No. 22-611

IN THE

Supreme Court of the United States

KEVIN LINDKE,

Petitioner,

v.

JAMES R. FREED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN ATHEISTS, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

American Atheists, Inc., is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. American Atheists strives to promote understanding of atheists through education, advocacy, and community-building; works to end the stigma associated with atheism; and fosters an environment where bigotry against our community is rejected.

To that end, in 2019 American Atheists conducted the U.S. Secular Survey, which canvassed 33,897 nonreligious Americans. Somjen Frazer, Abby El-Zhifei, & Alison M. Gill, Reality Check: Being Nonreligious in America, 14 (2020), https://www.secularsurvey.org/s/Reality-CheckBeing-Nonreligious-in-America.pdf [hereinafter Reality Check]. A significant majority of those surveyed (58.3%) reported negative experiences because of their nonreligious identity when using social media or commenting online. Reality Check at 23. Those who reported these negative experiences were 39.0% more likely to screen positive for depression.

One of the ways American Atheists has responded to this trend is by supporting our constituents when they face discrimination or censorship from government officials on social media. Atheists have rapidly

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[1] *Amicus* is a non-profit corporation and has been granted 501(c)(3) status by the IRS. It has no parent company nor has it issued stock. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

become the most politically engaged demographic in the country. Ryan Burge, "No One Participates in Politics More than Atheists," Graphs About Religion (May 16, 2023), https://www.graphsaboutreligion.com/p/no-one-participates-in-politics-more. According to Harvard's Cooperative Election Study, 37% of atheists reported contacting a public official in the month prior to participating in the study, more than any religious group. *Id*. Much of this engagement with government officials and agencies occurs on social media and, as a result, atheists often encounter censorship in the form of deleted comments or outright blocking of their accounts by government officials. *See, e.g., Am. Atheists, Inc. v. Rapert*, No. 4:19-cv-2019, U.S. Dist. LEXIS 230493 at *76-79 (E.D. Ark. Sept. 30, 2019); Atheists Win Settlement After Suing Christian Nationalist Lawmaker, American Atheists (Aug. 17, 2022), https:// www.atheists.org/2022/08/atheists-settlement-christian-nationalist-jason-rapert/; Atheists Reach $41,000 Settlement with Tennessee County Sheriff, American Atheists (Aug. 11, 2016), https://www.atheists.org/2016/08/atheists-reach-41000-settlement-with-tennessee-county-sheriff/.

These efforts, both in and out of court, to protect atheists from government censorship on social media has given American Atheists a unique perspective on the issues raised by this matter and the companion case, *O'Connor-Ratcliff v. Garnier*, No 22-324. American Atheists offers its expertise to the Court in an effort to elucidate issues that may otherwise go unnoticed.

SUMMARY OF THE ARGUMENT

Vagueness chills speech. *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). The people deserve clarity when any government action restricts expressive activity. Social media platforms "are the principal sources for knowing current events, checking ads for employment,

speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). When government officials mingle official business with private messaging on a single social media account, they actively undermine the freedom of speech by depriving individuals of that clarity. In so doing, they discourage expression and chill speech.

The protection of political speech is the keystone of the right enshrined in the Free Speech Clause of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 48 (1976); *see also Citizens United v. FEC*, 558 U.S. 310, 329 (2010); *McConnell v. FEC*, 540 U.S. 93, 205 (2003), *overruled on other grounds by Citizens United*, 558 U.S. at 365-66. If that protection is stripped from political speech, the entire edifice of the freedom of expression will crumble. Time and again, this Court has reinforced that the preservation of this right demands clarity from the government. Where circumstances may give rise to vagueness in the application of the law "'the First Amendment requires [the government] to err on the side of protecting political speech rather than suppressing it.'" *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638, 1653 (2022) (quoting *McCutcheon v. FEC*, 572 U.S. 185, 209 (2014)). And yet, when a government official restricts an individual's ability to engage in political speech on social media, the circuit courts have invariably—and impermissibly—muddied the waters. First, the courts repeatedly apply the "nexus" test for determining whether the defendant acted under color of state law in a manner that often makes it impossible for an individual to know in the moment whether their expressive activity is protected by the First Amendment. Second, the courts repeatedly mismatched the public forum at issue (the "interactive

space" connected to each social media post[2]) with the focus of their analysis (the account or page on which the post appears).

