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 RESPONDENT

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QUESTION PRESENTED

Whether a local government employee's social media activity constitutes state action where the employee did not use the social media account to perform a governmental duty or to act under the authority of his or her office?

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INTRODUCTION

At issue in this action is whether government employees—who "do not surrender their First Amendment rights by accepting public employment"—can maintain personal social media accounts like their private-sector counterparts. *Lane* v. *Franks*, 573 U.S. 228, 231 (2014). The Sixth Circuit's "duty or authority" test for evaluating when social media accounts constitute state action is a clearly defined, yet flexible, standard that comports with this Court's longstanding precedent; provides guidance to government employees; and avoids chilling government employees' speech.

This case arises out of Respondent James Freed's conduct on his personal Facebook account, @JamesRFreed1. Freed created his Facebook account while in college, sometime prior to 2008. Since opening his account, Freed used Facebook like many Americans—treating it as a diary or blog and posting about the minutiae of his everyday life. His Facebook activity included sharing takeout meals, troubles with raccoons in his garbage, and comings and goings with his family. Freed maintained the same personal Facebook account through college graduation and his post-graduate employment, including when he was hired to be the City Manager for the City of Port Huron in 2014.

In 2020, Petitioner Kevin Lindke posted on Freed's personal Facebook page. Freed was aware that Lindke had routinely engaged in online harassment with others, resulting in several criminal convictions. C.A. Rec. 963,

1005.[1] When Lindke later posted disparaging remarks on Freed's personal Facebook page, Freed deleted Lindke's comments and blocked Lindke from the page.

Lindke sued, claiming Freed violated his constitutional rights under the First Amendment by deleting his comments and blocking him from Freed's personal Facebook page. At the close of discovery, Freed filed a Motion for Summary Judgment.

The District Court granted Freed's Motion for Summary Judgment. The District Court applied an "appearance and content" test nearly identical to the test proposed by Petitioner here. The District Court dismissed Lindke's case on the threshold issue of state action given that Freed was acting in an "ambit of [his] personal pursuits" when using his Facebook page, *Screws* v. *United States*, 325 U.S. 91, 111 (1945), as opposed to "exercis[ing] some right or privilege created by the State," *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Lindke appealed, and the Sixth Circuit affirmed, applying a different test that focused on the government employee's duties and authority: "just like anything else a public official does, social-media activity may be state action when it (1) is part of the officeholder's 'actual or apparent dut[ies],' or (2) couldn't happen in the same way 'without the authority of [the] office.'" Pet. App. 6a (quoting *Waters* v. *City of Morristown*, 242 F.3d 353, 359 (6th Cir. 2004)).

Applying this analysis to Freed's page, the Sixth Circuit found that there was no law or ordinance requiring

1. Citations to "C.A. Rec." refer to the Sixth Circuit "Page ID #." See 6th Cir. R. 28(a).

Freed to maintain a Facebook page, that operating a Facebook page was not one of the actual or apparent duties of his position, and that no government funds or resources were used to operate the page. Pet. App. 8a. Moreover, the page, which Freed had solely maintained since college and logged into with his private email address, would not become property of the City should Freed decide to leave his position for other employment. Pet. App. 9a. The Sixth Circuit also rejected Lindke's argument that Freed was fulfilling his job duties by communicating with local businesses and residents through Facebook, explaining Freed's Facebook page was no different than "[w]hen Freed visits the hardware store, chats with neighbors, or attends church services"; in those circumstances, like here "he isn't engaged in state action merely because he's 'communicating'—even if he's talking about his job." Pet. App. 9a.

Petitioner proposes the Court adopt a test that focuses on appearance and function similar to that which was adopted by the Ninth Circuit in *Garnier* v. *O'Connor-Ratcliff*, 41 F.4th 1158 (9th Cir. 2022). The Ninth Circuit's test is not only inconsistent with this Court's precedent, but its adoption has the potential to chill the social media speech of 21 million public sector employees without having any significant benefit to First Amendment rights.

This Court should affirm the decision of the Sixth Circuit.

STATEMENT OF THE CASE

Respondent James Freed is one of 21 million public sector employees in the United States.[2] Prior to 2008, while Freed was enrolled in college at Indiana Wesleyan University, Freed created a personal Facebook account with the name "James Freed" and username @JamesRFreed1. J.A. 1; C.A. Rec. 667-668, 690. The login for the account is jamesfreedfacebook@gmail.com—Freed's personal email account. J.A. 293. Freed maintained this personal account while he was employed with the City of Walled Lake, Michigan as the Assistant to the City Manager; the Village of Lakeview, Michigan as the Village Manager; and the City of Stanton, Michigan as the City Manager. C.A. Rec. 676.

Freed was given an option by Facebook to convert his personal account to a "page" because, as a very active social media user, he was reaching the friend limit of 5,000. *Id.* at 668-69, 683, 699. All "pages" are generally accessible to the public. *Id.* at 1153-54. When Freed converted his account, he was required to choose a "category" that described his page. *Id.* at 684-85. Freed did not elect the other available designations of "Government Official," "Politician," or "Public & Government Service" because none accurately identified his personal account. Freed instead selected "Public Figure." *Id.* at 670, 684. The "Public Figure" designation can be chosen by anyone creating a Facebook "page." *Id.* at 684; J.A. 292.

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2. U.S. Bureau of Labor Statistics, *National Occupational Employment and Wage Estimates by Ownership, Federal, State, and Local Government, Including Government-Owned Schools and Hospitals and the U.S. Postal Service*, May 2022, *available at* https://www.bls.gov/oes/current/999001.htm.

This personal Facebook page was Freed's only Facebook account, and Freed was the only person with access to it. C.A. Rec. 679-80. Freed always considered the page as a "personal page." *Id.* at 676, 687. His Facebook "friends" and "followers" primarily included his family members and personal and casual friends he acquired over the last decade as a part of multiple communities. *Id.* at 688-89.

Freed was hired as the City Manager of Port Huron in 2014, more than six years after he began his Facebook account. *Id.* at 668. Port Huron's population is approximately 28,000.[3] The City government is comprised of a Mayor and six Council members, all elected at large. Charter § C2-2(a).[4] Under Michigan law, the City Council conducts business in open meetings that are broadcast on public television and include a public comment period. MCL § 15.261 *et seq.*

The City Manager is not elected. The City Manager is hired by City Council and "[s]erve[s] at the pleasure of City Council, pursuant to a written employment agreement." Charter § C5-1(1). The City Manager oversees City administration and "[m]ake[s] recommendations to the City Council concerning the affairs of the City." *Id.* § C5-

3. United States Census Bureau, *QuickFacts: Port Huron city, Michigan*, https://www.census.gov/quickfacts/fact/table/porthuroncitymichigan/PST045222.

4. Like Petitioner, 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.

1(5), (8). The City Manager can be removed by City Council at any time. *Id.* § C5-3.

The City of Port Huron has its own website with links to various departments, including the City Manager. J.A. 291. Members of the public can contact the City departments, including the City Manager, via email. J.A. 291. The City also operates several Facebook pages, including pages for the "Port Huron Police Department" and "City of Port Huron Parks & Recreation Department," but it does not have a "City Manager" Facebook page. J.A. 30-31.

Upon being hired by the City of Port Huron, Freed updated the "About" section of his Facebook page to reference his new job and his growing family. C.A. Rec. 699. It read, "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI." *Ibid.* The Facebook page also contained a link to the City website, a general City email address, and the City Hall address. *Ibid.* Freed created profile pictures, including a photo of his family and the photo below, and created a cover photo of a "Downtown Port Huron" promotional video created by a private individual. *Compare* C.A. Rec. 699, *with* J.A. 1. One of the profile pictures on Freed's page is below:

The City of Port Huron provided no monetary or administrate support for Freed's Facebook page. C.A. Rec. 676, 679-80. Freed never accessed his personal Facebook page on a City device. *Id.* at 676, 679-80.

