No. 22-611

IN THE

Supreme Court of the United States

KEVIN LINDKE,

Petitioner,

v.

JAMES R. FREED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether James Freed, the sole owner of his personal, now-unpublished @JamesRFreed1 Facebook page and City Manager of the City of Port Huron, Michigan, engaged in state action when he blocked Kevin Lindke and deleted Lindke's comments from Freed's personal Facebook page.

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INTRODUCTION

At issue in this action is whether public-sector employees are able to maintain private social media accounts like their private-sector counterparts.

Prior to 2008, Respondent James Freed created his personal Facebook account, @JamesRFreed1. At the time, Freed was a college student, and it would be years before he entered the public-service sector. Freed maintained the same personal account through employment with three different employers.

In 2020, Petitioner Kevin Lindke posted disparaging remarks on Freed's personal Facebook page. Freed deleted Lindke's comments and blocked Lindke from the page. Lindke sued, claiming Freed violated his constitutional rights under the First Amendment.

After Lindke sued, Facebook deactivated Freed's page multiple times without explanation. When Facebook reactivated it unexpectedly, Freed unpublished the page because he did not want a page if he did not have the ability to manage its followers and content.[1] C.A. Rec. 687.

The District Court and Sixth Circuit properly dismissed this case on the threshold issue of state action given that Freed was in an "ambit of [his] personal pursuits" when using his Facebook page, *Screws v. United States*, 325 U.S. 91, 111 (1945), as opposed to "exercis[ing] some right or privilege created by the State," *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999).

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1. Citations to "C.A. Rec." refer to the Sixth Circuit "Page ID #." See 6th Cir. R. 28(a). This is the same citation form used by Petitioner.

There is no compelling reason for the Court to review the Sixth Circuit's ruling. First, the Sixth Circuit adopted an appropriate test that comports with this Court's precedent on state action and that is consistent with the approach taken by other courts of appeal. Second, Lindke's appeal would fail under the so-called "appearance and purpose" test he proposes, as it did at the trial court level.

STATEMENT OF THE CASE

A. Factual Background

Respondent James Freed is the current City Manager for the City of Port Huron. Prior to 2008, while Freed was in college, Freed created a personal Facebook account with the name "James Freed" and username @JamesRFreed1. Pet. App. 2a; C.A. Rec. 667-668, 690. The login for the account is jamesfreedfacebook@gmail.com —Freed's personal email account. C.A. Rec. 1521. Freed has maintained this personal account through his employment with different employers prior to coming to work at the City of Port Huron.

Before Freed was hired by the City of Port Huron, Freed was given an option by Facebook to convert his personal account to a "page." *Id.* at 668-69, 683, 699. When Freed converted his account to a page, he was required to choose a category for his page. *Id.* at 684-85. The categories from which he was required to choose included "Public & Government Service," "Restaurant, "Public Figure," "Politician," "Government Official," or "Musician." Freed chose "Public Figure" because he believed none of the other categories fit. Pet. App. 2a. This personal Facebook page was Freed's only Facebook account, and Freed was the only person with access to his

personal page. C.A. Rec. 679-80. Most of his Facebook "friends" and "followers" were family members and personal friends. *Id.* at 688-89.

Freed was hired by the City of Port Huron in June 2014 as its City Manager, an unelected position. Pet. App. 2a. The City of Port Huron does not own or operate a City Facebook page or an account for the City Manager. However, the City operates several other Facebook pages, including pages named "Port Huron Police Department" and "City of Port Huron Parks & Recreation Department." C.A. Rec. 700-01. The City of Port Huron provided no support for Freed's Facebook page whatsoever. *Id.* at 676, 679-80. Freed never accessed his personal Facebook page on a City device. *Id.* at 676, 679-80.