Operating together, these approaches chill speech by, first, incentivizing government officials, particularly elected officials, to be sloppy in managing their social media presence by mingling private material with official posts, and then construing any resulting ambiguity *against* First Amendment protection. This inverts the analysis used by the courts when addressing restrictions on speech in every other context. This Court has already "rejected the argument that 'protected speech may be banned as a means to ban unprotected speech,' concluding that it 'turns the First Amendment upside down.'" *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 475 (2007) (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002)). "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *Id.* at 474. Virtual spaces for expression are not so different from their real-world counterparts as to warrant lower courts' significant departure from longstanding state-actor and public-forum jurisprudence. This Court should take the opportunity presented by this case and *O'Connor-Ratcliff v. Garnier* to establish an internally consistent, clear standard for determining whether a

[2] Social media platforms use a plethora of terms to describe content generated by a user on their own page or account. Depending on the platform, these might be labeled "posts" (Facebook, Instagram, TikTok, Tumblr), "tweets" (Twitter), "toots" (Mastodon), as well as many others. For the sake of clarity, these will be referred to as "posts" herein. Comments, boosts, replies, reposts, retweets, reactions, and other direct responses to posts will be referred to as "comments." The virtual space in which these posts and comments are published will be referred to as a "page."

private individual's interaction with a social media post created by a government official is entitled to First Amendment protection.

ARGUMENT

I. Any factors used to determine whether a "nexus" exists must be clear and capable of application at the time of the private individual's interaction with the social media account in question.

Clarity is imperative when delineating the scope of protected speech. When addressing a claim under Section 1983, the courts must determine whether the challenged action was performed "under color of" state law. 42 U.S.C. § 1983. The courts have invariably applied versions of the "nexus" test to determine whether a government official was acting in a private or official capacity when restricting an individual's ability to engage in expressive activity in connection with a particular social media account.[3] *Lindke v. Freed*, 37 F.4th 1199, 1202-03 (6th Cir. 2022); *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1170 (9th Cir. 2022); *Campbell v. Reisch*, 986 F.3d 822, 825 (8th Cir. 2021); *Davison v. Randall*, 912 F.3d 666, 679-80 (4th Cir. 2019); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 235-336 (2d Cir. 2019); *see also Am. Atheists v. Rapert*, 2019 U.S. Dist. LEXIS 230493 at *37-38 (E.D. Ark. Sept. 30, 2019). The ad hoc criteria that the courts have utilized when conducting this

[3] The need for this analysis is limited to cases involving accounts maintained by individual government officials, rather than those maintained by governmental agencies, such as a local sheriff's office, because unlike an individual government official, a government agency has no private aspect. *See*, *e.g.*, *Robinson v. Hunt Cty.*, 921 F.3d 440, 448 (5th Cir. 2019).

analysis invariably include factors that no individual would realistically have available to them in the moment that they are engaging in expressive activity on the putative designated public forum. This lack of clarity discourages public expression in spaces that are protected, and it must be avoided in order to preserve the freedom of speech in virtual spaces. *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 336 (2010) (invalidating "a regime that allows [the FEC] to select what political speech is safe for public consumption by applying ambiguous tests.").

A. Each of the circuit courts' conflicting applications of the nexus test are unworkable.

Each of the tests established by the circuits for determining whether the government has created a designated public forum on a social media platform involve consideration of facts that private individuals either cannot know at the time they are engaging in expressive activity or would require a near encyclopedic knowledge of the content on the page, potentially dating back months or even years. The test applied by the Sixth Circuit in the case presently before the Court requires that the page be created as the result of some "state law, ordinance, or regulation" or be supported by government funds. 37 F.4th 1199, 1204-05 (6th Cir. 2022). The Sixth Circuit also appears to exclude from the scope of First Amendment protection any page created prior to the official taking office and any page that will not transfer to the officer's successor upon departing their office. *Id.* at 1205. The Ninth Circuit, in *Garnier v. O'Connor-Ratcliff*, considered that the government officials' posts to their pages were "overwhelmingly geared toward 'providing information to the public about' the PUSD Board's 'official activities

