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 FOR THE STATES OF TENNESSEE, ALABAMA, ARKANSAS, COLORADO, IDAHO, INDIANA, IOWA, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, AND SOUTH DAKOTA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The States of Tennessee, Alabama, Arkansas, Colorado, Idaho, Indiana, Iowa, Michigan, Mississippi, Montana, Nebraska, North Dakota, Oregon, Pennsylvania, South Carolina, and South Dakota have a significant interest in ensuring the correct interpretation of 42 U.S.C. § 1983 and the proper application of that statute to conduct that occurs on social media.

In recent years, public officials—like millions of people throughout the country—have turned to privately owned social-media platforms to engage with their communities. A slew of litigation has followed. Suits involving social media have been filed against governors, state legislators, state court judges, county commissioners, sheriffs, mayors, and even school board members. *See*, *e.g.*, *Morgan v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018); *Fox v. Faison*, No. 3:22-cv-691, 2023 WL 2763130 (M.D. Tenn. April 3, 2023); *Kallinen v. Newman*, 616 F. Supp. 3d 645 (S.D. Tex. 2022); *Bear v. Escambia Cnty. Bd. of Cnty. Comm'rs*, No. 3:19-cv-4424, 2023 WL 2632103 (N.D. Fla. Mar. 25, 2023); *Robinson v. Hunt County*, 921 F.3d 440 (5th Cir. 2019); *Blackwell v. City of Inkster*, 596 F. Supp. 3d 906 (E.D. Mich. 2022); *Scarborough v. Frederick Cnty. Sch. Bd.*, 517 F. Supp. 3d 569 (W.D. Va. 2021). In each of these cases, slighted citizens claim that officials acting under color of state law have used social media to violate their constitutional rights.

The question presented in this case thus directly impacts the States. In determining when a public

official's social-media activity occurs under color of state law, the Court will not just determine the availability of damages and fee awards that States routinely end up paying, it will also drastically influence how state officials interact with their constituents and the broader body politic. The *amici* States urge the Court to affirm the decision below and make clear that § 1983 only reaches conduct enabled by a state "statute, ordinance, regulation, custom, or usage."

SUMMARY OF THE ARGUMENT

I. Since the Reconstruction era, federal law has provided a right of action against persons who violate constitutional rights "under color of any [State] statute, ordinance, regulation, custom, or usage." 42 U.S.C. § 1983. That list of state authorities was not written by accident. It identifies specific sources of power under which a state officer can act and, in so doing, limits § 1983 challenges to only actions taken pursuant to those powers. Linguistic and historic context confirms this plain reading of the text. And as this Court's precedent recognizes, "the touchstone of the § 1983 action . . . is an allegation that official [law or] policy is responsible for a deprivation of rights protected by the Constitution." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

II. The advent of social media has not changed the object of § 1983 or altered the fundamentals of how state governments operate. Private parties, not the States, control social-media platforms. And when state officials engage with others through social media, they use the same features available to every

other user—and almost always in pursuit of their own *private* political interests. This Court should prevent § 1983 from becoming a means of challenging every half-cocked post, block, or retweet by anyone who holds state or local office. It should draw a line between those who abuse state-granted powers through social media and those who merely use (and abuse) social media like the rest of the general public.

ARGUMENT

I. Section 1983 applies only to actions taken pursuant to state law.

For an official to violate federal rights "under color" of state *law*, there must be an identifiable state *law* enabling the official's actions. 42 U.S.C. § 1983. The mere aura of a state office does not suffice. Section 1983's text, its historic context, and this Court's precedent all demand a direct line from some actual state power to the conduct giving rise to the suit.

The Text: This Court has "consistently refused to read § 1983's 'plain language' to mean anything other than what it says." *Health & Hosp. Corp. v. Talevski*, 143 S. Ct. 1444, 1453 (2023). And it says that, to state a claim, the plaintiff must challenge an act taken under color of some concrete, identifiable state authority.