Since joining Facebook, Freed has been a prolific Facebook user and shared numerous updates of his daily activities with his family and friends. J.A. 264 ("I've been told I share too much, but we are all family here."). Most of Freed's Facebook posts were about personal matters, including hundreds of photos of his daughter. J.A. 32-286. His posts included pictures of Freed at a Daddy Daughter

Dance; numerous posts about his daughter, wife, and dog; and pictures of Freed attending Rotary Club and Chamber of Commerce events. J.A. 116 (date night with his wife); J.A. 124 (dinner with his wife and picture of his daughter and dog); J.A. 112 (Rotary Club and Chamber of Commerce events, Daddy Daughter Dance, nature walk with family). Freed also often shared Bible verses on his page. J.A. 55 ("Jeremiah 29:11 says, 'For I know the plans I have for you,' declares the [L]ord, 'plans to prosper you and not to harm you, plans to give you hope and a future.'"); J.A. 192 ("'In the beginning God created the heavens and the earth.' –Genesis 1:1").

Freed never issued administrative directives or press releases on his page. C.A. Rec. 671. But after such had been released publicly through other channels, Freed would occasionally share them on his page. *Ibid.* ("[N]othing was ever announced on my Facebook that wasn't readily available, either city press releases, newspaper articles, other information sources, I didn't make announcements like first time you hear it here on my Facebook page."); see J.A. 125 (January 14, 2020 post at 2:06pm linking to a local newspaper article and stating, "This morning I issued an emergency directive to the Public Works & Fire Department to begin filling and pre-positioning sandbags to vulnerable property owners."). Moreover, the Director of Public Safety, not the City Manager, releases emergency public information to the media. City Code § 20-15(1).

When the COVID-19 pandemic hit, Freed, like many other Facebook users, began posting about the pandemic in addition to the daily events of his life. Freed shared how his family was dealing with the pandemic; guidance

from several non-City sources, like the St. Clair County Health Department (which was also shared by hundreds of other Facebook users, C.A. Rec. 639); measures the City was taking; and the widely used phrase "Stay Home. Stay safe. Saves lives." J.A. 32-98.

Freed's posts often used the words "we" and "our." He sometimes used these terms to reference his family. J.A. 16 (a photo of his daughter with the caption "We interrupt this global pandemic for a strong dose of cute."); J.A. 32 ("Our Hosta[s] are coming in great this year!"); J.A. 284 ("Our little girl is growing up so fast! Amazing photos by Niven Weddings!"). He also used these terms to reference the greater St. Clair County and Michigan community. J.A. 16 ("we have a drive thru [COVID testing site] at Lake Huron [a local hospital unaffiliated with the City of Port Huron]"); J.A. 8 ("We are in this together. It's what makes Michigan great."); J.A. 12 ("Today alone, 16,938 meals were served to children in our community by hardworking food service folks at Port Huron [Area School District (a school district that serves multiple municipalities)]. These people are the real hero[e]s in our community!").

Freed would occasionally respond to comments made by others on his Facebook posts, but Freed did not always do so. J.A. 3, 16, 18. For example, on March 24, 2020, Freed posted a photo of his daughter sleeping on the couch with the caption "I just conducted the most seamless couch to crib transition mankind has ever seen." J.A. 81. A Facebook user commented, "Good job it takes skills." J.A. 5. Freed responded, "the key part is lowering into the crib with pacy and blanky position undisturbed." J.A. 5.

Prior to March 2020, Petitioner Kevin Lindke, who maintained multiple Facebook profiles with both real and fake names, posted personal attacks on Freed from several of Lindke's Facebook accounts. C.A. Rec. 975-76, 1005. Facebook had, in the past, unilaterally removed Lindke's accounts on numerous occasions for violations of its terms of service. *Id.* at 976. Regarding Lindke's activity on Facebook, Freed testified:

> I just remember one time he wrote like three weird smiley faces, and that was like the first time I saw him on my page. And to be quite honest, I was really creeped out, because I had been aware of other things in this community where he had essentially stalked people, harassed people, lots of [personal protection orders ("PPOs")] and records. So when I block[ed Lindke], I blocked him not on what he -- because I can't really recall anything he posted. I blocked him specifically on who he was. And I know what he's done in the community to some school employees and other stuff, so I blocked him just on who he was. I can't recall besides the three smiley faces anything that he specifically wrote. [*Id.* at 677-78.[5]]

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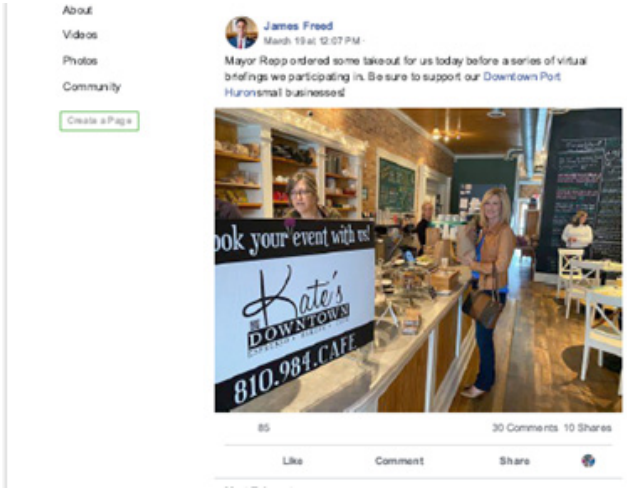
5. *Lindke* v. *King*, No. 19-cv-11905, 2023 U.S. Dist. LEXIS 90917, at **12-20 (E.D. Mich. May 24, 2023) (outlining the history of a PPO entered against Lindke in 2019); *Lindke* v. *Tomlinson*, 31 F.4th 487, 489-90 (6th Cir. 2022) (outlining the history of another PPO entered against Lindke). Lindke admits he has been "locked [] up a bunch" and that there were bench warrants out for his arrest at the time of his deposition pertaining to PPO matters. C.A. Rec. 963, 1005. Lindke would also be convicted of cyberstalking for his 2020 social media activity while this case was pending. L. Fitzgerald, *Kevin Lindke Sentenced to Time*

Lindke claims he posted comments criticizing Freed on Freed's Facebook page sometime in March 2020. C.A. Rec. 981-82. One of these posts included a March 19, 2020 post showing the City Mayor picking up takeout at a local café, J.A. 15:



Although Freed has no recollection of Lindke's specific comments, Freed deleted Lindke's comments and blocked Lindke from posting on his page. C.A. Rec. 677-78. Because Freed had always treated his page "as anyone would their own personal Facebook," Freed had also deleted comments and blocked other users in the past when, for example, he thought a user's comments were "creepy." *Id.* at 674, 676.

Served in Case Involving Facebook Posts, Times Herald, (Nov. 29, 2021, 1:02 PM), *available at* https://www.thetimesherald.com/story/news/2021/11/29/kevin-lindke-sentenced-time-served-case-involving-facebook-posts/8792168002/.

Shortly after this lawsuit was filed on April 6, 2020, Facebook deactivated Freed's account without explanation. *Id.* at 686. In June 2020, Facebook reactivated the page and then again without explanation deactivated it a second time for several months. *Id.* at 686-87. In October 2020, Facebook unexpectedly reactivated Freed's page. *Id.* at 687. Freed subsequently unpublished the page, explaining: "If it is not going to be a private page, I don't want it. I don't want to have -- I wouldn't put photos of my family out there. I wouldn't put photos of my kid out there if I didn't have the ability to control it like a personal page. So it is un-published. Nobody can find it." *Id.* at 687.

SUMMARY OF ARGUMENT

I. A government employee's operation of a social media page is not state action when it does not exercise any actual state duty or authority.

A. The state-action doctrine identifies conduct that is fairly attributable to the State and for which the State is responsible. The critical question in the context of government employees is whether the government employee is exercising rights of a private citizen or acting in a governmental capacity. The state action inquiry must provide specific guidance to governmental actors regarding conduct the Court will find attributable to the State and must provide a workable structure for courts to apply to varying governmental circumstances.

B. The phrase "under color of" as used in the Enforcement Act of April 20, 1871 (the "Third Enforcement Act'), the precursor to Section 1983, was understood to mean "pursuant to" or "under authority of." 17 Stat. 13-

15 (1871). The Third Enforcement Act was one of a series of legislation passed by Congress from 1863 through 1871 to address issues presented by the Civil War and Reconstruction. While this Court has acknowledged the turbulent nature of this time, the meaning of a statute cannot be divorced from the language used and the understanding of the Congress that adopted such provision.

