No. 22-611

In the Supreme Court of the United States

KEVIN LINDKE, PETITIONER

v.

JAMES R. FREED

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Courts have increasingly been called upon to determine whether a public official who selectively blocks access to his or her social media account has engaged in state action subject to constitutional scrutiny. To answer that question, most circuits consider a broad range of factors, including the account's appearance and purpose. But in the decision below, the court of appeals rejected the relevance of any consideration other than whether the official was performing a "duty of his office" or invoking the "authority of his office." Pet. App. 5a.

The question presented is:

Whether a public official's social media activity can constitute state action only if the official used the account to perform a governmental duty or under the authority of his or her office.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is published at 37 F.4th 1199. The court's order denying rehearing en banc (Pet. App. 30a) is available at 2022 WL 3221937. The district court's opinion and order granting respondent James Freed's motion for summary judgment (Pet. App. 13a-29a) is published at 563 F. Supp. 3d 704.

JURISDICTION

The court of appeals entered judgment on June 27, 2022, and denied a timely petition for rehearing on August 5, 2022. On October 7, 2022, Justice Kavanaugh extended the time to file a petition for a writ of certiorari to and including January 2, 2023. The petition was filed on December 29, 2022, and granted on April 24, 2023. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1983 of Title 42, United States Code, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

In March 2020, at the outset of the COVID-19 pandemic, petitioner Kevin Lindke and respondent James Freed found themselves in a dispute about their local government that would strike many Americans as familiar. Freed, the town's City Manager, was speaking regularly with his constituents to inform them about the steps that he and other town officials were taking to keep them safe, to solicit their feedback, and to answer their questions. Lindke felt that those efforts had been inadequate, and he said as much. Freed, like many public officials before him, wished that he could silence his critics.

But because this dispute played out on Facebook, an online social media platform, Freed *could* silence Lindke—and he did so. Freed deleted Lindke's comments from his Facebook page and then denied Lindke access to the page altogether. Freed would no longer have to face Lindke's criticisms, and none of Freed's other constituents would see them either.

Lindke challenged Freed's response as a denial of his First Amendment rights. But the Sixth Circuit held that the challenged conduct was immune from constitutional scrutiny because Freed had been using a personally created Facebook page rather than an official one. According to the court, a public official engages in state action—and is thereby bound to follow the Constitution—only when the official performs a legally mandated "duty of his office" or invokes the "authority of his office." Pet. App. 5a. In the court's view, it was irrelevant that Freed had designed his Facebook page to convey the impression that it was an official outlet for communication with the City Manager and had used the page for just that purpose.

The Sixth Circuit's ruling misunderstands the inquiry into whether a government official has engaged in state action—or, to put the same question in statutory terms,

whether the official has acted "under color of" law. 42 U.S.C. § 1983. The answer to that question, this Court has explained, "is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Acad.* v. *Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). The government's influence is vast and often subtle; a public official can act *under color of* law, affecting private interests in ways that matter under the Constitution, even when not executing a legal duty or drawing on the formal powers of office. The Sixth Circuit's attempt to identify "necessary condition[s] across the board for finding state action" was accordingly misguided, affording insufficient respect to "the range of circumstances that could point toward the State behind an individual face." *Ibid.*

A. Factual Background

1. Freed became the City Manager of Port Huron, Michigan, in 2014. C.A. Rec. 670.[1] Appointed by the Mayor and City Council, the City Manager serves as the town's chief administrative officer, leading its day-to-day operations. City Charter § C5-1.[2] In this role, Freed assists the City Council by carrying out the Council's policy vision; advising the Council on finances and budget; and coordinating the work of department heads and other employees. *Ibid.*

The City Manager has a broad mandate. His general powers include authority to appoint or suspend municipal employees, City Charter § C5-1(9); to promulgate rules of general applicability, *id.* § C5-1(11); and to enforce City ordinances, *id.* § C5-1(10). The Council has also authorized

[1] Citations to "C.A. Rec." refer to "Page ID #" citations from the record on appeal. See 6th Cir. R. 28(a).

[2] Citations to "City Charter" refer to the City of Port Huron City Charter, which is available at https://ecode360.com/30100704, and citations to "City Code" refer to the City of Port Huron Code of Ordinances, which is available at https://ecode360.com/PO3610.

the City Manager to perform a wide variety of specific executive tasks, such as declaring rental units a public nuisance, City Code § 10-168, and hearing appeals of fire code permit denials, *id.* § 24-35. And of particular note, the City Manager is responsible for "emergency public information . . . released to the media" on the City's behalf. *Id.* § 20-15(1).

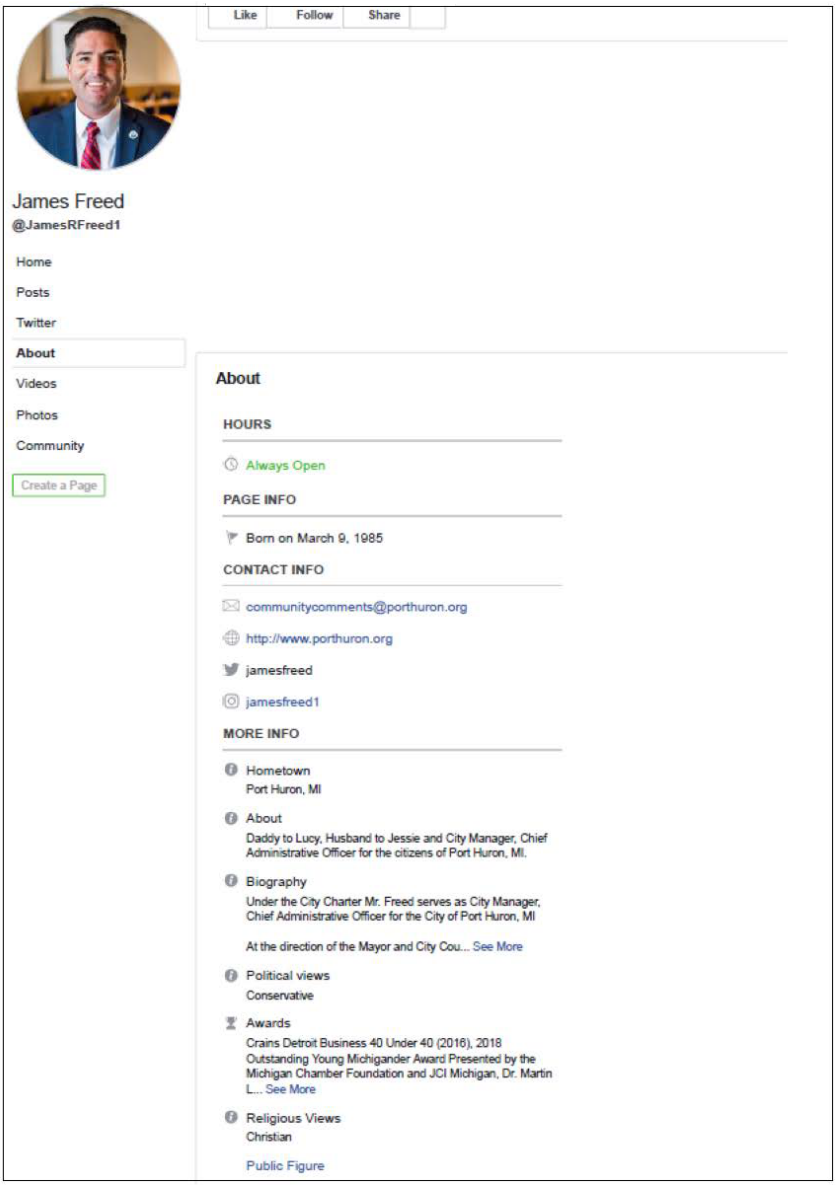
2. Like many public officials, Freed has connected with his constituents through Facebook, a social media platform. As relevant here, Facebook offers two different products for content-sharing. "*Profiles*" are personal accounts designed for individuals to create and share content with their "friends"—*i.e.*, family, friends, and other chosen audience members. Pet. App. 2a. Facebook profiles are limited to 5,000 friends. *Ibid.* "*Pages*" allow public figures, artists, businesses, brands, organizations, and the like to communicate with their constituents or customers. C.A. Rec. 1152.

