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 OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the most essential qualities of liberty. Since 1999, FIRE has successfully defended the rights of individuals through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate expressive rights under the First Amendment. *See, e.g.*, Brief of FIRE as *Amicus Curiae* in Support of Petitioner, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); Brief of FIRE as *Amicus Curiae* in Support of Respondents, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

FIRE regularly defends speakers whose expression has been censored by governmental social media accounts. For example, after Wright State University censored student and faculty supporters of a January 2019 faculty strike by hiding and removing comments from its official Facebook account, FIRE successfully advocated for a change to the university's social media policy. *See* Found. for Individual Rts. & Expression, *Wright State University: Facebook Comments Restricted During Faculty Union Strike*, https://perma.cc/6F8S-WQ5T. And FIRE's research demonstrates the extent of the problem. FIRE has collected and reported on public records from over 200 state colleges and universities,

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel contributed money intended to fund preparing or submitting this brief.

demonstrating that these public institutions widely use blocking and keyword-filtering tools on social media sites that constitute public forums for speech. *See* Found. for Individual Rts. & Expression, *No Comment: Public Universities' Social Media Use and the First Amendment*, (Apr. 22, 2020), https://perma.cc/3G4E-86WY ("*No Comment*").

In June 2022, FIRE expanded its public advocacy promoting a culture of free expression and its litigation efforts to protect First Amendment rights beyond the university setting to include society at large. *See* Found. for Individual Rts. & Expression, *The New York State Senate Blocks Critics on Twitter. That's Unconstitutional—and FIRE Calls on the Senate to Knock It Off,* (Aug. 18, 2022), https://perma.cc/6NC2-7GEH. FIRE files this brief in support of Petitioner to urge the Court to put public officials on notice: The First Amendment's protections cannot be "blocked" when critical constituents log on.

INTRODUCTION

From its first opportunity to consider the issue, this Court has recognized the Internet as "a unique and wholly new medium of worldwide human communication" that disseminates content "as diverse as human thought." *Reno v. ACLU*, 521 U.S. 844, 850, 852 (1997). The vital First Amendment interests inherent in this medium have only increased over time. Two decades after *Reno*, the Court observed that cyberspace, and "social media in particular," have become "the most important places . . . for the exchange of views." *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). This is because "[s]ocial media offers 'relatively unlimited, low-cost capacity

for communication of all kinds," where "users can debate religion and politics" or "petition their elected representatives and otherwise engage with them in a direct manner." *Id.* at 104–05. *See also Counterman v. Colorado*, No. 22-138, at *5 (June 27, 2023) (Sotomayor, J., concurring) ("Our society's discourse occurs more and more in the 'vast democratic forums of the Internet' in general, and social media in particular.") (quoting *Packingham*, 582 U.S. at 104).

This case asks the Court to decide when government officeholders' "personal" social media accounts become "official" and therefore constitute state action subject to constitutional rules. Most circuits have adopted a "purpose or appearance" test to determine when personal accounts take on official status, looking to the totality of circumstances to assess state action. *E.g.*, *Knight First Amend. Inst. v. Trump*, 928 F.3d 226, 235–36 (2d Cir. 2019), *reh'g denied*, 953 F.3d 216 (2d Cir. 2020), *vacated as moot sub nom. Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220 (2021); *Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019); *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1170–77 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 1179 (2023); *Campbell v. Reisch*, 986 F.3d 822, 825–26 (8th Cir. 2021). By contrast, the Sixth Circuit below adopted an "actual or apparent official duties" test. *Lindke v. Freed*, 37 F.4th 1199, 1203 (6th Cir. 2022), *cert. granted*, 143 S. Ct. 1780 (2023). Under this test, an officeholder's use of social media is considered state action only if it is part of an officeholder's "actual or apparent duties" or could not happen the same way "without the authority of the office." *Id.* (cleaned up).

SUMMARY OF ARGUMENT

This Court should reverse the Sixth Circuit, because the "actual or apparent official duties" test enables public officials to turn the social-media platforms on which they voluntarily choose to conduct public business into one-way channels of communication. Worse, it enables them to mute members of the public selectively to screen out views they dislike.

