No. 22-611

In the Supreme Court of the United States

KEVIN LINDKE, PETITIONER

v.

JAMES R. FREED,

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

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a public official engages in state action subject to the First Amendment by blocking an individual from the official's personal social-media account, when the official uses the account to feature his or her job and communicate about job-related matters with the public but does not do so pursuant to any governmental duty or authority.

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INTEREST OF AMICUS CURIAE

This Court has recently described social-media platforms as "the modern public square" that "for many are the principal sources for knowing current events, checking ads for employment, [and] speaking and listening." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). Recognizing this fact, "[p]ublic officials today routinely maintain social-media accounts for official, personal, and campaign use, and they address issues of public concern on all of them." *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 953 F.3d 216, 230 (2d Cir. 2020) (Park, J., dissenting from denial of rehearing en banc).

Public officials in Texas are no different: at every level of government, these individuals maintain presences on social-media websites as a means of campaigning, communicating with the public, and keeping in touch with family and friends. Disentangling their personal-capacity conduct on social-media platforms from their official-capacity conduct has proven to be a nettlesome undertaking, prone to litigation. *See, e.g.*, *Clark v. Kolkhorst*, No. 1:19-cv-00198 (W.D. Tex. filed Mar. 1, 2019); *Knight First Amend. Inst. at Columbia Univ. v. Paxton*, No. 1:21-cv-00307 (W.D. Tex. filed Apr. 8, 2021). Texas has a keen interest in this case because if the Court were to adopt petitioner's approach to state action—which mirrors that of the Ninth Circuit in the companion case—the State may be held responsible for conduct it has not sanctioned, may not endorse, and cannot control.

SUMMARY OF ARGUMENT

I. One of the basic features of our constitutional order is the principle that the Bill of Rights secures the liberties of individuals against *governmental* action—not

the conduct of other indiviudals. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . ."); *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). To the extent such rights are incorporated against the States via the Fourteenth Amendment, this foundational principle is reflected in the language of 42 U.S.C. § 1983, which provides a federal cause of action against those who deprive persons of their federal rights "under color of any statute, ordinance, regulation, custom, or usage[] of *any State*." *Id.* (emphasis added).

Because this bedrock principle requires courts to distinguish between governmental and private conduct, the state-action doctrine looks to what conduct is "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). That attribution requires a plaintiff to make two showings: (1) that the alleged malefactor is a state actor, and (2) that the deprivation of a federal right was "caused by the exercise of some right or privilege created by the [S]tate or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.*

Petitioner's approach, however, would effectively abandon the state-action test and the fundamental constitutional principle it implements. Although respondent, as the City Manager of Port Huron, Michigan, is a public official, his challenged conduct—blocking petitioner from commenting on his personal social-media page—did not flow from the exercise of any right, privilege, or rule of conduct created or imposed by the State. True, the Facebook page at issue discusses respondent's employment and activities. Many social-media accounts contain that type of content. But the account was created *before* respondent assumed public office, and respondent may maintain it *after* he leaves public service. No source

of state authority required or authorized respondent to maintain a social-media page in his official capacity. Under this Court's precedent, respondent's actions on his Facebook page do not constitute "state action."

II. Rather than look for a source of authority for respondent's actions under state law, petitioner's approach, which echoes the Ninth Circuit's approach in the companion case, would ask whether a public official "invoke[d] the pretense of governmental authority" through the "appearance and function" of his actions. Petitioner's Br. 12-13; *cf. Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1172 (9th Cir. 2022) (asking what the "appearance and the content" of a public official's social-media page might "signify[]" to the "public"). But such a free-form inquiry is irreconcilable with this Court's longstanding state-action precedent. If anything, it is reminiscent of the "reasonable observer" test for Establishment Clause challenges that the Court recently discarded as unprincipled and unworkable, *see Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022). And if adopted here, petitioner's test would blur, rather than clarify, the distinction between public officials' personal conduct and their official conduct.

Such confusion is untenable in a world where the pervasive (yet somehow still growing) dominance of social-media platforms obscures the lines between public and private in a way that was unimaginable only a few years ago. In that environment, lower federal courts and public officeholders need an administrable test. *Contra* Petitioner's Br. 12 (arguing that the doctrine must develop through "case-specific context[s]"). Without one, the state-action doctrine could swallow the First Amendment freedoms it was designed (in part) to secure.