and soliciting input from the public on policy issues' relevant to Board decisions." 41 F.4d 1158, 1171 (9th Cir. 2022). In *Davison v. Randall*, the Fourth Circuit considered whether the contact information provided by the defendant on her page, such as the phone number and mailing address, were for her government office or for a campaign office or other private space. 912 F.3d 666, 683 (4th Cir. 2019). To the extent that the Eighth Circuit can be said to have utilized a test of any sort in *Campbell v. Reisch*, that test seems to turn entirely on whether the official's "post-election use of the account is *too similar* to her pre-election use." 986 F.3d 822, 826 (8th Cir. 2021) (emphasis added). How similar the use must be before it is "too similar" is a mystery, leaving to censored individuals the task of litigating the question piecemeal.

Each of the factors laid out above are woefully inadequate to protect individuals' freedom of speech. The protection of the public's ability to engage in political speech demands clarity in the moment the expressive activity is taking place. *ACLU*, 521 at 871-72. Yet the circuit courts appear to have gone out of their way to develop tests that *cannot* be applied by a member of the general public in the moment they are deciding whether or not to speak. Before an individual can confidently speak their mind to a government official on social media, the Sixth Circuit requires them to first determine whether the page was created before or after the official took office. *Lindke*, 37 F.4th at 1204-05. At the time of filing, Facebook made this information available on the "Page transparency" sub-tab of the "About" tab of the page in question. *See, e.g.*, American Atheists, "Page transparency," Facebook, https://www.facebook.com/AmericanAtheists/about_profile_transparency (last visited June 26, 2023). It must be noted here that Facebook permits a page's

owner or administrator to *alter the date* on which a page was created after the fact. "How do I edit my Page's start date on Facebook?," Facebook, https://www.facebook.com/help/www/279680818764230 (last visited June 26, 2023). The publication date of specific posts on pages can also be altered after the fact. "Change the date of your Facebook Page's posts," Facebook, https://www.facebook.com/help/301591769889792/ (last visited June 26, 2023). Once the individual has left the post they wish to comment on, checked the page's creation date, cross-referenced that date with the date the official in question took office (assuming that the creation date of the page in question has not been altered), then the individual must ascertain whether the page can reasonably be expected to pass to the official's successor in the future. *Lindke*, 37 F.4th at 1204-05. That task completed, the individual must next either a) identify some "state law, ordinance, or regulation" that required the creation of the account or, perhaps even more unlikely, b) know whether or not government funds have been put toward managing the account in question. *Id.* The former option requires a thorough knowledge of state and local laws and policies. As to the latter consideration, absent a very specific line item in the government's budget, a private individual would have to *conduct discovery* in order to know whether government funding was utilized in the administration of the page. If the individual is able to answer those questions, and they are answered in the affirmative, the individual can then be confident that their speech will fall within the scope of the First Amendment's protections and they can go back to the original post that sparked their desire to express themselves (assuming that desire has not been snuffed out by the intervening legal research) and finally speak their mind.

The Sixth Circuit is not an outlier in its creation of a test that bears no resemblance to how people actually use social media in their day-to-day lives. The Ninth Circuit's test in *Garnier* indicates that the user considering commenting on a government official's post must, among other things, catalogue and weigh the entirety of the page's contents, placing public service posts on one side of the scale and campaign or private posts on the other side of the scale and then identify the threshold of balance or imbalance at which point the comment spaces below all the posts (or perhaps only below the posts that are on the public service side of the scale) become designated public fora, and then they can know that their speech will be protected. 41 F.4dh at 1171. The Fourth Circuit's criteria in *Davison* require an individual seeking to engage in public discourse to, among other things, cross-check the contact information on the page with government addresses and phone numbers in order to determine whether that contact information is public or private. The Eighth Circuit's "test" requires the would-be speaker to canvass the official's use of the page before they took office and compare that with their use of the page while in office and determine (using no objective criteria) whether the overall *oeuvre* of the page before and after are distinct enough to confidently conclude that their speech will be afforded First Amendment protection. *Campbell*, 986 F.3d at 826. The court offered no guidance as to how distinct in character the posts must be after the government official takes office for the official to be deemed to have acted under color of state law. Nevertheless, it seems that changes that are *insufficient* to be considered distinct include (in the case of a state legislator) ceasing to request campaign donations, ceasing to use campaign hashtags, reporting on newly passed legislation, informing the public of

the legislature's work, informing the public of their own official acts, changing the page's location to their legislative district, changing their biographical information to include their official title, and altering the page's banner image to one taken from the floor of the legislative chamber. *Id.* at 828-29 (Kelly, J., dissenting).