All too often, politicians choose the comfortable and convenient option of silencing their critics. Examples are not hard to find. Most prominently, former President Trump operated his personal Twitter account as a tool of his administration while selectively blocking users and their critical comments. The same techniques have been employed by public officials at all levels, from state and federal legislators, to governors and administrative officials, and on down to county board members and school board trustees. This case involves a city manager who used his Facebook page not just as an identifier for his government position, but also to conduct official business.

Politicians cannot have it both ways—they cannot use private social media accounts to conduct public business and then claim their decision to cut off discussion is a matter of private choice. "Having opted to create a [social media] account . . . and benefit from its broad, public reach," public officials should not be permitted to "divorce themselves from its First Amendment implications and responsibilities as state

actors." *One Wis. Now v. Kremer*, 354 F. Supp. 3d 940, 954 (W.D. Wis. 2019).

State actors are as state actors do: Nothing compels public officials to use personal social media accounts to conduct government business. But when they do so, they are bound by constitutional obligations. Government officials are not exercising their personal free speech rights when they use social media accounts to conduct public affairs. When speaking "pursuant to their official duties," officials "are not speaking as citizens for First Amendment purposes." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). When officials use personal accounts to boost their governmental profiles and conduct public business, they are acting "under color of state law," and their actions are "fairly attributable to the state." *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935–37 (1982).

Most circuits that have addressed this issue have applied a fact-specific inquiry into how the official describes and uses the account, to whom features of the account are made available, and how others, including government officials and agencies, regard and treat the account. Under this "purpose or appearance" approach, the courts have correctly found that state action is present and that the First Amendment does not permit a governmental official to use a social media platform for official purposes and then exclude persons from an otherwise open dialogue merely because they expressed views the official disfavors.

By contrast, the Sixth Circuit's "actual or apparent duties" test finds state action only where social media sites are authorized, managed, or funded by the government. This narrow approach effectively ignores this Court's jurisprudence that finds state action for activities conducted under color of state law or for actions "fairly attributable to the state." *Lugar,* 457 U.S. at 937. While the Sixth Circuit touted this as a "bright line rule," what it created is a blueprint to enable government officials to evade First Amendment review of their social media activity.

Public officials who use their social media accounts to conduct public business while claiming a "private" right to avoid criticism betray the First Amendment's guarantee of free expression and undermine its essential purpose of facilitating democratic rule. Speech concerning public affairs "is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). The First and Fourteenth Amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

This Court should reverse the decision below to preserve the promise that social media can serve as a forum where citizens can "petition their elected representatives and otherwise engage with them in a direct manner." *Packingham*, 582 U.S. at 104–05.

ARGUMENT

I. The Constitution Should Not Permit Government Officials to Use Social Media as a Tool to Limit Public Discourse.

A. Public officials increasingly reap the benefits of interactive communications media.

Political officeholders have widely recognized and embraced the potential of social media. The highest officials down to the most local have opted to conduct the public's business using the interactive features that are the defining characteristic of social media. Each day, thousands of officials converse directly with their constituents and the public at large on social media platforms. From mayors to district attorneys, congressional representatives to police chiefs, public officials from America's smallest towns and largest cities alike employ social media to connect with citizens.[2]

In an attempt to "bring[] clarity" "to a real-world context that's often blurry," the Sixth Circuit created

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[2] *E.g.*, DA Larry Krasner (@DA_LarryKrasner), Twitter, https://twitter.com/DA_LarryKrasner (last visited June 19, 2023) (Philadelphia District Attorney's Twitter account); *Has Florida Man Finally Met His Match? Meet Florida Sheriff*, Bay News 9 (July 26, 2022, 9:54 AM), [https://perma.cc/RN7N-RFSC] (describing how several Florida sheriffs use social media to communicate with the community); Cory Booker (@CoryBooker), Twitter, https://twitter.com/CoryBooker (last visited June 20, 2023) (the New Jersey senator and former mayor of Newark, NJ has used his personal Twitter account to connect with constituents since 2008).

a bright line test to determine when public officials' social media activity constitutes state action. *Lindke v. Freed*, 37 F.4th 1199, 1206–07 (6th Cir. 2022). In doing so, however, the court failed to recognize that government actors use social media in varied ways.