But the effects of adopting petitioner's proposed state-action test would be more than just practical. They would infect—and muddle—any analysis of petitioner's First Amendment claim. The companion case, in which the court of appeals applied something akin to petitioner's preferred test, exemplifies this danger. In that case, after concluding that the public officials engaged in state action when they blocked consitutents from commenting on their personal social-media pages, the court of appeals analyzed the Free Speech Clause claim using this Court's forum-analysis precedents. *Garnier*, 41 F.4th at 1177-83. Yet those precedents are aimed at assessing the constitutionality of restrictions on public access to *government-owned* property.

As this Court is well aware, there is a pending dispute about the extent to which a State can even *regulate* social-media platforms like Facebook and Twitter, which are privately controlled but which offer services analogous to those provided by traditional common carriers. *NetChoice, LLC v. Paxton*, No. 22-555 (U.S. pet. filed Dec. 15, 2022); *Moody v. NetChoice, LLC*, No. 22-277 (U.S. pet. filed Aug. 11, 2022). Indeed, the private plaintiff in those cases has deliberately sought to insert its theories into this litigation. *See generally* NetChoice Br. That is not appropriate because, as NetChoice admits, its theory is not part of the "narrow question that these two coordinate cases each present." *Id.* at 3. But, whatever the outcome of that litigation, no one maintains that the State owns or controls the platforms in the way it does a public park or a state capitol building, making forum analysis a poor framework for considering the constitutionality of respondent's actions. *Cf. Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672-73 (1998) (warning that "[h]aving first arisen in the context of

streets and parks, the public forum doctrine should not be extended in a mechanical way to [a] very different context").

Likewise, to the extent "blocking" a speaker from commenting on a Facebook account has been argued to be itself a form of expressive conduct, *e.g.*, NetChoice Br. 8, a conclusion that respondent both acted as the State and violated the First Amendment rests uneasily alongside this Court's government-speech precedents. After all, if respondent is speaking as the government, the First Amendment's forum-based restrictions do not apply to him. At the very least, if petitioner is right that public officials' actions on their personal social-media accounts constitute government action, then the lower courts will have to figure out how that conclusion interacts with the rules regarding government speech. The necessity of addressing these thorny First Amendment questions reinforces the Sixth Circuit's decision not to adopt petitioner's "I know it when I see it" approach to identfying state action in the digital sphere.

ARGUMENT

I. A Public Official's Operation of a Personal Social-Media Webpage Does Not Constitute State Action Without Some State-Conferred Authority.

Although this case and its companion present a novel question about how the First Amendment's Free Speech Clause restricts public officials' use of social-media websites, their resolution turns on application of longstanding principles establishing that to have state action, it is insufficient to merely have a state actor. "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom," but that citizen remains a human being with his or her own

rights protected by (among other things) the First Amendment. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). As a result, the state-action doctrine requires that the *conduct* resulting in the alleged deprivation of a federal right be "fairly attributable" to the State, including that it be undertaken pursuant to a source of state authority. *Lugar*, 457 U.S. at 937.

As the appointed City Manager of Port Huron, Michigan, respondent is a state actor. That is undisputed. It is also insufficient under this Court's case law. Because petitioner's proposed analysis does not adequately consider whether respondent acted pursuant to state authority, it is irreconcilable with this Court's unchallenged precedent and should be rejected.

A. The state-action doctrine serves to preserve the individual liberty not only of private citizens but also of those who serve them in state government.

For decades, the Court has recognized that the state-action doctrine reflects "a fundamental fact of our political order," *id.*: "that 'most rights secured by the Constitution are protected only against infringement by governments.'" *Id.* at 936 (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978)). The First Amendment's Free Speech Clause is no exception; it forbids "*governmental* abridgment of speech" but not "*private* abridgment of speech." *Halleck*, 139 S. Ct. at 1928.

This "fundamental fact," *Lugar*, 457 U.S. at 937, requires courts to distinguish governmental conduct from individual conduct, which is why this Court developed the state-action doctrine. *Halleck*, 139 S. Ct. at 1928. That doctrine also helps courts identify claims that are cognizable under 42 U.S.C. § 1983, which provides a federal cause of action for plaintiffs alleging the violation of

a federal right, privilege, or immunity by any person acting "under color of any statute, ordinance, regulation, custom, or usage[] of any State." As this Court has put it, "if a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, that conduct [is] also action under color of state law and will support a suit under § 1983." *West v. Atkins*, 487 U.S. 42, 49 (1988) (quotation marks omitted).

