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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondents never answer the question presented. This Court granted certiorari to resolve a circuit split on whether the job-related *appearance and content* of a public official's social-media account can sustain a state-action finding despite the fact that the official is not operating the page pursuant to any governmental *duty or authority*. Unwilling to defend the Ninth Circuit's affirmative answer, Respondents dodge the question by insisting that Petitioners and all other elected officials are actually "doing their job" whenever they communicate with the public about the government's work.

Respondents' claim disregards that public officials remain private citizens with their own personal interests in engaging in public discussion about the government, independent of their job duties. Under the precedents governing whether such individuals are speaking in their official or personal capacity, courts must avoid overbroad job descriptions and distinguish employee speech that *performs* the job from citizen speech that *concerns* the job. In the social-media context, the only workable way to draw this line is to focus on whether the government requires, controls, or facilitates the official's operation of the account. And when the State itself has no such involvement with the official's page—as is still undisputed here—the official is acting solely as an informed citizen and self-interested candidate.

Lacking any response to these points, Respondents resort to red herrings. There is no dispute that officials can act under color of law when wielding incidental authority or misusing their authority. But

that sheds no light on whether an official's social-media page exercises authority at all. It likewise is immaterial that courts take a broad approach to scope of employment when determining whether federal officials speaking about their jobs on private property should be protected from tort liability under the Westfall Act. As Respondents' own cases make clear, that hardly means such officials are not speaking as citizens under the Constitution—let alone that the private property where they speak is transformed into a governmental forum, which is the key issue for whether *blocking* Respondents from Petitioners' personal pages was state action.

Indeed, despite eventually admitting that public officials can host campaign events in their personal capacity where they communicate with the public about their jobs, Respondents provide no coherent explanation why Petitioners' social-media pages do not qualify. They ignore the undisputed evidence that the pages were operated in a manner consistent with campaign tools and inconsistent with governmental fora, such as the use of political slogans and the lack of disclaimers required for District-sponsored pages. And they cite laws and testimony that only further confirm Petitioners were *not* operating the pages to "do their job."

Respondents also offer no meaningful defense to the charge that their state-action theory would abridge Petitioners' own speech rights. They do not dispute their position would strip Petitioners of the editorial control retained by all other citizens while opening personal social-media pages to public debate. Nor do they dispute this would mean the First Amendment perversely penalizes Petitioners for

choosing to talk about their job on their pages. Respondents do not even offer a clear path for Petitioners to engage with the public in their personal capacity, thus chilling core political speech. And Respondents have no rationale to prevent their theory from allowing the State to dictate every aspect of Petitioners' speech on their pages under the guise of "supervising" *how* they do their alleged government "job."

With no solutions in sight, Respondents beg this Court not to think about these problems until a future case. But the threshold determination of the proper state-action boundary requires considering the effect on individual liberty, as this Court recently recognized. That should be the last nail in the judgment below's coffin.

ARGUMENT

I. RESPONDENTS DISREGARD THE QUESTION PRESENTED AND ABANDON THE DECISION BELOW

This case and *Lindke v. Freed* (No. 22-611) present the question whether a public official's operation of a social-media account constitutes state action "when the official uses the account to feature his or her job and communicate about job-related matters with the public, *but does not do so* pursuant to any governmental duty or authority." Pet. Br. i (emphasis added); *see Lindke* Pet. Br. i. Accordingly, the officials in both cases defend the Sixth Circuit's position that state action is absent when an official's operation of a social-media page "neither derives from the duties of his office nor depends on his state authority," *Lindke v. Freed*, 37 F.4th 1199, 1204

(6th Cir. 2022). *See* Pet. Br. 14, 23-34; *Lindke* Resp. Br. 13-14. And the plaintiff in *Lindke* at least joins issue, arguing (erroneously) that officials act under color of law "when they use social media to invoke the *pretense* of governmental authority and to perform *governmental functions*," even when they do *not* exercise any actual governmental "duty or authority." *See Lindke* Pet. Br. 12, 14 (emphasis added).