Petitioner contends the phrase "under color of" was meant to apply to persons who invoked the pretense of authority. That contention is not supported by the legislative history of Section 1983 or the language of the statute. The phrase "under color of" was used in several pieces of legislation prior to inclusion into the Third Enforcement Act on April 20, 1871. Review of such provisions and the legislative history relating to such demonstrates that the phrase was being used by Congress during this time to identify conduct taken "pursuant to law." Moreover, there were statutes enacted during this time period that explicitly applied to persons invoking the pretense of authority that did so with explicit language, most notably the Second Enforcement Act passed on February 28, 1871. 16 Stat. 433 (1871).

C. A government employee's use of social media cannot be fairly attributed to the State unless the employee is performing an actual duty of his office or could only behave in a particular manner because of his government employment. When government employees use their personal social media pages they act in a private capacity, even if such communication is public or involves the public. The government employee's action is not made possible only because he is clothed with state power, and

he is not acting at the direction of any job responsibility or requirement.

Any private party can open their property as a forum for speech, like a Facebook page. And that action cannot fairly be attributed to the State itself, which cannot control it and, thus, cannot be blamed for it.

D. Adopting a state action test that is not tied to an employee's governmental duty or authority will adversely impact First Amendment rights of government employees.

II. The appearance and content of a government employee's social media page cannot create state action absent any exercise of actual state duty or authority.

The job-related appearance of a page is immaterial. Unlike with off-duty law-enforcement officers, government employees gain no power from any hypothetical misperception of the nature of their social media pages. Citizen officeholders and government employees routinely engage in speech related to their duties in their personal rather than official capacity. The only workable way to determine whether such speech carries out their duties is to consider whether the State requires, controls, or facilitates it—none of which happened here. Moreover, at most, "under color of law" was meant to include illegal action by a public official who misused their power provided under state law, such as a police officer. The Court should reject Petitioner's attempt to extend such use of the "color of law" provision as a sword against a government employee to characterize an otherwise legal act by a government employee as improper because it could appear that he was doing so "under color of law."

III. Freed blocking Lindke and deleting Lindke's comments on Freed's personal Facebook page was not state action.

Petitioner's argument asks the Court to take a myopic approach and focus on an isolated post or action, while ignoring the overwhelming personal and private nature of Freed's posts and pictures. Ultimately fatal to Petitioner's appeal is that even the isolated posts or actions that Petitioner highlights undermine his claim. Freed did not seek to present his Facebook page as an official government outlet. Freed did not identify his page as that of a "Government Official" or "Public & Government Service." Freed was not required to engage with his personal Facebook page as part of his duties as City Manager and had no administrative assistance in his posting. Rather, Freed chose to categorize his page more generically as a "Public Figure" simply because he wanted to maintain over 5,000 Facebook friends. Freed did not announce City business on his private Facebook page, though he would occasionally share announcements that had already been publicly released from the City, or the State or County for that matter.

Not only did the Sixth Circuit find that Freed's conduct did not constitute state action under the "duty or authority" test, but the District Court also found Freed's conduct did not constitute state action, applying a test nearly identical to the Ninth Circuit's "appearance and purpose" test. Freed was not engaged in state action under either test.

ARGUMENT

I. Government Employees Who Use Social Media Only Act "Under Color of Law" When They Have a Governmental Duty or Authority.

Based on this Court's precedent and the history of the 42 U.S.C. § 1983 (Section 1983), the Sixth Circuit's "duty or authority" approach strikes the proper balance between holding state actors accountable for their actions taken pursuant to state authority on social media and recognizing their individual freedom to maintain personal lives outside of government employment. Accordingly, this Court should adopt the approach of the Sixth Circuit and hold that a government employee's operation of personal social media pages will only be state action when operation of the account is "part of the officeholder's 'actual or apparent dut[ies],'" or "couldn't happen in the same way 'without the authority of [the] office.'" Pet. App. 6a (quoting *Waters*, 242 F.3d at 359).

A. The State Action Doctrine Strikes a Balance Between Governmental Liability and Individual Liberty.

To state a claim under Section 1983, the plaintiff must show that he or she was deprived of federal rights and that the defendant acted "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." 42 U.S.C. § 1983. This Court has held that the analysis for Section 1983's "under color of law" requirement is the same as the analysis for the Fourteenth Amendment's state-action requirement. *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 929 (1982).

The "state-action doctrine distinguishes the government from individuals and private entities." *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1928 (2021) (citing *Brentwood Academy* v. *Tennessee Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295-96 (2001)). Ultimately, every state-action test seeks to determine whether an action "can fairly be attributed to the State." *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). "Careful adherence to the 'state action' requirement" serves several important functions. *Lugar*, 457 U.S. at 936. The state action requirement ensures that the State is only found responsible for conduct for which the State can be fairly blamed. *Nat'l Collegiate Ath. Ass'n* v. *Tarkanian*, 488 U.S. 179, 191 (1988) (citing *Lugar*, 457 U.S. at 936-37). The state action doctrine also "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar*, 457 U.S. at 950. For these goals to be achieved, courts must "respect the limits of their own power." *Id.* at 936-37.

This Court has articulated a "two-part approach to this question of 'fair attribution.'" *Id.* at 937. The first inquiry is "'whether the claimed [constitutional] deprivation has resulted from the exercise of a right or privilege having its source in state authority.'" *Georgia* v. *McCollum*, 505 U.S. 42, 51 (1992) (quoting *Lugar*, 457 U.S. at 939). "[T]he second inquiry is whether the private party charged with the deprivation can be described as a state actor." *McCollum*, 505 U.S. at 51 (citing *Lugar*, 457 U.S. at 941-42).

1. State Action Can Only Result from an Exercise of State Authority.

State action is present only where the government official's conduct is undertaken pursuant to a source of state authority. *McCollum*, 505 U.S. at 50. Petitioner acknowledges that a government employee may "claim that he or she engaged in challenged conduct solely in a *private*—rather than public—capacity," but then argues that the Court should look to "'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.'" Pet. Br. 16 (quoting *Jackson* v. *Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

As the Ninth Circuit did in *Garnier* v. *O'Connor-Ratcliff*, 41 F.4th 1158, 1169-73 (9th Cir. 2022), Petitioner conflates the standard for determining whether the defendant was a state actor with the standard for determining whether the defendant's conduct was taken in his private or public capacity. Pet. Br. 16. The vague close nexus test, a "necessarily fact-bound inquiry" determined on a case-by-case basis, *Lugar*, 457 U.S. at 939, has only ever historically been used when determining whether a private entity, specifically a heavily-regulated industry, is a state actor—not whether an actor's conduct was carried out in a private or official capacity. *See, e.g.*, *Jackson*, 419 U.S. at 351. In that instance, "[t]he true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine" whether "there is a sufficiently close nexus between the State and the challenged action of the regulated entity" so that the entity's action "may be fairly treated as that of the State itself." *Id.* at 351.

But the same is not true for acts of public officials or government employees, so the use of the "close nexus" test is inappropriate. This Court has held that this test is satisfied when a state statute provides a private party the right to garnish or attach property but not when a private club discriminates despite being licensed by the state. *Lugar*, 457 U.S. at 937; *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 177-78 (1972). A vague test is unworkable when analyzing whether a government official's conduct is personal or governmental in nature because it fails to recognize that the conduct must be done pursuant to a source of state authority.

2. State Action Can Only Exist When a Party Is a State Actor.

The second inquiry in determining whether conduct can be fairly attributed to the State often focuses on whether "a *private entity* can qualify as a state actor." *Halleck*, 139 S. Ct. at 1928 (emphasis added). As this Court held in *Halleck*, which Petitioner ignores, this only occurs in "a few limited circumstances," including where the private party "performs a traditional, exclusive public function"; "the government acts jointly with the private entity"; or "the government compels the private entity to take a particular action." *Id.* at 1928.

The second prong of the test exists to distinguish the official acts of government employees from personal acts and to recognize "that public officials aren't just public officials—they're individual citizens, too." Pet. App. 5a. State employment alone is "insufficient to establish that a [government employee] acts under color of state law within the meaning of § 1983." *Polk County* v. *Dodson*,

454 U.S. 312, 321 (1981). Thus, though a government employee may be engaged in conduct arising out of a "right or privilege created by the State," *Lugar*, 457 U.S. at 937, a government employee may still be engaged in the "ambit of [his] personal pursuits" where no state action will exist. *Screws* v. *United States*, 325 U.S. 91, 111 (1945). While government employees who misuse their power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law" remain engaged in state action, *United States* v. *Classic*, 313 U.S. 299, 325-26 (1941), government employees acting without any authority are not engaged in state action because one cannot misuse power he or she does not possess. *Luce* v. *Town of Campbell*, 872 F.3d 512, 514 (7th Cir. 2017) (government employees are acting in a private capacity when they are "off on a lark and a frolic, as some cases say").

