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 *AMICUS CURIAE* OF FIRST AMENDMENT CLINICS, CITIZENS, AND JOURNALISTS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici include the First Amendment Clinics at Duke, Illinois, Tulane, Southern Methodist, and Vanderbilt Law Schools. These clinics defend and advance freedoms of speech, press, assembly, and petition through court advocacy. The Clinics serve as an educational resource on free expression and press rights and provide law students with real-world practice experience to become leaders on First Amendment issues. The Clinics engage in advocacy and representation across the country and have an interest in promoting the sound interpretation of the First Amendment to preserve the freedom of speech afforded by the U.S. Constitution and subsequent court precedents.

Amici also include a non-partisan coalition of citizens and journalists whose comments have been deleted or hidden, or who have been blocked by public officials and public entities from their social media accounts. *Amici* live in North Carolina and Arizona. Some members of the coalition have not sought legal recourse after being blocked or deleted. Others are previously or currently represented, pro bono, by First Amendment clinics at the law schools of the Universities of Georgia, Arizona State, Tulane, and Duke. These *amici* are: Meg Larson (N.C.); Steven Barrett (N.C.); Matthew Creech (N.C.); Corey Friedman (N.C.); and Joshua Gray (Ariz.). First Amendment practitioner and scholar Andrew Geronimo, Director

[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

of the First Amendment Clinic at Case Western Reserve University School of Law, also joins in his personal capacity.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The exclusion of members of the public from social media platforms by government officials and agencies creates a fundamental free speech problem in our modern digital age. The question before this Court is what state action test should be used to address this problem, given this Court's commitment to a robust right of free speech under the First Amendment. Two categories of tests have been proposed by the circuit courts of appeal: a "duty-authority" test by the Sixth Circuit and an "appearance-purpose" test by the Second, Fourth, Eighth, and Ninth Circuits. While the appearance-purpose test is more protective of speech interests than the narrow duty-authority test, neither approach adequately protects the right of free speech.

Given the importance of public access to information and discourse on the social media accounts of government agencies and officials, this Court should instead adopt a test that creates a presumptive right of public access to such accounts, which, as in similar public access contexts, would be rebuttable. The presumption can be overcome only if the public official or entity can demonstrate either that: 1) the social media account is a truly private account; or 2) there is a compelling interest that justifies restriction of access to the social media account, and the limited restriction is narrowly tailored to achieve that interest.

This brief will provide a perspective on social media blocking that derives from providing pro bono services to citizens and journalists who have been blocked or deleted by public officials and public entities on their social media accounts. The issue is nonpartisan – there are social media blockers on both sides of the political aisle, and citizens of all political affiliations have been blocked. Some of the most egregious examples come from small towns and rural areas where social media is often the sole source of news. *Amici* will highlight why the rebuttable presumption test proposed herein best supports the free speech rights implicated in social media blocking by public officials and entities.

ARGUMENT

I. Free speech rights are best protected by a rebuttable presumption of public access to the social media sites of government entities and officials.

Social media platforms such as Facebook, Instagram, and Twitter (now known as X) facilitate the flow of information and communication between the public and its representatives. A clear and administrable test for state action is necessary to robustly protect discourse in these virtual spaces. Yet, the current state action tests are fact-intensive and difficult to apply, making outcomes unpredictable. Moreover, requiring constituents to litigate social media access unreasonably places the onus on individuals to advocate for access through a costly and time-intensive court process, in lieu of a speech-protective regime that incentivizes government actors to ensure their personal social media activity is distinct from their

official platforms and that official channels comport with viewpoint-neutral principles. The existing circuit tests fail to establish a bright-line rule to guide the conduct of government actors and protect the constitutional rights of members of the public and press. For that reason, this Court should adopt a rebuttable presumption of access as the standard for classifying state action in a public official's social media accounts.

A. Government use of social media is pervasive.

This Court has recognized that "cyberspace—the 'vast democratic forums of the Internet' in general . . . and social media in particular" is currently the most important place for the modern exchange of views. *Packingham v. North Carolina,* 582 U.S. 98, 104 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)). Not surprisingly, public officials and entities have abandoned more traditional modes of communication in favor of social media. The reasons are simple: social media provides a cost-effective (i.e., free) medium for "quickly and timely relaying information while simultaneously engaging with large numbers of constituents." Clare R. Norins & Mark L. Bailey, *Campbell v. Reisch: The Dangers of the Campaign Loophole in Social-Media-Blocking Litigation*, 25 U. Pa. J. Const. L. 146, 148 (2023).

