserving [a forum] for certain groups or for the discussion of certain topics." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *accord, e.g.*, *Perry*, 460 U.S. at 46 n.7. When it does, restrictions on the forum must be (1) reasonable, and (2) viewpoint neutral. *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001).

4. Finally, *nonpublic forums* are "[p]ublic property which . . . by tradition or designation" have not been "forum[s] for public communication." *Perry*, 460 U.S.

at 46. In a nonpublic forum, the government can have a "selective access" policy in which "individual non-ministerial judgments" govern forum participation, again subject to the same two limitations: any policy must be (1) reasonable, and (2) viewpoint neutral. *Ark. Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 680 (1998); *accord*, *e.g.*, *Perry*, 460 U.S. at 46.

The government may not discriminate based on viewpoint—in any forum. *Int'l Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 679 (1992); *accord Pleasant Grove City* v. *Summum*, 555 U.S. 460, 469–70 (2009) (requiring viewpoint neutrality for traditional, designated, and limited public forums); *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (same for nonpublic forums). Viewpoint discrimination occurs "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger*, 515 U.S. at 829. This Court has repeatedly condemned viewpoint discrimination as "an egregious form of content discrimination," *id.*, and "poison to a free society," *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring). Thus, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829.

The prohibition on viewpoint discrimination also means public officials cannot be granted unbridled discretion to censor speech in any forum. This Court "consistently condemn[s]" speech regulations that "vest in an administrative official discretion to grant or withhold a permit based upon broad criteria unrelated to proper regulation of public places." *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147,

153 (1969). With vague or non-existent criteria on which to make their decisions, government officials "may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 763–64 (1988). Speech restrictions therefore must contain "narrow, objective, and definite standards to guide" officials. *Shuttlesworth*, 394 U.S. at 150–51. In the social-media context, as in any context, government officials must employ policies with "narrow, objective, and definite standards" when those policies result in restrictions on speech.

B. Public officials' activity on social media can create either designated or limited public forums.

After a court determines that a government official's social-media activity constitutes state action, the court still must determine whether the official has created a "forum" for speech or whether the communication is truly one-way and limited to government speech. When the public is given the ability to interact with a government-controlled account, the account becomes a forum for speech by its very nature. *See, e.g.*, *Knight*, 928 F.3d at 236 (describing the social-media account at issue as having "interactive features open to the public, making public interaction a prominent feature of the account," and stating that "[t]hese factors mean that the account is not private"); *accord*, *e.g.*, *Packingham*, 582 U.S. at 104 (describing social media as particularly significant spaces "for the exchange of views" today). Moreover, a forum does not need to be "spatial or geographic." *Rosenberger*, 515 U.S. at 830. The "same principles" apply to a "metaphysical" forum. *Id.*

Assuming the public can access and interact with them, government officials' social-media accounts can create either designated or limited public forums. If state-action social-media accounts and posts allow the public to openly comment on and otherwise interact with them, they become designated public forums. So the typical, run-of-the-mill government-controlled social-media account that is open to the public for "indiscriminate use" (without any governmental speech-regulating policy in place) would become a designated public forum because "the state has opened [it] for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 45, 47. As such, an official could place content-neutral time, place, and manner restrictions on the public's interactions with the account, but any content-discriminatory regulations would have to survive strict scrutiny. *Id.* at 46.

State officials also can place certain "reasonable" limitations on their official social-media accounts, thereby transforming them into limited public forums. *See Forbes*, 523 U.S. at 680. For example, government social-media accounts can establish narrow, objective, and definite "polic[ies] and practice[s]" restricting discussion to certain topics relevant to the officials' work or setting rules against unlawful harassment. *Cornelius*, 473 U.S. at 802; *Garnier*, 41 F.4th at 1179 (discussing how the use of keyword filters that automatically block comments created a limited public forum); *Davison* v. *Plowman*, 247 F. Supp. 3d 767, 777 (E.D. Va. 2017), *aff'd*, 715 F. App'x 298 (4th Cir. 2018) (approving "clearly off topic" restriction). But "unwritten rule[s] of decorum" do not qualify. *Garnier*, 41 F.4th at 1167.

Based on these standard First Amendment principles, the Ninth Circuit here correctly held that the challenged government social-media accounts, absent a "policy or practice of regulating the content" of speech that the public posted on them, created designated public forums, and that the later addition of word-filter limitations transformed them into limited public forums. *Id.* at 1179.