In many cases, social media usage is fully integrated with governmental functions. For example, city council members live-tweet the minutes of public meetings,[3] mayors share videos and photos of themselves interacting with the community,[4] and city officials detail road closures.[5] Public universities also leverage social media to share news, make announcements, foster school spirit, point to resources, connect with alumni, and interact directly with students.[6]

Beyond facilitating the day-to-day functioning of government, social media can be a critically important public tool during emergencies and public health

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[3] Albuquerque City Council (@ABQCityCouncil), Twitter (May 2, 2023, 12:22 AM), https://twitter.com/ABQCityCouncil/status/1653253531443294209.

[4] Mayor Bryce Ward (@mayorbryceward), Instagram (Dec. 15, 2022), https://www.instagram.com/p/CmNoOb-v4OI/.

[5] City of Saint Paul – Government, Facebook (June 12, 6:01 PM), https://www.facebook.com/photo?fbid=569345462045121&set=a.168452565467748.

[6] *See, e.g.*, University of Michigan, Facebook, https://www.facebook.com/UniversityOfMichigan/ (last visited June 20, 2023); LSU (@lsu), TikTok, https://www.tiktok.com/@lsu (last visited June 20, 2023); Arizona State University (@arizonastateuniversity), Instagram, https://www.instagram.com/arizonastateuniversity/ (last visited June 20, 2023).

crises. Many Americans turned to social media for information during the first few months of the Covid-19 pandemic. A 2020 poll conducted by Gallup and Knight Foundation found that a majority of adults who use social media reported that the information they received about the virus from public officials' social media posts during that time was helpful.[7]

The interactive nature of social media makes it uniquely useful because it enables officials to solicit feedback and access public opinion.[8] A 2014 study found that more than three-quarters of congressional staffers reported that social media enabled "more meaningful interactions" between members of Congress and their constituents.[9] Many officials also use the same social media to cultivate their public image and connect with the public on a more human level. This includes peppering their social media feeds with family pictures and holiday greetings and

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[7] Zacc Ritter, *Americans Use Social Media for COVID-19 Info, Connection*, Gallup News (May 21, 2020), https://news.gallup.com/poll/311360/americans-social-media-covid-information-connection.aspx [https://perma.cc/R8Y5-VG88].

[8] Jacob R. Straus, *Social Media Adoption by Members of Congress: Trends and Congressional Considerations*, R45337, Cong. Rsch. Serv. 1 (Oct. 2018), https://crsreports.congress.gov/product/pdf/R/R45337 [https://perma.cc/VU59-QWJB].

[9] Bradford Fitch & Kathy Goldschmidt, #*SocialCongress 2015*, Cong. Mgmt. Found. 10 (2015), https://www.congressfoundation.org/storage/documents/CMF_Pubs/cmf-social-congress-2015.pdf [https://perma.cc/D7WU-VLRF].

offering words of fortitude, celebration, and gratitude.[10]

The government makes extensive use of social media though official websites and government-owned accounts. Federal agencies have registered more than 10,000 social media accounts with the U.S. Digital Registry.[11] The governors of each state use social media to communicate with the public about their official duties.[12] In such circumstances, there is no question that this use of official social media accounts to conduct official business constitutes state action.

In other instances, however, officials choose to use their personal accounts to conduct their official duties. Former President Trump converted what began as a private Twitter account into "one of the White House's main vehicles for conducting official business." *Knight First Amend. Inst.*, 928 F.3d at 232. Through this account, he announced and defended his policies, promoted his Administration's legislative agenda, engaged with foreign leaders, publicized state visits, responded to critical press coverage, and interacted

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[10] *See*, *e.g.,* Paulina Firozi, *Politicians fill social media with Christmas messages*, The Hill (Dec. 26, 2016), https://thehill.com/blogs/blog-briefing-room/news/311798-politicians-fill-social-media-with-christmas-messages/ [https://perma.cc/DP5P-ANHL].

[11] *U.S. Digital Registry*, Digital.Gov, https://digital.gov/services/u-s-digital-registry/ (last visited June 20, 2023) [https://perma.cc/FHQ9-SQ43].

[12] *Governors' Social Media Accounts*, Nat'l Governors Ass'n, https://www.nga.org/governors/social/ (last visited June 19, 2023) [https://perma.cc/R8J6-R2SS].

with more than 50 million followers. *Id.* The President used this account on a near daily basis "as a channel for communicating and interacting with the public about his administration." *Id.* at 235 (cleaned up).