With this shift toward government use of social media comes a litany of challenges that threaten the First Amendment rights of citizens. Government actors block access to their pages or delete or hide the comments of political critics and opponents, thereby curtailing speech and stifling dissenting voices at the cost of an informed electorate. *See generally Davison*

v. Randall, 912 F.3d 666, 687 (4th Cir. 2019) (concluding the Chair of the County Board of Supervisors engaged in viewpoint discrimination when she blocked a constituent for criticizing the school's budget); *see also Wagschal v. Skoufis*, 442 F. Supp. 3d 612, 615 (S.D.N.Y. 2020) (finding that a constituent was blocked for accusing an official of condoning racism and antisemitism); *Biedermann v. Ehrhart*, No. 1:20-CV-01388-JPB, 2023 WL 2394557, at *2 (N.D. Ga. Mar. 7, 2023) (unpublished) (analyzing claim that an official blocked over sixty constituents for critiquing proposed legislation). A serious threat to constituents' access to information develops when constituents rely on government officials to deliver information through social media, but those same officials have the unbridled power to selectively block access to information and remove individuals from the public discourse.

This shift to reliance on social media as a news source is evident throughout the nation, with Arizona serving as an example of the shift and its potential risks. First, most of Arizona's counties have social media pages for government activities and information. Arizona's two largest counties, Maricopa and Pima, interact with citizens through platforms such as YouTube, Facebook, and Twitter. Smaller counties within Arizona also have such platforms to communicate with the public. *See Arizona Government and Social Media,* Ariz. State Univ. Sandra Day O'Connor Coll. of Law First Amendment Clinic (June 27, 2023), https://perma.cc/78UG-YLZC. Citizens of rural counties have increasingly come to rely on access to public officials' social media accounts for news regarding governance, policy, and public services in the wake of the dwindling presence of traditional media. *See*

generally Penelope Abernathy, Arizona, *The Expanding News Desert* (2023), https://perma.cc/ 5P2B-4PPZ (last visited June 26, 2023). Second, Arizona's local government officials have around 213 social media accounts between both chambers of the legislature, averaging two accounts per representative or senator. Meanwhile, every member of Arizona's delegation to Washington has at least three different social media accounts. *See Arizona Government and Social Media*, *supra* at 9.

Arizona's public officials have few qualms about blocking people from their social media sites. U.S. Representative Paul Gosar declared in a Facebook post that "we don't care if a Facebook 'block' offends you." Ronald J. Hansen, *Arizona Congressman: 'So You're Upset I Blocked You on Facebook. Here's Why I Don't Care,'* AZCentral (July 7, 2018), https://perma.cc/SG35-MT4M. Representative Gosar notoriously blocked the comments of hundreds of users on his Twitter account before he was sued and agreed to stop blocking people based on his dislike of their comments. *See* Compl. at 3, *Morgaine v. Gosar*, No. 3:18-cv-08080-DGC (D. Ariz. June 11, 2018); *see also* Howard Fischer, *ACLU Drops Morgaine v. Gosar Lawsuit*, The Miner (Aug. 4, 2018), https://perma.cc/-3PU3-XG5N (reporting that the ACLU of Arizona dropped the case after Gosar changed his policy).

Social media blocking by public officials is so pervasive nationwide that a number of American Civil Liberties Union state chapters have created "social media blocking toolkits" for citizens in liberal and conservative jurisdictions across the country. *See, e.g.,* ACLU Ariz., *Social Media Blocking Toolkit,* https://perma.cc/GKG3-TXJX (last visited June 23,

2023); ACLU Mass., *Know Your Rights: Social Media Blocking by Public Officials*, https://perma.cc/TPP6-KMJ8 (last visited June 29, 2023); ACLU Wyo., *So You Got Blocked by a Politician on Social Media*, https://perma.cc/LB44-2N49 (last visited June 29, 2023).

Indeed, improving public access to the social media accounts of public officials and entities would benefit the First Amendment rights of citizens of *all* viewpoints. *See, e.g., Felts v. Vollmer*, No. 4:20-CV-00821 JAR, 2022 WL 175469964, at *4 (E.D. Mo. Dec. 9, 2022) (assessing claim that democratic lawmaker blocked constituent because of her critical viewpoint in a public debate about a local jail closure); *People for the Ethical Treatment of Animals v. Tabak*, No. 21-CV2380 (BAH), 2023 WL 2809867, at *2 (D.D.C. Mar. 31, 2023) (discussing the National Institutes of Health's efforts to restrict comments criticizing the practice of animal testing by animal-rights activists through the use of keyword filtering on Facebook and Instagram); *Reynolds v. Preston*, No. 3:22-CV-08408-WHO, 2023 WL 2825932, at *1 (N.D. Cal. Mar. 15, 2023) (considering claim of writer for the *Marina Times* newspaper who was blocked by a member of the San Francisco Board of Supervisors for statements made opposing the defunding of police).

The proliferation of social media usage by public officials has the potential to increase access to information about public matters. However, the public's First Amendment right to access this information and participate in public discourse is threatened by the lack of clear standards governing officials' use of social media. Having acknowledged that "vagueness chills speech," this Court should establish a clear and

predictable test for state action that robustly protects the rights of the public to access and interact with the social media accounts of public officials and agencies. *Reno v. ACLU*, 521 U.S. at 871–72.

B. The appearance-purpose test, adopted by four circuit courts of appeals, more accurately assesses state action, but does not adequately protect expressive rights.