C. Forum analysis protects public debate while preserving officials' control over their personal accounts and protecting their own First Amendment freedoms.

Using this Court's standard public-forum analysis, the Ninth Circuit correctly held that the Trustees violated the Garniers' First Amendment rights. The same cannot be said for the Sixth Circuit in *Lindke*. If the Sixth Circuit had used a post-by-post test, it should have recognized that at least some of the defendant's social-media activity was state action. It then could have held that the defendant violated the plaintiff's First Amendment rights—a vital question that the Sixth Circuit's state-action analysis prevented it from even entertaining.

Because Freed, the government official in *Lindke*, converted his Facebook page from a private to a public account, and because he employed no restrictions on who could follow his account or comment on his posts, any of his posts in which he carried out his official functions created designated public forums. *Lindke*, 37 F.4th at 1201; *cf. Garnier*, 41 F.4th at 1179 ("Where, as here, the government has made a forum available for use by the public and has no policy or practice of regulating the content posted to that forum, it has created a designated public forum.")

(cleaned up). In a designated public forum, officials can employ content-neutral and "reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions" are "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (cleaned up). But as in any public forum, "restrictions based on viewpoint are prohibited." *Pleasant Grove City*, 555 U.S. at 469.

Under this Court's standard forum analysis, the Sixth Circuit could have held that Freed's retaliatory actions of deleting Lindke's comments and then blocking Lindke from the page constituted viewpoint discrimination. After all, Freed used his public account to share "information about City programs, policies, and actions," post "about the COVID-19 pandemic and the City's response to it," and comment on news articles that reported on city actions. *Lindke* v. *Freed*, 563 F. Supp. 3d 704, 706–07 (E.D. Mich. 2021); *Lindke*, 37 F.4th at 1201. But Freed then deleted Lindke's comments that "questioned and criticized the response of Port Huron governmental officials, including Freed, to the COVID-19 pandemic." *Lindke*, 563 F. Supp. 3d at 707; *see Lindke*, 37 F.4th at 1201–02. And Lindke was not alone: "four other individuals testified that Freed deleted their comments on Freed's posts that were critical of Freed or the City's actions on different issues." *Lindke*, 563 F. Supp. 3d at 707.

Freed also likely could not have met his burden to show that his decision to completely block Lindke was narrowly tailored. Freed's decision to block Lindke likely "burden[ed] substantially more speech than is necessary." *Ward*, 491 U.S. at 799. Like the Garniers,

Lindke could not "leav[e] any comments at all, no matter how short, relevant, or non-duplicative they might be." *Garnier*, 41 F.4th at 1182. If the Sixth Circuit had held that Freed's posts were state action and that his actions against Lindke and other constituents violated the First Amendment, then Lindke and other concerned citizens could have held their city manager accountable for his online censorship.

That drastically different outcome highlights the importance of the questions presented in these cases, especially for organizations whose mission is to influence the climate of public opinion and shape public policy. Much public engagement now occurs online, where many public officials—at all levels of government—are present and active, personally and professionally. In the ever-evolving world of social media, where public officials blend their personal and professional lives, it is possible to balance a government official's interest in regulating discussion of his or her personal affairs with the public's interest in speaking freely on matters of public concern. But it is only possible if courts employ the correct test to properly identify state action in all its forms—including discrete posts on otherwise blended social-media accounts—and hold public officials accountable for free-speech violations while allowing them proper breathing room to convey their messages and exercise their own First Amendment rights.

CONCLUSION

The Court should apply the purpose-and-appearance test for social-media state action and affirm.

Respectfully submitted,

ILYA SHAPIRO
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 20017
(212) 599-7000

CORTNEY C. THOMAS
BRIAN E. ROBISON
RUSSELL T. BROWN
BROWN FOX, PLLC
8111 Preston Rd.
Suite 300
Dallas, TX 75225
(214) 327-5000

JOHN J. BURSCH
Counsel of Record
RYAN L. BANGERT
JEREMY D. TEDESCO
CHRISTOPHER P. SCHANDEVEL
MICHAEL R. ROSS
MATHEW W. HOFFMANN
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, VA 20176
(616) 450-4235
jbursch@ADFlegal.org

AUGUST 2023