Freed originally maintained a Facebook profile. *Ibid.* But when he hit the 5,000-friend limit, Freed converted his profile to a Facebook page that could be "followed" by any member of the public. Pet. App. 2a. Freed opted for his page to identify him as a "public figure." *Ibid.* Due to his choice of page settings, other Facebook users could not contact Freed via private Facebook messages; all such communications took the form of public comments. J.A. 288.

In the section of the page identifying the owner's contact information, Freed listed:

- www.porthuron.org as the page's website; and
- CommunityComments@PortHuron.org as its email address.

J.A. 1. He registered City Hall as the page's associated physical address. J.A. 287. As his page's profile picture, Freed chose a picture of himself wearing his City Manager pin—the same picture that appears on the Port Huron website:



J.A. 1 (excerpt); compare with J.A. 289.[3]

[3] The images of Freed's Facebook page on pages 1-29 of the Joint Appendix reflect how the page looked to the public in March 2020,

Freed used his Facebook page to post information about City programs and policies. In some cases, Freed merely shared communications from other City officials or offices. See, *e.g.*, J.A. 123 (press releases from Fire Chief and Director of Public Works); J.A. 130 (City audit report); J.A. 176 (sharing "a list of vacant boards and commission seats we need filled," along with a link to the applications); J.A. 281 (summer job openings with the City). In other instances, Freed provided information about his own actions as City Manager. See, *e.g.*, J.A. 125 (emergency directive for Public Works and Fire Departments to begin preparing and distributing sandbags); J.A. 159 ("Today, I am announcing that with authority granted to me by the City Charter, I am establishing and creating the City of Port Huron Office of Diversity, Equity & Inclusion."); J.A. 179 (live stream of Freed at town hall discussing "Comprehensive Financial Plan" to address unfunded City liabilities); J.A. 180 (video of Freed discussing City's economy); J.A. 281 (Freed's visit to local high schools to recruit students for City-government summer jobs). Freed also used the page to share personal information, including pictures of his family and dog, various home-improvement projects, and passages of scripture. See Pet. App. 14a.

When describing actions taken by the City and its officials, Freed's posts frequently used words like "we," "us," and "our." See, *e.g.*, J.A. 133 ("We are aware of the issues regarding leaf pickup. We are not satisfied and will hold this contractor accountable."); J.A. 164 ("We are conducting a project to bolster the stabilization of our water intake in the St Clair River at the Water Filtration Plant."); J.A. 274 ("We have completed precautionary ice breaking operations in the Black River. We also deployed

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prior to the litigation. Freed altered his profile "after th[e] lawsuit started," C.A. Rec. 1130, and the image of Freed's profile in the petition, see Pet. 4, reflects the altered version.

sandbags along the canals as a precaution. We will continue to monitor river levels.").

In addition to transmitting information to constituents, many of Freed's Facebook posts solicited feedback or other responses from the public. In one post, Freed circulated a community survey about the City's "Five Year Consolidated Plan regarding housing issues" and asked his followers to complete it. J.A. 125. In another, Freed announced that he was "looking for a new assistant" and linked to the job posting. J.A. 115.

But Freed also used his Facebook page to communicate with constituents directly. By default, every Facebook post invited members of the public to "write a comment. . . ." J.A. 2. And Freed's followers often did: His posts about City business regularly generated responses, often several of them. See, *e.g.*, J.A. 15-16 (listing two constituent responses and "22 more comments"). Freed would frequently respond to these comments, engaging in a back-and-forth with his constituents. See, *e.g.*, J.A. 21 (Constituent: "Can you allow city residents to have chickens?" Freed: "you can, call the Planning Dept for details"). In Freed's view, "regular communication with local businesses and residents" is an "essential" responsibly of his job as City Manager. J.A. 290.

3. With the onset of the COVID-19 pandemic, Freed's Facebook activity took on a new sense of urgency. Consistent with his responsibility to oversee aspects of the City's public health response, see City Code § 20-12(3) (responsibility for implementing quarantine regulations); see also *id.* § 20-13(2), Freed began posting about the pandemic daily—and often more than that. His posts included media releases from health officials, see, *e.g.*, J.A. 62 ("COVID-19 Daily Media Update"); J.A. 65, 68, 70, 75, 79, 82, 85, 87, 88, 90 (similar); statistics on the pandemic's spread, see, *e.g.*, J.A. 34 ("Average COVID-19 Cases per

day by week"); J.A. 51, 52, 54 (similar); and resources for City residents, see, *e.g.*, J.A. 64 ("Here is a COVID-19 Resource Page we put together."); J.A. 53, 74, 77.

Freed informed constituents about his own pandemic-related initiatives as well. Freed touted his efforts to reduce City staff and freeze hiring, J.A. 38, and announced various programs and policies that he was instituting, see, *e.g.*, J.A. 14 ("Mayor Repp and I have been working with the St Clair County Emergency Operations Center as our community prepares and deploys resources to confront the Coronavirus Emergency."); J.A. 18 ("We have now established drive-thru/pick-up zones throughout Downtown Port Huron so that you can continue to support your local small businesses."); J.A. 22 ("In light of the potential threat of the COVID-19 Virus, I hereby direct that effective immediately no water shutoffs should occur in the City for a duration of 30 days."); J.A. 60 (reporting on mask deliveries). Freed also provided his own recommendations on ways to interact safely around town, see, *e.g.*, J.A. 73, and posted photos of himself, the Mayor, and others social distancing, see, *e.g.*, J.A. 40.

Freed's pandemic-related posts attracted high levels of public engagement. Commenters thanked Freed for providing public health information, see, *e.g.*, J.A. 8, 13, 15, and asked him about the City's initiatives, see, *e.g.*, J.A. 15, 18, 21-22. Freed often responded to constituent questions with relevant information. See, *e.g.*, J.A. 13 (informing follower about the City's meal-delivery service for seniors); J.A. 16 (informing follower about locations for drive-thru COVID testing); J.A. 22 (answering question regarding water shutoffs). Occasionally, Freed would delete comments that he did not like. See C.A. Rec. 679 ("I deleted comments that were—I felt—some were just like derogatory towards me. Sometimes someone would write something stupid and I just didn't care.").

4. Kevin Lindke is a resident of Port Huron. *Id.* at 2. In March 2020, Lindke commented on Freed's Facebook page several times from three different Facebook profiles. Pet. App. 15a. Lindke's comments criticized Freed's handling of the pandemic. *Id.* at 15a-16a. Under a photo that Freed had posted of the Mayor at a local establishment "order[ing] some takeout for us today before a series of virtual briefings we are participating in," J.A. 15, Lindke commented that while City "residents [we]re suffering," its leaders were eating at a "pricy" restaurant "instead of out talking to the community," C.A. Rec. 1447. Under another post from Freed on his pandemic-related initiatives, Lindke commented that Freed's response to the pandemic had been "abysmal" and that "the city deserve[d] better." *Id.* at 1448.

Freed initially engaged with Lindke's criticisms. *Ibid.* ("[A]t one point we were actually conversating back and forth in the comment thread."). But then Freed opted instead to delete Lindke's comments from the page. Pet. App. 15a. Freed also blocked each of Lindke's Facebook accounts, meaning that Lindke could no longer access Freed's page. *Ibid.* Like Lindke, four other individuals who "were critical of Freed or the City's actions" had their comments deleted or their accounts blocked by Freed. *Id.* at 16a.

B. Proceedings Below

1. Lindke filed suit under 42 U.S.C. § 1983, alleging that Freed had violated the First Amendment by deleting his comments and blocking his accounts. The district court granted summary judgment for Freed, concluding that his Facebook activity was not state action and therefore was immune from First Amendment scrutiny. Pet. App. 21a-29a.

2. The Sixth Circuit affirmed. *Id.* at 1a-12a.

For a public official to be engaged in state action, the Sixth Circuit held, either the official must be "performing an actual or apparent duty of his office," or else the official's conduct must have been made possible by "the authority of his office." *Id.* at 5a (quotation marks omitted). And in the court's opinion, that will be the case if—but only if—the official's actions "are controlled by the government or entwined with its policies." *Ibid.* The court thus adopted what it called a "duty-or-authority test," under which a public official's social media activity is subject to constitutional scrutiny "only" where the activity is conducted in furtherance of governmental "duties" or where the activity depends on "state authority." *Id.* at 8a. "It's only then," the court concluded, "that [the official's] social-media activity is fairly attributable to the state." *Ibid.* (quotation marks omitted).