To assess whether public officials have deprived a person of their First Amendment rights by deleting their comments or blocking them from their official social media page, courts must determine whether the actions of the official are "fairly attributable" to the state. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Using the nexus test, courts engage in a fact-intensive inquiry to determine whether there is "such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Id.* (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). A robust, comprehensive, and easily ascertainable test would best protect people's First Amendment rights in the "vast democratic forums of the internet." *Packingham,* 582 U.S. at 104 (quoting *Reno,* 521 U.S. at 868).

The Sixth Circuit's duty-authority test considers only a few of the factors relevant to assessing whether state action exists. *Lindke v. Freed*, 37 F.4th 1199, 1203–04 (6th Cir. 2022). By contrast, the appearance-purpose test used by the Second, Fourth, Eighth, and Ninth Circuits is a more comprehensive inquiry that protects the fundamental First Amendment principle of "access to places where [people] can

speak and listen," as applied to social media in our "modern era." *Packingham*, 582 U.S. at 104; *see Knight First Amend. Inst. at Colum. Univ. v. Trump*, 928 F.3d 226, 234–36 (2d Cir. 2019), *vacated as moot sub nom.*, *Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. 1220, 1220–21 (2021); *Davison,* 912 F.3d at 680; *Campbell v. Reisch*, 986 F.3d 822, 826–27 (8th Cir. 2021) . The appearance-purpose test not only considers the *Lindke* factors, but also evaluates the appearance and use of the social media page.

For example, the test considers whether public officials cloak their social media pages with the power and authority of their offices, such as with official seals, titles, and photographs, or by providing their government contact information. *Knight*, 928 F.3d at 234–36 (noting that the president's Twitter account was presented as "belonging to, and operated by, the President" and was registered to "Donald J. Trump, '45th President of the United States of America, Washington, D.C.'"). These appearance factors are important because people will assume that they are interacting with public officials when their social media pages display the trappings of government office. *See Davison,* 912 F.3d at 680–81 (noting that the county official's page (1) included her title, (2) was categorized as the page of a government official, (3) listed official email address and phone number as contact information, and (4) included the web address of the county website). The appearance-purpose test also considers whether the official has sought certification from the platform as an official or verified page. Such badges are designed to foster public trust that the site is the "authentic presence" of the public figure it

represents and to bolster the impression that one is actually interacting with a public official through his social media site. *See, e.g.*, *Request a Verified Badge on Facebook*, Facebook (June 29, 2023), https://perma.cc/E23X-W5K5; *About Twitter Verified Organizations*, Twitter (June 29, 2023), https://-perma.cc/CPT9-EQ7J; *Requirements to Apply for a Verified Badge on Instagram*, Instagram (June 29, 2023), https://perma.cc/HU4Q-ENRN.

The test also evaluates whether officials use the platform to communicate about their official duties, whether it has interactive features, and whether the official encourages the public to interact with her through the social media site. *See, e.g.*, *Knight*, 928 F.3d at 235–36 (noting that the President used his Twitter account "as a channel for communicating and interacting with the public about his administration," including to announce "matters related to official government business," "to engage with foreign leaders," "to announce foreign policy decisions and initiatives," and "to understand and to evaluate the public's reaction to what he says and does"); *Davison,* 912 F.3d at 680–81 (noting that county official mostly posted content related to her office on her Facebook page; that many of her posts were addressed collectively to "Loudon" (her constituency); that official had submitted posts on behalf of the county board as a whole; and that official had asked constituents to use the page as a channel for "back and forth constituent conversations"). All told, these factors provide a holistic assessment of the appearance and function of the social media site, and the public's perception of it, in determining whether state action exists. When officials use the apparent authority of their office to maintain a

social media site, First Amendment protections, such as viewpoint neutrality, should protect this "avenue to communicate between the public and the [State]." *Blackwell v. City of Inkster*, 596 F. Supp. 3d 906, 912 (E.D. Mich. 2022).

Despite the more encompassing nature of the appearance-purpose test, this fact-intensive inquiry places a significant burden on litigants and suffers from unpredictable outcomes. *Scarborough v. Frederick Cnty. Sch. Bd.*, 517 F. Supp. 3d 569, 579 (W.D. Va. 2021) (noting plaintiff's discovery burden in a case alleging viewpoint discrimination after being blocked by school board members for criticizing COVID-19 protocols and facemask policy). The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976) (citation omitted). Not only could prolonged litigation moot cases prematurely before parties can obtain relief, even the prospect of costly and protracted litigation would chill speech. *See Biden*, 141 S. Ct. at 1220 (case mooted on appeal due to intervening election). Establishing a rebuttable presumption that the operation of social media by government officials and entities constitutes state action would optimize speech protections and promote judicial efficiency.

C. A rebuttable presumption of access to social media sites provides optimal protection for First Amendment rights.

The free speech rights implicated by social media blocking require the protection of a test that presumes a public right of access to social media sites that provide important government information and

facilitate participation in public discourse. The test should simply be that when a public official's interactive social media site provides any kind of official information, a rebuttable presumption attaches that the official has created a public forum governed by First Amendment principles. This presumption can be overcome by following the standard "strict scrutiny" test—where the official demonstrates that a compelling state interest justifies such an exclusion, and the exclusion is narrowly tailored to meet that interest, see, e.g., *R.A.V. v. St. Paul,* 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 115 (1991); *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015)—or this Court's *Press-Enterprise* test for court access—"the presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"). Additionally, an official could avoid the public forum designation by demonstrating that an account is purely personal and devoid of anything constituting state action, such as the inclusion of government contact information or the announcement and discussion of official business.