President Biden similarly uses his "personal" Twitter account to communicate with the public. The President regularly tweets about his positions on important public policy issues—ranging from gun control[13] to the cost of living.[14] He also comments on other politicians' agendas,[15] shares information related to his administration's work,[16] and re-tweets announcements from the official "@POTUS" account. President Biden's personal account, which he established in 2007, has nearly 6 million more followers than the official POTUS account.[17]

Members of Congress and their staff also use personal social media accounts in furtherance of their public duties. In 2020, members of the 116th Congress

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[13] Joe Biden (@JoeBiden), Twitter (June 15, 2023, 2:29 PM), https://twitter.com/JoeBiden/status/1669411704537587712.

[14] Joe Biden (@JoeBiden), Twitter (June 14, 2023, 3:44 PM), https://twitter.com/JoeBiden/status/1669068188691185665.

[15] Joe Biden (@JoeBiden), Twitter (May 24, 2023, 8:30 PM), https://twitter.com/JoeBiden/status/1661530118458683394.

[16] Joe Biden (@JoeBiden), Twitter (May 14, 2023, 11:37 AM), https://twitter.com/JoeBiden/status/1657047252605575170.

[17] As of June 20, 2023, 37.2 million people followed Biden's personal account, while 31.3 people followed the official POTUS account.

maintained more than 2,000 active Facebook and Twitter accounts and accumulated over a quarter-billion followers between them. In an average month, congressional social media accounts publish more than 100,000 tweets and Facebook posts and garner millions of reactions.[18]

The Pew Research Center found that the typical (median) member of congress maintains two accounts on each platform—one "official" account and another personal or campaign-related account.[19] Representatives Dan Crenshaw and Alexandria Ocasio-Cortez and Senator Cory Booker, for example, all use their personal Twitter accounts to communicate their policy positions, comment on legislative matters and current affairs, and interact with other Twitter users. They also use these accounts to offer personal updates and general messages unrelated to their official duties.[20] In each instance, the politicians' personal accounts have garnered significantly more followers than their official

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[18] Patrick Van Kessel et al., *Congress Soars to New Heights on Social Media* (July 16, 2020) https://www.pewresearch.org/internet/2020/07/16/congress-soars-to-new-heights-on-social-media/ [https://perma.cc/3343-WPQU].

[19] *Id.*

[20] Dan Crenshaw (@DanCrenshawTX), Twitter, https://twitter.com/DanCrenshawTX (last visited June 20, 2023) (1.2 million followers); Alexandria Ocasio-Cortez (@AOC), https://twitter.com/AOC (last visited June 20, 2023) (13.4 followers); Cory Booker (@CoryBooker), https://twitter.com/CoryBooker (last visited June 20, 2023) (4.7 million followers).

congressional accounts.[21] These examples illustrate the overlap between a state-sanctioned social media account and "personal" accounts.

This case likewise involves a public official who uses his personal social media account to identify his official governmental position and to conduct public business. Respondent is a city manager who chose to use his personal Facebook page to post administrative directives he issued, announce Covid-19 policies, and share news about policies he initiated. *Lindke*, 37 F.4th at 1201.

B. Public officials too often succumb to the temptation to silence critics.

Many public officials understandably want to reap the benefits of the social media megaphone while retaining the ability to mute critics and silence dissenters. Officials spanning the political spectrum, from former President Trump to Representative Ocasio-Cortez, have used the blocking functions of social media to deny access to critics and vanish dissenting comments. [22]

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[21] *Compare supra* note 22, *with* Rep. Dan Crenshaw (@RepDanCrenshaw), Twitter, https://twitter.com/RepDanCrenshaw (last visited June 21, 2023) (695,600 followers); Rep. Alexandria Ocasio-Cortez (@RepAPC), Twitter, https://twitter.com/repaoc (last visited June 21, 2023) (779,100 followers); Sen. Cory Booker (@SenBooker), Twitter, https://twitter.com/SenBooker (last visited June 21, 2023) (199,100 followers)

[22] Charlie Savage, *Trump Can't Block Critics From His Twitter Account, Appeals Court Rules*, N.Y. Times (July 9, 2019),