Section 1983 provides a private right of action against any person who violates federal rights while acting "under color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C.

§ 1983. This language explicitly lists discrete sources of authority—"statute, ordinance, regulation, custom, or usage"—that a government official can act "under color of." *Id.* The "specification of" those sources "implies exclusion of . . . other" wellsprings of power or influence that a person may draw upon. A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 107 (2012). That is, by specifying a "particular mode" of action, Congress "include[d] a negative of . . . other mode[s]." *Raleigh & Gaston R.R. Co. v. Reid*, 80 U.S. (13 Wall.) 269, 270 (1871).

This exclusive list in § 1983 also elucidates the "object[]" of the statute: the use of state-granted authority. *Helvering v. N.Y. Trust Co.*, 292 U.S. 455, 464 (1934) (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1856)). Each enumerated item is a means of conferring government power. Statutes, ordinances, and regulations explicitly authorize state coercion. And with the inclusion of "custom [and] usage," § 1983 sweeps in "the persistent practices of state officials" insofar as they are "so permanent and well settled as to [carry] the force of law." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167 (1970). Thus, in each enumerated item, the State's asserted power is what gives an official her ability to coerce private citizens.

The Context: The text of § 1983 is clear, but linguistic and historic "[c]ontext confirms th[e] reading" above. *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1789 (2022); *see also Abramski v. United States*, 573 U.S. 169, 179 (2014) (interpreting words with reference to "context" and "history"). "[A]t the time Con-

gress enacted" this law, the "ordinary, contemporary, common meaning" of its language required an official to wield the powers of the State. *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (quotations omitted).

The drafters of what is now § 1983 did not start from scratch. The statute built on the Civil Rights Act of 1866—a precursor to § 1983 that sought to eradicate the "Black Codes." Eric H. Zagrans, *"Under Color of"* What *Law: A Reconstructed Model of Section 1983 Liability*, 71 Va. L. Rev. 499, 541 (1985); *see Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 386 (1982). First appearing "in the summer of 1865," Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877, at 198 (1988), these state and local laws "so discriminated against the freed blacks as to render 'illusory' the liberty newly conferred by the thirteenth amendment," Zagrans, *supra*, at 542. Section 1 of the Civil Rights Act attempted to secure certain rights for all citizens, and Section 2 punished the deprivation of those rights by persons acting "under color of any law, statute, ordinance, regulation, or custom." Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27.

Although scholars and jurists have debated whether this language was intended to cover actions taken under the mere *pretense* of a state authority, *see Baxter v. Bracey,* 140 S. Ct. 1862, 1864 n.2 (2020) (Thomas, J., dissenting from the denial of certiorari) (compiling articles), they have widely agreed that there must always be an identifiable state authority for the official to colorably act under, Steven L. Win-

ter, *The Meaning of "Under Color of" Law*, 91 Mich. L. Rev. 323, 405 n.401 (1992). And from the outset, it has been clear that liability only adhered to actions enabled by an assertion of government power.

For example, Representative James F. Wilson of Iowa explained that the "color of law" language in the Act of 1866 "gr[ew] out of the fact that there is discrimination in reference to civil rights under the *local laws of the States*" and that the Act would "provide that the persons who under color of *these local laws* should do these things shall be liable to this punishment." Cong. Globe, 39th Cong., 1st Sess. 1120 (1866) (emphasis added). Representative Samuel Shellabarger of Ohio emphasized that the bill covered "only [wrongs] done under color of State authority" and would "defeat[] an attempt, *under State laws*, to deprive races and the members thereof as such of the rights enumerated." *Id.* at 1294 (emphasis added). Analyzing the text, Senator Reverdy Johnson of Maryland recognized that the "under color of law" language "assume[d]" the existence of "a statute, an ordinance, a regulation, or a custom inconsistent with the exercise of rights secured by the" Act. *Id.* at 1778. And Senator William Morris Stewart of Nevada highlighted that, "[i]f there is no law or custom in existence in a State authorizing [the challenged actions], it will be impossible for" an official to take action "under color of any law." *Id.* at 1785.