Respondents here, however, deny the premise of the question presented. They claim Petitioners "were engaged in state action" on the theory the Trustees were simply "doing their job" in operating the pages, Br. 15, and they invoke the pages' "[a]ppearance" only to "reinforce[]" that claim, Br. 31. But while Respondents start their brief by confirming the truism that doing one's government job is typically state action, Br. 18-29, that is *not* what the court of appeals held Petitioners were doing. Rather, the Ninth Circuit concluded merely that the Trustees "used their pages to communicate *about* their official duties" and "*clothed* their pages in the authority of their offices." Pet.App. 26a (emphasis added); *accord, e.g.*, Pet.App. 20a ("[G]iven the close nexus between the Trustees' use of their social media pages and their official positions, [they] were acting under color of state law…."), 23a ("[B]oth through appearance and content, the Trustees held their social media pages out to be official channels of communication with the public about the work of the PUSD Board."), 24a ("[T]he Trustees' management of their social media pages related in some meaningful way to their governmental status and to the performance of their duties." (cleaned up)). In fact, the Ninth Circuit acknowledged that Petitioners' pages included

"material that could promote the Trustees' personal campaign prospects," and it faulted them only for insufficiently "disclaim[ing]" that the pages were not operated in their official capacity, "*whether or not* the District had in fact authorized or supported them." Pet.App. 26a-27a (emphasis added).

Like other parties who attack "issues other than the one on which certiorari was granted" because they "fear[] an inability to prevail on the question presented," *Yee v. City of Escondido*, 503 U.S. 519, 536 (1992), Respondents evidently recognize that the Ninth Circuit's "appearance and content" test is indefensible. That the content of officials' social-media activity *relates to* their duties is not remotely the same as operating the pages to *carry out* those duties. Pet. Br. 47-48. And appearance matters only if it creates state authority, which does not occur where officials simply inform the public about their actions and beliefs. Pet. Br. 44-46. Moreover, it is futile to look to appearance and content in ruling whether a social-media page is operated in an official or personal capacity, because the two types of pages can look the same. Pet. Br. 41-44. The only workable way for courts to disentangle the capacity in which the page is operated from the page itself is to focus on whether the State requires the page, controls its content, or facilitates its operation. Pet. Br. 48-51.

Respondents gain nothing, though, by abandoning the Ninth Circuit's flawed position. As demonstrated next, their reframed claim replicates the same errors and creates several more.

II. RESPONDENTS' QUESTION-BEGGING CLAIM THAT PETITIONERS WERE "DOING THEIR JOB" DISREGARDS THAT ELECTED OFFICIALS MAY COMMUNICATE WITH THE PUBLIC ABOUT THEIR JOB IN THEIR PERSONAL CAPACITY

Highlighting good-governance aphorisms and hortatory enactments, Respondents repeatedly assert that communicating with the public was part of Petitioners' job. *See* Br. 1, 17-18, 29-31, 34-35. This argument ignores the core difference between speech actually carrying out a government job and speech merely relating to one. Respondents try to blur that line by invoking scope-of-employment principles drawn from inapposite contexts. And they ultimately fail to show that Petitioners were "doing their job" when blocking Respondents. In fact, their own evidence confirms the undisputed record that Petitioners operated the pages at issue in their personal capacity as candidates and citizens.

A. Respondents Ignore The Critical Distinction Between Official Speech That Performs One's Government Job And Citizen Speech That Relates To One's Government Job

1. A public official "is nonetheless a citizen" with a First Amendment right to "speak[] … about matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). Such speech, grounded in "informed opinion," has "considerable value." *Lane v. Franks*, 573 U.S. 228, 235-36 (2014). So like any other citizen, officials acting in their personal capacity may "open their property for speech" without "los[ing] the ability to exercise what they deem to be

appropriate editorial discretion." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1931 (2019); Pet. Br. 26-30. And since the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office," *FEC v. Cruz*, 142 S. Ct. 1638, 1650 (2022), incumbent officials have an unquestionable right to use their personal social-media pages to "position [themselves] for more electoral success down the road." *Campbell v. Reisch*, 986 F.3d 822, 826 (8th Cir. 2021).

