No. 22-611

In the Supreme Court of the United States

KEVIN LINDKE,
PETITIONER

v.

JAMES R. FREED

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

REPLY BRIEF FOR THE PETITIONER

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Respondent James Freed's response confirms that the courts of appeals are split on the question presented; that this case is an ideal vehicle for resolving it; and that the Sixth Circuit got the answer wrong.[*]

ARGUMENT

I. THE CIRCUIT SPLIT IS REAL AND SIGNIFICANT

Freed concedes (at 8) 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.'" But he asserts (at 12) that "[t]here is no

[*] The petitioners in *O'Connor-Ratcliff* v. *Garnier* have filed a "Supplemental Brief" in which they agree with Petitioner Kevin Lindke that the circuit split is real, Suppl. Br. at 4-5, No. 22-324 (Mar. 14, 2023), and that Lindke would have prevailed under the majority approach, *id.* at 5. The *Garnier* petitioners nevertheless repeat Freed's arguments that this case is a poor vehicle, *id.* at 6-10, which are incorrect for the reasons explained in Part II below. Insofar as the Court is uncertain whether this case or *Garnier* is the better vehicle, it could grant both petitions and consolidate the cases for oral argument.

qualitative difference" between those two standards. Freed's assertion is incorrect.

A. Most courts of appeals have adopted a "totality of the circumstances" approach that considers a broad range of factors—including a social media account's *appearance* (whether the official "clothed [the account] in the power and prestige of her state office") and its *purpose* (whether the official used the account "as a tool of governance"). *Davison* v. *Randall*, 912 F.3d 666, 680-81 (4th Cir. 2019) (cleaned up); see *Campbell* v. *Reisch*, 986 F.3d 822, 826-27 (8th Cir. 2021) ("trappings" and "purposes"); *Knight First Amend. Inst.* v. *Trump*, 928 F.3d 226, 235-36 (2d Cir. 2019), vacated as moot *sub nom. Biden* v. *Knight First Amend. Inst.*, 141 S. Ct. 1220 (2021).

In the decision below, the Sixth Circuit specifically *disclaimed* the need to "examin[e] a page's appearance or purpose." Pet. App. 12a. The court thus rejected as legally irrelevant Lindke's argument that "the presentation of the account [was] connected with [Freed's] position." *Id.* at 10a (citation omitted). The court recognized that "several other courts have used that approach," *ibid.* (citing *Knight*, *Davison*, and *Campbell*), but it found their reasoning unpersuasive, *id.* at 11a-12a. Instead, to the Sixth Circuit, the "only" relevant factors were whether the public official's social media activity was conducted in furtherance of governmental "duties" or was made possible only by "state authority." *Id.* at 8a.

Freed argues (at 11) that the difference between the Sixth Circuit's approach and that of the other circuits is merely "semantic." Yet that is not how the Sixth Circuit understood its own decision, in which the court self-consciously "part[ed] ways with other circuits' approach to state action." Pet. App. 12a. In so ruling, the Sixth Circuit dismissed as "shallow" Lindke's analogy to "factors [the court] consider[s] in assessing when [off-duty] police officers are engaged in state action." *Id.* at

11a-12a. The Ninth Circuit, in turn, declared the Sixth Circuit's reasoning unpersuasive because it viewed the "off-duty officer cases [as] instructive." *Garnier* v. *O'Connor-Ratcliff*, 41 F.4th 1158, 1177 (9th Cir. 2022). The Ninth Circuit accordingly "decline[d] to follow" the Sixth Circuit's decision here, instead "follow[ing] the mode of analysis of the Second, Fourth, and Eighth Circuits." *Ibid.* Freed simply fails to engage with the actual reasoning of these cases, including their reliance on (by the majority of circuits) or rejection of (by the Sixth Circuit) factors drawn from cases involving off-duty police officers.

B. Attempting to downplay the split, Freed offers (at 11-12) a list of seventeen "factors" that the courts of appeals have "analyzed" when deciding whether a public official's social media use constitutes state action. Of the listed factors, however, each falls cleanly into one of two categories—(a) appearance and purpose; or (b) duty or authority. Freed's list is as follows:

Factor	Category
1. How the public official describes and uses the page	Appearance and purpose
2. How others, including government officials and agencies, regard and treat the page	Appearance and purpose
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)	Appearance and purpose
4. Whether the public official uses the page to announce official business	Appearance and purpose
5. How the page is categorized (as either a "government official" or a "public figure")	Appearance and purpose
6. Whether the page includes governmental contact information	Appearance and purpose
7. Whether posts are expressly addressed to constituents	Appearance and purpose
8. Whether the public official solicits comments or invites constituents to have discussions on the page	Appearance and purpose
9. Whether the content posted relates to official responsibilities and business conducted in an official capacity	Appearance and purpose