In adopting this test, the Sixth Circuit expressly "part[ed] ways with other circuits' approach to state action." *Id.* at 12a. Those other circuits consider a broader range of factors, including "a social-media page's purpose and appearance," such as where the public official's conduct conveys the "impression that the page operated under the state's imprimatur." *Id.* at 10a-11a (citing *Knight First Amend. Inst.* v. *Trump*, 928 F.3d 226, 231, 234-36 (2d Cir. 2019), vacated as moot sub nom. *Biden* v. *Knight First Amend. Inst.*, 141 S. Ct. 1220 (2021); *Davison* v. *Randall*, 912 F.3d 666, 680-81 (4th Cir. 2019); *Campbell* v. *Reisch*, 986 F.3d 822, 826-27 (8th Cir. 2021); *Charudattan* v. *Darnell*, 834 F. App'x 477, 482 (11th Cir. 2020) (per curiam)). In the Sixth Circuit's view, concern for the appearance of authority may be appropriate "in assessing when police officers are engaged in state action," but the court rejected as "shallow" the analogy to the social media context. Pet. App. 11a. The court thus reaffirmed that its state-action inquiry would instead focus solely "on the actor's

official duties and use of government resources or state employees." *Id.* at 12a.

Applying its duty-or-authority test to Freed's conduct, the Sixth Circuit determined that Freed had not engaged in state action when he blocked Lindke's accounts and deleted Lindke's posts. On the duty prong, the Sixth Circuit explained that "no state law, ordinance, or regulation compelled Freed to operate his Facebook page." *Id.* at 8a; see *ibid.* ("[I]t wasn't *designated by law* as one of the actual or apparent duties of his office.") (emphasis added). And on the authority prong, the court explained, the page "did not belong to the office of city manager," nor did "Freed rely on government employees to maintain" it. *Id.* at 9a-10a. Since Freed's Facebook activity did not cross either of these "bright lines," the court concluded, "he was acting in his personal capacity—and there was no state action." *Id.* at 12a.

SUMMARY OF ARGUMENT

I. Public officials can act "under color of" law when they use social media to invoke the pretense of governmental authority and to perform governmental functions.

A. The state-action inquiry does not lend itself to a rigid, one-size-fits-all test. This Court's jurisprudence identifies several reasons why formulating such a test would be not just impossible, but undesirable as well. The state-action inquiry reflects a balance of competing interests—including preventing the abuse of governmental power, preserving individual liberty, and attributing conduct to the state only when it would be fair to do so. Weighing these interests requires paying close attention to case-specific context. State power may take many forms, moreover, some more obvious than others. And because a finding of *no* state action would render challenged conduct immune from constitutional scrutiny, sweeping rulings are especially inadvisable. In light of these considerations,

"[w]hat is fairly attributable [to the State] is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Acad.* v. *Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001).

B. The phrase "under color of" has a longstanding meaning in Anglo-American law that includes public officials who have invoked the *pretense* of governmental authority. Stretching back at least to thirteenth-century England, actions taken *colore officii* (under color of office) were distinguished from those taken *virtute officii* (by virtue of office). The former category included conduct by a public official that was unauthorized or illegal but nonetheless bore "a dissembling visage of duty." *Dive* v. *Manningham*, (1551) 75 Eng. Rep. 96, 108 (KB).

By the time Congress enacted Section 1983's predecessor, section 1 of the Ku Klux Klan Act, the phrase "under color of" had long been incorporated into American law as well. The Act sought to protect newly freed slaves against constitutional-right deprivations committed by the Klan with the connivance of public officials, whose apparent authority lent greater weight to the violations. Congress thus drew on the term's well-established meaning, as reflected in statutes, judicial decisions, and common parlance.

C. Identifying state action often requires consideration of appearance and function. That is especially true in "dual-role" cases, where the challenged conduct was committed by a public official who nevertheless claims to have been acting in a private capacity. Under this Court's jurisprudence, the question is whether the character of the defendant's conduct was sufficiently governmental to make it fair to treat the conduct as state action.

That will often be the case where a public official *purports* to act in his or her official capacity. In such cases, the official invokes the semblance (even if not the reality)

of governmental authority, which gives added weight to the conduct and bears on the fairness of applying constitutional scrutiny. And conduct can also take on a governmental character if it serves governmental purposes or functions—just like conduct can *lack* governmental character if it serves only private functions.

D. Appearance and function help determine whether social media use constitutes state action. A public official who blurs the line between official and private use—purporting to speak on the government's behalf and performing governmental functions—can reasonably be held responsible for any resulting role-ambiguity. A contrary rule would also create perverse incentives for officials to rely on private social media accounts as a means of evading accountability.

II. In the decision below, the Sixth Circuit ignored the role of appearance and function, instead limiting the state-action inquiry solely to consideration of duty or authority. Its reasons for doing so are unpersuasive.

First, the court erred in thinking that the challenged conduct must have been made possible *only* by virtue of governmental power. State action may be present even if the public official "might have taken the same action had he acted in a purely private capacity," so long as the official "is possessed of state authority and purports to act under that authority." *Griffin* v. *Maryland*, 378 U.S. 130, 135 (1964).

Second, relying exclusively on duty or authority would create a test that is *too broad* in certain respects, treating as state action situations where the defendant was carrying out state-imposed duties or wielding state-conferred authority, yet was performing *non*-governmental functions. In several such cases—including those involving private contractors, the U.S. Olympic Committee, and a public defender—this Court found *no* state action.

Third, the Sixth Circuit relied on a property-based argument that Freed's Facebook account belonged to him personally, not to the City. But even though the use of government property *supports* a state-action finding, the use of private property does not necessarily *negate* such a finding. If it did, public officials could escape constitutional scrutiny by using private property to perform their governmental functions.

Fourth, the Sixth Circuit admitted the significance of appearance in cases involving off-duty police officers, but held that appearance is irrelevant if the pretense of authority does not give a public official's social media use "the force of law." Pet. App. 12a. But the stamp of governmental approval may carry constitutionally significant influence even if legal force is lacking, such as where a school official uses a private social media account to discriminate against a student.

Finally, the Sixth Circuit was wrong that a duty-or-authority test is necessary to prevent every job-related communication by a public official from being state action. Most officials do not intentionally blur the line between their personal and official social media use. But when they do, subjecting their conduct to constitutional scrutiny is appropriate.

III. The Court need not resolve whether Freed's use of Facebook in this case constituted state action. But if it wishes to address the question, the answer is yes. Freed designed the page to appear as an official government outlet and used it to perform public responsibilities, including announcing official City business to his constituents and soliciting their feedback. Those features of his social media use led directly to the conduct challenged here: removing comments that were critical of the City's pandemic response and blocking Lindke's access. Freed's conduct should not be immune from constitutional scrutiny.

ARGUMENT

Section 1983 provides a cause of action for violations of rights secured by the Constitution or laws of the United States committed by any person acting "under color of" state law. 42 U.S.C. § 1983. Congress intended for Section 1983 to extend to all federal rights violations committed by state actors: Where a defendant's conduct "constitutes state action . . . then that conduct was also action under color of state law and will support a suit under § 1983." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 935 (1982).

As this Court has recognized, "state employment is generally sufficient to render the defendant a state actor." *Id.* at 935 n.18. "If an individual is possessed of state authority and purports to act under that authority," therefore, "his action is state action." *West* v. *Atkins*, 487 U.S. 42, 56 n.15 (1988) (quoting *Griffin* v. *Maryland*, 378 U.S. 130, 135 (1964)). A public official may nevertheless claim that he or she engaged in challenged conduct solely in a *private*—rather than public—capacity. In that context, this Court has asked "whether there is a sufficiently close nexus between the State and the challenged action . . . so that the action of the latter may be fairly treated as that of the State itself." *Jackson* v. *Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

I. Public Officials Who Use Social Media to Invoke the Pretense of Authority and to Serve Governmental Functions Can Act "Under Color of" Law

A. The State-Action Inquiry Is Ill-Suited to a Rigid Test

Because "most rights secured by the Constitution are protected only against infringement by governments," *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 156 (1978), this Court has repeatedly been called upon to decide whether challenged conduct amounts to what the Court has described as "state action," *id.* at 155. Through its long experience with cases raising state-action questions, this Court

has identified several pertinent factors that make the inquiry particularly unsuitable for a one-size-fits-all approach.