By contrast, employee speech "pursuant to [one's] official duties" "amount[s] to government speech attributable to" the State. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423-24 (2022). So "employees [who] are not speaking as citizens" are unprotected from "the exercise of employer control." *Garcetti*, 547 U.S. at 421-22.

Given that dichotomy, this Court has repeatedly warned against "the error" of using an "excessively broad job description" to determine the capacity in which an official spoke. *Kennedy*, 142 S. Ct. at 2425. In *Lane*, the "mere fact" that the program director's testimony "simply *relate[d] to* [his] public employment [and] concern[ed] information learned" on the job "d[id] not transform that speech into employee—rather than citizen—speech." 573 U.S. at 239-240 (emphasis added). And in *Kennedy*, it did not matter that the coach's prayers "took place 'within the office' environment," as he was not "acting within the scope of his duties." 142 S. Ct. at 2424-25.

2. Respondents thus fundamentally err in asserting that "virtually any time an elected official communicates with the public, … he is also doing his

job." Br. 35. "The critical question under *Garcetti* is whether the speech *at issue is itself* ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane*, 573 U.S. at 240 (emphasis added). While communicating with the public is part of officials' ordinary duties in *other* contexts like formal meetings and hearings, it is not when, as here, the speech at issue entails officials using their own social-media pages without any facilitation, control, or other involvement by the government itself. *See* Pet. Br. 23-26, 47-51. In *this* context, the official speaks in a private capacity, *Lindke*, 37 F.4th at 1203-05, because the State as sovereign "plays absolutely no part," *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972).

Respondents never even acknowledge *Lane* or *Garcetti*, much less reconcile their theory with those precedents. And while they mention (Br. 47) *Kennedy*'s statement that "what matters is whether [the coach] offered his prayers while acting within the scope of his duties," they flout the admonition in the following paragraph *not* to employ "excessively broad job descriptio[ns]." 142 S. Ct. at 2425.

Moreover, Respondents blithely dismiss the paramount First Amendment interests of political candidates, asserting "it does not matter" that Petitioners used their pages to "enhance their prospects for reelection." Br. 34-35. Respondents' sole justification is that, in *Screws v. United States*, 325 U.S. 91 (1945), the Court held that the sheriff acted under color of law "even though his conduct was the product of a purely personal motive." Br. 35. But the sheriff there assaulted a prisoner while transporting him "to the court house" after

"arresting" him "on a warrant," so the sheriff clearly was "perform[ing] [his] official duties" despite "overstep[ping]" and "[m]isus[ing]" his authority due to "a grudge." 325 U.S. at 92-93, 110-11 (plurality op.). *Screws* noted that law-enforcement officers who seize and beat a victim as a "personal pursuit[]" *without* exercising governmental duties or authorities would "plainly" not be acting under color of law, *id.* at 111, and lower courts have so held, *see, e.g.*, *Butler v. Sheriff of Palm Beach Cnty.*, 685 F.3d 1261, 1263-64, 1267 (11th Cir. 2012). An elected official likewise does not engage in state action merely because she uses her social-media account as "a campaign page" that promotes "herself working at the job she was elected to perform and hopes to be elected to perform again." *Campbell*, 986 F.3d at 827.

Indeed, Respondents retreat from their untenable position in a critical footnote, which "agree[s]" that officials "are not state actors" when they host "townhall[s]" on "their own" property "using their own personal [resources] to further their own private objectives as candidates for re-election and concerned citizens." Br. 37 n.10. *But that is this case.* Pet. Br. 35-36. Of course, the venue was Petitioners' online accounts rather than their real property, but state-action principles under the First Amendment "do not vary[] when a new and different medium for communication appears." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790 (2011). Respondents neither dispute the point nor provide any basis to distinguish Petitioners' pages from a campaign-hosted townhall.