They are far from alone. Former Maryland Governor Larry Hogan blocked hundreds of users who posted critical comments on his personal Facebook page that he had used to inform the public about his personal life, but also to promote his administration's agenda and urge voters to contact his opponents. The users were restored after a legal challenge was filed.[23] Likewise, former Alabama Secretary of State John Merrill used his personal Twitter account to perform his official duties, yet blocked a number of accounts for tweets "that were directed at him and that concerned election law, criticized him, or included comments with which he disagrees." *Fasking v. Merrill*, No. 2:18-cv-809-JTA, 2023 WL 149048, at *2–6, *18 (M.D. Ala. Jan. 10, 2023), *dismissed as moot*, *Fasking v. Allen*, No. 2:18-cv-809-JTA, 2023 WL 2655863 (M.D. Ala. Mar. 27, 2023). Several members of the Wisconsin legislature blocked critics from their personal Twitter accounts for, among other things,

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https://www.nytimes.com/2019/07/09/us/politics/trump-twitter-first-amendment.html [https://perma.cc/YWN2-83X2]; Sasha Ingber, *Alexandria Ocasio-Cortez Is Sued Over Blocking Twitter Followers*, NPR (July 12, 2019), https://www.npr.org/2019/07/12/741038121/alexandria-ocasio-cortez-is-sued-over-blocking-twitter-followers [https://perma.cc/5QLJ-MYXB].

[23] Ovetta Wiggins and Fenit Nirappil, *Gov. Hogan's Office has blocked 450 people from his Facebook page in two years*, Washington Post (Feb. 8, 2017), (https://www.washingtonpost.com/local/md-politics/gov-hogans-office-has-blocked-450-people-from-his-facebook-page-in-two-years/2017/02/08/54a62e66-ed45-11e6-9973-c5efb7ccfb0d_story.html [https://perma.cc/L4NQ-C2Q7]; Jon Brodkin, *Republican governor forced to stop blocking Facebook users who criticize him*, Ars Technica (April 3, 2018), (https://arstechnica.com/tech-policy/2018/04/republican-governor-forced-to-stop-blocking-facebook-users-who-criticize-him/ [https://perma.cc/72KR-MC22].

"crude comments on Wisconsin politics," and "tweets of an inappropriate and unprofessional nature." *One Wis. Now*, 354 F. Supp. 3d at 948–49. And former Maine Governor Paul LePage, who used his personal Facebook page to support his office, deleted posts and blocked users from a progressive group.[24]

Unfortunately, the tendency to resort to blocking has taken root even on official government sites. In 2020, FIRE published a report summarizing information gained from public records requests sent to 224 public colleges and universities in all 50 states, asking for details on the institutions' use of social media blocking tools. *See* No Comment, *supra*. Substantive responses from 198 institutions revealed that nearly ninety percent had blocked at least some users from either their Facebook or Twitter pages. *Id.* at 11. Collectively, these institutions blocked 13,197 users on Facebook and 4,065 users on Twitter from interacting with their posts, pages, or tweets.

The subjects of the blocking decisions ranged from political or controversial topics to the seemingly random. For example, Georgia State University blocked a "Georgia for Bernie" account on Twitter, while the University of Alaska Anchorage blocked an "Alaskans4Trump" account. *Id.* at 13. The University of Montana blocked a Twitter account that reported on "the #UMRape crisis that has been plaguing" the university. *Id.* Idaho State University blocked a

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[24] Scott Thistle, *Settlement ends blocking of critical comments on pro-LePage Facebook page*, Portland Press Herald (Dec. 10, 2018), https://www.pressherald.com/2018/12/10/lepage-team-settles-lawsuit-over-facebook-blocking/ [https://perma.cc/5634-PFJJ].

Facebook page critical of a university employee's big game hunting trip in South Africa. *Id.* And, weirdly, the University of North Dakota blocked a Facebook group called "Dog Enthusiasts of North Dakota, no posers, only real dog lovers." *Id.*

And so it goes. In this case, the Respondent's Facebook posts regarding his city's Covid-19 policies "caught the attention of one disconcerted citizen" who posted critical comments. But as the Sixth Circuit summed up, "Freed didn't appreciate the comments, so he deleted them. And Freed eventually 'blocked' Lindke from the page, which kept Lindke from commenting on Freed's page and its posts." *Lindke*, 37 F.4th at 1202. In short, the City Manager's justification for silencing a constituent boiled down to this: I blocked critical speech *because I can*.