B. Congress Was Intentional When It Selected the Phrase "Under Color" of Law, Which Does Not Include the "Pretense" of Authority.

Petitioner is incorrect that a historical analysis of the evolution of the Section 1983's "under color of law" language was meant to encompass acts performed under the "pretense of law," Pet. Br. 13,[6] as the statutory and legislative history surrounding the adoption of Section 1983 demonstrates the phrase "under color of" was

6. Petitioner cites *United States* v. *More*, 7 U.S. 159 (1805). Pet. Br. 21. *More* simply held the Court did not have jurisdiction. *Id.* at 174. *Contra Baltimore* v. *Baltimore Railroad*, 77 US 543, 553 (1871) ("[T]ax was exacted under color of law, and the company … were justified in paying it"); *Barnet* v. *Ihrie*, 1 Rawle 44 (Pa. 1828) (disallowing certain fees sought "for which there is no colour of law").

intended to limit suits to only those actions that arose directly out of state law.

The meaning of "under color of law" must be evaluated in "context and with a view to their place in the overall statutory scheme," *Sturgeon* v. *Frost*, 577 U.S. 424, 438 (2016) (quoting *Roberts* v. *Sea-Land Services, Inc.*, 566 U.S. 93, 101 (2012)), and interpreted using the meaning of such words "'at the time Congress enacted the statute.'" *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 539 (2019) (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)). Evaluating the phrase through this lens makes clear that "under color of law" was originally intended to only apply to people who were acting "under authority of" and "pursuant to" that authority.

The Civil Rights Act of 1871 provided a private cause of action for the deprivation of Constitutional rights by any person acting "under color of" state law. 17 Stat. 13 (1871). This provision is now codified at 42 U.S.C § 1983 (Section 1983). Reading the phrase "under color of law" in the context of other Civil War and Reconstruction era statutes demonstrates the language was never intended to extend to private conduct or unilateral action taken without the exercise of State authority. Eric H. Zagrans, *"Under Color Of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 Va. L. Rev. 499, 545-46 (1985) (Zagrans) (quoting Cong. Globe, 39th Cong., 1st Sess. 1120, 1293-94 (1866)).

The 1866 Civil Rights Act indicates the phrase "under color of" was meant to focus on discriminatory state laws.[7]

7. The phrase "under color of" had been used in earlier statutes. Section 2 of the Habeas Corpus Act of 1863 stated,

The intent of the 1866 Act was the "nullification of the Black Codes, those statutes of the Southern legislatures." *Monroe* v. *Pape*, 365 U.S. 167, 226 (1961) (Frankfurter, J., dissenting); Zagrans 544-45. Congress debated the provisions following President Andrew Johnson's veto of the Act. At that time, Senator Trumbull urged approval of Section 2 explaining:

> These words of "under color of law" were inserted as words of limitation . . . . If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protections as if he were white, *this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the State courts*; but if he is discriminated against under color of State laws because he is colored, then it becomes necessary to interfere for his protection. [Cong. Globe, 39th Cong., 1st Sess. 1758 (1866) (emphasis added); *see also* Cong. Globe, 39th Cong., 1st Sess. 1785 (1866) (Sen. Stewart: "If there is no law or custom in existence in a state authorizing it, it will be impossible for him to do it under color of any law")].

Congress overrode President Johnson's veto of the 1866 Civil Rights Act.

"any order of the President . . . shall be a defence to any action or prosecution . . . done under and by virtue of such order or under color of any law of Congress." 12 Stat. 756 (1863). Senator Powell objected to the scope of immunity given to Presidential action and the fact that such was not limited by "color or warrant of law." Cong. Globe, 37th Cong., 3d Sess. 1473-74 (1863).

In 1869 and 1870, Ku Klux Klan terror spread throughout southern states. Xi Wang, *The Making of Federal Enforcement Laws 1870-1872*, 70 Chi.-Kent L. Rev. 1013, 1018 (April 1995) (Wang). In response, Congress enacted a series of laws, known as the Enforcement Acts, designed to address Klan violence and enforce the Thirteenth, Fourteenth, and Fifteenth Amendments.

On May 31, 1870, Congress passed the First Enforcement Act, 16 Stat. 140 (1870), to prevent attacks on voting rights of black citizens and to outlaw "the terrorism of the Ku Klux Klan." Wang 1024. Section 6 of the First Enforcement Act made it a felony where "two or more persons" conspire to "injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment" of any federal rights. 16 Stat. 141 (1870). This provision applied to both private persons and public officials.

On February 28, 1871, Congress passed the Second Enforcement Act, federalizing administration of national elections. 16 Stat. 433 (1871). Section 10 of the Second Enforcement Act made it a misdemeanor for "whoever, *with or without any authority, power, or process, or pretended authority, power, or process*, of any State" interferes with the election supervisors, voter registration or voting. 16 Stat. 436-37 (1871) (emphasis added).

Less than two months later, Congress passed the Third Enforcement Act in April 1871, later known as the Ku Klux Force Act of April 20, 1871. 17 Stat. 13-15 (1871). "Section 2 was the core" of the Ku Klux Force Act, as it expanded on Section 6 of the First Enforcement Act and "virtually outlawed the Klan and similar Groups." Wang

1050 (discussing 17 Stat. 13). Section 2 created a federal cause of action "for the recovery of damages" relating to a deprivation of rights and privileges "against any one or more of the persons engaged in such conspiracy." 17 Stat. 13-14. By way of contrast, Section 1 provided a private cause of action against only persons acting "under color of law" and did not use the broader language used in Section 2.

Congressman Shellabarger confirmed the "model" for Section 1 of the Third Enforcement Act was the second section of the 1866 Civil Rights Act, explaining Section 1: "[t]his section being in its terms carefully confined to giving a civil action for such wrongs against citizenship as are done under color of state laws which abridge these rights, goes directly to the enforcement of that provision which says the State shall not make or enforce any law which shall abridge any privileges or franchises of citizens." Zagrans 550 (citing Cong. Globe, 42d Cong, 1st Sess., app. 68 (1870)).

Petitioner claims the Select Committee's rejection of Senator Frelinghuysen's "under pretense of any law" language in favor of the phrase "under color of any law" was not a substantive change, citing only David Achtenberg, *A "Milder Measure of Villainy"*, 1999 Utah L. Rev. 1, 51 (1999) (Achtenberg). Pet. Br. 23. Achtenberg's position relies, in part, upon the argument that "[b]ecause Shellabarger was more radical . . . than Frelinghuysen, it would have been anomalous for Shellabarger . . . to make [Section 1] less radical," Achtenberg 57, nn.423-24, disregarding the fact that an earlier radical bill sponsored by Representative Butler had failed due, in part, to lack of Republication support. Wang 1049-50 n.139. For his part,

Senator Frelinghuysen explained that since Congress "can not reach the Legislators" that pass laws violating privileges and immunities, the purpose of Section 1 was to allow an injured party "relief against the party who under color of such law is guilty of infringing his rights." Zagrans 558-59 (citing Cong. Globe, 42d Cong., 1st Sess. 501 (1871)). Moreover, Congress used "pretence" and "under color" in different contexts in other legislation. *See* Act of April 15, 1790, ch. 3, § 9, 1 Stat. 103 (1790) (discussing piracy: "if any based upon acting "*under colour* of any commission from any foreign prince, or state, or *on pretence* of authority from any person" (emphasis added)).

Thus, Petitioner's contention that "under the pretense of law" is the same as "under color of law" is not supported by the legislative history of Section 1983 or the language of the statute.