The benefit of a rebuttable presumption of access is to establish a definite standard that promotes judicial efficiency and reduces the time and cost of litigation for prospective plaintiffs. Additionally, if elected officials are responsible for ensuring the distinction between their official and personal communications, they will be incentivized to separate their public and private accounts. Furthermore, using a

rebuttable presumption of access simplifies litigation, promotes First Amendment values, and discourages bad faith actors from using the threat of burdensome litigation to silence dissenters.

This Court already uses a rebuttable presumption of access to protect First Amendment rights. In *Richmond Newspapers*, Chief Justice Burger observed that a public right of access is implicit in the First Amendment because the Amendment was designed to ensure a meaningful right to communicate on matters relating to the functioning of government. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 558, 575 (1980). In *Globe Newspaper Co.*, Justice Brennan similarly observed that the structural values underlying the First Amendment support a presumptive right of public access "to ensure that this constitutionally protected 'discussion of government affairs' is an informed one." *Globe Newspaper Co. v. Super. Ct.,* 457 U.S. 596, 604–05 (1982). Indeed, the public's right of access under the First Amendment raises confidence in the system of governance, educates the public, and maintains the integrity of the public process.

While these fundamental principles were articulated in court access cases, they are equally applicable to the Court's examination of whether a public official or entity has impermissibly restricted access to government information and discourse on social media. In *Press-Enterprise II*, Chief Justice Burger established a two-part First Amendment inquiry for access to government processes: 1) "whether the place and process [was] historically . . . open to the press and general public" and 2) "whether public access [played] a significant positive role in the functioning of the particular process in question." *Press-*

Enterprise Co. v. Super. Ct., 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*"). Both of these principles justify the application of the presumption of access to a social media forum. Today, distribution by social media has replaced many of the historical forms of communication that would have been open to the press and the public. Furthermore, "the internet generally, and particularly social media, is a new space for public discourse analogous to traditional public forums." *One Wisconsin Now v. Kremer*, 354 F. Supp. 3d 940, 953 (W.D. Wis. 2019). This Court has already acknowledged the importance of social media platforms for public discourse and the exercise of a citizen's First Amendment rights. *See Packingham,* 582 U.S. at 101. The social media accounts of public officials and entities have replaced their historical physical counterparts.

A test that presumptively favors public access incentivizes officials and politicians to enforce a distinction between public and private social media accounts in their own postings. By contrast, upholding even the Ninth Circuit's capacious test for state action provides the opposite incentive, inviting incumbent officials to mask their social media sites as campaign sites to avoid the responsibilities of lawfully managing a public forum. Requiring officials to separate personal from public accounts eliminates the "game playing" of social media postings that lead to fact-intensive discovery whenever a controversy over blocking arises.

This Court should put aside the complexities and burdens of the state action test. Instead, there should be a rebuttable presumption of public access to

social media accounts operated by public officials and government entities.

D. A rebuttable presumption of access to social media sites could arguably apply to the social media sites of non-incumbent political candidates, thereby increasing speech about campaigns.

A rebuttable presumption that the social media sites of public officials are public forums could arguably attach to the social media accounts of non-incumbent candidates for office. Candidates are already subject to restrictions on their speech. For instance, this Court long ago held that while monetary contributions constitute First Amendment-protected speech, "the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling." *Buckley v. Valeo*, 424 U.S. 1, 29 (1976). Because the political speech of the voters is fundamentally more important to the democratic process than the right of a candidate to regulate a forum, a similar "limited effect" on a candidate's expression is justified. In short, restrictions on how candidates can regulate a forum would be more akin to allowable "time, place and manner" restrictions, *see, e.g., Ward v. Rock Against Racism*, 491 U.S. 781 (1989), while fully giving voice to those voters wishing to participate in democratic discourse.

A rule recognizing that candidates also create and are limited by public forums would not be tantamount to allowing the censorship of candidate speech itself. Instead, it recognizes that candidates have a

greater obligation than most speakers to maintain the robust speech of a public forum that is essential to a democracy. The First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989). Far from serving as a restriction on candidates' speech, such a recognition would instead be consistent with this Court's holdings on the rights of voters to speak and participate in campaigns. The "discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. … In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *Buckley*, 424 U.S. at 14–15. Requiring non-incumbent candidates to abide by constitutional norms on their social media sites would equalize the playing field between incumbent and non-incumbent candidates and also protect the rights of voters to engage in the virtual town square on issues of public import. This would ensure that "political speech . . . prevail[s] against laws that would suppress it, whether by design or inadvertence." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010).

II. A presumptive right of public access to the social media sites of government officials and entities is vital to protect First Amendment values.