First, the state-action inquiry necessarily reflects a balance of interests. An overly *narrow* conception of state action can provide insufficient protection for individual rights and can sanction abuses of governmental power. See *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961). An overly *broad* conception can threaten "individual freedom" and can impose on the government and its officials "responsibility for conduct for which they cannot fairly be blamed." *Lugar*, 457 U.S. at 936. Reconciling these competing concerns—as with any balancing of incommensurable values—requires careful attention to context.

Second, the inquiry must account for the full "variety of individual-state relationships which [the Constitution] was designed to embrace." *Burton*, 365 U.S. at 722. State power comes in many "manifestations," and the "involvement of the State in private conduct" may in some cases be "nonobvious." *Ibid.* Especially where such involvement is indirect or ambiguous, discerning its "true significance" in a particular case will require "sifting facts and weighing circumstances." *Ibid.*; see *Jackson*, 419 U.S. at 351 ("The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met.").

Third, because a finding of *no* state action renders challenged conduct "immune from the restrictions of" the Constitution, *Jackson*, 419 U.S. at 349, this Court has been especially reluctant to issue sweeping rulings that may prove overbroad in future cases. The state-action test functions as a blunt on/off switch: If a particular consideration is treated "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 (2001), then the absence of that one consideration will render all other considerations irrelevant.

A more flexible approach that refuses to treat any particular factor as dispositive, by contrast, can allow the same factor to be considered within the context of the relevant constitutional framework. In *New Jersey* v. *TLO*, 469 U.S. 325 (1985), for instance, this Court rejected the State's argument that school officials' distinct role meant they had "immunity from the strictures of the Fourth Amendment." *Id.* at 337; see *id.* at 336-37. But the Court nevertheless relied on their special role to justify abandoning "strict adherence" to the probable-cause requirement in the school setting. *Id.* at 341; see *id.* at 337-43.

In light of these considerations, "the question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer." *Jackson*, 419 U.S. at 349-50. Indeed, the Court has repeatedly emphasized the inquiry's context-specific and fact-dependent nature:

- "What is fairly attributable [to the State] is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Acad.*, 531 U.S. at 295.
- "[T]he line between private conduct and governmental action cannot be defined by reference to any general formula unrelated to particular exercises of governmental authority." *Columbia Broad. Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 115 (1973).
- "This Court has never attempted the impossible task of formulating an infallible test for determining whether the State in any of its manifestations has become significantly involved in private [conduct]." *Reitman* v. *Mulkey*, 387 U.S. 369, 378 (1967) (quotation marks omitted).

These pronouncements reflect the wisdom of resolving the state-action inquiry "in the framework of the peculiar facts or circumstances present," rather than seeking to divine some "constitutional precept" of "nigh universal application." *Burton*, 365 U.S. at 726.

To be sure, this Court has sometimes attempted to sort its state-action cases into overarching categories—including by "articulat[ing] a number of different factors or tests in different contexts: *e.g.*, the 'public function' test; the 'state compulsion' test; the 'nexus' test; and . . . a 'joint action test.'" *Lugar*, 457 U.S. at 939 (citations omitted). But the Court has never allowed these shorthand labels to substitute for "the necessarily fact-bound inquiry that confronts the Court" when deciding whether conduct is sufficiently intertwined with governmental authority to merit constitutional scrutiny. *Ibid.* Any attempt to reduce the inquiry to a defined set of "necessary condition[s] across the board" would accordingly do insufficient justice to the full "range of circumstances that could point toward the State behind an individual face." *Brentwood Acad.*, 531 U.S. at 295.

B. "Under Color of Law" Includes Conduct Under Pretense of Law

In crafting Section 1983 to cover all conduct "under color of" state law, Congress drew on the phrase's well-established meaning, which historically has encompassed actions that were not authorized by the government, yet nevertheless invoked the pretense of state authority. That includes circumstances where a public official merely purports to act in an official capacity, even if the official's conduct serves private interests.

1. The phrase "under color of" has deep roots in Anglo-American law. Its original meaning was nearly literal, dating from "a time when many of the King's officers and agents would actually have worn the King's coat of arms."

Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 Mich. L. Rev. 323, 396 (1992) (Winter). An official thus acted under "*color of office*" when his conduct bore "the trappings and indicia of an official act even though it was without sufficient warrant in law." *Ibid.*

This sense found early incorporation into positive law. A statute from the reign of Edward I provided:

> That no Escheator, Sheriff, nor other Bailiff of the King, *by Colour of his Office*, without special Warrant, or Commandment, or Authority certain pertaining to his Office, disseise any Man of his Freehold, nor of any Thing belonging to his Freehold[.]

3 Edw. 1, c. 24 (Eng. 1275), reprinted in 1 *The Statutes at Large* 92-93 (Danby Pickering, ed. 1762) (emphasis added). Annotating this statute, Edward Coke explained that it applied to acts taken "[*c*]*olore officii*" (by color of office), as distinct from acts taken "*virtute officii*" (by virtue of office). 1 Sir Edward Coke, *The Second Part of the Institutes of the Laws of England* 206 (1681). In targeting the former category, Lord Coke explained, the statute "implieth a seizure unduly made against Law," such as where the officer "hath no warrant at all." *Ibid.*

Over time, the phrase solidified as "a common law term of art referring to the illegal or unauthorized actions of governmental officials." Winter 326. Blackstone thus described extortion as "any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due." 4 William Blackstone, *Commentaries on the Laws of England* 141 (1769); see 1 William Hawkins, *Pleas of the Crown* 170 (2d ed. 1724) (similar). As explained in one leading case, a statutory reference to *colore officii* "signifies an act badly done under the countenance of an

office," such that "it bears a dissembling visage of duty." *Dive* v. *Maningham*, (1551) 75 Eng. Rep. 96, 108 (KB).

The term of art readily made the leap into American law. The Judiciary Act of 1789, for instance, authorized federal courts "to issue writs of . . . *habeas corpus*," but provided that the writ could extend only to prisoners "in custody, under or by colour of the authority of the United States." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82. The Act's disjunctive phrasing—"under *or* by colour of"—reflected Congress's understanding that a prisoner might be confined "by colour of" a federal law even if he or she was *not* properly confined "under" that law. See David Achtenberg, *A "Milder Measure of Villainy,"* 1999 Utah L. Rev. 1, 59 (Achtenberg) (noting that "numerous federal statutes" used "'under color of law' and 'under color of office' to describe conduct by officials who exceeded their official power and violated the law").

The phrase was similarly used in judicial decisions in circumstances where a governmental official had engaged in unauthorized or even illegal conduct, including for personal gain. For instance, in *United States* v. *More*, 7 U.S. (3 Cranch) 159 (1805), the defendant had charged fees in his capacity as justice of the peace of the District of Columbia despite an Act of Congress that had abolished such fees. *Id.* at 160 n.2. As Chief Justice Marshall explained, this offense amounted to "taking fees, under colour of his office." *Id.* at 172; see, *e.g.*, *City of Lowell* v. *Parker*, 51 Mass. (10 Met.) 309, 313-14 (1845) (sheriff who "took the plaintiff's goods" without authorization "therefore took the goods *colore officii*"); *Sangster* v. *Commonwealth*, 58 Va. (17 Gratt.) 124, 129-30 (1866) (similar); see also Winter 350-51 & nn.116-27 (citing additional cases).[4]

[4] Some early decisions used the phrase in a more limited sense as well—referring to "conduct that, though ultimately proved

2. The statute now codified as Section 1983 "came onto the books as § 1 of the Ku Klux Act of April 20, 1871." *Monroe* v. *Pape*, 365 U.S. 167, 171 (1961), overruled in unrelated part, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). This Court has, on several occasions, detailed the history of its enactment at some length. See *id.* at 172-83; see also, *e.g.*, *Health & Hosp. Corp. of Marion Cnty.* v. *Talevski*, No. 21-806 (June 8, 2023), slip op. 6-7; *District of Columbia* v. *Carter*, 409 U.S. 418, 425-29 (1973); *Mitchum* v. *Foster*, 407 U.S. 225, 238-42 (1972). "Although there are threads of many thoughts running through the debates," *Carter*, 409 U.S. at 426, three aspects of the process merit special emphasis.