C. The Sixth Circuit's Duty or Authority Test Properly Balances Competing Interests.

1. To analyze the ever-growing digital landscape in the context of state action, there first must be an identification of "the specific conduct of which the plaintiff complains." *Blum*, 457 U.S. at 1004. The "specific conduct" on social media is deleting the plaintiff's comments and/or blocking the plaintiff. This is not an "exercise of some right or privilege created by the State," *Lugar*, 457 U.S. at 937, but is instead private action taken on a platform over which the government has no control. *See Biden* v. *Knight First Amend. Inst.*, 141 S. Ct. 1220, 1220-22 (2021) (*vacating as moot Knight First Amend. Inst.* v. *Trump*, 928 F.3d 226 (2d Cir. 2019)) (Thomas, J., concurring). Facebook is not a state-based company, and the ability to block and

delete persons on Facebook is not derived from any state power. A government employee, therefore, does not need to "exercise . . . state authority" to "use [Facebook's] features." *Knight First Amend. Inst.* v. *Trump*, 953 F.3d 216, 227-28 (2d Cir. 2020) (Park, J., dissenting from the denial of rehearing). The government employee is acting in the same way as millions of other Americans on social media act every day.

Petitioner rejects a characterization of the specific conduct at issue as the acts of blocking and deleting comments and instead focuses on the government employee's operation of his social media page as a whole. Pet. Br. 30-31. To avoid a rule that "would preclude government officials from discussing public matters on their personal accounts without converting all activity on those accounts into state action," *Knight*, 928 F.3d at 226 (Park, J., dissenting from the denial of rehearing en banc), the Sixth Circuit found that government employees' operation of personal social media pages will only be state action when operation of the account is "part of the officeholder's 'actual or apparent dut[ies],'" or "couldn't happen in the same way 'without the authority of [the] office.'" Pet. App. 6a (quoting *Waters*, 242 F.3d at 359).

The analysis adopted by the Sixth Circuit is a flexible approach, as it allows the Court to evaluate whether the government employee could "have behaved as he did 'without the authority of his office.'" Pet. App. 5a (quoting *Waters*, 242 F.3d at 359). The critical difference between this test and the one advanced by Petitioner is that the Sixth Circuit analysis is tethered to state law. Such a test provides courts with a structured analysis that does not devolve into ad hoc determinations that vary based

upon the appellate panel while at the same time allowing the court flexibility. The test also provides guidance to employees and protects individual liberty, as public employees do not lose their rights merely because they are employed by the government.

Failing to require the use of state-granted duty or authority in a test would impose state liability for activity over which the state has no control. When neither governmental duty or authority is involved, the social media page cannot be "fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351.

Despite being employed by the government, a government employee may still be pursuing his purely personal, private interests on social media. Not all acts performed by government employees are taken in their professional capacities; "they're individal citizens, too." Pet. App. 5a. For example, it would be difficult to imagine any situation where operation of a LinkedIn account, a professional networking social media site centered on career growth,[8] could ever be considered anything but "in the ambit of [the government employee's] personal pursuits" that is "plainly excluded" from constitutional scrutiny by the state-action doctrine. *Screws*, 325 U.S. at 111. This would be true even if the LinkedIn account identifies the government employee's position, contains posts about career achievements in the course of his work, and provides updates about his government position. A government employee is not an indentured servant. A

8. *What is LinkedIn and how can I use it?*, https://www.linkedin.com/help/linkedin/answer/a548441/what-is-linkedin-and-how-can-i-use-it-?lang=en.

government employee has a clear right to pursue his purely personal interest in job advancement on social media and cannot be fairly said to be acting on behalf of the State because of such.

2. Under the guise of asking the Court to adopt a flexible approach, Pet. Br. 16-19, Petitioner asks the Court to adopt a test that will recognize the "context-specific and fact-dependent nature of the test." Pet. Br. 18. This is simply a more sophisticated version of the Petitioner's argument before the Sixth Circuit that all state-action claims involve "a factual question that must go to a jury." Pet. App. 4a n.1.

Adopting the amorphous, fact-intensive "appearance and function" test for which Petitioner advocates would undermine the aforementioned goals. The test completely disregards any consideration of whether the State can fairly be said to control the conduct. By endorsing this fact-based analysis, Petitioner invades government employees' individual freedom, which will likely result in self-censorship and less speech.

In 1998, Justice Scalia described Section 1983 litigation as "one that pours into the federal courts tens of thousands of suits each year and engage[s] this Court in a losing struggle to prevent the Constitution from degenerating into a general tort law." *Crawford-El* v. *Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting). While Justice Scalia was referencing the explosion in litigation following this Court's incorrect expansion of Section 1983 to conduct outside of state law in *Monroe* v. *Pape*, 365 U.S. 167 (1961), the same concern is presented by Petitioner's proposed ad hoc test. There are estimated

to be 21 million government employees in the United States. On average, Americans use six to seven different social media accounts every month;[9] thus, a conservative estimate of the number of social media accounts being used by government employees is over 120 million. Adopting the amorphous test advanced by Petitioner will only encourage rogue characters and Internet trolls to bring pointless litigation and further stress an already burdened federal judiciary.

D. Government Employees' First Amendment Rights Will Be Impacted If Personal Social Media Pages Are Subject to Section 1983 Liability Without the Invocation of Governmental Duty or Authority.

Though it is true that "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom," the government employee still maintains his or her own rights. *Garcetti* v. *Ceballos*, 547 U.S. 410, 418 (2006). Imposing liability under Section 1983 for government employees' use of social media, without limiting such liability to actions taken pursuant to governmental duty or authority, would chill a significant amount of online speech for two reasons.

First, an overly expansive state action test for social media would lead to overregulation of government employees' speech, as governmental entities would potentially be subjected to Section 1983 for their

9. Belle Wong, J.D., *Top Social Media Statistics and Trends of 2023*, Forbes Advisor, May 18, 2023, https://www.forbes.com/advisor/business/social-media-statistics/.

employees' conduct on their own personal social media accounts. *See Monell* v. *Department of Social Servs.*, 436 U.S. 658 (1978). This is entirely inconsistent with this Court's precedent acknowledging that a government employee's speech is not transformed into government speech merely because it "concerns information acquired by virtue of his public employment." *Lane* v. *Franks*, 573 U.S. 228, 240 (2014) (citing *Garcetti*, 547 U.S. at 421). Instead, the critical question is whether the speech at issue itself is ordinarily within the scope of an employee's official duties, not whether it merely concerns those duties. *Lane*, 573 U.S. at 240; *Garcetti*, 547 U.S. at 419 (unlike a private actor, a local government cannot "leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens"). The reason for this is obvious. If everything a government employee said while on the government employers' premises or on duty was considered government speech, government employers would essentially have the right to unbridled censorship over their employees' online speech—especially when technology allows employees to be available twenty four hours a day, seven days a week.

An overbroad state action test also creates a risk of self-censorship, as public employees would be reluctant to post about political or religious issues. This would essentially treat government employees' "expression as second-class speech." *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2425 (2022). Just as public-school employees do not "'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'" *id.* at 2423 (quoting *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969)), government employees

should not be required to shed their constitutional rights to freedom of speech or expression online upon entering public employment.

Second, government employees would lose editorial discretion over their speech on their personal social media pages if an overly broad state action test were adopted. Government employees would be forced to decide between shutting down comments altogether or tolerating "harassment, trolling, and hate speech." *Knight*, 953 F.3d at 231 (Park, J., dissenting from the denial of rehearing en banc). But "[t]he Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property." *Halleck*, 139 S. Ct. at 1930-31. Just as "Benjamin Franklin did not have to operate his newspaper as 'a stagecoach, with seats for everyone,'" government employees should not be forced to "face the unappetizing choice of allowing all comers or closing the platform altogether." *Id.*

A government employee should not be stripped of his personal liberties simply by virtue of his title, and he should not have to exchange his First Amendment rights to contribute to his community. The Sixth Circuit's test strikes the appropriate balance between individual liberties and state responsibility on social media.

II. State Action Cannot Be Determined Simply by Evaluating The Appearance and Function of a Social Media Page.

A. Evaluating the Appearance of a Social Media Page Proves Shallow.

Petitioner asks this Court to adopt an unworkable, factually intense analysis that would require district courts to investigate government employees' social media pages to determine whether the "appearance" of such constitutes state action. Pet. Br. 27-28, 31. Just as beauty is in the eye of the beholder, the "appearance and purpose" test is inherently subjective. Will the "appearance and purpose" of the social media page be viewed through the prism of the political class or through the eyes of millennials who live their lives through social media?[10]

Removing state law as a touchstone in the state action inquiry will result in erroneous and inconsistent decisions. The "appearance" test will be "overinclusive," as it could extend to conduct or speech that should clearly not be considered state action. Government employees who maintain two social media accounts for "personal" and "official" business could also have their personal accounts "appear"—whatever that means—to be an "official" government account.