The absurdities that result from the tests propounded by the circuit courts are more starkly illustrated by attempting to apply them to prior cases that do not involve the use of social media. Consider a government-run civic center that hosts events organized by third parties, including non-profit and commercial entities. *D'Amario v. Providence Civic Center Authority*, 783 F.2d 1, 2 (1st Cir. 1986). A freelance photographer who sells pictures of local events to publications seeks to cover an event but learns that a "no cameras" policy is in place for the event. *Id.* When civic center staff attempt to remove him from the property for violating the "no cameras" policy, he will need to know, in the moment , 1) whether some state law, local ordinance, or policy required the existence of the civic center, *Lindke*, 37 F.4th at 1204-05; 2) whether the civic center staff were being paid by the civic center or by the organization holding the event, *Id.*; 3) whether all the prior events at the civic center were "overwhelmingly geared toward" the public or toward private events, *Garnier*, 41 F.4d at 1171; 4) whether the contact information made available at the civic center at the time of the event was for a public or private entity, *Davison*, 912 F.3d at 683; and 5) whether the operation of the civic center at the event was not sufficiently similar to the operation of the civic center during other, public events, *Campbell*, 986 F.3d at 826. In fact, according to the First Circuit, none of this information was required. The source of payment for staff at the event, in particular,

was "a distinction without significance . . . ." *D'Amario*, 783 F.3d at 3. That they were government officers performing their official duties during the event "supplie[d] the state involvement nexus." *Id.*

Or consider a ministry that has contracted with a billboard company to display scripture on two of the company's billboards. *Okwedy v. Molinari*, 333 F.3d 339, 341 (2d Cir. 2003). The billboard company receives a letter from a city council member in which the council member notes that the company owns a number of billboards within the city and directing the company to contact the council member's "legal counsel and Chair of my Anti-Bias Task Force." *Id.* at 341-42. The billboard company removes the ministry's messages in response. In order to determine whether the council member was acting under color of state law or as a private individual (and therefore whether his actions implicated the First Amendment rights of either the ministry or the billboard company at all), they would need to determine 1) whether some state law, local ordinance, or policy required the council member to weigh in on the content of billboards within the city, *Lindke*, 37 F.4th at 1204-05; 2) whether the council member (or perhaps his legal counsel) was being paid by the government when they sent the letter, *Id.*; 3) whether all the prior letters sent by the council member were expressing his personal views or constituted his official statement on the matter, *Garnier*, 41 F.4d at 1171; 4) whether the contact information provided on the letterhead corresponded to government-operated communication channels, *Davison*, 912 F.3d at 683; and 5) whether the letter was not sufficiently similar to letters the official sent to other parties prior to taking office, *Campbell*, 986 F.3d at 826, and bearing in mind that changes in official titles and other information in the letterhead are not necessarily sufficient

to show the requisite dissimilarity, *Id.* at 828-29 (Kelly, J., dissenting).

Attempting to apply the circuit courts' multifarious standards to these and numerous other cases, *see, e.g., McDade v. West*, 223 F.3d 1135, 1139-41 (9th Cir. 2000); *Jones v. Duncan*, 840 F.2d 359, 361-63 (6th Cir. 1988); *Brown v. Miller*, 631 F.2d 408, 410-11 (5th Cir. 1980), in which the nexus test is used to determine whether alleged acts were performed under color of state law demonstrates the absurd lengths individuals would need to go to in order to preserve their rights. The disparity between how the circuit courts have treated actions taken in the virtual space and those taken in the "real world" has no justification, and this Court should take the opportunity presented by these cases to state a clear standard that is capable of ready application in order to correct the imbalance in free speech law that the circuits have created.

B. A standard that requires lengthy litigation and extensive discovery further stymies individuals' ability to protect their First Amendment rights.