First, the "whole purpose of the Ku Klux Klan Act was to prevent public authorities from violating constitutional rights through the use of nominally private means." *Rossignol* v. *Voorhaar*, 316 F.3d 516, 527 (4th Cir. 2003) (Wilkinson, C.J.). The legislation "was designed primarily in response to the unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others." *Carter*, 409 U.S. at 426. In the years leading to the Act's enactment, "Radical Republican members of … Congress had become increasingly concerned that outrages—the phrase then used to describe murders, whippings, and similar Klan-inspired violence in the South—were preventing southern blacks from voting." Achtenberg 7. Foremost among the perpetrators were state officials acting in "concert, understanding, and arrangement" with private citizens. Cong. Globe, 42d Cong., 1st Sess. 459 (1871) (statement of Rep. Coburn); see *id.* at 394 (statement of Rep. Rainey).

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mistaken, was at least a good faith assertion of authority." Winter 358. But even those cases "understood that *under color of law* referred to official action *without* proper authority." *Id.* at 359.

After attempts to combat such violence through federal legislation stalled, see Achtenberg 7-35, proponents turned to President Grant for support, see *id.* at 35-46. Persuaded by their pleas, he sent Congress a message urging action, which was read aloud on the House floor. Cong. Globe, 42d Cong., 1st Sess. 244 (1871). Succinctly but forcefully, President Grant decried the "condition of affairs" in some States "rendering life and property insecure." *Ibid.* Since "the power to correct these evils" lay "beyond the control of State authorities"—the very same State authorities who, in many cases, were participating in the rights violations—he urged Congress to enact new legislation "sufficient for present emergencies." *Ibid.* The President's message was "effective," Achtenberg 45, leading to the creation of the Select Committee that drafted the legislation, see *id.* at 46.

Second, the Select Committee did not start from scratch, but rather incorporated key language from the text of a bill introduced only two weeks earlier by Senator Frelinghuysen. The first section of that bill had created a cause of action for the deprivation of constitutional rights "*under pretense of* any law, custom, or usage of any State." S. 243, 42d Cong. § 1 (1871) (emphasis added), reprinted in Achtenberg 61-63. Congressman Shellabarger, the Select Committee's main drafter and himself a Radical Republican, then "based section 1 of the Select Committee Bill on section 1 of Frelinghuysen's Bill." Achtenberg 51; see *id.* at 48, 56.

The Select Committee Bill, H.R. 320, made a number of changes to section 1 of the prior bill. See H.R. 320, 42d Cong. § 1 (1871), reprinted in Achtenberg 92-95. Most of these were relatively minor grammatical and wording edits, though others expanded its coverage. See Achtenberg 51-52. Of particular note, the new bill replaced the phrase "under pretense of" with "under color of." *Id.* at 52. This revision was *not* intended to be "substantive," however,

and in fact legislators understood the two terms as being functionally "interchangeabl[e]." *Id.* at 56; see *id.* at 56-60.

Third, at the time of enactment, using "'under color of' law to describe misconduct committed under the pretense of official authority" would have been "natural." *Id.* at 58. Members of Congress were "well aware" of judicial decisions using the phrase that way, as several of these decisions were referred to "during the debates on the Ku Klux Klan Act itself." *Id.* at 59; see *id.* at 59 & n.445. Indeed, one such case was quoted at length, including its explanation that public officials sometimes engage in "unauthorized and unlawful acts . . . under color of their office." Cong. Globe, 42d Cong., 1st Sess. 762 (1871) (statement of Sen. Stevenson) (quoting *Prather* v. *City of Lexington*, 52 Ky. (13 B. Mon.) 559, 560 (1852)).

This sense was then prevalent in popular usage as well. Webster's, for instance, defined "color" to mean "[e]xternal appearance; false show; pretense; guise." Noah Webster, *An American Dictionary of the English Language* 225 (rev. 1854). Other contemporary dictionaries were in accord. See, *e.g.*, *Johnson's Dictionary* 39 (James Henry Murray ed., 1874) ("pretext or pretence"); Noah Webster, *A Common-School Dictionary of the English Language* 77 (William G. Webster & William A. Wheeler eds., 1868) ("pretense"); Samuel Johnson & John Walker, *Dictionary of the English Language* 130 (2d ed. 1828) ("pretence; false show"). And the full phrase continued to be understood, including in legal contexts, to mean "under pretext or pretence of, under the mask or alleged authority of." 1 *The Compact Edition of the Oxford English Dictionary* 470 (1971) (defining "under colour of" based on examples dating from 1340).

C. Identifying State Action Often Requires Consideration of Appearance and Function

This Court has long maintained that state action may be present even when the conduct of a public official "was *not* authorized by state law." *Griffin*, 378 U.S. at 135 (emphasis added). Several of the Court's cases have involved public officials who were accused of violating the plaintiffs' rights while exercising the formal obligations of their office, albeit in ways that state law did not allow. See, *e.g.*, *Monroe*, 365 U.S. at 184-87; *Screws* v. *United States*, 325 U.S. 91, 110-12 (1945); *United States* v. *Classic*, 313 U.S. 299, 326 (1941).

In other cases, however, it was unclear or ambiguous whether the perpetrator had acted in an official capacity, rather than in a private one, including because the perpetrator occupied more than one role simultaneously. In such dual-role cases, the Court has been required to look to other considerations—most prominently whether the perpetrator "purport[ed] to act" in a governmental role, *Griffin*, 378 U.S. at 135, and whether the perpetrator's conduct served governmental "functions," *Polk Cnty.* v. *Dodson*, 454 U.S. 312, 318 (1981).

1. *Appearance*

The significance of appearance in dual-role cases is illustrated by *Griffin*. There, Black picketers who entered a private amusement park to protest the park's policy of racial segregation were ordered by a security guard to leave. 378 U.S. at 131-32. The guard had been "formally retained and paid by" a private security agency, whose uniform he wore, and he was "subject to the control and direction of the park management." *Id.* at 132. At the same time, he had been "deputized as a [special deputy] sheriff," and he "wore, on the outside of his uniform, a deputy sheriff's badge." *Ibid.* When the protesters refused to leave, he "told them … that they were under arrest for

trespassing," and he took them to the police station, where he filled out an "Application" for a warrant. *Id.* at 133. The protestors were then charged with and convicted of criminal trespass, and their convictions were upheld on appeal. *Id.* at 133-35.

The question for this Court was whether the security guard had violated the protesters' equal protection rights under the Fourteenth Amendment—which could only have been the case if his conduct amounted to "state action." *Id.* at 135. The State of Maryland contended that the guard had acted only "in his private, non-official capacity as a mere agent of the park," and not in any "official capacity." Br. of Respondent at 20-21, *Griffin* v. *Maryland*, 378 U.S. 130 (1964) (No. 6). Although he had been deputized as a sheriff, that did "not mean that all acts done by him [we]re public and in furtherance of the state authority reposed in him." *Ibid.* Under the circumstances, Maryland argued, he had acted "privately within the scope of his employment as a servant or employee" of the amusement park—both when ejecting the protesters from the park and at the police station, where he employed "the same procedures as any ordinary citizen in applying for an arrest warrant from a magistrate," which "indicat[ed] that he was not exercising the powers of Special Deputy Sheriff vested in him." *Id.* at 20-21; see *id.* at 21 n.7 (noting that Maryland law allowed "private persons" to make arrests for "misdemeanors amounting to a breach of the peace").

This Court disagreed. The Court did not definitively resolve the dispute over whether the security guard had acted "in his private capacity as an agent or employee of the operator of the park or in his limited capacity as a special deputy sheriff." *Griffin*, 378 U.S. at 134 (citation omitted). Instead, what mattered was that he had "*purported* to exercise the authority of a deputy sheriff." *Id.* at 135 (emphasis added). As the Court explained:

> He wore a sheriff's badge and consistently identified himself as a deputy sheriff rather than as an employee of the park. Though an amended warrant was filed stating that [the protesters] had committed an offense because they entered the park after an "agent" of the park told them not to do so, this change has little, if any, bearing on the character of the authority which [the guard] initially purported to exercise. If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law.

Ibid.