B. Respondents Invoke Inapposite Bodies Of Law To Obscure The Distinction Between Official And Citizen Speech

1. Respondents trumpet the principle that public officials' job performance can extend beyond "expressly required or authorized" tasks to include "incident[al]" authority and "misuse" of authority. Br. 20-22. Oddly, Respondents scavenged for ancient authority under the Fourteenth Amendment and the common law, Br. 20-24, even though Petitioners do not contest the principle, Pet. Br. 22 (citing *Screws*, 325 U.S. at 109-11). Respondents' efforts are odder still because Petitioners' claim is that they did not exercise governmental authority *of any type*. So what Respondents really need to establish is that governmental constraints apply to conduct an official *personally* undertakes without any governmental involvement, just because the official *could have* performed analogous conduct when "doing his job."

On that front, Respondents muster nothing, for that is not the law. None of their cases—including those incorporated from the *Lindke* briefing—presented the situation where an official claimed to have undertaken a personal pursuit entailing the type of conduct he also could have performed on the job. Instead, they all involved officials who acted without, or contrary to, express authority while performing *exclusive* governmental functions (*e.g.*, public-land management or law-enforcement efforts). Such functions' exclusivity proved the actions were taken in an official capacity: The officials could not undertake inherently governmental conduct in their personal capacity, and the State itself could (and sometimes did) direct them not to take the actions

involved. Such cases shed no light on how to determine the capacity in which officials *communicate with the public* through personal social-media accounts—conduct they *could* perform as private citizens independently from the State.

Respondents thus are wrong that "[i]t does not matter whether communicating with constituents is 'a traditional, exclusive public function[.]'" Br. 41. While officials of course *can* be doing their job when performing functions that are not exclusively governmental, Br. 41-42, exclusivity is relevant in determining *if they are* doing their job. And where, as here, an official acts without any governmental facilitation or control, there is no basis to dispute that the action was taken in a personal capacity unless it is an exclusive function, which can be performed only in an official capacity. U.S. Br. 19.

In doctrinal terms, Respondents overlook that "[t]he traditional definition of acting under color of state law *requires* that the defendant … have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49 (1988) (emphasis added). That requirement is not satisfied if "[a]nyone else could have done exactly what [the official] did … [while] acting in a private capacity." *Luce v. Town of Campbell*, 872 F.3d 512, 514 (7th Cir. 2017). In these circumstances, the State itself "could not control" such conduct, *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988), and cannot "fairly be blamed," *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

Respondents rejoin that *Lugar*'s "fairly be blamed" language is limited to "private entities," and that "individual officer[s] *can* be held liable" even when the government itself is not sufficiently culpable to also be held liable under 42 U.S.C. § 1983. Br. 21-22. But the rejection of vicarious liability in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), rested on § 1983's *statutory* text. *See id.* at 691-92. As a *constitutional* matter, the very reason the Fourteenth Amendment applies to an officer's actions under color of law is also why Congress could make the State itself liable for such actions: "as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." *Ex Parte Virginia*, 100 U.S. 339, 347 (1880). By contrast, when officials in their personal capacity injure private parties, Congress cannot hold the State constitutionally responsible. *See Monell*, 436 U.S. at 693 (noting "the constitutional problems associated" with imposing on a State "the obligation to keep the peace"); *United States v. Morrison*, 529 U.S. 598, 621 (2000) ("[T]he Fourteenth Amendment … prohibits only state action," not "merely private conduct.").

This case presents the latter scenario. Neither the State of California nor the Poway Unified School District can fairly be deemed responsible under the First Amendment for Petitioners' operation of social-media pages in their personal capacity.

2. Respondents also emphasize that, under the Westfall Act, courts have held that federal legislators' communications with the public—including in campaign settings—can fall within their scope of employment. Br. 27-29. Those cases are doubly inapposite.

First, the Westfall Act's scope-of-employment standard is broader than the Constitution's state-action standard, reflecting a materially different function. "The Westfall Act's core purpose … is to relieve covered employees from the cost and effort of defending [tort] lawsuit[s], and to place those burdens on the Government's shoulders." *Osborn v. Haley*, 549 U.S. 225, 252 (2007). Because protecting federal employees from job-related liability does not "restrict[]" their "individual liberty," *Halleck*, 139 S. Ct. at 1934—just the opposite—employing an "excessively broad job description[]," *Kennedy*, 142 S. Ct. at 2425, is a feature, not a bug, in that context.