10. To whom features of the page are made available	Appearance and purpose
11. The use of government resources, including government employees, to maintain the page	Duty or authority
12. Whether creating the account is one of the public official's enumerated duties	Duty or authority
13. Whether the account will become state property when the public official leaves office	Duty or authority
14. Whether the public official's social media activity takes place during normal working hours	Duty or authority
15. Whether the government official purposed [*sic*] to act in performance of his duties	Appearance and purpose (assuming "purposed" means "purported")
16. Whether the page had the purpose and effect of influencing the behavior of others	Appearance and purpose
17. Whether the management of the page related in a meaningful way to government status or the performance of government duties	Appearance and purpose

Under the majority's totality-of-the-circumstances approach, all the "factors" on Freed's list are potentially relevant. The Sixth Circuit, by contrast, takes into consideration "only" the factors that speak directly to whether the public official's social media activity "derives from the duties of his office [or] depends on his state authority." Pet. App. 8a. That means factors 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, and 17 are given no significance in the Sixth Circuit. Thus, the issue is not that the "the Sixth Circuit declined *to emphasize* the 'appearance and purpose' factors," Br. in Opp. 12 (emphasis added), but rather that the court declared those factors categorically off limits to the state-action inquiry.

C. Freed further argues (at 17) that the split is not meaningful because "[i]f 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." As an initial matter, Freed's reference to "the Ninth Circuit's *Garnier* analysis" is a tacit admission that the Ninth Circuit's approach differs from the approach applied by the Sixth Circuit in this case. Indeed, Freed's application of the "*Garnier* analysis" (at 17-18) takes account of factors that the Sixth Circuit did not: his Facebook page's appearance (how he "purport[ed] to act") and its purpose (whether he used it to discuss "official City business or promote the City"). In any event, Freed's application of the *Garnier* analysis is unpersuasive on its own terms.

First, Freed asserts (at 17) that "unlike the Trustees in *Garnier*, [he] did not purport to act in the performance of his duties as City Manager on his Facebook page." To support that assertion, he relies primarily on his own testimony that "he did not *intend to* have a City Manager Facebook page." Br. in Opp. 17-18 (emphasis added). Freed does not explain how his unexpressed, subjective intent is relevant to whether "the appearance and the

content" of his social media page were such that the page "effectively displayed a badge to the public signifying that [the] account[] reflected [his] official role[]." *Garnier*, 41 F.4th at 1172 (cleaned up). Nor did the Ninth Circuit in *Garnier* concern itself with the subjective intent of the public officials at issue there.

Freed further notes (at 18) that "[t]he Trustees in *Garnier* categorized their pages as 'government officials,' while [he] categorized his page as a 'public figure.'" Yet it is hard to see why that is a meaningful difference in this case, where Freed was a "public figure" *only* by virtue of his official role as City Manager. And in fact, Freed's Facebook page did not merely label him a "public figure." His page also "reflect[ed] his [official] title"; listed the Port Huron website as the page's own web address; gave an official Port Huron email as its email address; and listed City Hall as its associated physical address. Pet. App. 2a-3a, 11a; see C.A. Rec. 1154 (Freed's profile featured a picture of him wearing his City Manager pin). These "official identifications" on Freed's page are similar to the ones on which the Ninth Circuit relied in *Garnier*. See 41 F.4th at 1171 (public officials "listed their official titles in prominent places on both their Facebook and Twitter pages"); *ibid.* (one official "included her official [school board] email address in the page's contact information").

Second, Freed argues (at 18) that "there is no evidence that Freed influenced anyone's behavior on the page." That argument is especially curious, as this case arose because Lindke was spurred to action by Freed's posts. See Pet. App. 15a-16a; see also Br. in Opp. 4 (noting past responses by others to Freed's posts). If anything, Freed's social media presence was *more* influential than that of the public officials in *Garnier*. Freed's Facebook page had over 5,000 followers. Pet. App. 2a. In *Garnier*, by contrast, one of the public officials had "nearly 600

followers," while the other had "nearly 300." 41 F.4th at 1171.

Contrary to Freed's argument, moreover, he indeed sought to influence public opinion by sharing initiatives and policies of which he was proud. See Pet. App. 2a-3a, 14a-15a. Though Freed claims (at 18) that he never solicited "back-and-forth conversation" with citizens, he listed CommunityComments@PortHuron.org as the page's email address, Pet. App. 2a—clearly welcoming feedback from the public through an official city channel. And his influence on the public was no less significant because he merely "re-posted information that was already published elsewhere, the same as any other citizen could do." Br. in Opp. 18. As the Second Circuit has explained, "the fact that any [social media] user can" use their account in a particular manner "does not mean that [a public official] somehow becomes a private person when he does so." *Knight*, 928 F.3d at 236. Indeed, it is "irrelevant that [the public official] might have taken the same action had he acted in a purely private capacity." *Griffin* v. *Maryland*, 378 U.S. 130, 135 (1964). Nor is it significant that the information Freed shared about Port Huron policies had (usually) already been published elsewhere; the state-action inquiry does not have an original-content requirement.