Dual-role cases like *Griffin* reflect the fact that individuals often wear multiple hats: As public officials, they may be "vested" with certain governmental "powers," *Williams* v. *United States*, 341 U.S. 97, 99 (1951), yet they may not always be exercising them or acting on the government's behalf. In such cases, it is reasonable to treat the perpetrator's conduct as state action where he or she acts in a way that invokes a "semblance of [governmental] power." *Id.* at 100. Doing so is fair as a normative matter because, through "the manner of his conduct," the perpetrator conveys to the world that he "asserting the authority granted [to] him." *Ibid.* A public official's credible assertion of authority, moreover, will usually have the desired effect. And as a textual matter, such conduct also falls comfortably within the historical meaning of "under color of law" described above because "it bears a dissembling visage of duty." *Dive*, 75 Eng. Rep. at 108.

Some dual-role cases involve police officers who are accused of violating constitutional rights through their off-duty conduct. These cases reflect the respect that

members of law enforcement naturally command from the public, even when they are out of uniform. See, *e.g.*, *Anderson* v. *Warner*, 451 F.3d 1063, 1068 (9th Cir. 2006) (off-duty officer "act[ed] under color of state law when he invoked his law enforcement status to keep bystanders from interfering with his assault on" the plaintiff); *Rossignol*, 316 F.3d at 526 (off-duty officers "were recognized as police officers" while executing their scheme to deprive the plaintiffs of their First Amendment rights).

But state actors need not wear literal badges in order for "the badge of their authority to deprive individuals of their federally guaranteed rights." *Wyatt*, 504 U.S. at 161. What matters is whether the defendant, by invoking his governmental office or authority, has "len[t] the weight of the State to his decisions." *Lugar*, 457 U.S. at 937. A defendant who does so thereby "abuses the position given to him by the State." *West*, 487 U.S. at 50.

2. *Function*

In addition to considering whether a defendant purports to act in a governmental role, the Court has also taken account of whether the defendant is performing governmental "functions and obligations"—sometimes referred to as a governmental purpose—or instead is performing merely "a private function." *Polk Cnty.*, 454 U.S. at 318-19.

This principle has its origin in *Marsh* v. *Alabama*, 326 U.S. 501 (1946). There, a Jehovah's Witness was convicted of criminal trespass for attempting "to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management." *Id.* at 502. Though acknowledging that "all the property interests in the town are held by a single company," the Court nevertheless rejected the State's argument that "the corporation's right to control the inhabitants" was "coextensive with the right of a homeowner to regulate the conduct of

his guests." *Id.* at 505-06. Under the circumstances, the Court held that the private property on which the trespass had occurred was dedicated to "performance of a public function," no different from a State-created municipality. *Id.* at 507; see *id.* at 507-09. "Whether a corporation or a municipality owns or possesses the town," the Court concluded, "the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free." *Id.* at 507.

Performing a public function thus can cause ostensibly private conduct to take on a "governmental character." *Georgia* v. *McCollum*, 505 U.S. 42, 53 (1992); see, *e.g.*, *id.* at 52-55 (criminal defense attorney performs a "governmental function" when exercising peremptory challenge during jury selection); *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 624-28 (1991) (similar analysis for civil litigation). Even conduct that makes use of "private capital" or serves "private interests" may be governmental in nature if it "substitut[es] for and perform[s] the customary functions of government." *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 562 (1972).

But the opposite is also true: Conduct undertaken by a public official may nevertheless *lack* governmental character where it serves "essentially a private function." *Polk Cnty.*, 454 U.S. at 319. In *Polk County*, the Court considered whether a public defender "acts 'under color of state law' when representing an indigent defendant in a state criminal proceeding." *Id.* at 314. The public defender was "[a] full-time employee of the county" who had been "assigned" by her governmental employer to represent the defendant. *Ibid.* Yet despite this "employment relationship"—and despite the fact that the public defender "work[ed] in an office fully funded and extensively regulate[d] by the State and act[ed] to fulfill a state obligation"—this Court concluded that her representation of the defendant was *not* state action. *Id.* at 321, 322 n.13

(quotation marks omitted). In her capacity as the defendant's counsel, the Court explained, she had performed only the same "private function traditionally filled by retained counsel." *Id.* at 319. In the context of a criminal prosecution, that function was "adversarial" to the State, and thus not aligned with "the mission that the State . . . attempts to achieve." *Id.* at 320.

Taking account of whether challenged conduct was performed in service of a public or private function makes particular sense in dual-role cases, where the same person may serve in multiple capacities—some with a governmental character, some without. Thus a public defender acts under color of state law when making hiring and firing decisions on behalf of the State, see *Branti* v. *Finkel*, 445 U.S. 507 (1980), but *not* when "exercising her independent professional judgment in a criminal proceeding," *Polk Cnty.*, 454 U.S. at 324, *unless* she is "performing a traditional function of the government" such as helping to select a jury, *McCollum*, 505 U.S. at 52; see *id.* at 54-55. Careful attention to function can thus cut both ways—expanding or narrowing the sphere of state action depending on the relevant circumstances.

D. Appearance and Function Help Determine When a Public Official's Social Media Use Is State Action

Public officials have many job responsibilities. Principal among these are the obligations to keep constituents apprised of business conducted by the government on their behalf and to engage with the public on matters of concern. Today, "the most important places . . . for the exchange of views" are often "social media" platforms like Facebook and Twitter. *Packingham* v. *North Carolina*, 582 U.S. 98, 104 (2017). Numerous public officials thus

maintain accounts on such platforms—in the name of their offices, in their own names, or both.[5]

At the same time, public officials may maintain private accounts in order to stay connected with their family and friends. They may use these accounts for purely personal reasons, such as to "debate religion and politics with their friends and neighbors or share vacation photos." *Packingham*, 582 U.S. at 104. But a public official may also use an ostensibly private account to engage with the public in a manner that mimics an official account. In such a dual-role case, determining whether the public official's social media use amounts to conduct "under color of" law should take account of its appearance and purpose.

Appearance speaks to whether the public official "purports" to speak through the account on the government's behalf. *Griffin*, 358 U.S. at 135. The person who creates and operates a social media account controls nearly every aspect of its presentation—not just the content of posts to the account, but also the identifying information (*e.g.*, name, profile picture, contact information) and whether to make the account available for input from others (and if so, from whom).[6] Given this degree of

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[5] See, *e.g.*, President Joe Biden, Facebook, https://m.facebook.com/POTUS; Joe Biden, Facebook, https://m.facebook.com/joebiden; Speaker Kevin McCarthy, Facebook, https://m.facebook.com/SpeakerMcCarthy; Kevin McCarthy, Facebook, https://m.facebook.com/kevinomccarthy; President Biden, (@POTUS), Twitter, https://twitter.com/POTUS; Joe Biden (@JoeBiden), Twitter, https://twitter.com/JoeBiden; Speaker Kevin McCarthy (@SpeakerMcCarthy), Twitter, https://twitter.com/SpeakerMcCarthy; Kevin McCarthy (@kevinomccarthy), Twitter, https://twitter.com/kevinomccarthy.

[6] See *Manage Page Settings*, https://www.facebook.com/help/1206330326045914; *Customize a Page*, https://www.facebook.com/help/1602483780062090; *How to Customize Your Profile*, Twitter, https://help.twitter.com/en/managing-your-account/how-to-customize-your-profile; *How to Control Your Twitter Experience*, Twitter,

control, a public official who knowingly blurs the line between official and private social media use can "fairly be blamed" for any resulting role-ambiguity. *Lugar*, 457 U.S. at 936. And that is particularly true where the public official does so not just knowingly but *deliberately*: Having attempted "to lend the weight of the State to his [conduct]," the official cannot be heard to complain if that conduct is then held up to constitutional scrutiny. *Id.* at 937.

Function speaks to whether the public official is using the ostensibly private account as a "substitut[e] for" an official account. *Lloyd*, 407 U.S. at 562. Where officials treat "social media pages as official outlets facilitating their performance of their [public] responsibilities," it has "the purpose and effect of influencing the behavior of others." *Garnier* v. *O'Connor-Ratcliffe*, 41 F.4th 1158, 1171 (9th Cir. 2022), cert. granted, No. 22-324 (Apr. 24, 2023) (quotation marks omitted). Regardless of whether those functions are being performed on an official account or a personal one, "the public in either case has an identical interest." *Marsh*, 326 U.S. at 507. And consideration of an account's function can also prevent and deter public officials from seeking to escape constitutional scrutiny in the performance of their duties by resorting to the "subterfuge" of using a private account—which may, in fact, be "little different" from an official one. *Gilmore* v. *City of Montgomery, Ala.*, 417 U.S. 556, 567 (1974).