For example, in *Does 1-10 v. Haaland*, 973 F.3d 591 (6th Cir. 2020), students brought a defamation suit against a Member of Congress who had accused them of racism on "her campaign Twitter account." *Id.* at 593-94. Holding that she acted within the scope of employment and therefore had Westfall Act immunity, the court reasoned that her speech "reasonably relate[d]" to a public controversy and "serve[d] the interests of [her] constituents (i.e., employers) by informing them of [her] views regarding a topical issue and related legislation." *Id.* at 601-02. This reasoning equally applies, however, to the speech in *Lane*, where the employee's testimony "relate[d] to public employment" and furthered his employer's interest in ferreting out "public corruption." 573 U.S. at 239-40. So Westfall Act immunity would apply to tort claims based on such testimony—*yet for First Amendment purposes*, that testimony is *not* "within the scope of an employee's duties" and instead "is speech as a citizen." *Id.* at 240-41.

Second, even if Petitioners' *speech* on their social-media pages was part of "their job," their *operation* of the pages was not. This distinction matters because the "specific conduct of which the plaintiff complains" (*Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)) is not Petitioners' speech, but being *blocked* from the pages. Respondents' theory why Petitioners' use of the blocking functions on Facebook and Twitter exercised state "authority" under *West* is that the pages were operated in a governmental capacity. *See* Br. 38-39. But even if an official is "doing her job" when speaking to the public on private property, that alone does not transform the property into a government venue subject to constitutional constraints.

Respondents' own cases prove the point. While Senator Kennedy's abortion-related comments at "a campaign fund-raising luncheon" received Westfall Act immunity, Br. 29, that did not convert the event itself into an official function. Regardless of what the Senator *said* in the room, his campaign staff could *restrict access* to the room—neither the First Amendment nor any other constitutional constraint applied at all, as Respondents concede. Br. 37 n.10. Indeed, even new announcements about legislative votes or staff would not transform that personal campaign event into a government press conference.[1]

3. Respondents also discuss public-records laws and work-from-home policies to show it is *possible* and *not uncommon* for officials to use personal

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[1] Likewise, it makes no sense to analyze state action in this context "post by post." *Contra* Manhattan Inst. Br. 16. That would be like treating Senator Kennedy's event as toggling between personal and official from comment to comment.

resources when doing their jobs. Br. 25-26, 35-37. Petitioners never disputed that. But when an official's social-media activity is not facilitated by *any* governmental resources or authorities, or subject to *any* governmental control, there is no basis to conclude the official is exercising an official duty, rather than speaking in a personal capacity. Pet. Br. 24, 35-36. All that remains is the page's content and appearance, which can be the *same either way*. Pet. Br. 47-48. Respondents have no answer.

C. Respondents Cannot Show That Petitioners Were Actually "Doing Their Job" In Operating Their Personal Social-Media Pages

1. Respondents' flawed legal theory is confirmed by their baseless factual position. The proffered evidence that Petitioners were "doing their job" instead proves they were managing their personal property and running their campaigns.

First, the statutes and bylaws Respondents invoke (Br. 29-30) undermine their position. Although "[t]he governing board of any school district" can "[i]nform" the public about school activities, Cal. Educ. Code § 35172(c), the Board itself can act only "by majority vote," *id.* § 35164, so this law does not apply to the Trustees' individual conduct. Further, whereas Board "meetings" "shall" be open to the public, *id.* § 35145, the Board "may" update the public through other means, but need not do so, *id.* § 35172(c). Respondents rejoin that the Trustees *chose* to do so through their social-media pages. Br. 30. But the cited bylaw makes clear what Respondents studiously ignore: *independent* of Petitioners' duties,

they retain "their right to freely express their personal views" and "participate in public discourse on matters of civic or community interest"—"including those involving the district." PUSD Board Bylaw 9010(a), https://perma.cc/325K-PULK.