C. Government officials can't have it both ways when they use social media.

Obviously, no one likes being subject to "vehement, caustic, and sometimes unpleasantly sharp attacks," but the First Amendment requires public officials to accept that the possibility of criticism comes with the job. *Sullivan*, 376 U.S. 254, 270 (1964). "Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government." *Id.* "[H]arsh criticism . . . is a price our people have traditionally been willing to pay for self-governance." *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring).

It is not as though public officials lack choices for how they communicate with the public. They can

simply use official state-owned or managed websites that may—or may not—include interactive features. They can augment their "official" government social media accounts with personal accounts, as the President and most members of Congress have done. *See supra* pp. 10–13. Or they keep their social media activity as individuals separate from their government personae, leaving little doubt about when they communicate in their personal identities as citizens, as opposed their institutional roles. The choice is entirely in their hands—but constitutional limits kick in when they blur the lines between the official and the personal.

Government officials who opt to use their social media accounts as tools of governance forfeit the ability to cancel critics or delete unfavorable comments as if they were merely deciding who to entertain in their homes. "Having opted to create a [social media] account . . . and benefit from its broad, public reach," public officials should not be permitted to "divorce themselves from its First Amendment implications and [their] responsibilities as state actors." *One Wis. Now*, 354 F. Supp. 3d at 954.

II. Public Officials Engage in State Action When They Use Social Media Accounts to Conduct Public Business.

A. The key issue is whether personal accounts are used as tools of governance.

A person's status as a government official may not alone resolve the state action question, but neither does the fact that the social media account at issue is "personal," or that it communicates information about

the official's private life. The Sixth Circuit held that the Respondent "maintained his Facebook page in his personal capacity," despite the fact that his page category designated him a "public figure" and listed his title as City Manager of Port Huron along with contact information for city offices, and used the site to publicize administrative directives he issued, including posts related to the city's Covid-19 response. *Lindke*, 37 F.4th at 1202–03. This conclusion is incorrect: It is not just Respondent's position as a public official that renders his conduct state action, but the fact that he also uses his personal account to act in his official capacity and exercise his responsibilities pursuant to state law.

Government officials are not exercising their personal free speech rights when they choose to use their social media accounts to conduct public affairs. *E.g.*, *Campbell*, 986 F.3d at 826 ("A private account can turn into a governmental one if it becomes an organ of official business."). A citizen "who works for the government" undoubtedly has a constitutionally protected right to speak as a citizen "about matters of public concern," but when speaking "pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti v. Ceballos*, 547 U.S. at 419–21. The relevant question is whether the official has chosen to use his or her social media site to conduct government business. *West v. Adkins*, 487 U.S. 42, 50 (1988) ("a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities under state law").

This Court has addressed various contexts in which officials pursue their official duties and thus are considered to be acting "under color of state law." *Lugar v. Edmondson Oil Co*, 457 U.S. 922, 928 (1982) ("'[U]nder color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment"). When a government official uses his social media account to conduct public business, the main issue to consider is whether the actions are "fairly attributable to the state." *Id.* at 937; *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). No single factor is dispositive, *id.*, and courts will examine the "totality of the circumstances" to determine if the challenged action bears "a 'sufficiently close nexus' with the State to be 'fairly treated as that of the State itself.'" *Rossignol v. Voorhaar*, 316 F.3d 516, 525 (4th Cir. 2003) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). *See Skinner v. Ry. Lab. Execs. Ass'n.*, 489 U.S. 602, 614–15 (1989).

Under this analysis, an official's conduct is more likely to amount to state action when it "occurs in the course of performing an actual or apparent duty of his office." *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995). The most important question for a government official's social media account is whether it has been used as a "tool of governance." *Campbell*, 986 F.3d at 825. If so, there can be little doubt that the official is engaged in state action.

Of course, government officials have the right to use social media without being encumbered by constitutional obligations. *Campbell*, 986 F.3d at 826 ("not every social media account operated by a public official is a government account") (quoting *Knight*, 928

F.3d at 236). But when they choose to use such accounts to conduct public affairs and take advantage of social media's defining feature of interactivity, they are engaged in state action.