Upon being hired by Port Huron, Freed updated the "About" section of his Facebook page to read, "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI." Pet. App. 2a. The Facebook page also contained a link to the City website, a general City email contact, and the City Hall address, which is information any private citizen or business could include on their page. *Ibid.* Freed created profile pictures, including a photo of his family and a head shot, and created a cover photo of a "Downtown Port Huron" promotional video. *Id.* at 28a.

Freed used his Facebook page to share pictures of his daily activities with his family and friends. The posts included pictures of Freed at a Daddy Daughter Dance; numerous posts about his wife, daughter, and dog; pictures of Freed attending a Rotary Club and Chamber of Commerce events; and Bible verses. *Id.* at 2a, 14a, see, *e.g.*, C.A. Rec. 674, 705, 782, 835-36. Freed also posted

administrative directives and press releases he issued as the City Manager that had already been released to the public elsewhere prior to being posted on his personal Facebook page. Pet. App. 3a.

When the COVID-19 pandemic hit, Freed, like many other Facebook users, began posting about the pandemic. Freed shared information about how his family was staying safe during the pandemic, including guidance from the St. Clair County Health Department and measures the City was taking. *Ibid.*; see, *e.g.*, C.A. Rec. at 731, 750.

Prior to March 2020, Petitioner Kevin Lindke made Facebook posts on other accounts personally attacking Freed. C.A. Rec. 1005. In March 2020, Lindke began criticizing Freed on Freed's personal Facebook page. Pet. App. 3a. Freed deleted the comments and blocked Lindke from posting on his personal Facebook page. *Ibid.* Freed deleted other Facebook users' comments and blocked users in the past when he felt as though he was being personally attacked. C.A. Rec. 676.

Shortly after this lawsuit was filed, Facebook deactivated Freed's account without explanation. *Id.* at 686. In June 2020, Facebook reactivated the page and then again without explanation deactivated it a second time for several months. *Id.* at 686-87. In October 2020, Facebook unexpectedly reactivated Freed's page. *Id.* at 687. Freed unpublished the page because he had no interest in maintaining a personal page he could not manage. *Id.* at 687.

B. Procedural History

Lindke filed suit on April 9, 2020 under 42 U.S.C. § 1983. Lindke sued Freed in his individual and official

capacities, alleging that when Freed deleted posts Lindke made on Freed's personal Facebook page and blocked Lindke from making additional posts, Freed violated the First Amendment to the United States Constitution.

Summary judgment. Freed filed a Motion for Summary Judgment, arguing that Lindke's claims failed because there was no state action. C.A. Rec. 623-59. Freed further argued that Lindke's claims were moot, that Freed was entitled to qualified immunity, that the page was a nonpublic forum and any restrictions on the page were reasonable, that Lindke's official capacity claims failed because he could not prove a *Monell* claim, and that injunctive and declaratory relief was improper because an official City Manager Facebook page did not exist.

The District Court granted Freed's Motion, finding Freed's actions did not constitute state action. The District Court explained the "core question" in determining whether state action exists is "whether 'there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as the State itself." Pet. App. 20a.

In evaluating this question, the District Court applied fourteen factors that had been addressed in cases involving state action and social media to determine whether a public official acted under color of state law. *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021); *Knight First Amend. Inst. v. Trump*, 928 F.3d 226 (2d Cir. 2019), *vacated as moot sub nom. Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1220-21 (2021); and *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019). The District Court concluded that "Freed's actions in deleting comments by Lindke on Freed's Facebook page and later blocking Lindke from the

page were not state action that required him to conform to constitutional strictures." Pet. App. 13a.

Appeal. The Sixth Circuit affirmed the District Court's decision. Pet. App. 12a. The Court agreed that Freed did not act under color of state law when he deleted Lindke's comments and blocked Lindke. Pet. App. 4a.