Second, Respondents mischaracterize the trial testimony. They say "Zane testified that it is 'part of the job' to listen to and address constituents' concerns," Br. 30, yet elide that he was referring to Board "meetings" where "members of the public … showed up," JA 47. They also highlight testimony where Petitioners noted the general "importan[ce]" of constituent engagement. JA 51-52. But *that very testimony refuted*, rather than "conceded," that Petitioners "maintained their social media pages in furtherance of [any] duty." Br. 31. O'Connor-Ratcliff testified her "practice" was to respond only to questions she "was interested in answering," JA 52, which reflects personal privilege rather than official duty. And Zane testified he "disseminate[d] information to … voters" about "[his] own political activities," JA 49-50, a personal partisan pursuit *improper* for a governmental page, JA 28-29. This all confirms the undisputed facts that Petitioners viewed themselves as "always running" for re-election and used their social-media pages to portray themselves "in the most positive light," "hop[ing] [the pages] will win [them] support." JA 19, 22, 31-32.

Finally, Respondents refuse to engage with most of the evidence cited in the opening brief. Not only did Petitioners operate their accounts *without* governmental support or control, but they did so *without* disclaimers required for "District-Sponsored Social Media," *with* political information banned on

such pages, and *with* campaign-related usernames for their re-election efforts. Pet. Br. 8-9, 42. Collectively, this evidence is irreconcilable with Petitioners having operated the pages as part of "their job." So Respondents pretend none of it exists.

2. Though Respondents will not defend the Ninth Circuit's conclusion that the pages' appearance created state action "whether or not the District had in fact authorized or supported them," Pet.App. 26a-27a, they do invoke "[a]ppearance" to "reinforce[]" the claim that Petitioners were "doing their job," Br. 31. Blinding themselves to the personal-capacity indicia discussed above, Respondents fixate on Petitioners' self-identification as "Government Official[s]" and use of "collective pronouns." Br. 32-33. But "[e]xploiting the personal prestige of one's public position is not state action," *Hall v. Witteman*, 584 F.3d 859, 866 (10th Cir. 2009), and using official "trappings" on "campaign page[s]" is what incumbents "position[ing] [themselves] for more electoral success" routinely do, *Campbell*, 986 F.3d at 824, 827. As for Petitioners' offending use of "we," that shorthand for "I and my colleagues" says nothing whatsoever about the capacity in which Petitioners spoke.

Respondents' arguments illustrate that an appearance-focused test would abridge officials' right to choose "what to say and what *not* to say," *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988), and "invite[] [the] chaos" associated with similar (un)reasonable-observer inquiries, *Kennedy*, 142 S. Ct. at 2427; Pet. Br. 48. Indeed, the vagueness of the Ninth Circuit's approach led *amici* on *both* sides to reject it. *E.g.*, NRSC Br. 18-20; Am. Atheists Br. 6-8. That vagueness is particularly pernicious in

"the conduct of campaigns for political office," *Cruz*, 142 S. Ct. at 1650, because it will "chill protected speech," *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 254 (2012), as officials decline to exercise full editorial rights on their pages to avoid "the costs of litigation and the risk of a mistaken adverse finding," *Riley*, 487 U.S. at 794.

Respondents insist that "[a]ppearance matters" (Br. 31-32) under *Griffin v. Maryland*, 378 U.S. 130 (1964), but that case is inapposite. There, a deputy sheriff employed by an amusement park arrested protestors on criminal-trespass charges. *Id.* at 131-34. While he *hypothetically* "might have taken the same action had he acted in a purely private capacity," that was "irrelevant" because he *actually* was "possessed of state authority and purport[ed] to act under that authority," "w[earing] a sheriff's badge and consistently identif[ying] himself as a deputy sheriff." *Id.* at 135. His official appearance mattered because "[w]e're generally taught to stop for police," *Lindke*, 37 F.4th at 1206, but not for amusement-park rent-a-cops. Thus, in cases like *Griffin*, the appearance of authority *creates effective authority*, which typically satisfies the "require[ment]" that the asserted state actor exercise power "possessed by virtue of state law and made possible only because [he] is clothed with the authority of state law." *West*, 487 U.S. at 49. In cases like this, however, authority is not created by the appearance of Petitioners' tweets and posts, which *assert no compulsory power*. Plastering the pages with private-capacity disclaimers would thus be a pointless exercise and gratuitous burden, Pet. Br. 41-44, as Respondents do not dispute, Br. 46 n.12.