But as the Sixth Circuit noted, the doctrine also serves an additional purpose: it recognizes that "public officials aren't just public officials—they're individual citizens, too." Pet.App.5a. This recognition has at least two components. *First*, because public officials have independent agency and may not act under (or even comply with) the directions of the State, this Court has long held that "acts of officers in the ambit of their personal pursuits" that do not involve a "misuse of power possessed by state law" are not attributable to the State. *Screws v. United States*, 325 U.S. 91, 109, 111 (1945) (quotation marks omitted). *Second*, public officials also have civil rights—including "First Amendment rights"—that "may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency," *Branti v. Finkel*, 445 U.S. 507, 517-18 (1980); *see also Elrod v. Burns*, 427 U.S. 347, 367 (1976) (plurality opinion), but that do not disappear entirely just because the individual has entered into the service of the public, *see Hous. Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1260-61 (2022).

"Careful adherence to the 'state action' requirement" thus serves two vital functions in our constitutional order: it "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar*, 457 U.S. at 936. It likewise "avoids imposing on

the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Id.* As a result, "[e]xpanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise." *Halleck*, 139 S. Ct. at 1934. But "[b]y enforcing th[e] constitutional boundary between the governmental and the private, the state-action doctrine protects a robust sphere of individual liberty." *Id.* at 1928.

B. State action is present only where a public official's conduct is undertaken pursuant to a source of state authority.

To preserve this balance, the essence of the state-action doctrine has always been that "the conduct allegedly causing the deprivation of a federal right" must "be fairly attributable to the State." *Lugar*, 457 U.S. at 937. This Court has articulated a "two-part approach to this question of 'fair attribution.'" *Id.* The first part is that "the party charged with the deprivation [of a federal right] must be a person who may fairly be said to be a state actor." *Id.* But perhaps more fundamentally, the second part requires that "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the [S]tate or by a person for whom the State is responsible." *Id.* (listing this requirement first). This Court has "repeated[ly] insiste[d] that state action requires *both*" prongs to be met. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999).

1. Many of the Court's key state-action cases have focused on whether "a private entity can qualify as a state actor." *Halleck*, 139 S. Ct. at 1928. That prong of the two-prong test is not disputed here: because respondent is the City Manager of Port Huron, Michigan,

Pet.App.2a, he "may fairly be said to be a state actor" for purposes of the state-action requirement and section 1983. *Lugar*, 457 U.S. at 937; *see Sullivan*, 526 U.S. at 51 ("All agree that the *public officials* responsible for administering the workers' compensation system . . . are state actors"). Indeed, "it is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment. The actions of local government are the actions of the State." *Avery v. Midland County*, 390 U.S. 474, 480 (1968) (footnote omitted).

Nevertheless, understanding these cases is vital to discerning where petitioner's proposed test goes astray. *See infra* Part II.A. In each of the cases addressing this prong of the state-action test, "a private party ha[d] taken the decisive step that caused the harm to the plaintiff, and the question [wa]s whether the State was sufficiently involved to treat that decisive conduct as state action." *NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988). The Court has emphasized that this can happen in only "a few limited circumstances," including: (1) when the government clothes a private entity with the authority to "perform[] a traditional, exclusive public function," *Halleck*, 139 S. Ct. at 1928; (2) when the government imposes a duty or otherwise "compels the private entity to take a particular action"; (3) "when the government acts jointly with the private entity," *id.*; (4) where a private entity acts alone, but it is so closely tied to the State that the private entity's act is effectively "that of the State itself," *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176 (1972)); and (5) when the private actor "is 'entwined with governmental policies,' or when government is 'entwined in [its] management or control,'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296

(2001) (quoting *Evans v. Newton*, 382 U.S. 296, 299, 301 (1966)).

But this Court has never suggested, as petitioner does here (at 12-13), that this element of the state-action test could be satisfied if a private actor merely took some action that might "invoke the pretense of governmental authority" through the "appearance and function" of his actions. This case affords the Court the opportunity to hold that similar principles govern when the question is whether a public official's actions in his *personal* capacity may be attributed to the State.