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10. Pew Research Center, *Millennials in Adulthood: Detached from Institutions, Networked with Friends* (Mar. 7, 2014), *available at* https://www.pewresearch.org/social-trends/2014/03/07/millennials-in-adulthood/ (describing millennials as the "digital natives" and "the generation to document everything with social media").

Congresswoman Alexandria Ocasio-Cortez's Twitter (now "X") pages are a prime example. Ms. Ocasio-Cortez maintains two X pages: @AOC[11] and @RepAOC.[12] Her personal @AOC page was formed in 2010. It contains a professional headshot as the profile photo, a cover photo of Ms. Ocasio-Cortez engaging with constituents, a grey check mark identifying her account as a "government official,"[13] and the following description: "US Representative,NY-14 (BX & Queens)." The account has 13.3 million followers and over 14,000 tweets. There is no "disclaimer" on the page drawing users to the @RepAOC account or indicating that it is a personal account. Any X user can comment on the posts.

Ms. Ocasio-Cortez was elected in 2018. The U.S. government prohibits Ms. Ocasio-Cortez from serving constituents through an unofficial account. See 2 U.S.C. § 503(d); Cheryl L. Johnson, Clerk, H.R. 118th Cong. Rules on the House of Representatives, Rule XXIV(1) (2023).

Ms. Ocasio-Cortez opened her @RepAOC account in December 2018. The @RepAOC account is hardly different from the @AOC in terms of appearance. It contains a professional headshot as the profile photo, a cover photo of Ms. Ocasio-Cortez sitting at a desk, and

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11. Alexandria Ocasio-Cortez, X, @AOC, https://twitter.com/AOC.

12. Rep. Alexandria Ocasio-Cortez, X, @RepAOC, https://twitter.com/RepAOC.

13. X HelpCenter, https://help.twitter.com/en/rules-and-policies/profile-labels ("The grey checkmark indicates that an account represents a government/multilateral organization or a government/multilateral official.").

a grey check mark identifying her as a "government official." It also contains the following description: "This account is maintained by federal staff to share services and legislation relevant to constituents of NY-14."[14] The account has only 776,000 followers (12 million less than @AOC) and only a little over 1,500 tweets.

These accounts show how shallow the appearance test is. Looking at the appearance of the @AOC account alone, an X user viewing the page, especially one with no knowledge of the @RepAOC account, could conclude that the @AOC account's presentation is of an official page that serves her constituents—even though this is expressly prohibited by the government. An everyday American may not know that Ms. Ocasio-Cortez is only permitted to operate an "official" social media account by using only government resources (staff, information, and photos), as she does on her @RepAOC account. In fact, Ms. Ocasio-Cortez was sued in March 2023 for blocking a political commenter from her personal @AOC Twitter page.[15]

Likewise, any government employee's LinkedIn account that identifies as a government employee and discusses work would suffer the same fate. Though LinkedIn is an inherently personal social media site used to promote an individual, the account would meet the

14. Requiring such a disclaimer creates its own First Amendment concerns, as "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795, 798 (1988).

15. *Stein* v. *Ocasio-Cortez*, 1:23-cv-628 (D.D.C., filed Mar. 8, 2023).

definition of an "official" account under "appearance" test if it is open to the public, uses a professional headshot, and identifies the government employee's position.

Focusing on "appearance and function" will also lead to ad hoc determinations. Not only does the number of social media users grow year over year, but the number of social media platforms and ways for people to access and use them also increases year over year. Government employees will have little to no guidance on the parameters of their social media use. Courts' decisions across the country will likely vary with every new medium addressed, possibly bringing the Court right back to the current circuit split the Court addresses today.

Moreover, application of this test would allow wrongdoers to simply deny responsibility for items appearing on their social media page. Between allegations of hacking social media accounts and the prevalence of AI and "deep fake" videos and photos, the "appearance and purpose" test will be unreliable and uncertain. *See Bey* v. *City of Chicago*, No. 1:21-CV-00611, 2022 U.S. Dist. LEXIS 57643, at *11 (N.D. Ill. Mar. 30, 2022) ("[I]n this day and age of deep-fake videos, it is possible to explain away video footage . . . ."); *see also* Alexandria Ocasio-Cortez, X, @AOC, May 30, 2023, https://twitter.com/AOC/status/1663599965698916371?lang=en (personal account) ("FYI there's a fake account on here impersonating me and going viral.").

B. Petitioner Has Not Demonstrated That an Appearance Test Is Supported by Precedent.

The appearance test is both practically unworkable and legally unsound. Petitioner asserts state action can

still be present when a government employee's actions were "not authorized by state law," citing this Court's ruling in *Griffin* v. *Maryland*, 378 U.S. 130 (1964). Pet. Br. 25. However, this represents a misreading of the *Griffin* ruling. In *Griffin*, the Montgomery County Code included a provision that allowed the Sheriff to "appoint special deputy sheriffs for duty in connection with the property" of a corporation or individual. 378 US at 132, n.1. In *Griffin*, Deputy Collins arrested protesters in a privately-owned amusement park. *Id.* at 132-33. It is undisputed that Deputy Collins had been deputized as Sheriff Deputy under the County Code at the request of the amusement park where Deputy Collins worked. *Id.* Under the Montgomery County Code, Deputy Collins had "the same power and authority as deputy sheriffs possess within the area to which they are appointed." *Id.* at 132 n.1. Consistent with his authority under state law, Deputy Collins wore a "deputy sheriff's badge," "identified himself as a deputy sheriff," ordered the protestors to leave, and arrested them when they refused his directive. *Id.* at 135.

Griffin supports the Sixth Circuit's ruling in the instant case. The Court did not focus on Deputy Collins' appearance or assertion of authority; rather, the Court focused on Deputy Collins' "duty" and "authority." Because Deputy Collins was "'performing an actual or apparent duty of his office,'" Pet. App. 6a (quoting *Waters*, 242 F.3d at 359), Deputy Collins was engaged in state action under the Sixth Circuit's duty or authority test.

Petitioner also incorrectly asserts that the *Griffin* Court did not determine whether Deputy Collins 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." Pet. Br. 26. This quote is not from this Court's analysis of *Griffin*. Petitioner quotes from the Maryland Court of Appeals' decision. This Court said Deputy Collins "purported to exercise the authority of a deputy sheriff . . . wore a sheriff's badge and consistently identified himself as a deputy sheriff." *Griffin*, 378 U.S. at 135. As Justice Clark noted in his concurrence, the outcome may have been different if "Collins had not been a police officer," but that "case we do not pass upon." *Id.* at 137 (Clark, J., concurring). Deputy Collins could not have taken the actions he took without being deputized by the State of Maryland and that was the basis for the Court's ruling.

Petitioner refers the Court to several off-duty law enforcement cases as supporting the "appearance" test, including *Anderson* v. *Warner*, 451 F.3d 163 (9th Cir. 2006). Pet. Br. 27-28. However, the Ninth Circuit explained the *Anderson* decision and similar cases demonstrate "a state employee who is on duty, or otherwise exercises his official responsibilities in an off-duty encounter," acts under color of state law. *Naffe* v. *Frey*, 789 F.3d 1030, 1037 (9th Cir. 2015). This is the same as the duty or authority test. Pet. App. 5a (state action is found where "the official is 'performing an actual or apparent duty of his office,' or if he could not have behaved as he did 'without authority of his office.'" (quoting *Waters*, 242 F.3d at 359)).

The Sixth Circuit properly rejected the request to apply the same factors used when determining when a police officer is acting under "color of law" to that of the use of social media. The Sixth Circuit was correct when it stated that the "resemblance is shallow. In police-officer cases, we look to officers' appearance because their

appearance actually evokes state authority" because an officer exudes authority "when he wears his uniform, displays his badge, or informs a passerby that he is an officer." Pet. App. 12a. That is far different in the use of social media because a user "gains no authority by presenting himself as city manager on Facebook. His 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.