Respondents conclude by "contrast[ing]" the social-media pages at issue with Petitioners' "other social media pages" used to communicate privately "with family and friends." Br. 33. But the more probative comparison is that Petitioners had *no* "other social media pages" to promote their reelection campaigns. Given that "[n]early all candidates use social media to advocate their election," NRSC Br. 8, the pages at issue *obviously were* Petitioners' campaign pages, not "job" pages.

III. RESPONDENTS CANNOT EVADE THE FIRST AMENDMENT FLAWS IN THEIR STATE-ACTION THEORY

A. Desperate to hide from the conflict between their state-action theory and Petitioners' free-speech rights, Respondents contend the issue is outside the question presented. Br. 2-3. This gambit is frivolous.

Petitioners' arguments are entirely consistent with their having "limited" "the question presented … to [the Ninth Circuit's] threshold state-action holding." Pet. 13; *see* Pet i. *If* the blocking of Respondents were state action, Petitioners do not contest the merits holding that the blocking violated Respondents' First Amendment rights because it "was not a reasonable time, place, or manner restriction" permitted for "public fora." Resp. Br. 2. Petitioners instead invoke their *own* First Amendment rights to show that the Ninth Circuit *erroneously deemed* the blocking to be state action. Because the court's state-action theory "restricted" the "robust sphere of individual liberty" the state-action doctrine is meant to "protect[]," it "[e]xpanded the … doctrine beyond its traditional boundaries." *Halleck*, 139 S. Ct. at 1934.

Halleck applied the same analysis. In holding that a cable-channel operator's exclusion of filmmakers was not state action, the Court reasoned that the operator "otherwise … would lose the ability to exercise" the "editorial discretion" possessed by other "private property owners." *Id.* at 1931. *Halleck* did not treat the operator's speech rights as an "irrelevant" sideshow "for another day," let alone invite the "thorny" (and bizarre) scenario envisioned by Respondents—where plaintiffs *and* defendants have *competing* First Amendment rights regarding exclusion from speech fora. *See* Br. 3.

Petitioners' speech rights are thus "predicate to an intelligent resolution" of the state-action question presented and "fairly included therein." *Ohio v. Robinette*, 519 U.S. 33, 38 (1996). Especially fair, as "[i]t was clear from the petition" that the question "included th[is] contention." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 n.3 (1992); *see* Pet. 3-4, 18-19, 25-26, 28-32.

B. Respondents' brief discussion of Petitioners' rights only proves that their theory would weaponize the First Amendment to abridge officials' speech.

First, Respondents emphasize that officials could still "enforce reasonable and non-discriminatory time, place, and manner restrictions" for their pages. Br. 43-45. But this tacitly concedes officials would be stripped of the rights—enjoyed by all other citizens—to exercise *viewpoint-and-content-based* "editorial control over speech and speakers on their properties." *Halleck*, 139 S. Ct. at 1932; Pet. Br. 33-34.

That would "provide[] a vehicle for citizens to engage in harassing or threatening behavior." LGLC

Br. 5-6 (citing recent study). It also would mean officials' personal pages could be conscripted by political opponents to promote messages they do not support, like Respondents' toxic libel that Petitioners believe children "associated with a man of color" are "not … worthy of [their] time." D. Ct. Dkt. 80 at 65. Moreover, restricting *only incumbent* officials' editorial rights would be uniquely harmful as *opposing campaigns* remain "free to craft a positive image of themselves and delete negative comments." CSBA Br. 3. The First Amendment gives courts no "authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392.

Second, Respondents disregard the perversity of wielding the First Amendment to penalize officials for their speech's content. Respondents admit that Petitioners would retain full editorial discretion over their pages, *even if* used to communicate with the public, *so long as* they did not discuss matters related to their office. Br. 33-34. Yet stripping Petitioners of their editorial rights under *Halleck because* they exercised their speech rights under *Lane* is a content-based sanction, which the First Amendment presumptively prohibits and certainly does not require. Pet. Br. 32-33.