2. To distinguish the official acts of a public official from her personal acts for purposes of the state-action doctrine, this Court created the other half of the state-action test: whether "the deprivation [of a federal right] [is] caused by the exercise of some right or privilege created by the State." *Lugar*, 457 U.S. at 937. In doing so, the Court recognized that "state employment is generally sufficient to render the defendant a state *actor*," *id.* at 935 n.18 (emphasis added), but that alone is "insufficient to establish that a public [official] acts under color of state law," *Polk County v. Dodson*, 454 U.S. 312, 321 (1981).

To avoid making state *action* a question about an individual's *status* as a public official, the Court has always looked to whether a challenged act reflects the exercise of state authority or the performance of a state duty. For example, this Court has found state action in circumstances where the defendant has enforced a "state statute," *Sullivan*, 526 U.S. at 50, or a "procedural scheme created by [a] statute," *Lugar*, 457 U.S. at 941. And the Court has indicated that state action may be present when an individual enforces "regulations" or even "rule[s] of conduct imposed by the State," *Blum v.*

Yaretsky, 457 U.S. 991, 1004, 1009 (1982). Likewise, in the context of section 1983, the Court has explained that the "[t]he traditional definition of acting under color of state law requires that the defendant in a § 1983 action *have exercised power 'possessed by virtue of state law* and made possible only because the wrongdoer is clothed with the authority of state law.'" *West*, 487 U.S. at 49 (emphasis added) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

Stated differently, "generally, a public employee acts under color of state law while acting in his official capacity or *while exercising his responsibilities pursuant to state law*." *Id.* at 50 (emphasis added). Ultimately, the overriding inquiry is whether the defendant's conduct "entail[s] functions and obligations" that are "dependent on state authority." *Dodson*, 454 U.S. at 318.

3. A straightforward application of these principles resolves this case in respondent's favor. Petitioner has alleged that his right to freedom of expression was violated when respondent blocked him from posting comments on respondent's Facebook page. Pet.App.3a. Because respondent's actions in blocking petitioner from commenting further on his Facebook page were not "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state," *Lugar*, 457 U.S. at 937, petitioner cannot meet this essential element of the state-action test, as the Sixth Circuit correctly recognized. *See* Pet.App.8a (holding that respondent's Facebook "page neither derives from the duties of his office nor depends upon his state authority").

Far from exercising a "right or privilege created by the State"—whether by state statute, regulation, or rule of conduct—respondent's actions are no different than

those that can be taken by millions of other citizens. As Judge Oldham recognized in *NetChoice*, Facebook and Twitter have turned themselves into modern-day common carriers because they are "communications firms[] [that] hold themselves out to serve the public without individualized bargaining[] and are affected with a public interest." *NetChoice, LLC v. Paxton*, 49 F.4th 439, 473 (5th Cir. 2022) (Oldham, J.), *petition for cert. filed* (U.S. Dec. 15, 2022) (No. 22-555). *Contra* NetChoice Br. 6 (asserting that large internet platforms have the same rights as "*any* private entity" to refuse undifferentiated service to customers). It is no more surprising that public officials utilize communication services through Facebook or Twitter than that they use cell-phone services provided by Verizon or AT&T. And a public official's refusal to accept incoming communications on a personal Facebook page is no more state action than declining to take a phone call on a personal cell phone would be—even if that official occasionally uses the same phone to place work-related calls.

The facts of this case support that common-sense conclusion. Respondent's Facebook page was created "years before [he] t[ook] office." Pet.App.9a. The City of Port Huron exercises no control over, or access to, respondent's Facebook page. *Id.* And he may continue to maintain ownership over this page after he leaves public office. *Id.* Thus, the "right or privilege" for respondent to create this social-media page and block certain users was "created" by Facebook—not the State. *See Knight*, 953 F.3d at 227 (Park., J., dissenting from denial of rehearing en banc). And "[b]ecause [Facebook] is privately owned and controlled, a public official's use of its features involves no exercise of state authority." *Id.*

As a result, when respondent blocked petitioner from commenting on his Facebook page, he was neither "exercis[ing] power 'possessed by virtue of state law'" nor "exercising his responsibilities pursuant to state law." *West*, 487 U.S. at 49-50. Rather, he was acting "in the ambit of his personal pursuits." *Screws*, 325 U.S. at 111. There was thus no state action, foreclosing a claim under section 1983.