In the case of a police officer, applying an appearance factor to the "under color of law" inquiry to encompass a public official who misuses their power provided under state law may make sense. *See, e.g.*, *Griffin*, 378 U.S. 130. However, Petitioner's attempt to extend such use of the "under color of law" provision as a sword against a government employee to characterize an otherwise legal act by a government employee as improper because it could appear that he was doing so "under color of law" does not.

C. Analyzing Whether a Government Employee Engaged in a Public Function Is an Incorrect Analysis.

Petitioner asks the Court to adopt a state action analysis that focuses on whether a defendant is performing governmental "functions and obligations," based upon *Marsh* v. *Alabama*, 326 U.S. 501 (1946), Pet. Br. at 28, a decision this Court described more than fifty years ago as involving "an economic anomaly of the past." *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 561 (1972).

Ms. Marsh was convicted of trespassing under state law and challenged the conviction as violating the First Amendment. The Court found the question presented was whether the State "can impose criminal punishment on a person" for distributing literature in a company town. *Marsh*, 326 U.S. at 502. The Court ultimately ruled that "[i]nsofar as the State has attempted to impose criminal punishment on appellant," such violated the First Amendment. *Id.* at 509. While it is often argued that *Marsh* stands for the proposition that private conduct can take on governmental character, Pet. Br. 29, the actual holding in *Marsh* is limited to the enforcement of state law.[16]

As the Court has subsequently made clear, private property does not "lose its private character merely because the public is generally invited to use it." *Id.* at 569. Just as the shopping center in *Lloyd* did not lose its private character despite being "open to the public," 407 U.S. at 568, government employees' social media pages do not lose their private character just because members of the public are allowed to view them and comment on them.

Petitioner also argues that private actors can be found to engage in state action by performing a "public function," relying upon the jury cases of *Edmonson* v. *Leesville Construction Co.*, 500 U.S. 614 (1991) and *Georgia* v. *McCollum*, 505 U.S. 42 (1992). Pet. Br. 29. However, neither *Edmonson* nor *McCollum* turned on the

16. To the extent *Marsh* can be read for the proposition that state action can arise from purely private conduct, the decision has been limited to its specific facts. *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 159 (1978).

action of the attorney somehow taking on a governmental character. Rather, both cases turned on the fact that the State had delegated authority to select a governmental body (jury) in a process that was controlled by State law.

In *Edmonson*, the Court discussed the government's extensive involvement in the jury selection process, including the fact the government "summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination." 500 U.S. at 624. Based upon the foregoing, the Court found a jury was "a quintessential governmental body, having no attributes of a private actor." *Ibid.* The Court explained when the government delegates responsibility to a private body, in this case a private attorney, to choose the government's employees or officials, the private body "becomes a governmental actor for the limited purpose" and is "bound by the constitutional mandate of race neutrality." *Id.* at 625, 627; *see also McCollum*, 505 U.S at 53 (the "State cannot avoid its constitutional responsibilities by delegating a public function to private parties"). Thus, the Court found state action where the state delegated its authority to third parties.

The Court's analysis of whether a public defender was engaged in state action in *Polk County* v. *Dodson* is also consistent with this analysis. 454 U.S. 312 (1981). Unlike *Edmonson* and *McCollum*, state law did not delegate any quintessential state duty to the public defender. Pet. Br. 30 (public defender performed "private function traditionally filled by retained counsel"). Even though the public defender was paid by the state, the "public defender works under the canons of professional responsibility" and was required to exercise "independent judgment on behalf of

the client" under state law. *Id.* at 320-21. The Iowa Code of Professional Responsibility for Lawyers states a "lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." *Id.* at 321, n.11. Iowa Code further provided that a public defender was to prosecute appeals and other remedies that the attorney "considers to be in the interest of justice." *Id.* at 324, n.16. Thus, in *Polk*, the Court did not find state action because state law did not delegate its authority to act to a third party.

In practice, the function test will also be over-inclusive of action that is clearly not state action. Continuing with the example of the @AOC account, while there are photos of Ms. Ocasio-Cortez attending basketball games and being interviewed on Twitch (a gaming app), an overwhelming majority of the posts on the page are related to her role as a representative (see, e.g., June 14, 2023 re-post of a video of herself in a congressional hearing[17]). If spreading the word and reverberating messages is considered a public function, government employees would never be able to talk about their jobs online. It is completely normal for all kinds of employees—athletes, actors, business executives—to discuss their jobs through social media. The athlete is not speaking on behalf of the team; the actor is not speaking on behalf of the movie; and the business executive is not speaking on behalf of the business on their private accounts.

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17. Alexandria Ocasio-Cortez, X, @AOC, May 16, 2023, https://twitter.com/AOC/status/1669180360544907271.

If the "appearance and function" test is adopted, a government employee would essentially be restricted from ever posting about his or her job on social media without the real threat of his social media activity constituting state action. This flies in the face of the very purpose of the First Amendment—to protect from government abridgement of speech. The "appearance and function" test should not be adopted because it would be overly inclusive and chill speech.

III. Freed Blocking Lindke and Deleting Lindke's Comments on Freed's Personal Facebook Page Was Not State Action.

A. Freed Was Not Performing Any Government Duties or Using Government Authority When Operating His Personal Facebook Page.

It is undisputed that there was no law or ordinance requiring Freed to operate a Facebook page in his position as the City Manager. Petitioner also has not provided record support for any of the City Manager's job duties that would require Freed to operate a Facebook page in his position as the City Manager. Petitioner argues Freed's job duties included responsibility for "emergency public information . . . released to the media," citing to City Code § 20-15(1). Pet. Br. 5. Yet, this section of the City Code actually places such responsibility on the City's Director of Public Safety, not the City Manager.[18]

18. Petitioner also states that Freed's job duties included "responsibility for implementing quarantine regulations," citing to City Code § 20-12(3). City Code § 20-12(3) gives the *mayor* the power to implement quarantine procedures *through* the City Manager. Freed would have no power to implement quarantine procedures without authorization from the mayor.

Petitioner also argues that Freed was "discharging his duty to engage in 'regular communication with local businesses and residents'" on his Facebook page, citing to the City Manager's website. Pet. Br. 41. The website, however, actually reads, "Mr. Freed believes strongly that regular communication with local businesses and residents is essential to good government." J.A. 290. Freed's personal beliefs are a far cry from a governmental duty.

In an attempt to show that Freed was performing an official job duty on his Facebook page, Petitioner claims that Freed on one occasion announced an initiative "*through* his page" in a March 16, 2020 Facebook post. Pet. Br. 41. In the post, Freed re-posted (i.e. affirmatively posted something that had been posted elsewhere) a PDF of an administrative directive he issued to the Director of Public Works directing cones and barrels to create drive-thru and pick up lanes with a caption stating, "Administrative Directive I issued this morning regarding drive-thru/pickup lanes." J.A. 93. The only thing Freed did in this re-post was share "information acquired by virtue of his public employment," which "does not transform that speech into employee—rather than citizen—speech," *Lane*, 573 U.S. at 240, just as it would not be employee speech if he discussed the administrative directive at the hardware store. Pet. App. 9a ("When Freed visits the hardware store, chats with neighbors, or attends church services, he isn't engaged in state action merely because he's 'communicating'—even if he's talking about his job."); *see also Kennedy*, 142 S. Ct. at 2425 (quoting *Garcetti*, 547 U.S. at 424) ("[T]reating everything [government employees] say in the workplace as government speech subject to government control" would result in "'excessively broad job descriptio[ns]'").

Freed stated that he would "take information from other parts of the community, sources and stuff and put it out there" and agreed that this was a way in which he would "reverberate" that message to get it to as many people in the community as possible. C.A. Rec. 672. *Contra Knight First Amend. Inst.* v. *Trump*, 928 F.3d 226, 235 (2d Cir. 2019) (President Trump's "MODERN DAY PRESIDENTIAL" Twitter account being used "on almost a daily basis 'as a channel for communicating and interacting with the public about *his* administration'" (emphasis added)). Freed never announced policy decisions on his page. C.A. Rec. 671. Freed only occasionally re-posted information that had already been announced via official channels, distinguishing his actions from President Trump who "announce[d] 'matters related to official government business,'" like "high-level White House and cabinet-level staff changes"; changes to "major national policies" and "foreign policy decisions"; to "evaluate the public's reaction" to decisions or statements; and to "engage with foreign leaders." *Knight*, 928 F.3d at 235-36.