Relying upon *Waters v. City of Morristown*, 242 F.3d 353, 359 (6th Cir. 2001), the Sixth Circuit held that "just like anything else a public official does, social-media activity may be state action when it (1) is part of the officeholder's 'actual or apparent dut[ies],' or (2) couldn't happen in the same way 'without the authority of [the] office.'" Pet. App. 6a. The Sixth Circuit provided a few examples of when a governmental employee could be acting under color of state law when operating a social media page, including when a government entity passes a law requiring the public official to maintain a social media account, when state resources are used to operate the account, or when the account belongs to the state. Pet. App. 6a-7a.

Applying this analysis to Freed's page, the Sixth Circuit found that there was no law or ordinance requiring Freed to operate his page, that operating a Facebook page was not one of the actual or apparent duties of his position, and that no government funds or resources were used to operate the Page. Pet. App. 8a. Moreover, the page, which Freed solely operated since college and logged into with his private email address, would not become property of the City should Freed decide to leave for other employment. Pet. App. 9a.

The Sixth Circuit rejected Lindke's argument that Freed was fulfilling his job duties by communicating with

local businesses and residents, as "[w]hen Freed visits the hardware store, chats with neighbors, or attends church services, he isn't engaged in state action merely because he's 'communicating'—even if he's talking about his job." Pet. App. 9a. The Sixth Circuit also rejected Lindke's argument that government employees must have been involved in the operation of the page because photos of Freed were on the page. The Sixth Circuit explained, even if City employees had taken the photos (of which there was no evidence), "such minimal involvement" "isn't enough to transform a personal page into an official one." Pet. App. 10a.

REASONS FOR DENYING THE PETITION

Lindke asks the Court to resolve a purported circuit split. However, as is explained herein, the circuits all perform a fact-intensive inquiry to determine whether there is a sufficient nexus between the government official's actions and the state. Though there may be semantic differences in the approaches used by the circuits, the outcome of this case does not depend upon which test was applied, as Lindke's case would properly be dismissed by any of the circuit courts.

First, as this Court's longstanding precedent has held, there is simply no one-size-fits-all approach for the threshold question of state action. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). The fact that the action occurs on social media cannot and should not change that. It is, therefore, unnecessary for this Court to address this issue when the judgments in the Second, Fourth, Sixth, Eighth, and Ninth Circuits are largely compatible. The Sixth Circuit's decision complies with the fact-intensive nature of the state-action inquiry,

as the District Court's did, and it also correctly found that Freed was not engaged in state action when he deleted Lindke's comments and blocked Lindke from his private Facebook page.

Finally, this case is not an ideal vehicle for review given that the Sixth Circuit did not reach Freed's additional arguments, including that the claim for damages is obviously barred by qualified immunity and that his claims for injunctive and declaratory relief should be found to be moot given that his Facebook page has not been active in two and a half years.

I. There Is No Significant Conflict Among the Circuits.

Every circuit that has applied the state action analysis to public officials' social media pages has applied a calculus of factors to determine whether conduct arises to the level of state action. Lindke's argument that there is a circuit split centers on the fact that the Sixth Circuit is the only circuit to apply a "duty-or-authority" test, while other circuits focus on the social media account's "appearance and purpose." Pet. App. 9-14. Lindke misses the mark here because all circuits that have analyzed this issue have also applied what is essentially the "duty or authority test." Moreover, in practice, the Sixth Circuit's test, as well as the tests that have been used by the Second, Fourth, Eighth, and Ninth Circuits, have complied with this Court's requirement to conduct a "necessarily fact-bound inquiry," *Lugar*, 457 U.S. at 939 and to take a holistic approach, *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295-96 (2001). Because there is no significant circuit split, the Court should deny the petition.

A. There Is No State Action When the Activity Cannot Be Fairly Treated as That of the State

The First Amendment's Free Speech clause, applicable to the states via the Fourteen Amendment, only "prohibits governmental abridgment of speech"—not "private abridgment of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2021). Accordingly, a claim for constitutional deprivation fails unless it can be shown the deprivation was caused by "state action."