To fully understand the deleterious effect of social media blocking, this Court should consider four critical values served by social media in the modern free speech context: access, interaction, discourse, and the

public record. First, the public relies on access to social media pages to obtain information about events and services relevant to their daily lives. Second, public social media pages enable direct communications between citizens and government officials, facilitating communication, petitions for redress, and providing a means for government actors to offer services and assistance. Third, social media promotes discourse among citizens and engagement with public issues. Finally, social media pages function as a repository of information about the actions of government agencies and officials. These values are particularly relevant in small towns and rural areas that lack media coverage of local news, where social media can be the primary or, in some instances, the *only* way to obtain news about local government and officials.

A. Social media blocking by public officials eliminates access to information about governance, policy, and public services.

Arizona provides an example of how rampant social media blocking prevents citizens from accessing the most basic information about government officials. Based on one survey conducted in Arizona, twenty-eight out of forty Arizona lawmakers block at least one person on social media. Rachel Leingang, *Politicians Block Constituents' Speech on Social Media,* Ariz. Capitol Times (Mar. 16, 2018), https://perma.cc/Q3KM-64TS. To give just one example, in 2013, Representative Bob Thorpe of the Arizona House blocked critics—including reporters with the Arizona Capitol Times—from following his Twitter account following a backlash in response to his racially insensitive tweets. Jeremy Duda, *Thorpe Erases Tweets, Locks Down Twitter Account Following*

Racism Accusations, Ariz. Capitol Times (Aug. 14, 2013), https://perma.cc/WK7E-QC2G. Blocking the press impedes the widespread dissemination of news about the representative's policies and views by making it more difficult to access that information.

It is all too common that public officials do not respond to requests to be unblocked. In early 2022, Joshua Gray, a politically engaged Arizonan and frequent Twitter user, was blocked from Arizona Senator Anthony Kern's Twitter account after he criticized Kern's politics. Senator Kern uses Twitter for various purposes, including discussing his political beliefs, speaking about his opinions on prominent issues, and relaying news about the areas he represents. Mr. Gray has not received a response from Senator Kern regarding his request to be unblocked and is effectively prevented from accessing Senator Kern's governance and policy perspectives. *Arizona Government and Social Media,* Ariz. State Univ. Sandra Day O'Connor Coll. of Law First Amendment Clinic (Jun. 27, 2023).

In Missouri, the president of the St. Louis Board of Aldermen blocked a constituent on Twitter because she tweeted a request for him to "clarify his position on @CLOSEWorkhouse." *Felts*, 2022 WL 17546996 at *3. In rural Alexander County, North Carolina, Steven Barrett was blocked from the Facebook page of his daughter's public school district for having the temerity to post a question asking whether buses would be running on a snowy, winter morning. Due to a disability, Mr. Barrett could not drive his daughter to school to find out whether schools were open, and he hoped to avoid her needlessly waiting for the school bus in the dark at 6:00 a.m. The school

district had a policy of only permitting positive comments on its Facebook page so it deleted his post and blocked him. Mr. Barrett was not only cut off from addressing the school regarding their weather emergency policies, but he was thereafter prevented from accessing any information conveyed by the district through its Facebook page, whether celebrations of student achievements or updates from the superintendent. The district ignored his requests to be unblocked until he engaged legal counsel.

In short, blocking the public from social media sites starves them of information on issues large and small—from the attitudes and policies of state-wide elected officials to the openings and closings of public schools. There is no justification for denying access to such information based on a mere dislike of a user's comment.

B. Social media provides critical opportunities for direct interaction between government officials and constituents.

Social media platforms are "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham,* 582 U.S. at 107. Elected officials, federal and state agencies, and other government entities use social media platforms to solicit and receive input from constituents and to offer services to the public. This engagement provides a critical opportunity for members of the public to communicate directly with government officials and employees through reactions, posts, and messaging functions. *See, e.g.*, *Davison*, 912 F.3d at 673 (noting the official's page invited feedback by

stating: "I really try to keep back and forth conversations (as opposed to one time information items such as road closures) on my county Facebook page").

Interactive social media sites also facilitate the petitioning of the government—another right protected by the First Amendment. *See Edwards v. South Carolina,* 372 U.S. 229, 235 (1963) (affirming that "peaceably express[ing] . . . grievances" is "an exercise of basic constitutional rights in their most pristine and classic form"). Yet, when people are blocked from accessing a government social media page because they have expressed critical views, they are effectively prevented from asking for government services through the social media account because of those critical viewpoints. *See Miller v. Goggin*, 2023 WL 3294832, at *11 (E.D. Pa. May 5, 2023) (noting "content-neutral restrictions, even if reasonable, cannot be applied to foreclose a specific viewpoint"); *Attwood v. Clemons*, 526 F. Supp. 3d 1152, 1161–62 (N.D. Fla. 2021) (analyzing claim that plaintiff was impermissibly blocked after challenging a representative's voting decision); *Price v. City of New York*, No. 15 CIV. 5871 (KPF), 2018 WL 3117507, at *16 (S.D.N.Y. June 25, 2018) (concluding plaintiff was blocked after criticizing city officials for inadequate services for domestic violence victims). Accordingly, to the extent that government social media sites are interactive, the interactive features cannot be denied to users based on their viewpoints. *Id.*