The lower courts' decisions impose a unique burden on individuals seeking to defend in court their freedom of speech online and, at the same time, expose government officials to expansive discovery obligations in order to resolve questions that, outside the social media context, would require little if any discovery and far less burdensome litigation. Where the freedom of speech is implicated, the courts must utilize a standard that "entail[s] minimal if any discovery," lest the courts defeat their own purposes by "chilling speech through the threat of burdensome litigation." *Wis. Right to Life, Inc.*, 551 U.S. at 469 (citing *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)). As with other

statutes that implicate the freedom of speech, when Section 1983 is utilized to remedy a free speech violation, the application of the statute's "under color of" state law element "must give the benefit of any doubt to protecting rather than stifling speech." *Id.* The circuit courts have done the opposite, imposing an interpretation of the nexus test that, in practical effect, makes the protection of speech contingent on lengthy litigation and burdensome discovery, permitting individuals' speech to be needlessly chilled for months, if not years.

Though they may not like to admit it, those holding elected office do so only temporarily, most for only two years. "Number of Legislators and Length of Terms in Years," Nat'l Conf. of St. Legislatures (Apr. 19, 2021), https://www.ncsl.org/resources/details/number-of-legislators-and-length-of-terms-in-years [hereinafter NCSL]. Sixteen states impose term limits on legislators, ten of which limit those holding office to only eight years. "Term limits in the United States," Ballotpedia, https://ballotpedia.org/Term_limits_in_the_United_States (last accessed June 26, 2023). In addition, local officials in at least nine major cities face similar term limits. *Id*.

As a result of these limitations, there is often only a short window in which an official could potentially be acting under color of state law. This poses a special problem for private individuals who, facing potentially unconstitutional censorship from such officials, seek to vindicate their free speech rights in court. In the vast majority of free speech litigation, the remedies available to a plaintiff are equitable, forward-looking measures: declaratory judgments and injunctions. Claims seeking to impose these remedies against elected officials are generally moot when the official leaves office. *See Biden v. Knight First Amendment Inst. at Columbia*

Univ., ___ U.S. ___, 141 S. Ct. 1220 (2021). Yet the litigation itself can often be expected to last longer than an official's term. NCSL, *supra*. For example, in the present case, the Petitioner filed the initial complaint on April 3, 2020, *Lindke v. Freed*, No. 2:20-cv-10872, Doc. # 1 (E.D. Mich. Apr. 3, 2020), and the case has yet to be resolved more than three years later. In *O'Connor-Ratcliff v. Garner*, the complaint was filed even earlier, on October 30, 2017. No. 3:17-cv-02215, Doc. # 1 (S.D. Cal. Oct. 30, 2017). *O'Connor-Ratcliff* is unlikely to even be heard by this court, let alone resolved, until over *six years* after the plaintiffs took legal action in the matter.

As the dockets of these pending cases demonstrate, unless a plaintiff can obtain a preliminary injunction (no small feat) or prevail on an early motion for summary judgment (a near impossibility when the applicable standard all but *requires* the parties to conduct discovery), their freedom of speech may be curtailed for years and even a meritorious claim may never be resolved if the official leaves office prior to final adjudication.

Furthermore, the process of adjudicating a case using any of the standards developed by the circuit courts imposes extensive discovery obligations on the defendant-officials. A plaintiff tasked with demonstrating that an account was used by an official under color of state law may have no choice but to seek through discovery the *entirety* of an official's social media presence. Take, for example, *American Atheists v. Rapert*, in which *amicus* sought to protect the free speech rights of several of its members who were

blocked or whose comments were deleted by Arkansas State Senator Jason Rapert. No. 4:19-cv-17, 2019 U.S. Dist. LEXIS 230493 (E.D. Ark. Sept. 30, 2019). Rapert maintained numerous social media pages, including four Twitter accounts (@RapertSenate, @ChristLawmakers, @HGM_Evangelism, and @JasonRapert) and four Facebook pages ("Holy Ghost Ministries," "National Association of Christian Lawmakers," "American History & Heritage Foundation, Inc.," and "Sen. Jason Rapert") in addition to his personal "Jason Rapert" Facebook page. *Id.* at *8-10. Under the Eighth Circuit's formulation of the nexus test, it was incumbent on the plaintiffs to show that the accounts at issue were "'organ[s] of official business.'" *Am. Atheists, Inc. v. Rapert*, No. 4:19-cv-17, 2022 U.S. Dist. LEXIS 132824, at *15 (E.D. Ark. July 26, 2022) (quoting *Campbell*, 986 F.3d at 826) (alterations in original). In order to make their case, the plaintiffs sought, *inter alia*, copies of "every social media account, as well as any deactivated or deleted account[,] including pages and groups, under [Rapert's] control" from the earliest date at which the defendant blocked one of the plaintiffs, *Id.* at *13-14, and the court ordered the defendant to produce those records, overruling his objections. *Id.* at 23-24.[4] As this example shows, the circuit courts' failure to establish a clear and objective standard that reduces the need for discovery imposes significant burdens on government