This state action doctrine "requires both an alleged constitutional deprivation 'caused by the exercise of some right or privilege created by the State …', and that 'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (quoting *Lugar*, 457 U.S. at 937). Conduct satisfying the constitutional "state action" requirement also satisfies the "color of state law" requirement under 42 U.S.C. § 1983 and turns on whether the defendant's actions are "fairly attributable to the State." *Lugar*, 457 U.S. at 935 n.18. Resolving the state action question focuses on "whether 'there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as the State itself.'" *Brentwood*, 531 U.S. at 295 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)).

State action can be found where a public official acts in a way that a private citizen would not have been able to act, but not every action performed by a government official is done with "some right or privilege created [or imposed] by the State." *Sullivan*, 526 U.S. at 50. State action, therefore, does not apply when a government

actor is in the midst of his personal, private pursuits. *See Screws v. United States*, 325 U.S. 91, 111 (1945). The public employee must be "acting in his official capacity or while exercising his responsibilities pursuant to state law." *West v. Atkins*, 487 U.S. 42, 50 (1988).

This makes sense given that public employees are also private citizens. Pet. App. 5a ("It stems from our recognition that public officials aren't just public officials—they're individual citizens, too."). Public employees are not only permitted to "speak[] as citizens about matters of public concern," but their speech is also integral in "promoting the public's interest in receiving the well-informed views of government employees engag[ed] in civic discussion." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

B. The Sixth Circuit's Test Is Compatible with the Other Circuits' Tests

Under *Brentwood*, the state action analysis must focus on whether action "may be fairly attributed to that of the State itself." 531 U.S. at 295-96. In making this determination, this Court held the analysis cannot be reduced to rigid simplistic criteria, explaining "no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." *Id.* All circuit courts evaluating whether public officials' actions on their social media accounts can fairly be attributed to the state itself have applied a version of the "nexus" analysis required by *Brentwood*. *See Knight*, 928 F.3d at 234-36; *Davison*, 912 F.3d at 679-80; *Campbell*, 986 F.3d at 825-29; *Garnier v. O'Connor-Ratcliff*, 41

F.4th 1158, 1170-73 (9th Cir. 2022); pet. for cert. pending No. 22-324 (filed Oct. 4, 2022). Even though there may be semantic differences in how the circuits express the "nexus test," the judgments between all the circuits addressing this issue are largely compatible. *See Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (the Court "reviews judgments, not opinions").

Every circuit ultimately focuses on whether the government actor's actions were "fairly attributable" to the state based on "normative judgment." *Brentwood*, 531 U.S. at 295-96. In applying the *Brentwood* test, circuit courts of appeal have analyzed the following factors: (1) how the public official describes and uses the page; (2) how others, including government officials and agencies, regard and treat the page; (3) whether the public official is identified on the page with the public position he or she holds (such as through the title of the page or cover or profile photos); (4) whether the public official uses the page to announce official business; (5) how the page is categorized (as either a "government official" or a "public figure"); (6) whether the page includes governmental contact information; (7) whether posts are expressly addressed to constituents; (8) whether the public official solicits comments or invites constituents to have discussions on the page; (9) whether the content posted relates to official responsibilities and business conducted in an official capacity; (10) to whom features of the page are made available; (11) the use of government resources, including government employees, to maintain the page; (12) whether creating the account is one of the public official's enumerated duties; (13) whether the account will become state property when the public official leaves office; (14) whether the public official's social media activity

takes place during normal working hours; (15) whether the government official purposed to act in performance of his duties; (16) whether the page had the purpose and effect of influencing the behavior of others; and (17) whether the management of the page related in a meaningful way to government status or the performance of government duties. Pet. App. 21a-22a (citing *Campbell*, 986 F.3d 822 at 826-28; *Knight*, 928 F.3d at 236; *Davison*, 912 F.3d at 680-81); *Garnier*, 41 F.4th at 1170-73.