The problem is exacerbated by Respondents' refusal to clarify whether Petitioners could use a disclaimer—though one is neither required nor warranted, Pet. Br. 43-44—to clarify they speak in a personal capacity. Respondents first say an official is "doing his job" "virtually any time [he] communicates with the public," Br. 35, which implies disclaimers would be false and void. But then they agree an

official can "host" a "townhall" in his "personal" capacity to further "private objectives," Br. 37 n.10, which suggests there is some way to clarify that *these* pages have *that* status. Respondents never try to resolve this tension. And their amici propose an Orwellian approach where courts would determine if an official's page is limited to "campaign topics"—the danger of which is immediately illustrated by their diktat that "announcing an appointee" would be verboten, notwithstanding that appointments are often a key electoral issue. Manhattan Inst. Br. 15. All this illustrates the uncertainty, burden, and chill that Respondents' position would impose on officials.

Third, Respondents assert that, at minimum, officials' *own* speech would receive limited First Amendment protections against their employers under a balancing test. Br. 45-47. Not true. If officials were "doing their job" when communicating with the public, such speech "pursuant to [their] official duties" "amount[s] to government speech attributable to" the State, *Kennedy*, 142 S. Ct. at 2423-24, and it thus would be unprotected from "the exercise of employer control," *Garcetti*, 547 U.S. at 421-22. This is no hypothetical concern: government *amici* have warned that "an overly expansive theory of state action in this context might well lead to overregulation of public employees' speech." U.S. Br. 28; *see* LGLC Br. 20-22.

Respondents give the game away by rejoining that "the government clearly cannot compel [an official] to say a potential policy is a good idea if she believes it isn't." Br. 47 n.13. But the government clearly *could* do that *if* the official's "job" was to speak about the policy (say, a press secretary or community-relations

director): the government would be *supervising* how such employees "did their job." That Respondents properly recoil from the notion that California could tell Petitioners what to say on their social-media pages is an admission those communications are *not* part of "their job."

Finally, after accusing Petitioners of engaging in "fearmongering," Respondents warn that Petitioners' position is "dangerous." Br. 47 & n.13. But their parade of horribles is nothing to be worried about.

Respondents emphasize that officials could exclude individuals from their pages based on "viewpoint" or "invidious" grounds. Br. 48. But that is *unavoidable either way*. Again, Respondents concede that officials may communicate with the public about their job in their personal capacity. Br. 37 n.10. When they do, the Constitution "erects no shield against [their] merely private conduct, however discriminatory or wrongful." *Morrison*, 529 U.S. at 621. So the issue is not whether discrimination will happen, but whether the Constitution requires that it happen only accompanied by disclaimers or whatever other constraints Respondents would impose on officials' personal pages. Neither law nor logic supports such a useless antidiscrimination rule.

Respondents also worry that governments might "enact policies" for officials to use "individual accounts" to "insulate themselves from constitutional scrutiny." Br. 49. But such "policies" would be state action. *Monell*, 436 U.S. at 690. And regardless, jurisdictions are allowed to stop providing functions that are not exclusively governmental even if private replacements engage in discrimination. *Palmer v.*

Thompson, 403 U.S. 217, 218-19 (1971). Though it is doubtful any jurisdiction would go to such lengths when its officials could just use disclaimers etc.

Thus, if officials behave as Respondents fear, "the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973). States can require more official-capacity interaction, and voters can hold derelict or bigoted officials responsible. This Court would make matters worse by adopting the Ninth Circuit's "appearance and content" approach or Respondents' "doing their job" argument. Either of those unworkable standards will burden officials trying to use their social-media pages to communicate with the public in their personal capacity, without any benefit to individuals who will remain excluded from such pages. This Court instead should adopt the Sixth Circuit's "duty and authority" approach. Focusing on whether the government itself requires, controls, or facilitates operation of the account is the only principled and administrable way to determine whether or not the official speaks as a citizen there.

CONCLUSION

The judgment below should be reversed.

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Respectfully submitted,

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