II. Petitioner's Appearance-and-Function Test Should Be Rejected As Legally And Practically Unworkable.

Petitioner offers a different reading of this Court's case law. On his telling, rather than reflecting an administrable two-part test, its state-action jurisprudence depends upon deployment of a "flexible approach" that looks to "several pertinent factors" that may vary based on the "context-specific and fact-dependent nature" of a given case. Petitioner's Br. 17-19. Here, petitioner argues (at 31) that, in the context of social-media usage, "*[a]ppearance* speaks to whether the public official 'purports' to speak through the account on the government's behalf." *Id.* at 31 (quoting *Griffin v. Maryland*, 378 U.S. 130, 135 (1964)). And "*[f]unction* speaks to whether the public official is using the ostensibly private account as a 'substitut[e] for' an official account." *Id.* at 32 (quoting *Lloyd Corp. v. Tanner*, 407 U.S. 551, 562 (1972)).

But petitioner's approach cannot be squared with this Court's longstanding precedent—which, as already noted, creates a single two-part test, not an indeterminate multi-factor test whose form varies from case to case. It is also unworkable in practice, would dramatically expand the scope of the state-action doctrine, and is in considerable legal tension with other significant strands of this Court's First Amendment case law.

A. Petitioner's approach misapplies this Court's precedent.

1. Petitioner's approach to the question of state action is flawed from its inception. It ignores, or possibly misunderstands, the two-part framework that has been a central component of this Court's state-action jurisprudence for at least four decades. *See Lugar*, 457 U.S. at 937. In doing so, petitioner conflates the test for determining whether the *defendant* is a state actor with the standard for whether the challenged *action* was taken in the defendant's official or personal capacity. *See* Pet.App.19a-20a; *see also Lugar*, 457 U.S. at 939 (citing *Jackson*, 419 U.S. 345). As noted above (at 6, 8-9), the former is not in dispute in this case. Respondent is a state actor. This case turns on the latter question: whether respondent's *actions* were taken in his official or personal capacity. But each of the three cases on which petitioner focuses addresses whether a particular defendant was a *state actor*—not, as here, whether a state actor's conduct was taken in his official or personal capacity.

First, consider *Griffin v. Maryland*, the case upon which petitioner stakes (at 14, 16, 25-27, 31, 34, 35, 40) the lion's share of his argument. *Griffin* concerned the question whether a private security guard was a state actor—not whether that security guard's actions ("arresting and instituting prosecutions against" civil-rights protesters) were taken in his personal or official capacity. *Griffin*, 378 U.S. at 135. In *Griffin*, "the State contended that the deputy sheriff in question had acted only as a private security employee." *Flagg Bros.*, 436 U.S. at 163 n.14. But this Court "specifically found that he 'purported to exercise the authority of a deputy sheriff,'" *id.* (quoting *Griffin*, 378 U.S. at 135), by "[wearing] a sheriff's badge and consistently identify[ing] himself as a

deputy sheriff rather than as an employee of the park," *Griffin*, 378 U.S. at 135.

The Court's conclusion that the security guard was a state actor, not merely a "private security employee," *Flagg Bros.*, 436 U.S. at 163 n.14, reflects an early instance of this Court's attempt to distinguish "private entit[ies]" from "state actor[s]." *Halleck*, 139 S. Ct. at 1928. That would later become one half of the state-action test, *see Lugar*, 457 U.S. at 936; *see supra* at 9-10. But there was no serious dispute in *Griffin* about whether what would become the second half of the test was satisfied: "at the request of the park," the security guard "had been deputized as a sheriff of Montgomery County" pursuant to state law and thus "ha[d] the same power and authority as deputy sheriffs possess." *Griffin*, 378 U.S. at 132 & n.1. Making arrests and instituting prosecutions are prototypical official-capacity actions taken pursuant to a source of state law.

Petitioner ignores this distinction and divines a state-action test focused on the defendant's outward "appearance" primarily by fixating (at 26) on a single word: "purported," used three times in *Griffin.* But that word cannot bear the weight petitioner would place on it. *Griffin* did not turn solely on whether the defendant "purported" to act as a state official; the Court stated that "[i]f an individual is possessed of state authority *and* purports to act under that authority, his action is state action." *Griffin*, 378 U.S. at 135 (emphasis added). Whether or not respondent was "possessed of state authority" to block petitioner from commenting on his Facebook page is the key issue in this case. But because that issue was not disputed in *Griffin*, the case provides no framework for addressing that central question, let

alone a basis for discarding this Court's longstanding two-part state-action test.