There is no qualitative difference in the test adopted by the Sixth Circuit from that used by the Second, Fourth, Eighth and Ninth Circuits. Like these other circuits, the Sixth Circuit considered: the use of government resources, including employees, to maintain the page; whether creating the account is one of the public official's enumerated duties; whether the account will become state property when the public official leaves office; and whether the public official's social media activity takes place during normal working hours. Pet. App. 8a-10a. The mere fact that the Sixth Circuit declined to emphasize the "appearance and purpose" factors, explaining such factors tend to "lose the forest for the trees," Pet. App. 6a, does not create a substantive difference in the approaches between the circuits.

Lindke incorrectly asserts that the Sixth Circuit "stands alone" by focusing on whether social media is part of the public employee's actual or apparent duties or whether the social media activity could not have happened in the same way without the authority of the office. Pet. App. 14. However, every circuit evaluating whether a government official's social media activity constitutes state action has placed significant emphasis on this "duty" or "authority" analysis. *Knight*, 928 F.3d

at 235 ("The @WhiteHouse account, an undoubtedly official Twitter account run by the government, 'directs Twitter users to "Follow for the latest from @POTUS @realDonaldTrump and his Administration."'"); *Davison*, 912 F.3d at 680 ("Randall created and administered the Chair's Facebook Page to further her duties as a municipal official."); *Campbell*, 986 F.3d at 826-27 ("Even if Reisch's official duties as a representative extend beyond voting or participating in committee meetings and include things like communicating with constituents about legislation, her sporadic engagement in these activities does not overshadow what we believe was quite clearly an effort to emphasize her suitability for public office."); *Garnier*, 41 F.4th at 1170-73 (evaluating whether the social media usage is related to the performance of the government official's duties or government status).

Lindke also suggests this Court must consider how to evaluate state action in the context of social media. Pet. 8. This Court and countless other federal courts have repeatedly been confronted with new situations that present questions regarding state action. *See Lugar*, 457 U.S. 179 (lessee-operator of a truckstop); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (Amtrack); *Pennsylvania v. Bd. of Dirs. Of City Trusts of Philadelphia*, 353 U.S. 230 (1957) (privately owned college). This Court has evaluated whether numerous athletic associations have engaged in state action, *see Brentwood*, 531 U.S. 288 (nonprofit athletic association), *Nat'l Collegiate Ath. Ass'n v. Tarkanian*, 488 U.S. 179 (1988) (NCAA). Yet none of these cases required a unique test. Social media is no different. This Court's precedent already provides the appropriate test to determine whether such activity constitutes state action.

C. The Second, Fourth, Eighth, and Ninth Circuits Would Decide This Case the Same Way

1. Lindke argues the so-called "appearance and purpose" test used by the Second, Fourth, Eighth, and Ninth Circuits should have been applied by the Sixth Circuit and would have resulted in a different outcome. Pet. 21. Lindke's analysis is wrong on both points.

The District Court considered a combination of these circuits' approaches and found that Freed did not act under color of law. Pet. App. 13a. The District Court first essentially analyzed the Sixth Circuit's so-called "duty or authority" test by addressing whether there was evidence of government involvement and control of the page. App. 22a-25a. The District Court found that (1) no governmental resources, devices, or employees were used to maintain Freed's page; (2) Freed "did not hold out his page as an official channel of governmental communication"; (3) Freed never intended to use his page as an official city manager page; and (4) the page "did not purport to be an official way of giving notice of City actions or by its nature serve to memorialize official acts." Pet. App. 22a-25a.

The District Court then looked to the "appearance and purpose" of the page and found that the posts had a "strong tendency" toward Freed's family life, the page would not become the City's property when he left his employment with the City, the page did not contain his job title, and the page was not categorized as a "government official." Pet. App. 25a-28a.

The District Court held:

> [T]his case lacks "substantial and pervasive government involvement with, and control over" the social media account, given the prevailing personal quality of Freed's post, lack of formal policy pronouncements, and absence of evidence that it was a tool for official governance, *Knight*, 928 F.3d at 235. In addition, under the factors outlined in *Davison*, Freed's management of the page cannot reasonably be treated as that of the City itself. Freed administered his Facebook page in a private, not public, capacity. And he was not engaged in state action when he deleted Lindke's comments and blocked Lindke from the page. As a result, his First Amendment claims fail. Pet. App. 29a.