[4] Rapert settled the case shortly after the court entered that order. "American Atheists Wins New Victory Against Arkansas State Senator Jason Rapert As Case Heads to Trial," American Atheists (July 28, 2022), https://www.atheists.org/2022/07/atheists-new-victory-jason-rapert/; "Atheists Win Settlement After Suing Christian Nationalist Lawmaker," American Atheists (Aug. 17, 2022), https://www.atheists.org/2022/08/atheists-settlement-christian-nationalist-jason-rapert/

officials as well as those who seek to engage with them on social media. Under the current applications of the nexus test to social media pages, officials often have no choice but to open their social media presence up to the detailed examination that plaintiffs must necessarily perform to make their case.

In short, the circuit courts' tests for determining whether the government officials in the above cases acted under color of state law, thereby creating designated public forums, are unworkable and take no account of how people actually use social media every day. Americans not only deserve to know when they speak online whether that speech will be protected, they are entitled to it. The judiciary's consideration of this issue should reflect its obligation to the public and this Court must announce a standard that allows the people to know *when they speak* whether that speech will be protected, not after they have suffered censorship and been forced to resort to litigation. Anything less will result in continued harm to free expression.

II. Judicial analysis of whether an official was acting "under color of" state law should be post-by-post, not account-by-account.

When a government official organizes a town meeting at a local hotel, convention center, or other meeting space, the courts do not look to how the official has used that space for other events when deciding whether the official acted under color of state law. How a particular official utilized the space in other instances is largely irrelevant. Unfortunately, the circuit courts have lost sight of this basic point when turning their attention from "real-world" public fora to those created in virtual spaces.

A. Examination of whether an official was acting "under color of" state law must focus on the action of creating the purported public forum at issue.

Despite the fact that the lower courts all acknowledge that each official government post creates its own public forum, something about transposing longstanding state actor analysis from the real world to the virtual space causes the courts' thinking to get a little scrambled. The opinion below warned that "[l]ooking too narrowly at isolated action without reference to the context of the entire page risks losing the forest for the trees." *Lindke v. Freed*, 37 F.4th 1199, 1203 (6th Cir. 2022). No such sentiment can be found in existing § 1983 jurisprudence. The "isolated action" in question is the potential creation of a designated public forum by publishing a post on which the public is allowed to comment. The courts do not engage in any broader analysis when determining whether a government official was acting under color of state law outside the social media context. The Sixth Circuit insists that this special analysis is necessary in the social media context because "to answer [the] cornerstone question—whether the official's act is 'fairly attributable' to the state—we need more background than a single post can provide." *Lindke v. Freed*, 37 F.4th 1199, 1203 (6th Cir. 2022). Again, this simply is not so. Courts routinely determine whether a government official has acted under color of state law by narrowly examining the isolated action at issue.

When assessing § 1983 claims concerning the potentially private acts of a government official, the courts apply the "close nexus" test for determining whether "the State was sufficiently involved" in the action that allegedly violated the plaintiff's rights "to

treat that decisive conduct as state action." *Nat'l Collegiate Ath. Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988). Under the "close nexus" test, state action exists where "the State 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). This test is an imperfect fit when addressing the actions of elected officials who are never truly "off the clock" while they hold public office. A law enforcement officer may take off her badge when off duty. Not so a city mayor or state legislator.