After ratification of the Fourteenth Amendment protected civil rights as a matter of constitutional law, Congress passed the Ku Klux Klan Act of 1871 "for the purpose of enforcing" those protections. *Ngi-*

raingas v. Sanchez, 495 U.S. 182, 187 (1990) (quotation omitted). Section 1 of the Klan Act—what is now § 1983—incorporated the same language used in the earlier Civil Rights Act of 1866, including the cause of action granted for violations of federal rights "under color of any law, statute, ordinance, regulation, custom, or usage, of any State." Ch. 22, 17 Stat. 13, 13.[1] This language was understood to "carry[] out the principles of the civil rights bill [of 1866], which ha[d] since become a part of the Constitution." *Monell*, 436 U.S. at 684 (quoting Cong. Globe, 42d Cong., 1st Sess. 568 (1871) (Rep. Edmunds)). In fact, Representative Shellabarger, who introduced the Klan Act in the House, expressly connected it to the earlier legislation: "The model for [the first section] will be found in the second section of the act of April 9, 1866, known as 'the civil rights act.'" Cong. Globe, 42d Cong., 1st Sess. app. 68 (1871); Cong. Globe, 42d Cong., 1st Sess. 461 (1871) (Rep. Coburn) ("The measure under consideration gives a civil remedy parallel to the penal provision based upon the first section of the civil rights act.").

While "debate on § 1 of the [Klan Act] was limited," *Monell*, 436 U.S. at 665, legislators made clear that, as with the Act of 1866, the under-color-of-law language required a connection between the challenged acts and state authority. Representative Horace Maynard of Tennessee stated that § 1 "declares in substance that whoever interferes with the rights

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[1] Without explanation, Congress dropped the term "law" from the statute when it reenacted § 1 as Revised Statute § 1979 in 1874. *Adickes*, 398 U.S. at 203 n.15 (Brennan, J., concurring in part and dissenting in part).

. . . granted . . . by the Constitution . . . , though it may be done *under State law or State regulation*, shall not be exempt from responsibility." Cong. Globe, 42d Cong., 1st Sess. app. 310 (1871) (emphasis added). Representative Benjamin Biggs of Delaware explained that, "for the violation of the rights, privileges, and immunities of the citizen a civil remedy is to be had by proceedings in the Federal courts, *State authorization in the premises to the contrary notwithstanding*." Cong. Globe, 42d Cong., 1st Sess. 416 (1871) (emphasis added). And even opponents of the bill stated that the "object of [§ 1] is not very clear, as it is not pretended by its advocates . . . that any State has passed any laws endangering [the protected] rights or privileges." Cong. Globe, 42d Cong., 1st Sess. app. 268 (1871) (Rep. Sloss); *see also id.* at 209 (Rep. Blair) (adopting same reading).

The events and debates from the time of enactment thus confirm that § 1983's language requires a connection between identifiable state authority and the challenged actions. The façade of state office will not do.

The Precedent: This Court's precedent has generally remained faithful to the law's text and history. Decades ago, the Court recognized that "[t]he traditional definition of acting under color of state law requires . . . the defendant [to] exercise[] power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). It has also explained that "the touchstone of

the § 1983 action . . . is an allegation that *official policy* is responsible for [the] deprivation of rights." *Monell*, 436 U.S. at 690 (emphasis added). And it has required "an affirmative link" "between the [government's] policy and the particular constitutional violation alleged." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). Across a range of contexts, this principle has remained constant.

The Bottom Line: Text, context, and precedent all confirm that an official's conduct should not be attributed to the State unless that official acted pursuant to an identifiable source of government authority.