In short, the District Court applied both the "appearance and purpose" test and the "duty and authority" test and found the actions of Freed did not constitute state action under either test.

2. The Ninth Circuit addressed a similar case in July 2022. *Garnier*, 41 F.4th 1158. Had the Sixth Circuit applied the reasoning of the Ninth Circuit to the facts in this case, the Sixth Circuit still would have reached the same result and found that Freed was not engaged in state action.

In *Garnier*, the Ninth Circuit addressed the status of Facebook and Twitter pages belonging to members of a school district board of trustees. *Id.* at 1163. The Trustees made Facebook pages during the course of their campaign to communicate to the public about their campaign activities. *Id.* at 1164-65. The Trustees simultaneously

maintained private Facebook pages. *Id.* at 1163. After their election, they continued to use the campaign pages to discuss Board activities. *Id.* at 1164. Two parents often posted critical comments on the Trustees' Facebook pages, and the Trustees eventually blocked the parents and/or deleted their comments. *Id.*

The Ninth Circuit concluded that "given the close nexus between the Trustees' use of their social media pages and their official positions, the Trustees in this case were acting under color of state law when they blocked the Garniers." *Id.* at 1170. While recognizing that the state action analysis should be a process of "'sifting facts and weighing circumstances,'" the Court found that the Trustees were "'exercising power possessed by virtue of state law and made possibly only because' they were 'clothed with the authority of state law.'" *Id.* at 1173 (quoting *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 748 (9th Cir. 2020); *Gritchen v. Collier*, 254 F.3d 807 (9th Cir. 2001)).

First, the Ninth Circuit found that the Trustees "'purport[ed] . . . to act in the performance of [their] official duties'" through their social media pages. *Id.* at 1171 (quoting *Anderson v. Warner*, 451 F.3d 1063, 1069 (9th Cir. 2006)). The Court found that the Trustees categorized their pages as "government official[s]," listed their official titles in prominent places, and provided information about official activities and solicited input from constituents. *Id.* at 1171. The Court also found that the content of the Page was exclusively related to their official duties on the school board and included no personal information; therefore, "both through appearance and content," the Trustees held their pages out to be official channels of communication. *Id.*

Second, the Ninth Circuit looked to the "purpose" of the pages and found that the pages "had the purpose and effect of influencing the behavior of others." *Id.* at 1171.

> Both Trustees actively solicited constituent input about official PUSD matters, including encouraging constituents to mark their calendars for upcoming Board meetings, to fill out surveys relating to Board decision-making, and to apply for volunteer committees run by the Board. And both Trustees sought feedback from constituents, and responded to their comments. It was by "invoking" their "'governmental status' to influence the behavior of those around" them that the Trustees were able to muster this kind of public engagement with their social media pages. *Id.* at 1171.

Finally, the Trustees' management of their pages related in a meaningful way to their school board duties, as they used the pages exclusively to discuss official business. *Id.* "After their election in 2014, the Trustees virtually never posted overtly political or self-promotional material on their social media pages. Rather, their posts either concerned official District business or promoted the District generally." *Id.* at 1172.

3. If the Sixth Circuit had applied the Ninth Circuit's *Garnier* analysis to the facts of the instant case, the Sixth Circuit still would have reached the same result.

First, unlike the Trustees in *Garnier*, Freed did not purport to act in the performance of his duties as City Manager on his Facebook page. His testimony makes clear that he did not intend to have a City Manager Facebook page. C.A. Rec. 679-80 ("If it wasn't – to be quite frank, if I

couldn't use it as a personal page, I wouldn't have had one. You know, I don't want an official city manager page."). The Trustees in *Garnier* categorized their pages as "government officials," while Freed categorized his page as a "public figure." One Trustee in *Garnier* named his page "T.J. Zane, Poway Unified School District Trustee," while Freed's page was titled "James Freed." By contrast, the Facebook pages for the City of Port Huron's police department and parks and recreation department feature official titles and government emblems.