B. The First Amendment prohibits viewpoint discrimination on social media sites used to conduct public business.

In stark contrast to the Sixth Circuit's ruling, most circuits that have addressed this question have correctly held that "the First Amendment does not permit a governmental official who utilizes a social media platform for official purposes to exclude persons from an otherwise open dialogue merely because they expressed views disfavored by the official." *Knight*, 953 F.3d at 220 (statement of Parker, J.). *See Garnier*, 41 F.4th at 1177; *Davison*, 912 F.3d at 687.

That conclusion naturally follows from three premises: (1) Operating a social media site to conduct public business is government speech, not private speech; (2) The interactive features of social media that invite public comment are a type of public forum; and (3) Viewpoint-based restrictions on public comments violate the First Amendment.

First, an official who clothes his personal social media account with the trappings of office and conducts official business on that site is speaking as the government, not in a personal capacity. *Davison*, 912 F.3d at 686 ("To be sure, Randall's comments and curated references on the Chair's Facebook Page to other Pages, personal profiles, and websites amount to governmental speech."); *Garnier*, 41 F.4th at 1172

("both in the appearance and the content of the pages, the Trustees effectively 'display[ed] a badge' to the public signifying that their accounts reflected their official roles as PUSD Trustees, whether or not the District had in fact authorized or supported them") (cleaned up); *Knight*, 928 F.3d at 239 ("Everyone concedes that the President's initial tweets (meaning those he produces himself) are government speech."). It is untenable to conclude the officials are exercising their personal First Amendment rights when speaking "pursuant to their official duties." *Garcetti v. Ceballos*, 547 U.S. at 421. *See supra* Section II.A.

Second, an official's decision to use social media as the method of communication, with its inherent interactivity, indicates a choice to open a forum of some kind. *Packingham*, 582 U.S. at 106–08. "Social media websites—Facebook and Twitter in particular—are fora inherently compatible with expressive activity." *Garnier*, 41 F. 4th at 1178. As noted, officials could choose many forms of one-way communication, including static websites, to deliver messages about their government positions. But the selection of a medium that provides two-way communication by definition is an open invitation to citizen participation. *One Wis. Now*, 354 F. Supp. 3d at 954 ("If defendants truly had no intention to create a space for public interaction and discourse, they would not have created public Twitter accounts in the first place."). *See also Davison*, 912 F.3d at 687 ("Randall also expressly opened the Chair's Facebook Page's middle column—its interactive space—for 'ANY' user to post on 'ANY' issues"). Opening a channel of communication in this way "for indiscriminate use by the general public" creates a

public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983).

The fact that the government actor's original posts are "official" does not convert citizens' responses into government speech. Given social media's interactive features, "the speech in question is that of multiple individuals, not just . . . the government. When a Twitter user posts a reply to one of the President's tweets, the message is identified as coming from that user, not from the President." *Knight*, 928 F.3d at 239. Thus, "while the President's tweets can accurately be described as government speech, the retweets, replies, and likes of other users in response to his tweets are not government speech under any formulation." *Id.* *See Davison*, 912 F.3d at 687 ("[T]he interactive component of the Chair's Facebook Page constitutes a public forum, even though Randall's curation of and posts to the Chair's Facebook Page amount to government speech."). Accordingly, operation of the interactive portions of public officials' social media accounts is constrained by the First Amendment.

Third, this means—at a minimum—that public officials cannot engage in viewpoint discrimination when they block comments and limit users on social media accounts used for public purposes. The rule is a basic tenet of First Amendment law: When the government creates a public forum, "'viewpoint discrimination' is forbidden." *Matal v. Tam*, 582 U.S. 218, 243 (2017). This Court has long held that viewpoint discrimination is "an egregious form of content discrimination," and when government targets "particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector & Visitors of the*

Univ. of Va., 515 U.S. 819, 828–829 (1995). As Justice Alito pithily put it, viewpoint discrimination is "poison to a free society." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring).

Once public officials "are permitted to pick and choose" who they want to receive feedback from on their social media accounts, "the path is cleared for a regime of censorship under which full voice can be given only to those views which meet with the approval of the powers that be." *Knight*, 953 F.3d at 221 (statement of Parker, J.) (quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 563 (1975)). Accordingly, the Court should confirm that the constitutional prohibition against viewpoint discrimination applies to public officials who use their "personal" social media accounts to conduct public business.