II. Arguments for Limiting the State-Action Inquiry to Duty or Authority Are Unpersuasive

In the decision below, the court of appeals categorically rejected the relevance to the state-action inquiry of a social media page's "purpose [*i.e.*, function] and appearance." Pet. App. 10a; see *id.* at 12a. Instead, the court opined that

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https://help.twitter.com/en/safety-and-security/control-your-twitter-experience.

only two factors are relevant: (1) whether maintaining the page was part of the "actor's official duties"; and (2) whether the actor "use[d] his governmental authority to maintain it," such as by employing "government resources or state employees." *Id.* at 12a. As to *duty*, the court found that factor lacking because "no state law, ordinance, or regulation compelled Freed to operate his Facebook page." *Id.* at 8a. And the court found an absence of governmental *authority* because "Freed's page did not belong to the office of city manager," and Freed did not "rely on government employees to maintain [it]." *Id.* at 9a-10a.

In thus limiting the state-action inquiry to a two-factor test, the court of appeals did not consider the text or history of Section 1983. Nor did that court engage with precedents from this Court that have examined the relevance of appearance and purpose in dual-role contexts. And insofar as the court of appeals articulated reasons for limiting the state-action inquiry to consideration of duty or authority, those reasons are unpersuasive.

First, the court of appeals placed undue emphasis on whether the challenged conduct was enabled *solely* by state power—*i.e.*, on whether the public official whose social media use is being challenged "can operate the account *only because of* his state authority." Pet. App. 7a (emphasis added). Such would be the case, the court explained, where an "official Facebook account" was maintained in the name of the public office itself, such as an "@KentuckyGovernor" address. *Ibid.* But a private account opened by a public official in his or her own name (*e.g.*, "@JohnDoe") does not depend for its existence on state authority, the court noted, and it will remain functional "even after [the official] leaves office." *Ibid.*

Conduct that depends on governmental power often constitutes state action. This Court's decisions make clear, however, that state action may be present even where the

challenged conduct would have been possible in absence of state authority. In *Griffin*, for instance, the State of Maryland noted that the security guard who ejected the protesters and applied for their arrest merely employed "the same procedures as any ordinary citizen," Br. of Respondent at 21, *Griffin*, *supra* (No. 6), and it argued that no state action could be present if the guard "was not executing any state authority by virtue of his status as a Special Deputy Sheriff," *id.* at 23.

This Court disagreed, going so far as to declare it "irrelevant that he might have taken the same action had he acted in a purely private capacity." *Griffin*, 378 U.S. at 135. What mattered was not whether the security guard *could have* undertaken the same conduct even in absence of his governmental powers, but that he "[wa]s possessed of state authority and *purport*[*ed*] *to* act under that authority." *Ibid.* (emphasis added); see *Williams*, 341 U.S. at 100 (private detective engaged in state action when torturing confessions from suspects because "he was asserting the authority granted him"). The same is true when a public official, possessed of state authority, uses a social media account in a manner that knowingly—or even intentionally—invokes his or her official status.

To be sure, the Court has said that Section 1983 "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*, 487 U.S. at 49 (quoting *Classic*, 313 U.S. at 326). But in *Classic*, the Court stated only that the exercise of such power "*is* action taken 'under color of' state law," 313 U.S. at 326 (emphasis added), without suggesting that the exercise of such power is *necessary* to state action. And in context, it is clear that the Court's statement in *West* was not intended to create any litmus test for state action.

The question in *West* was "whether a physician who is under contract with the State to provide medical services to inmates at a state-prison hospital on a part-time basis acts 'under color of state law' . . . when he treats an inmate." 487 U.S. at 43. The physician was "employed by North Carolina," and he had indisputably engaged in the challenged conduct in the course of that employment. *Id.* at 54. As a result, any ambiguity about his role was based solely on the fact that he had dispensed the medical care "in accordance with [his] professional discretion and judgment." *Id.* at 52. The Court had no occasion to consider a situation in which a public official had blurred the line between his or her professional and personal conduct. Nor did the Court cast any doubt on its statement in *Griffin* that state action may be present even if the public official "might have taken the same action had he acted in a purely private capacity"—which the *West* Court in fact quoted. *Id.* at 56 n.15 (quoting *Griffin*, 378 U.S. at 135).

Second, relying exclusively on duty or authority would create a state-action test that is *too broad* in certain respects. Public officials are not automatically state actors whenever they perform their job responsibilities. The public defender in *Polk County* was not a state actor, for instance, even though she had been "assigned" by the county to represent the plaintiff in a criminal proceeding. 454 U.S. at 318. A duty-or-authority test would also be overbroad as to private parties, such as contractors, on whom federal and state law may impose duties and in whom it may invest significant authority. See *Blum* v. *Yaretsky*, 457 U.S. 991, 1005-09 (1982) (transfer of Medicaid patients by private nursing home was not state action even though state and federal law determined the transferor's responsibilities). Indeed, even entities that are *created by* the government—and hence, by definition, exercise powers possessed only by virtue of law—are not always state actors. See *San Francisco Arts & Athletics,*

Inc. v. *U.S. Olympic Comm.*, 483 U.S. 522, 543-45 (1987) (U.S. Olympic Committee did not engage in state action when it challenged the use of the word "Olympic" by a non-profit, even though Congress created the Olympic Committee and gave it exclusive permission to use the word for commercial and promotional purposes). In all these cases, even though the defendant was carrying out a state-imposed duty under state-conferred authority, the Court determined that the relevant *function* was non-governmental in nature.

Third, the court of appeals gave significant weight to the fact that Freed's account "did not belong to the office of city manager," but instead "belonged to him" personally. Pet. App. 9a. This property-based argument mirrors the one made at the certiorari stage by the petitioners in *O'Connor-Ratcliffe*:

> Private citizens who are also public officials own all sorts of real property that they can use to communicate with the public about their official activities. For example, to conduct a townhall discussion about past and future administration initiatives, President Bush could have invited members of the public to his Crawford ranch and Governor Pritzker could do likewise at one of the Hyatt resorts owned by his family. But if they did not rely on any governmental resources or carry out any governmental obligations, no one could seriously conclude that they had transformed their private properties into temporary public fora, thereby losing their rights as property owners to exclude unwanted visitors from the events.

Pet. at 24, *O'Connor-Ratcliffe* v. *Garnier*, *supra* (No. 22-324). This argument fails on multiple levels.

For one thing, the argument conflates the state-action question with the merits of the constitutional dispute.

Whether a public official's use of private property constitutes state action, and whether the property has been "transformed" into a "temporary public for[um]," are distinct questions. An affirmative answer to the former by no means dictates an affirmative answer to the latter.

For another thing, this Court has already rejected the view that the status of the relevant "property interests settle[s] the question" of state action. *Marsh*, 326 U.S. at 505. In *Marsh*, the exclusion of the religious pamphleteer violated her First Amendment rights even though "all the property interests in the town [we]re held by a single company." *Ibid.* And in *Polk County*, the Court found *no* state action even though the public defender "work[ed] in an office fully funded . . . by the State" and had presumably used many state-purchased resources. 454 U.S. at 322 n.13 (citation omitted). The court of appeals was certainly correct that "[t]he use of state resources may" *support* a state-action finding, including because it can corroborate that the challenged conduct was part of the official's formal job responsibilities. Pet. App. 7a; see *Burton*, 365 U.S. at 724 (private restaurant that leased space in a public parking garage was state actor based in part on the financial "benefits" that the lease conferred on the restaurant). But it does not follow that a public official's reliance on *private* resources *negates* the possibility of state action.

Indeed, the property-based argument would prove far too much. If a town decided to temporarily relocate its public meetings to the home of a councilmember, that would not exempt from constitutional scrutiny a decision to exclude members of the public who were of a disfavored race or political party. And overreliance on property interests would also create a perverse incentive for public officials to use their personal accounts in order to evade their constitutional obligations. Cf. *Competitive Enter. Inst.* v. *Off. of Sci. & Tech. Pol'y*, 827 F.3d 145, 146 (D.C. Cir. 2016) ("an agency cannot shield its records from search or

disclosure under FOIA by the expedient of storing them in a private email account controlled by the agency head").