Second, there is no evidence that Freed influenced anyone's behavior on the page. While the Trustees were encouraging citizens to take action and soliciting back-and-forth conversation, at most Freed re-posted information that was already published elsewhere, the same as any other citizen could do.

Finally, Freed's management of his page was unrelated in any meaningful way to any of his official duties. It is axiomatic that Freed's personal posts of his Daddy Daughter dances and Bible verses did not concern official City business or promote the City generally. Though he made various posts relating to his employment position and the City of Port Huron itself, none of these posts contained original content that was part of his official duties, as in *Garnier*.

The Ninth Circuit, therefore, would also find Freed was not engaged in state action. Thus, the differences between the standards are not outcome determinative in this case.

II. This Is Not an Ideal Case to Address This Question.

Neither this case nor *O'Connor-Ratcliff v. Garnier*, No. 22-324 (filed Oct. 4, 2022) raise questions justifying

review. This case specifically is not well-suited to address the state action issue because there are alternate grounds for affirmance.

In both cases, the plaintiffs sought damages, declaratory relief, and injunctive relief. In *O'Connor-Ratcliff*, because the Ninth Circuit found that state action existed, the Ninth Circuit reached the qualified immunity question and answered it in the affirmative—ruling that the claim for damages was barred. 41 F.4th at 1183-84. Should the instant action proceed further, the qualified immunity argument, which the District Court did not reach in its analysis, must be addressed. *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *clarified by Pearson v. Callahan*, 555 U.S. 223 (2009) (case must be dismissed at this threshold stage because 42 U.S.C. § 1983 is inapplicable on its face). Like the Trustees in *O'Connor-Ratcliff*, Freed, too, is entitled to qualified immunity on Lindke's claim for damages for the same reasons applicable in the *O'Connor-Ratcliff* case. Def's C.A. Br. at 41-42. The case law is not so clearly established to "put the constitutional question beyond debate" that a private Facebook page operated by a public official constitutes state action. *See Novak v. City of Parma*, 932 F.3d 421, 433-34 (6th Cir. 2019) (officer entitled to qualified immunity when they deleted comments on an official police Facebook page because the law regarding First Amendment protections for comments on social media platforms is far from clearly established). Therefore, the damage claim will likely be barred by qualified immunity.

Lindke argues that this case is better suited for review than *O'Connor-Ratcliff* because that case will be moot if the Trustees cease to remain government officials. Pet. 17. The same argument would apply if Freed left his

position with the City of Port Huron and went into private employment or a position with another municipality. Moreover, the mootness issue in this case is much stronger than in *O'Connor-Ratcliff* case. Whereas the Trustees continue operating their pages, Freed ceased operating the social media page and has not operated it for almost three years. Therefore, the claims for declaratory and injunctive relief will likely be moot. *See Green v. Mansour*, 474 U.S. 64, 68 (1985) (to maintain an official capacity claim for injunctive and declaratory relief cognizable under 42 U.S.C. § 1983, plaintiff must plead and be able to prove a continuing violation of his First Amendment rights).

The two cases are also different because, after finding state action, the Ninth Circuit also found that the Trustees' social media pages were designated public fora because the Trustees sought "constituent input about official PUSD matters" and "sought feedback from constituents, and responded to their comments." 41 F.4th at 1171. By establishing public fora, the Trustees were barred from limiting speech based on its content. *Id.* at 1177-79. By contrast, Freed never solicited back-and-forth conversations with City residents. Pet. App. 27a. Freed's page was akin to a direct mailing list and, therefore, a nonpublic forum, and the restrictions drawn on Lindke's speech were reasonable. *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 806 (1985) ("[C]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."). Freed unequivocally testified that he blocked Lindke because of his past cyber activity and personal attacks. C.A. Rec. 677-78. It is reasonable that a municipal employee

would not want a poster who regularly disparages him to post on his Facebook page where his mother and other family members review pictures of his wife and daughter. Accordingly, Freed's restriction of Lindke's speech was reasonable considering the purpose served by his Facebook page.