C. The Sixth Circuit's "actual or apparent official duties" test is too narrow.

The Sixth Circuit does not disagree that the First Amendment rule against viewpoint discrimination binds government actors, but it adopted far too narrow a test for when officials' use of their social media accounts constitutes state action. Under its approach, operation of a social media site should be treated as state action only where (1) it is part of an officeholders' "actual or apparent duties," or (2) it could not happen in the same way "without the authority of the office." *Lindke*, 37 F.4th at 1203. The court explained that it "part[ed] ways with the other circuits' approach to state action" that focus on the social media page's "appearance or purpose." *Id.* at 1206.

But the Sixth Circuit's test identifies when actions are undertaken directly *by the state*, not when they are taken "under color of state law," or could be "fairly attributed to the state." The examples the court set forth make this clear: State action will be found only where state law "requires an officeholder to maintain a social-media account," where maintaining the page is "one of the [officeholder's] actual duties," where state resources are used to pay for or run the account, or where the social media account belongs to the office rather than the official. *Id.* at 1203–04.

This constrained conception ignores this Court's repeated admonitions that determining whether a given activity "is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer." *Jackson*, 419 U.S. at 349–350. The analysis may turn on a "host of facts" that address, among other things, whether ostensibly private action is "entwined with governmental policies," or when government is "entwined in [its] management or control." *Brentwood Acad.*, 531 U.S. at 296. *See Lugar*, 457 U.S. at 939.

The Sixth Circuit characterizes its test as an effort to bring "the clarity of bright lines" that "offer predictable application for state officials," *Lindke*, 37 F.4th at 1206–07, but it merely proffers the easy answers this Court has eschewed. True, the Sixth Circuit's approach does promise "predictable application for state officials"—but not in a good way. Officeholders would be able to use their "personal" social media accounts to conduct public business, as many have done. And so long as the accounts are not mandated, funded, or managed by state law, these officials could censor criticism to their heart's content,

free from any constitutional restraint. The Sixth Circuit's "actual or apparent duties" test gives government officials a blueprint for evading First Amendment review.

As the various cases that have made their way through the courts have shown, liberal politicians would mute their critics from the right while conservatives would silence their critics from the left. And once officeholders understand that the "actual or apparent duties" test gives them free rein to create an echo chamber, it is predictable that more "official" business will be conducted on ostensibly "personal" social media accounts. This prospect undermines social media's potential as an important means of civic engagement.

The better alternative is the "fact-specific inquiry" other circuits have used, which examines things like "how the official describes and uses the account; to whom features of the account are made available; and how others, including government officials and agencies, regard and treat the account." *Knight*, 928 F.3d at 236. Such an inquiry focuses on how public officials actually use their accounts based on easily understood factors. While there may be close cases where "occasional stray messages that might conceivably be characterized as conducting the public's business" are claimed to constitute state action, *Campbell*, 986 F.3d at 827, in most cases courts have had little difficulty in identifying when personal social media accounts are being used as "an official vehicle for governance." *See Knight*, 928 F.3d at 237; *Davison*, 912 F.3d at 683; *Garnier*, 41 F.4th at 1170 ("The Trustees' use of their social media

accounts was directly connected to, although not required by, their official positions.").

This Court should apply the well-established principles from its cases analyzing action taken under color of state law to public officials' use of social media accounts. Doing so would require rejecting the simplistic, ripe-for-abuse approach articulated by the Sixth Circuit below, and it would keep this Court's promise that social media can serve as a forum where citizens can "petition their elected representatives and otherwise engage with them in a direct manner." *Packingham*, 582 U.S. at 104–05.

CONCLUSION

The nature of our government is that it is subject to wide-open and robust debate. *Sullivan*, 376 U.S. at 270. In these polarized times, "[t]his debate encompasses an extraordinarily broad range of ideas and viewpoints and generates a level of passion and intensity the likes of which have rarely been seen." *Knight*, 928 F.3d at 240. But as uncomfortable as that might make us, it is a feature of the system, not a bug. For "if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less." *Id.* Accordingly, this Court should reverse the decision below.

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Respectfully Submitted,

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