Nor did *Griffin* establish a rule "that state action may be present even where the challenged conduct would have been possible in the absence of state authority." *Contra* Petitioner's Br. 33-34. Petitioner points (at 34) to the statement in *Griffin* that "[i]t is irrelevant that [the defendant] might have taken the same action had he acted in a purely private capacity." *Griffin*, 378 U.S. at 135. But the Court was just explaining that *because* the security guard was *both* "possessed of state authority *and* purport[ed] to act under that authority," it mattered not that, in a counter-factual scenario, he could have "taken the same action had he acted in a purely private capacity." *Id.* As discussed above, the Court had no occasion to explore how the analysis would have been different had the security guard *not* been "possessed of state authority" to effectuate arrests and initiate prosecutions.

Petitioner's proposed interpretation of *Griffin*, moreover, would be difficult to square with *West*, as he tacitly concedes (at 34-35). *West* explained that section 1983's "under color of state law" requirement—which is coextensive with the state-action test—is satisfied when the defendant has "exercised power '*possessed by virtue of state law* and made possible only because the wrongdoer is clothed with the authority of state law.'" 487 U.S. at 49 (emphasis added). Petitioner suggests (at 35) that this Court did not really mean what it said in *West* because that would be inconsistent with petitioner's proposed reading of *Griffin* and because *West* did not involve a situation where "a public official had blurred the line between his or her professional and personal conduct." But for decades, this Court's state-action precedent has—consistent with *West* and contrary to petitioner's reading

of *Griffin*—required a plaintiff to show that "the deprivation [of a federal right] [is] caused by the exercise of some right or privilege created by the State." *Lugar*, 457 U.S. at 937.

Second, the same flaws are evident in petitioner's invocation (at 35) of *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), for the proposition that "even entities that are *created by* the government—and hence, by definition, exercise powers possessed only by virtue of law—are not always state actors." Petitioner again overlooks that, there, the Court considered one half of the state-action test: whether or not the U.S. Olympic Committee, a private corporation established under federal law, should be considered a state actor. 483 U.S. at 543-45. The Court did *not* address whether the U.S. Olympic Committee's initiation of a trademark-infringement lawsuit (which allegedly deprived the plaintiff of a federal right) constituted the exercise of some right or privilege created by the government. Indeed, after concluding that the U.S. Olympic Committee was *not* a state actor, the Court would have had no need to opine on that distinct portion of the state-action test. After all, this Court has "repeated[ly] insiste[d] that state action requires *both*" prongs to be met before state action will be found. *Sullivan*, 526 U.S. at 50. *United States Olympic Committee*, therefore, supplies no ground for dispensing with this Court's traditional two-part state-action test either.

Third, *Marsh v. Alabama*, 326 U.S. 501 (1946), did not involve any state-action question at all. Instead, it addressed whether, consistent with the First Amendment, a State could criminally prosecute a Jehovah's Witness for "distribut[ing] religious literature on the premises of a company-owned town contrary to the wishes of the

town's management." *Id.* at 502. Likely because a prosecutor attempting to enforce a criminal trespassing statute is facially state action, *see id.* at 503-04, the disputed point turned on whether the town's status as a privately owned company town made any constitutional difference on *the merits of the First Amendment claim. See id.* at 504-08. *Marsh*, therefore, is of limited relevance in assessing the state-action question presented here.

Petitioner nevertheless cites *Marsh* (at 37) to counter the Sixth Circuit's reliance on the facts that respondent's social-media "page did not belong to the office of [the] city manager," was created "years before taking office, and there's no indication his successor would take it over." Pet.App.9a. Specifically, petitioner reasons (at 37) that "it does not follow that a public official's reliance on *private* resources *negates* the possibility of state action." But the Sixth Circuit created no such categorical rule. It merely noted that, under this Court's precedent, state action might arise in three circumstances: (1) when the "text of state law" requires the conduct at issue; (2) "use of state resources"; or (3) "use of state authority." Pet.App.6a-7a. As to the third category, the court explained, using a "social-media account belong[ing] to an office, rather than to an individual officeholder," constitutes the use of state authority. Pet.App.7a. But nowhere did the Sixth Circuit limit the state-action inquiry to that third category. The Sixth Circuit never considered—and certainly never held—that a town which "temporarily relocate[d] its public meetings" to the home of a councilmember would be "exempt from constitutional scrutiny." *Contra* Petitioner's Br. 37. In such a circumstance state action would likely still be present, not because of the locus of the meeting, but because it is "an actual . . . duty of" the city council, as indicated by "the text of

[municipal] law," to hold *public* meetings. Pet.App.5a-6a; *see* Port Huron, Mich., Mun. Code §§ 2-31, 2-32.