In sum, the Court's review of this case would be largely academic given that even a remand would lead to dismissal of this case on other grounds.

III. The Sixth Circuit Correctly Found Freed's Action Did Not Involve State Action.

The Sixth Circuit correctly found that Freed was not engaged in state action. The Sixth Circuit also correctly applied this Court's longstanding state action principles in deciding that a government official will act under color of law when he operates a social media account "pursuant to his actual or apparent duties or using his state authority." This test is merely a restatement of this Court's precedent to ensure that social-media activity is "fairly attributable" to the state. *Lugar*, 457 U.S. at 937.

Lindke argues that the Sixth Circuit's approach is too narrow and requires "[n]ecessary condition[s] across the board for finding state action" and excludes all other factors. Pet. 20. To the contrary, within the context of applying the duty or authority test the Sixth Circuit considered several other indicia, including evaluating the use of government resources, including employees, to maintain the page; whether creating the account is one of the public official's enumerated duties; whether the account will become state property when the public official leaves office; and whether the public official's social media activity takes place during normal working hours. Pet. App. 6a-8a.

While Freed is undoubtedly a public employee as the City Manager of Port Huron, in his own words, he is also "Husband to Jessie, Daddy to Lucy." His @JamesRFreed1 Facebook page that he has logged into with a personal email account since he was in college was, likewise, a private, personal pursuit. Because the City of Port Huron did not require his Facebook page, control its content, or provide any support for its dissemination, the Sixth Circuit correctly found there was no state action.

This Court's decision in *Halleck* provides further support for the Sixth Circuit's decision. 139 S. Ct. 1921, 1928-29 (2019) (reversing the Second Circuit and holding that operations of public access channels on a cable system did not constitute state action). This Court held, "when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor." *Id.* at 1930. A private entity that opens a forum for speech is entitled to "editorial discretion over the speech and speakers in the forum." *Id.* (citing *Hudgens v. NLRB*, 424 U.S. 507 (1976)). As this Court explained, the reason for this is obvious:

> If the rule were otherwise, all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints and would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum. **Private property owners and private lessees would face the unappetizing choice of allowing all comers or closing the platform altogether.** "The Constitution by no means requires such an attenuated doctrine of

> dedication of private property to public use." Benjamin Franklin did not have to operate his newspaper as "a stagecoach, with seats for everyone." That principle still holds true. As the Court said in *Hudgens*, to hold that private property owners providing a forum for speech are constrained by the First Amendment would be "to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." The Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property. *Id.* at 1930-31 (internal citations omitted).

Similarly, in his concurring opinion in *Biden*, Justice Thomas found it tenuous that government officials' social media pages could be considered state action when there is no governmental control over the platforms. *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1220-22 (2021). Justice Thomas analogized that government officials on social media pages are similar to "government officials who informally gather with constituents in a hotel bar" who "can ask the hotel to remove a pesky patron who elbows into the gathering to loudly voice his views" because the government does not control the space. *Id.* at 1222; *Knight First Amend. Inst. at Columbia Univ. v. Trump,* 953 F.3d 216, 227 (2d Cir. 2020) (Park, J., dissenting from denial of rehearing en banc) ("Such a rule would preclude government officials from discussing public matters on their personal accounts without converting all activity on those accounts into state action.").

This is the exact situation facing Freed. Facebook can (and has) unilaterally shut the account down. As Freed explained, he never intended this account to be an official account and would shut it down if he were forced to allow all comments, including personal attacks against himself and his family. In sum, Freed should not be required to either close his personal Facebook page or allow all comers on it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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