When government officials block citizens from their social media accounts, they effectively create two classes of citizens, those who can petition and interact with their government and those who cannot. Alderman James Gardiner of Chicago, for example,

maintained a highly interactive Facebook page where, among other things, he "solicited citizen input about how Tax Increment Financing ('TIF') funds will be used for improvements in the 45th Ward" and allowed "hundreds of Chicagoans [to] participate in the comments sections on [his] posts, expressing opinions, asking questions, and engaging in debate." Compl. at 2, *Czosnyka v. Garnider,* No. 21-cv-3240, 2022 WL 407651 (N.D. Ill. Feb. 10, 2022). Yet, after the plaintiff "questioned Gardiner's stance on affordable housing," the Alderman blocked him from the page, meaning that he could not react to or comment on posts—even ones where he was directly referenced. Not only was Pete Czosnyka prevented from providing input on funding measures and policy proposals, he also was prevented from responding to the Alderman's taunts. *Id.* at 9.

To provide another example, Georgia State Representative Ginny Ehrhart carefully curated her Facebook page to prevent citizens with views she disliked from interacting with it. Ehrhart used her Facebook page not only to document her legislative and public activities but also to engage with citizens on public issues, encouraging them to use the platform to discuss and debate her policies and "to communicate directly with her office." *Biedermann*, 2023 WL 2394557, at *1. Ehrhart also engaged with users on the official Facebook page by "liking" comments in support or praise of her legislative and political activities. *Id.* However, this opportunity to interact with Ehrhart was not equally available to all individuals. Litigation revealed that Ehrhart had blocked at least sixty people from her Facebook page, including political opponents and critics of her policies. *Id.* at *3–4. In

her effort to "tailor" the message of her Facebook page "to convey a specific image and message to the public," Ehrhart effectively prevented a large swath of the constituency she represented from communicating with her office on an equal basis with other members of the public. *Id.* at *3. Such viewpoint-based favoritism is anathema to the First Amendment.

Similarly, Tennessee State Representative Jeremy Faison used his Facebook page to share policy positions, discuss legislation, and offer the services of his office. *Fox v. Faison*, 2023 WL 2763130, at *5 (M.D. Tenn. Apr. 3, 2023). For example, the representative conducted polls on legislation, inviting individuals to weigh in on policy preferences. *Id.* In one post from 2022, Representative Faison asked constituents to comment on the following proposals: "What would you choose between the state: waiving your vehicle registration, taking the sales tax off groceries for a month, lowering the F[ranchise] [and] E[xcise] tax, [or] doing away with the professional privilege tax." Compl. at 12, *Fox,* 2023 WL 2763130, at *5. He also used the site to encourage constituents to contact his office for help. *Id*. In one post, he invited individuals "struggling with the state unemployment office" to "please call my office and we will do everything we can to make sure you are taken care of," and provided his office phone number. *Id.* In another post regarding mass flooding in the state, Representative Faison tagged the Tennessee Department of Transportation and encouraged users to engage with his office, providing his office number and stating: "Please feel free to contact our office if you see dangerous issues. . . . We will make sure the right people get contacted." *Id.* Once blocked from Faison's page, the plaintiff was disadvantaged in

accessing the services offered by Representative Faison.

These examples demonstrate some of the significant interactive and communicative roles that social media enables between government officials and constituents, primarily through the reaction, commenting, and messaging functions of the platforms. The ability to communicate directly with government officials, petition for help, provide feedback, and access government services are critical First Amendment rights deserving of robust protection for all, not parceled out to a select few. Although government officials are permitted to "simply broadcast their views"—such as "through a non-interactive blog"—once officials decide to "create a space for public interaction and discourse," they must manage these platforms in a viewpoint-neutral manner. *One Wisconsin Now,* 354 F. Supp. 3d at 954 ("Having opted to create a [social media] account, however, and benefit from its broad, public reach, defendants cannot now divorce themselves from its First Amendment implications and responsibilities as state actors.").

C. Social media accounts are critical for public discourse.

Not only do the social media accounts of government officials offer a means for the public to communicate with the officials, but these sites also serve as a forum for citizens to communicate with one another. If the internet is "the modern public square," as this Court held in *Packingham*, comments posted on officials' social media accounts parallel the public comment period of government meetings. *Packingham,* 582 U.S. at 107. Through that communication, an

interested or concerned citizen communicates with public officials and fellow citizens alike. Permitting a government official to hinder the formation of the public record by filtering viewpoints—the equivalent of kicking someone out of the public square—gives the citizenry a distorted view of the prevailing sentiment. *See Rinne v. Camden Cnty.*, 65 F.4th 378, 382–83 (8th Cir. 2023) (finding plaintiff "plausibly alleged that he participated in activity that was protected by the First Amendment" when he was banned from attending public meetings after making critical comments in-person and on social media, resulting in the absence of his expressions on the public record). The First Amendment would not permit an elected official to selectively mute the microphone in a public meeting or allow a government actor to modify the transcript of a public hearing to omit particular viewpoints. Comparable conduct in the virtual sphere should also be forbidden.