While the nexus test may be an awkward fit, it is the best-fitting test available for determining whether an official is acting under color of state law when restricting access to a putative public forum within their control. This nexus inquiry is necessarily fact-intensive but the inquiry is narrow, focusing on the act itself and the duties and position of the government official. Thus, when a borough president sent a letter to a billboard company implying potential punishment for displaying a ministry's materials, *Okwedy*, 333 F.3d at 341-42, the court did not concern itself with who funded the letter, how the borough president used his letterhead in other communications, or whether he was statutorily compelled to write the letter. The court focused on the contents of the letter itself. *Id.* at 344. When a government-run civic center imposed a "no camera" rule at certain events at the request of event organizers, the court did not attempt to balance the

public events against the private events or tally up the number of events that did and did not have "no camera" requirements. The court went so far as to explicitly state that the source of funding to pay the government employees during the "no camera" events was irrelevant to the analysis. *D'Amario*, 783 F.2d at 3. The court focused on the government officials' conduct *during the events*. *Id.* at 3-4. When an off-duty corrections officer involved in a car accident violently attacked the other driver, the Ninth Circuit limited its analysis to the incident at issue and determined that the officer's act of identifying himself as a "cop" during the incident invoked his governmental status. *Anderson v. Warner*, 451 F.3d 1063, 1069-70 (9th Cir. 2006). The court did not examine the defendant's other uses of his vehicle or whether it was his official vehicle or his private vehicle. It did not inquire how he identified himself during any other altercations he may have been involved in.

In each of these instances, the courts focused their analysis of whether the government official in question was acting under color of state law on the official's action in the moment of the purported violation, not how they presented themselves in other situations and certainly not how they acted years prior. Nevertheless, as soon as social media is involved, the circuit courts preoccupy themselves with the conduct of defendants months or even years prior to their challenged actions against the plaintiffs.

B. Courts err by focusing the "under color of state law" analysis on the management of the account as a whole.

Social media platforms are "the modern public square . . . ." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). As the Electronic Frontier Foundation

thoroughly lays out in its *amicus curiae* brief, social media is one of the most widely used means of engaging with government agencies and officials. Brief for Electronic Frontier Foundation as *Amicus Curiae* Supporting Petitioner, *Lindke v. Freed*, No. 22-611 (U.S. June 30, 2023). Despite this reality, the courts have, through their misapplication of the "nexus" test for state action, caused dramatic harm to the freedom of speech. By focusing their state actor analysis on the "page or account as a whole," *Lindke v. Freed*, 37 F.4th 1199, 1203 (6th Cir. 2022), the courts give government officials every incentive to co-mingle official posts with private content in order to deny the public the protection the First Amendment is meant to provide, particularly in the context of political speech.

While some aspects of the page in question are relevant to the proper application of the nexus analysis, *see* Part III, below, the lower courts' universal decision to make these considerations the *focus* of the analysis results in absurd conclusions. Consider that the Sixth Circuit's test in the case presently before the Court turns *entirely* on questions about the page on which the post appears. The Sixth Circuit justified this exclusive focus on the page as an effort to avoid "losing the forest for the trees." *Id.* at 1203. In the process, however, the court entirely lost the point. James Freed could have announced that he was holding a public meeting in a local hotel's convention space in order to "share[] the policies he initiated for Port Huron and news articles on public health measures and statistics" relating to COVID-19. *Id.* at 1201. If, upon being asked a question at that meeting by a constituent who pointed out potential flaws in the government's policies, Freed had the constituent removed from the meeting, there would be no doubt that Freed had crossed a very bright constitutional line. The Sixth Circuit would not concern

itself with whether Freed had used that space for private events before taking office, whether some state law or local ordinance explicitly required him to hold that meeting, or whether the cost of the meeting was borne by the state government, paid by Freed himself,[5] or absorbed by the hotel in the interest of serving its community (and benefiting from some free advertising). The court would focus on the details of the event itself. Yet, according to the court below, the same official engaging in the same conduct on a social media platform instead of a hotel convention space suddenly turns the analysis on its head. The purpose of the post is rendered all but irrelevant, and the Sixth Circuit is content to devote itself to *only* these minutiae that are, at best, tangentially related to the putative public forum at issue and, at worst, completely extraneous.

The Ninth Circuit's test fails for similar reasons, though that court's test concerns itself with slightly different criteria ("the Trustees clothed their pages in the power and prestige of their offices and created and administered the pages to perform actual or apparent duties of their offices," *Garnier*, 41 F.4th at 1177). Had O'Connor-Ratcliff, being a Trustee of the Poway Unified School District, held the same hypothetical town hall meeting as Freed did above, but never specifically used her government title, the outcome would be no different than in the hypothetical above. She would clearly have been acting under color of state law.