2. Likely due to his misconception of the proper analytical framework, petitioner gives short shrift to the key question: whether respondent's conduct in blocking petitioner from commenting on his Facebook page was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the [S]tate." *Lugar*, 457 U.S. at 937. To the extent petitioner addresses this question at all, he does so obliquely, by arguing (at 12-13) that respondent "invoke[d] the pretense of governmental authority" through the "appearance and function" of his actions. Those actions include: (1) "identify[ing] himself on the [Facebook] page as a public figure;" (2) "mak[ing] his profile generally accessible," including "turn[ing] off private messages"; (3) "shar[ing] press releases and other information about City business," including announcing new initiatives; and (4) communicating with constituents. Petitioner's Br. 40-42.

But respondent's use of a private Facebook account cannot be linked to a "right or privilege created by the State" just because his social-media page identified respondent's governmental role, discussed official business, and engaged with some members of the public. To start, this Court has squarely held that "[t]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech." *Lane v. Franks*, 573 U.S. 228, 240 (2014). Moreover, this Court's state-action test does not turn on hypothesizing about what a member of the public might subjectively surmise from reviewing a particular webpage, but rather on an objective inquiry into whether the defendant

inflicted the alleged deprivation of a federal right while exercising "a right or privilege created by the State or by a rule of conduct imposed by the [S]tate." *Lugar*, 457 U.S. at 937.

To change course now would be to put the state-action requirement in considerable tension with this Court's recent First Amendment precedent, which rejects a freewheeling First Amendment test designed to approximate the views of a hypothetical "reasonable observer." *Kennedy*, 142 S. Ct. at 2427. Although the state-action doctrine and the merits of the First Amendment inquiry are legally separate inquiries, they should not be entirely divorced from one another. Because, as the Sixth Circuit aptly observed, public officials are "individual citizens, too," Pet.App.5a, it makes little sense to hold the State responsible for an action that the individual performing the act is legally privileged to perform. *Cf., e.g.*, *West*, 487 U.S. at 49 (discussing the role of the state-action doctrine in determining liability for private acts).

B. Petitioner's appearance-and-function test is practically unworkable in the increasingly digital world.

Apart from being irreconcilable with this Court's precedent, petitioner's focus on the appearance and function of social-media pages is unworkable in practice and, if adopted, would usher in a dramatic expansion of the state-action doctrine and a concomitant contraction of public officials' engagement with constituents. Petitioner's test is striking in its subjectivity. He acknowledges (at 31) that "public officials may maintain private accounts in order to stay connected with their family and friends" and even use those accounts to "debate religion and politics with their friends and neighbors and share vacation photos" as well as to "engage with the public."

But if that official "blurs the line between official and private social media use" by using that account "to engage with the public in a manner that mimics an official account," petitioner cautions (at 31-32), that public official may be deemed to have engaged in state action and will be subject to suit under section 1983.

Petitioner suggests (at 31) that courts and public officials can distinguish between these two potential usages by focusing on the social-media account's "presentation—not just the content of posts to the account, but also the identifying information (*e.g.*, name, profile picture, contact information) and whether . . . the account is available for input from others (and if so, from whom)." Likewise, he suggests (at 32) "consideration of an account's "function" and whether the account is being used "as a 'substitut[e] for' an official account."

Yet beyond these generalized assertions, petitioner offers no concrete guidance for how the tens—if not hundreds—of thousands of public officials who use social media to communicate are to tell when they have "blurred the line" to such a degree that their private social-media pages "mimic[] . . . official account[s]." For example, if an individual has one Facebook account on which she posts about *both* her children's soccer games and her duties as a city official, is the signaling factor to the public judged by the entire feed or just those posted comments relating to her official status? Is whether the "presentation" of the account judged by the perspective of a suburban soccer mom or a seasoned campaigner? Does the test account for the role of user preferences in the algorithms of what posts by public officials their constituents see? Petitioner does not say. Nor does he opine on what portion of the public would have to think the page "invoke[s]

the pretense of governmental authority" for section 1983 liability to attach.