The same is true for the events giving rise to this lawsuit. Petitioner claims that he commented on Freed's March 19, 2020 post that contained a picture with the Port Huron Mayor standing at the counter of a local café with the caption, "Mayor Repp ordered some takeout for us today before a series of virtual briefings we are participating in. Be sure to support our Downtown Port Huron small businesses!" Pet. Br. 42. Petitioner testified that he commented something to the effect of "residents are suffering" while city leaders were at a "pricy" restaurant. C.A. Rec. 989. Freed's job duties included attending virtual briefings with the Mayor. But when communicating his upcoming attendance at said

virtual briefings, eating a sandwich, and posting it on his page, Freed was in an "ambit of [his] personal pursuits," *Screws*, 325 U.S. at 111. Any other citizen "could have done exactly" what Freed did on the citizen's own social media page after ordering a sandwich before attending a virtual meeting that day without being subject to such scrutiny. *Luce*, 872 F.3d at 514. In sum, Petitioner cannot show that Freed operated his Facebook page using any governmental duty or authority.

B. Petitioner's Attempts to Show that Freed's Facebook Page "Appeared" to Be an Official Page Fall Short.

Petitioner's theory in this case is that Freed's Facebook page was "designed to appear as an extension of his position as City Manager." Pet. Br.40. If there was any merit to this theory, then Freed would have identified his page as that of a "Government Official" or "Public & Government Service." Yet, Freed did not select either and instead went for the generic title of "public figure," including thousands of other private parties who chose the "public figure" designation, like Lassie.[19] *See also* J.A. 292.

Though Petitioner contends that the evaluation of a government employee's conduct in operating his Facebook page should be done by looking at the account as a whole, Pet. Br. 30-31, Petitioner simply cherry-picks isolated portions and posts of Freed's page to argue that Freed was acting as a "mouthpiece" of the City Manager's office, Pet. Br. 41. Petitioner thereby "los[es] the forest for the trees." Pet. App. 6a.

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19. Lassie, Facebook, https://www.facebook.com/Lassie/about.

Looking at Freed's page as a whole demonstrates that Freed was merely sharing his every day, commonplace thoughts, observations, and activities online, including the raccoons in his garage, J.A. 231, 257; his yardwork, J.A. 39, 60; his dog's birthday party, J.A. 43; a passage of scripture with a link to worship music to celebrate Easter, J.A. 55; his dog's veterinary appointment, J.A. 184; and numerous posts about his hometown of Port Huron, J.A. 197, 236, 240, whose "resurgence" he acknowledged was "not government driven." J.A. 213. Like the government employee in *Kennedy* who prayed mid-field while coaching a high school football game, Freed was not (1) acting "within the scope of his duties as a [City Manager]"; or (2) "speak[ing] pursuant to government policy" on his Facebook page. *Kennedy*, 142 S. Ct. at 2424-25. Freed maintained his Facebook page "in his capacity as a private citizen," *id.* at 2425—not as an "extension of his position as a City Manager." Pet. Br. 40. The fact that some of his posts involved sharing information relating to the City does not change the analysis.

Petitioner contends the fact Freed "chose a professional headshot of himself wearing a City Manager pin" somehow indicates an effort by Freed to present to the public the official nature of the page. Pet. Br. 40. Petitioner cannot be suggesting that a finding of state action can be predicated upon use of a "nice picture" on Facebook. Not only is there no record support indicating Freed's lapel pin in the picture was a "City Manager pin," but the very fact that the Petitioner considers the lapel pin relevant, Pet. Brief 5, 40, also underscores the flaws of the appearance test. It is highly unlikely that an average Facebook user viewing Freed's page would ever think that Freed's lapel pin had some connection to the City of Port Huron. Even

when Freed's picture is artificially blown up for purposes of litigation, *see supra*, the lapel pin is not akin to the badges worn by Deputy Collins in *Griffin* or Deputies Follmer and Kinas in *Kalvitz* v. *City of Cleveland*, 763 F. App'x 490, 496 (6th Cir. 2019). *See also* Pet. App. 12a ("We're generally taught to stop for police, to listen to police, to provide information police request. And in many cases, an officer couldn't take certain action without the authority of his office—authority he exudes when he wears his uniform, displays his badge, or informs a passerby that he is an officer.").

Thus, regardless of which test is ultimately adopted by this Court, Freed's private operation of his personal Facebook page was not state action.

C. This Action has Already Negatively Impacted Free Expression.

Freed's speech has already been chilled by the threat of state action on his personal page. As Freed explained, he never intended this account to be an official account and would shut it down if he were forced to allow all comments, including personal attacks against himself and his family. C.A. Rec. 687. Freed, unfortunately, had to "face the unappetizing choice of allowing all comers or closing the platform altogether" and he chose the latter. *Halleck*, 139 S. Ct. at 1930-31. Meanwhile, Petitioner continues to have outlets for his own speech, including his numerous Facebook profiles. Petitioner was and has never been deprived of all "reasonable opportunity to convey [his] message," *Lloyd*, 407 U.S. at 566, to Freed.

D. Remand Is Redundant.

Freed's conduct does not constitute state action under either the duty or authority test or the appearance and function test. Petitioner suggests this matter should be remanded to the district court to "sift[] facts and weigh[] circumstances" presented by Petitioner's appearance and function test. Pet. Br. 40. Apparently unbeknownst to Petitioner, the District Court, relying upon *Knight*, 928 F.3d 226; *Davison* v. *Randall*, 912 F.3d 666 (4th Cir. 2019); and *Charudattan* v. *Darnell*, 510 F. Supp. 3d 1101 (N.D. Fla. 2020), *aff'd*, 834 F. App'x 477 (11th Cir. 2020), actually already applied a test nearly identical to the one for which Petitioner now advocates.

With respect to the "appearance" portion of Petitioner's test, the District Court held:

> Freed's use of "we" in some posts hardly shows official trappings. The same can be said about the inclusion of a link to the City's website, as purely private individuals can include links to government websites on their pages. Lindke's other points are not supported or only negligibly so . . . Freed's page contrasts notably with City-operated Facebook pages that readily signaled their official governmental nature. For instance, the Facebook pages for the City's police department and parks and recreation department feature official titles and government emblems.
>
> . . . . Other aspects of Freed's page demonstrate its overwhelming personal nature and lack of

> official trappings. Freed's username was not connected to his government position. The title of the page did not include his official title. And it was not designated as a "government official" page. [Pet. App. 27a-28a (citations omitted)]

Regarding the purpose, or function, part of the test, the District Court held that "Freed's use of his Facebook page is markedly distinguishable from Trump's use of Twitter in several ways. First, unlike Trump, who relied on paid White House staff to help maintain his account, Freed testified that he did not use any governmental employees, resources, or devices in maintaining his Facebook page." Pet. App. 24a. Freed also "did not hold out his page as an official channel of governmental communication." Pet. App. 24a. Freed "neither intended his Facebook page to be an official City Manager page nor wanted an official City Manager page." Pet. App. 26. Finally, Freed's "page did not purport to be an official way of giving notice of City actions or by its nature serve to memorialize official acts. Freed's page did not claim to promulgate City policies but rather amalgamated and shared information that originated from other sources." Pet. App. 25a. After analyzing both the "purpose and appearance" portions of the test, the District Court ultimately found that "Freed administered his Facebook page in a private, not public, capacity. And he was not engaged in state action when he deleted Lindke's comments and blocked Lindke from the page." Pet. App. 29a.

Because the District Court has already done the "sifting facts and weighing circumstances" and did not find state action, which is a question of law, there is no benefit to remanding to the District Court.

* * *

Petitioner's test ignores the real-world implications of such a broad and over-reaching approach to regulating speech. Petitioner's test would not only have a chilling impact on Washington's most influential public and elected officials' speech, but it would also have a chilling impact on small town, every day local government employees' speech. Perhaps worse, such application could discourage those in any government role from feeling empowered to engage, share, and speak freely. When we elect an individual to office, whether it be a position in the U.S. Congress or on the local City Council, that person does not lose all individuality or personal freedoms, despite holding an important role in government. The same goes for those hired into a government office, like Freed. Only the "duty or authority" test as applied by the Sixth Circuit strikes the balance required to protect online speech while holding government employees accountable. This Court should affirm.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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