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[5] Many government employees, particularly teachers, devote personal funds to their work and yet rightly remain bound by the obligations imposed by the U.S. Constitution. *See, e.g.*, *Q.C. v. Winston-Salem/Forsyth Cty. Sch. Bd. of Educ.*, No. 1:19-cv-1152, 2022 U.S. Dist. LEXIS 94399, at *7-8 (M.D.N.C. May 26, 2022).

III. To preserve individuals' freedom of speech, courts must apply a clear standard that limits the ability of government actors to benefit from imprecision and that can be applied without conducting extensive discovery.

A. The nexus test should be applied in a matter that, to the extent possible, avoids lengthy litigation that delays the restoration of plaintiffs' freedom of speech.

The restriction of the freedom of speech, even for a single day, constitutes a harm that can never be fully remedied. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). A standard that requires "burdensome litigation" in order to determine whether speech was protected in the first place chills speech for months or even years. *Wis. Right to Life, Inc.*, 551 U.S. at 469. It should therefore be only in the rarest edge cases that lengthy and arduous litigation is made necessary. And even in these fringe cases, that ambiguity should generally be resolved in favor of protecting speech because, as this Court has stated, "the tie goes to the speaker, not the censor." *Id.* at 474. Government officials cannot be permitted to sidestep their constitutional obligations through either the sloppy or intentional co-mingling of private and official posts on a single page. A government official should not be permitted to block, ban, or otherwise restrict an individual's ability to express themselves on a matter relating to their official duties simply because other posts on the page are "private" and therefore do not create a public forum. An official cannot justify restricting protected speech simply because the restriction also applies to unprotected speech. Such an argument "'turns the First Amendment

upside down.'" *Id.* at 475 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

B. The application of the nexus test to social media should not enable government officials to avoid their constitutional obligations by intentionally mingling private and official content on a single page.

Yes, government officials have the same right as any private person to control their social media presence when acting in their private capacity. However, where government officials choose voluntarily to mix personal or private content with official content on the same social media page, they have deprived themselves of the opportunity to impose blanket bans on participation in that page. This includes blocking a user from interacting with *all* posts on the page, be they private or official in nature. The Court should therefore take this opportunity to apply the nexus test in the social media context in a manner consistent with its application in other First Amendment contexts.

C. The Court should apply the nexus test in a manner that encourages officials to take appropriate care when conducting government business on social media.

The inquiry should focus on whether the government official acted under color of state law *when publishing each post* that created a distinct, putative public forum. Although aspects of a page may certainly be relevant to the analysis,[6] placing those considerations

[6] Indicators such as a statement on the page that it is intended as a channel to communicate with constituents or enabling

at the center of the inquiry causes the courts and the parties to lose focus of the specifics of the alleged violation and instead engage in lengthy discovery and examinations of an official's use of a social media page over a period that could span years. *See* Part I-B, above. By instead focusing the analysis on each post that could create a public forum, and resolving ambiguity against the official and in favor of protecting speech, the Court will protect the freedom of speech in the space where Americans are most likely to engage in political discourse in the 21st century. Further, such a focus will create a strong incentive for government officials to take the management of their social media presence seriously, keeping their discussions of official matters separate from private messaging.

This approach has the benefit of clarity and will result in more efficient resolution of potential First Amendment litigation. A clear test focused on the creation of each distinct putative public forum avoids the need for lengthy litigation and discovery that delves into all manner of issues that would not demand examination in litigation over the creation of a designated public forum in any other context. *See, e.g.*, *Am. Atheists, Inc. v. Rapert*, 4:19-cv-17, 2022 U.S. Dist. LEXIS 132824 at *10-40 (E.D. Ark. July 26, 2022).

Twitter's feature that only allows those whom the official chooses to follow to comment on the official's tweets are highly relevant but cannot be the end the inquiry. Such indicators are easily altered by the account holder (as are page titles, contact information, and other data associated with the page) and may be in conflict with the official's actual use of the page day to day.

CONCLUSION

For the above reasons, *amicus* respectfully request this Court to REVERSE and REMAND the judgment of the U.S. Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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