II. Officials rarely use the State's coercive power to take action on social media.

For better and worse, many government officials use social media to promote themselves and their political agendas. In doing so, though, such officials almost never exercise power conferred by a state "statute, ordinance, regulation, custom, or usage." 42 U.S.C. § 1983. This Court should not read § 1983 in a manner that conflates the color of state law with the privileges that any person with a smartphone enjoys.

To begin, the exercise of state power hardly ever occurs through social networking. Sites like Twitter and Facebook offer a means of publishing text, photos, and videos in a way that can make "*any* person with a phone" into "a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (emphasis added). And they do not just offer that service to

government officials—they give it to practically everybody. In fact, social media's advertising-based business model all but guarantees that nearly *anyone* can create a page on nearly *any* platform, and *anyone* with a social-media account can curate their own page through content creation, removal, and user blocking. "[A] public official[]" therefore need not "exercise . . . state authority" to "use [these] features." *Knight First Amend. Inst. v. Trump*, 953 F.3d 216, 227 (2d Cir. 2020) (Park, J., dissenting from the denial of rehearing). All he needs is an email address.

As a result, any attempt to hold such an official liable for "the specific conduct" of posting, removing posts, or blocking generally does not implicate "right[s] or privilege[s]" of an office "created by . . . State" law. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50–51 (1999) (quotations omitted). The universe of social media behavior "made possible only because [someone] is clothed with the authority of state law" is vanishingly small—if it even exists in the first place. *West*, 487 U.S. at 49 (quotations omitted). And unless a plaintiff can identify an action taken pursuant to some state "statute, ordinance, regulation, custom, or usage," 42 U.S.C. § 1983, no right of action exists.[2]

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[2] Whatever this Court holds on the question presented, it should make clear that the question of whether action occurs under color of state law remains distinct from the question of whether the First Amendment has been violated. The scope of a statutory provision obviously cannot dictate the scope of a constitutional right. And this Court has repeatedly held that the First

That is significant because officials increasingly use social media for the "private" purpose of "[*r*]*unning* for public office[s]"—including the offices they already occupy. *Campbell v. Reisch*, 986 F.3d 822, 825 (8th Cir. 2021) (emphasis added). More than any other country, the United States has a rich and admirable tradition of filling a wide range of offices through direct election. *See* Anthony King, *Running Scared*, The Atlantic (Jan. 1997).[3] Those elections occur regularly and "very frequently." *Id.* And when faced with brief terms and limited budgets, officials have increasingly turned to Facebook, Twitter, and other platforms to "raise their own profiles," *id.*, by promoting themselves and their policy agendas, *see, e.g., Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1163 (9th Cir. 2022); *see also Davison v. Randall*, 912 F.3d 666, 674 (4th Cir. 2019) (describing posts about "a variety of trips and meetings [an official] had taken in furtherance of [government] business").

Sometimes officials explicitly convey a campaign message. Other times they frame the message as a mere update to the public. *See Felts v. Vollmer*, No. 4:20-cv-821, 2022 WL 17546996, at *2 (E.D. Mo. Dec. 9, 2022). But, at bottom, the point of this activity is

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Amendment provides no right to demand access to privately controlled forums for expression. *See Hudgens v. NLRB*, 424 U.S. 507, 520–521 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568–569 (1972); *see also Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring).

[3] Of course, not *all* state officials that use social media are elected. *See, e.g.*, Tenn. Const. art. VI, § 5; Tenn. Code Ann. § 8-6-101; Twitter, @AGTennessee.

to convey a message to constituents, donors, and political supporters, thereby improving one's prospects in the next election. *See Campbell*, 986 F.3d at 823–824. And social media platforms allow this without the expense of printing and mailing literature, while also allowing for "viral" boosts in publicity that can elevate an official's public profile. *See* Kristin Snyder, *Local Political Candidates Are Using TikTok to Communicate with Young Voters*, dot.LA (Oct. 14, 2022).[4]