The salutary effects of allowing all viewpoints to be expressed were lauded by Justice Oliver Wendell Holmes in his so-called Great Dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919); *see also* John Stuart Mill, *On Liberty* 87 (David Bromwich & George Kateb eds., 2003) (1859). Quoting Holmes' opinion, this Court described the marketplace of ideas as "[t]he theory of our Constitution." *United States v. Alvarez,* 567 U.S. 709, 728 (2012). In the context of government officials' social media accounts, the marketplace should operate to allow fulsome public discussion and debate, trusting that at the end of the day, truths and superior views will rise to the top.

A thwarted debate over the use of publicly owned property in Hope Mills, North Carolina, a small

town of about 17,000, offers an illustration. After a church and parish hall were donated to the Town, a discussion ensued about how to use the property. When Town leaders proposed tearing down the parish hall, Meg Larson and a contingent of citizens posted their objection to that plan on the mayor's Facebook page. The comments were deleted, and the citizens were blocked from the page. With a sanitized "record" showing only public support for the demolition plan, fellow citizens who also favored preservation of the building might think they were alone in their views and self-censor their opinions. Any hope of building a consensus to change the course of public action is derailed when only one side of a debate is allowed to speak. Likewise, when a citizen of Hope Mills posted criticism of the Town for not having insured a dam, costing taxpayers millions of dollars in repairs when it malfunctioned, the post was hidden by the mayor. Again, Town citizens were deprived of being educated about and reacting to a critique of government operations. *See* Verified Complaint and Request for Mediation Pursuant to N.C. Gen. Stat. § 7A-38.3E at ¶ 30–34, *Larson v. Warner*, No. 22 CVS 2320 (N.C. Super. Ct. Apr. 27, 2022) (filing a public records lawsuit encompassing social media allegations, settled on January 9, 2023, with an agreement not to hide, delete, or block comments).

The significance of interactive social media space and the importance of protecting public discourse there has been recognized by many courts. *See, e.g.*, *Mcdow v. Reinbold*, No. 3AN-21-05615CI, 2022 WL 18399021, at *10–11 (Alaska Super. Ct. Dec. 9, 2022) (finding that Facebook is a virtual channel of communication for public assembly and speech)

(internal citation omitted); *Gilley v. Stabin*, 2023 WL 418155, at *12 (D. Or. Jan. 26, 2023) (explaining that social media websites—Facebook and Twitter in particular—are fora inherently compatible with expressive activity); *Biedermann,* 2023 WL 2394557, at *1 (noting the particular significance of the official Facebook page including an interactive section open for other users to post comments and engage in public debate on matters of public concern). Because "popular social-media platform[s] allow users to share messages, promote their ideas and businesses, and communicate directly with other users," protecting the full panoply of public perspectives on these sites is essential. *Clark v. Kolkhorst*, 2021 WL 5783210, at *1 (W.D. Tex. Dec. 7, 2021). Strong First Amendment protections benefit all ideologies and perspectives on the political spectrum. *Compare Gilley*, 2023 WL 418155, at *12 (summarizing blocked constituent's advocacy for white men's rights in response to a tweet soliciting responses from the public about discrimination) with *Tanner v. Ziegenhorn*, No. 4:17-cv-780-DPM, 2021 WL 4502080, at *6 (E.D. Ark. Sept. 30, 2021) (describing police department's efforts to screen out critical comments through the use of word filters such as "pig" and "copper").

"It is elementary that a democracy cannot long survive unless the people are provided the information needed to form judgments on issues that affect their ability to intelligently govern themselves." *Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 115 (2d Cir. 1977). The potential benefits of social media to reach that goal are myriad: the efficient dissemination of information, allowing give and take between the government and the governed, and affording

communication within the community. Those benefits are stifled, however, when representative voices are skewed or silenced. *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp't Rels. Comm'n*, 429 U.S. 167, 175–76 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views . . . is the antithesis of constitutional guarantees.").

D. Social media accounts are records of governance, essential to public discourse and democracy.

The significance of accurate and accessible records of official actions in a republic cannot be understated; the discussion of such information and records is the foundation of self-governance. The Supreme Court has consistently held that free discussion of government affairs is the core of expressive activity the First Amendment protects: "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74–75 (1964); *see also Citizens United*, 558 U.S. at 339 ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."). Citizens cannot meaningfully or intelligently discuss public affairs or self-govern if they do not know—because the records are unavailable, inaccessible, or inaccurate—what their government is doing. As James Madison noted, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." James Madison, *Letter to W. T. Barry*, *in* 9 *The Writings of James Madison* 103, 103 (Gaillard Hunt ed., 1910).