Fourth, the court of appeals rejected the relevance of "presentation-based factors" despite acknowledging that the impression conveyed *can be* relevant to "assessing when police officers are engaged in state action." Pet. App. 11a. A police officer's appearance "actually evokes state authority," the court noted, because "[w]e're generally taught to stop for police, to listen to police, to provide information police request." *Id.* at 11a-12a. But "Freed gains no authority by presenting himself as city manager on Facebook," the court concluded, since "[h]is posts do not carry the force of law simply because the page says it belongs to a person who's a public official." *Id.* at 12a.

As an initial matter, by acknowledging that appearance is relevant to whether off-duty police officers are acting "under color of" law, the court of appeals implicitly admitted that duty-or-authority *cannot be* the exclusive test. There is no sound reason to think that law-enforcement officials have a constitutionally unique status insofar as state action is concerned. Whether any other category of public official "gains . . . authority" by invoking his or her status is accordingly a question of fact. See *Williams*, 341 U.S. at 99 (concluding that the defendant "was acting 'under color' of law . . . or at least that the jury could properly so find").

But the court of appeals also erred in dismissing the relevance of appearance so long as a public official's invocation of governmental status would not give his or her conduct "the force of law." Pet. App. 12a. "Owing to the very 'largeness' of government," and to its "multitude of relationships" with the public, the government has many ways of exerting influence that fall short of formal legal commands. *Burton*, 365 U.S. at 725-26. A public official

may, by invoking the "prestige" of her office, give significant additional weight and influence to her social media use in ways that raise constitutional concerns. *Id.* at 725.

Real-world examples are not hard to come by. In 2021, for instance, a teaching assistant at the University of Vermont repeatedly posted antisemitic content to her personal Twitter account, prompting a Title VI complaint filed with the U.S. Department of Education. See Letter re: Complaint No. 01-22-2002 from Office for Civil Rights, U.S. Dep't of Educ., to Suresh Garimella, President, Univ. of Vt. (Apr. 3, 2023).[7] The tweets included the suggestion that it would be "funny" for her "to not give zionists credit for participation" in class, and that students should get "-5 points for going on birthright [*i.e.*, a program for young adults of Jewish heritage to visit Israel]." *Id.* at 5; see *ibid.* (another tweet included "the word 'Kristallnacht' above a picture of a damaged storefront with accompanying Hebrew text"). Her tweets "do not carry the force of law," Pet. App. 12a, yet it would blink reality to suggest that they could therefore have no meaningful influence on her students. If she knowingly—or even deliberately—used her Twitter account in a manner that associated her tweets with the prestige of her position of authority at a public university, she would have "no substantial [basis] to claim unfairness in applying constitutional standards to" her conduct. *Brentwood Acad.*, 531 U.S. at 298.

Finally, the court of appeals erred in thinking that a duty-or-authority test is necessary to prevent "*every* communication" by a public official about his or her job—including when he or she "visits the hardware store, chats with neighbors, or attends church services"—from being state action. Pet. App. 9a. No one could reasonably believe that a public official was purporting to speak on the

[7] https://tinyurl.com/m3sr2zh3.

government's behalf merely because job-related topics arose while the official was at church or chatting with his or her neighbors. But there is nothing far-fetched about a public official blurring the line between personal and official social media use. Indeed, as the next section shows, that is precisely what Freed did here.

III. FREED'S FACEBOOK ACTIVITY CONSTITUTED STATE ACTION

"Only by sifting facts and weighing circumstances (on a case-by-case basis) can the nonobvious involvement of the State in private conduct be attributed its true significance. This is [an appropriate] task for the District Court on remand." *Gilmore*, 417 U.S. at 574 (citation and quotation marks omitted). But if the Court wishes to perform the task itself, it should conclude that the challenged social media use in this case constituted state action.

First, Freed's Facebook page was designed to appear as an extension of his position as City Manager. Indeed, he "consistently identified himself" as a public official. *Griffin*, 378 U.S. at 135. For his profile picture, Freed chose a professional headshot of himself wearing his City Manager pin—the same photo used on the Port Huron City Manager webpage. Compare J.A. 1, with J.A. 289. This picture appeared beside every post Freed made to the page. See J.A. 1-29.[8]

Freed made other choices conveying the impression that his Facebook page was an official communication outlet for the City Manager. Freed identified himself on the page as a public figure and listed Port Huron's official

[8] As noted above, pages 1-29 of the Joint Appendix reflect how Freed's Facebook page looked to the public during the relevant time period. See *supra* p. 6 n.3. There are other images of the page in the Joint Appendix, see J.A. 32-286, but they appear to have been downloaded from Facebook after the litigation began. These images do not include comments or other aspects of the page that would have been visible to public users.

website and the City's "community comments" email address as the page's contact information. J.A. 1. His self-created "Biography" begins, "Under the City Charter Mr. Freed serves as City Manager, Chief Administrative Officer for the City of Port Huron, MI." *Ibid.* Freed also elected to make his profile generally accessible, and he turned off private messaging so that other Facebook users could contact him only by posting public comments. J.A. 288.

Second, Freed treated his Facebook page as a mouthpiece for the Office of City Manager—in effect, using it as a substitute for formal channels of communication. Freed shared press releases and other information about City business, which often appeared under the City's seal or on official letterhead. See, *e.g.*, J.A. 6, 8, 68, 70, 133. He announced new initiatives *through* his page as well. See, *e.g.*, J.A. 20 ("I am directing the Public Works to begin deploying cones and barrels in front of downtown businesses to create drive-thru/pickup lanes"); J.A. 22, 159. Freed routinely described actions taken by the City and its officials in the first person ("we" and "us"), even when he was not personally involved. See, *e.g.*, J.A. 133, 164, 274.

Freed also used his Facebook page to communicate directly with constituents about his work. His posts about City business regularly generated comments and questions, to which Freed would respond with definitive pronouncements. See, *e.g.*, J.A. 13, 16, 21. Based on the page settings that Freed selected, all of this correspondence took place in public, J.A. 288, underscoring the impression that he was discharging through Facebook his duty to engage in "regular communication with local businesses and residents," J.A. 290; see C.A. Rec. 672 (Freed agreeing that Facebook was a means for the "city manager [to] reverberate [a] message out to get it to as many people in the community as possible").

In the early weeks of the pandemic—the period at issue in this case—City business dominated Freed's Facebook page even more than before. His posts, which now occurred at least daily, garnered increased public attention and feedback. See, *e.g.*, J.A. 18 (39 comments); J.A. 20 (two posts, 26 and 28 comments); J.A. 23 (17 comments). As residents were forced to stay home, official information increasingly migrated online, where Freed announced or reported on City initiatives. See, *e.g.*, J.A. 22 ("In light of the potential threat of the COVID-19 Virus, I hereby direct that effective immediately no water shutoffs should occur in the City for a duration of 30 days."); J.A. 14, 18, 38. Although Freed still sometimes posted about his family or other non-City topics, even those posts frequently referenced his efforts to keep residents safe. See, *e.g.*, J.A. 3-4 ("Stay home. Stay Safe. Save lives!" followed by pictures of his daughter playing at home); J.A. 16-17.

Third, the particular conduct being challenged in this case was closely "linked to events which arose out of [Freed's] official status." *Rossignol*, 316 F.3d at 524. The dispute arose from posts by Freed about his and the mayor's actions to address the pandemic, to which Lindke responded with critical comments. See C.A. Rec. 1445; see also *id.* at 1448 (Lindke commenting that Freed's efforts had been "abysmal" and "the city deserves better"). In doing so, Lindke understood himself to be speaking "as a citizen of the city" who was simply "voic[ing his] concerns on Mr. Freed's . . . public official city page that he was using to . . . discuss city business and steps the that the city was taking in response to the pandemic." *Id.* at 1448.

Consistent with his practice of responding to constituents, Freed initially engaged with Lindke's pandemic-related criticisms. *Ibid.* But then he decided instead to delete Lindke's comments and block his access to the page. Pet. App. 15a-16a. These action form the gravamen of Lindke's First Amendment claim. C.A. Rec. 13-15.

* * * * *

The evidence thus makes clear—particularly given the summary judgment posture—that Freed designed his Facebook page to convey the impression that it was an official outlet for communication with the City Manager; that he used the account to perform the functions of his office; and that his dispute with Lindke arose out of those specific functions. Freed acted "under color of" law, and his decision to delete Lindke's comments and block his access should not escape constitutional scrutiny.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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