Indeed, scholars have long recognized that elected leaders campaign by publicizing their acts *in* office. They spend their time "advertising," "position taking," and "credit claiming" in the hope of retaining their positions. *See generally* David R. Mayhew, Congress: The Electoral Connection (1974). This blurs any theoretical line between "campaign" and "governmental" publications. If "the act of communicating one's views to constituents" is considered "governmental" in some nebulous sense, *Does #1–10 v. Haaland*, 973 F.3d 591, 601 (6th Cir. 2020), it will be practically impossible to separate "government" conduct from the official's pursuit of reelection, which is solely a "private" activity. But by limiting § 1983's reach to the exercise of identifiable state authority, the Court can avoid that problem altogether while remaining faithful to the original meaning of the text.

What is more, a text-based approach to § 1983 ensures that state and local governments only face

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[4] https://dot.la/local-politicians-tiktok-2658449104.html.

the threat of damages for delegating *sovereign* power to their official agents. Our political culture has long tended to *limit* the scope of power that any one official may exercise unilaterally—"ambition . . . counteract[s] ambition." The Federalist No. 51, at 349 (J. Madison) (J. Cooke ed. 1961). The classic example is the average member of the House of Representatives. She can take *no* action on behalf of the country as a whole and cannot accomplish anything in Congress without the assent of, at the very least, a committee. *See* CRS, Roles and Duties of a Member of Congress: A Brief Overview 1 (2022). Not in spite of those limitations, but because of them, public officials have long been pressed to promote their careers not by wielding *government* power, but by engaging with the public.

In the age of social media, the same is now true of countless state office holders. With limited official powers and resources, these often charismatic and gregarious community leaders lean on Facebook, Twitter, and other platforms to build coalitions and bring about policy changes that they cannot implement "on [their] own." *Bear*, 2023 WL 2632103, at *2.

Indeed, it is the *lack* of unilateral authority, rather than the exercise of such authority, that drives the social media activity of these state office holders. That is why so many new cases target the online activities of county commissioners, *Swanson v. Griffin*, No. 21-2034, 2022 WL 570079, at *1 (10th Cir. Feb. 25, 2022), city supervisors, *see Reynolds v. Preston*, No. 3:22-cv-8408, 2023 WL 2825932, at *1 (N.D. Cal.

Mar. 15, 2023), and state legislators, *One Wis. Now v. Kremer*, 354 F. Supp. 3d 940, 941 (W.D. Wis. 2019). These officials want to use social media as a megaphone to promote actions they cannot unilaterally take, and their critics want to hijack that megaphone and use it for cross purposes. *That* is what leads to the "blocking" and other forms of alleged censorship that give rise to this breed of litigation.

Whether laudable or lamentable, this typical fact pattern does not feature the "deprivation of [federal] rights" § 1983 was enacted to redress. Having your post deleted from someone else's Facebook page is not the same as being fined or imprisoned for peaceful assembly or "vagrancy" based on your race. Foner, *supra*, at 200; *see also Rogers v. Grewal*, 140 S. Ct. 1865, 1873 (2020) (Thomas, J., dissenting from the denial of certiorari). And it is not the same as being mistreated by police, who "exude[state] authority" through "uniform[s]" and "badge[s]." *Lindke v. Freed,* 37 F.4th 1199, 1206 (6th Cir. 2022). If the Court decides to expand the Civil Rights Act into the "Twittersphere" even absent the use of state authority, it will overshoot the object of § 1983 and needlessly burden state and local government resources by multiplying the ways in which a single public servant with limited formal power can be accused of acting on behalf of the State.

The federal judiciary need not push the boundaries of § 1983 in such a novel manner. Members of the public who take issue with an official's use of social media can "register th[eir] disagreement . . . at the polls," or—more immediately—on their "own

page[s]." *Campbell*, 986 F.3d at 827–828 (cleaned up). The Court should read § 1983 as written.

CONCLUSION

The judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

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