Third, Freed claims (at 18) that his "management of his page was unrelated in any meaningful way to any of his official duties." Yet his Facebook usage was directly related to his official duties as City Manager: His posts publicized "administrative directives he issued" and "policies he initiated." Pet. App. 2a-3a. The content of Freed's page was thus comparable to "the content of the Trustees' pages" in *Garnier*, which provided "information to the public about the [school] Board's official activities and solicit[ed] input from the public on policy issues relevant to Board decisions." 41 F.4th at 1171 (quotation

marks and citation omitted). And while Freed is correct (at 17) that the percentage of job-related posts was higher in *Garnier*, that fact is not dispositive. Indeed, a totality-of-the-circumstances approach—like the one followed there—means "there is no rigid formula for measuring state action." 41 F.4th at 1169 (citation omitted).

II. THIS IS AN IDEAL CASE FOR ADDRESSING THE QUESTION PRESENTED

Freed argues that this case is poorly suited for addressing the state-action question for three reasons: qualified immunity, mootness, and First Amendment forum analysis. None is persuasive.

A. *Qualified immunity*. In addition to his damages claim, Lindke is "seeking declaratory and injunctive relief," Pet. App. 18a, to which qualified immunity does not apply. For that reason, neither the district court nor the Sixth Circuit had occasion to address Freed's qualified immunity defense; nor would this Court have occasion to address it. And even if the Court *could* address qualified immunity, it would not be obligated to do so. See *Pearson* v. *Callahan*, 555 U.S. 223, 242 (2009) (courts have discretion "to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case").

In any event, qualified immunity does not apply here. The legal considerations that inform the state-action inquiry are well established, as is the precise legal issue on which the Sixth Circuit erred—namely, treating duty or authority as a litmus test for state action. Rejecting the Sixth Circuit's approach will require the Court to do little more than reaffirm that "no one fact can function as a necessary condition across the board for finding state action." *Brentwood Acad.* v. *Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-96 (2001).

Freed argues (at 19) that the right approach is subject to debate because this case, unlike the Court's prior state-

action cases, involves a "private Facebook page." Yet the question presented concerns the right test for evaluating state action, not the substantive First Amendment standard that would apply once state action has been found to exist. Unless Facebook merits a unique state-action inquiry—and neither Freed nor the Sixth Circuit explains why it should—the social media context does not create a reasonable disagreement about whether duty or authority are the "only" relevant factors. Pet. App. 8a; see Br. in Opp. 13 (disclaiming the need for "a unique test").

B. *Mootness*. Lindke's request for "nominal, actual, and punitive damages," Pet. App. 18a, means that the case will continue to present a live controversy throughout this Court's consideration, see *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 796 (2021). For that reason alone, Freed's mootness concerns (at 19-20) about Lindke's request for declaratory and injunctive relief are irrelevant.

Freed's concerns are also insubstantial. Freed claims (at 20) that he has voluntarily "ceased operating" his Facebook page. But "[v]oluntary cessation does not moot a case or controversy unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," a "heavy burden" that Freed does not even attempt to meet. *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (cleaned up). Freed's assertion (at 4) that he "ha[s] no interest in" using his Facebook page is plainly insufficient. See *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (defendant's "announcement" that it has abandoned the challenged action "does not moot th[e] case"). Indeed, as Freed testified in his deposition, he has previously vowed on multiple occasions never to use Facebook again—only to return to it later. C.A. Rec. 686. Nor has Freed indicated that, if he *does* return, he will stop blocking

access to his page by constituents who criticize his governmental conduct.

C. *First Amendment forum analysis*. Freed argues (at 20) that this case is a less-desirable vehicle than *Garnier* because the public officials there used their social media accounts as "public fora," whereas his Facebook page was "a nonpublic forum." That argument conflates the threshold question of state action (whether his use of social media is subject to First Amendment scrutiny) with the merits (whether his conduct would satisfy such scrutiny). The Court thus has the option of considering the First Amendment standard alongside the state-action inquiry, see Pet. 19, though it is not obligated to do so.

III. FREED FAILS TO REHABILITATE THE ERRONEOUS DECISION BELOW

On the merits, Freed barely defends the Sixth Circuit's decision to transform the state-action inquiry into a two-factor test. Freed argues (at 21) that the Sixth Circuit's test considers several facets of a public official's social media use "within the context of applying the duty or authority test." But the problem is the court's refusal to consider facets *outside* that test, such as a social media account's appearance or purpose.

As "support for the Sixth Circuit's decision," Freed invokes (at 22) this Court's ruling in *Manhattan Community Access Corp.* v. *Halleck*, 139 S. Ct. 1921 (2019). But the question there was whether "a private nonprofit corporation" was a state actor when operating public access cable channels. *Id.* at 1926. In that context, the Court was wary of "transform[ing] private entities into state actors subject to First Amendment constraints." *Id.* at 1930. Here, by contrast, the question is whether someone who is indisputably a public official, and thus subject to the First Amendment, acts in his public or private capacity when operating a social media account.

Freed also relies (at 23) on Justice Thomas's concurrence in *Biden* v. *Knight First Amendment Institute*, 141 S. Ct. 1220 (2021). But the quoted passage addressed the distinct question whether the President's Twitter account constituted a "public forum" for purposes of the First Amendment. *Id.* at 1222. Indeed, Justice Thomas described the dispute there as implicating "governmental use of private space," *ibid.*, thus presuming an affirmative answer to the threshold question whether state action was present.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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