The public records laws of the federal and state governments are premised on the idea that citizens should have a right to know "'what their Government is up to.'" *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989)). This right "defines a structural necessity in a real democracy." *Id*. at 172; *see also N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."). Already, the federal government has acknowledged that certain social media accounts of federal officials are considered official records. For example, the National Archives concluded that President Trump's tweets were official records required to be preserved under the Presidential Records Act. *Knight*, 928 F.3d at 232; s*ee also* U.S. Nat'l Archives and Records Admin., Bulletin 2014-02 (Oct. 25, 2013), https://www.archives.gov/records-mgmt/bulletins/2014/2014-02.html (listing the following factors to consider whether social media is a public record: "Does it contain evidence of an agency's policies, business, or mission? Is the information only available on the social media site? Does the agency use the tool to convey official agency information? Is there a business need for the information? If the answers to any of the above questions are yes, then the content is likely to be a Federal record.").

Certain states have also determined that their public records laws apply to the social media accounts of public officials. In Florida, for example, a county

commissioner's personal Facebook account was subject to public records law because the commissioner was using the account to conduct county business. *Bear v. Escambia Cnty. Bd.*, No. 3:19cv4424-MCR/HTC, 2023 WL 2632103, at *6 (N.D. Fla. Mar. 25, 2023); *see also, e.g., Penncrest Sch. Dist. v. Cagle*, 293 A.3d 783, 799–802 (Pa. Commw. Ct. 2023) (noting that posts on official social media sites are presumptively subject to state public records laws and defining factors to determine whether social media posts on private sites are subject to disclosure laws); *Swanson v. Griffin*, 526 F. Supp. 3d 1005, 1016 (D.N.M. 2021) (finding that plaintiff plausibly pled that county commissioner's social media posts were subject to state public records law), *rev'd on other grounds*, No. 21-2034, 2022 WL 570079 (10th Cir. Feb. 25, 2022), *cert. denied*, 143 S. Ct. 100 (2022); *West v. Puyallup*, 410 P.3d 1197, 1201 (Wash. Ct. App. 2018) (ruling that "postings on a 'personal' Facebook page can constitute public records if the [statutory] definition is satisfied"); *see also, e.g.*, Att'y Gen. Josh Stein, *North Carolina Open Government Guide*, N.C. Dep't of Justice 1 (2019), https://perma.cc/WMP2-XWNA ("Under the Public Records Act, what matters is the content of the communication, not the channel. The guiding principle [the Department of Justice] operates under is this: if it is the state's business in an email, a letter or a memo, it is also the state's business in a text message, Facebook post or Tweet.").

These cases recognize the significance of social media communications to contemporary discourse on public issues. It is no wonder, then, that public officials are so eager to erase comments on their social media accounts that create a record of disagreement

with official policies or that bring attention to embarrassing moments in the official's tenure. In Gaston County, N.C., for example, Commissioner Tracy Philbeck voted in favor of suing the local paper, the Gaston Gazette, for libeling the commission. Corey Friedman posted comments on Philbeck's Facebook page, criticizing the commissioner for attacking local journalists and spending taxpayer money on a clearly frivolous lawsuit. The commissioner deleted Friedman's comments and blocked him from his Facebook page, thereby making it more difficult for people, including future voters, to learn that Philbeck had supported the frivolous lawsuit. *See* Verified Complaint and Request for Mediation Pursuant to N.C. Gen. Stat. § 7A-38.3E at ¶ 23-25, *Friedman v. Philbeck*, No. 21 CVS 3976 (N.C. Super. Ct., Oct. 1, 2021). If the Sixth Circuit state action test had controlled these circumstances, it likely would not have been possible to compel the commissioner to unblock Friedman from his Facebook page and to require him to maintain critical comments about his official actions.

The records created by social media communications are especially significant in news deserts, where there is "limited access to the sort of credible and comprehensive news and information that feeds democracy at the grassroots level." Abernathy, *supra* at 9. News deserts, which occur most frequently in small towns and rural areas, are typically overlooked by major media outlets and lack journalists to investigate, report, and hold public officials accountable. Governments are thus free to shape their own narrative without the checking influence of a robust fourth estate. The result is a whitewashed version of reality. In 2019, for example, the Town of Lucama, North

Carolina—population 1,108—created an official Facebook page. The Town has no other internet presence and no newspaper. The Town's second post stated that the page was to be "strictly for informational purposes" and that it would not allow any "criticizing of the town or individuals." Town of Lucama, Facebook (Dec. 12, 2019), https://perma.cc/8ZDB-WZM5. Matthew Creech, a retired police officer, commented on the post, expressing his concern that the Town's policy of excluding critical comments might violate the First Amendment. The Town deleted his comment and blocked him from the page for three years, which meant that he could not comment on or react to any of the Town's posts. By instituting this "no criticism" policy, the Town used its Facebook page to construct a pro-town echo chamber.

CONCLUSION

For the reasons discussed, this Court should reverse the holding of the Sixth Circuit and establish a rebuttable presumption that the operation of a public agency or government official's account should be considered state action, overcome only in narrow circumstances. At a minimum, the Court should adopt the appearance-purpose test, which more robustly protects speech rights than solely considering the duty-authority factors.

Respectfully submitted,

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