By adopting a test that is inherently fact-bound and incapable of principled application, petitioner champions an approach that would "'invite[] chaos' in lower courts, le[a]d to 'differing results' in materially identical cases, and create[] a 'minefield' for legislators." *Kennedy*, 142 S. Ct. at 2427 (quoting *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 768-69 & n.3 (1995)).

Due to the indeterminacy of petitioner's test, public officials have no way of knowing what type of activity on social-media pages would lead to their personal pages being deemed official accounts. That puts them to a Hobson's choice: be among the few social-media users *never* to discuss any work-related matters on their social-media pages or let those pages be overrun with harassment, profanity, and irrelevant or extraneous content. Those concerns are not hypothetical, as evidenced by the facts of the companion case, in which the Ninth Circuit adopted a subjective test similar to what petitioner proposes. *See Garnier*, 41 F.4th at 1171-73. There, "[o]n one occasion, within approximately ten minutes," one respondent "posted 226 identical replies" to one [petitioners'] Twitter page, "one to each Tweet [she] had ever written on her public account," and "nearly identical comments on 42 separate posts [petitioner] made to her Facebook page." *Id.* at 1166.

Faced with such a choice, many public officials may opt to close down their accounts completely, as one of the petitioners in that case did. *See* Petitioners' Br. 7 n.4, 13, *O'Connor-Ratcliff v. Garnier*, No. 22-324 (U.S. June 23, 2023). The net result of this dramatic expansion of the state-action doctrine would be to *discourage* public officials from engaging in speech with their constituents.

Apart from the public officials themselves, local governments may also find themselves in an impossible situation. Because public officials and employees have First Amendment rights, it is far from clear that local governments can forbid their employees to discuss work on their social-media accounts. *Cf. Kennedy*, 142 S. Ct. at 2423-32; *Lane*, 573 U.S. at 235-42. If they do not, however, local governments will be on the financial hook for actions that public officials take on their personal social-media pages—now deemed to be "state action"—if that activity can be characterized as "invok[ing] the pretense of governmental authority" through the "appearance and function" of their actions. Petitioner's Br. 12-13; *see generally Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 689-90 & n.53 (1978). State officials may similarly find themselves on the receiving end of federal-court injunctions policing how they can and cannot utilize their personal social-media accounts. *See, e.g.*, *Campbell v. Reisch*, No. 2:18-cv-4129, 2019 WL 3856591, at *5 (W.D. Mo. Aug. 16, 2019), *rev'd*, 986 F.3d 822 (8th Cir. 2021).

Taken together, the upshot of adopting petitioner's unprincipled approach to questions of state action, would be just what this Court cautioned against a few Terms ago: "expand[ing] governmental control while restricting individual liberty and private enterprise." *Halleck*, 139 S. Ct. at 1934. The Court should not allow for that.

C. Treating public officials' actions on a personal social-media account as state action is legally unworkable in the light of other First Amendment precedent.

Petitioner's proposed state-action analysis is not faulty just on its own terms. By greatly expanding the state-action doctrine—and therefore the scope of

potential First Amendment liability—it also runs headlong into numerous areas of this Court's existing First Amendment case law. This is not merely hypothetical or "conflat[ing] the state-action question with the merits of the constitutional dispute," as petitioner suggests (at 36). Again, it is exemplified by the Ninth Circuit's decision in the companion case, which suggested that officials could have avoided the state-action problem at issue by appending a "disclaimer" to their social-media pages specifying that the page was operated in those officials' personal capacities. *Garnier*, 41 F.4th at 1172. Or, it opined, they could have avoided the First Amendment problem the court later found by promulgating "clear rules of etiquette for public comments on their pages." *Id.* at 1182. Perhaps these policy prescriptions are good practice. But can they be imposed on public officials as a matter of law consistent with the First Amendment? The Ninth Circuit appears to have given no thought to such knotty questions, which are bound to proliferate should the Ninth Circuit—and petitioner's—free-form state-action analysis become law.

Indeed, one does not even need to look at hypotheticals to see the problems that petitioner's expansive interpretation of "state action" will cause. The Ninth Circuit's merits analysis in the companion case shows what a hopeless muddle it causes to treat respondent as engaged in state action when he blocked petitioner from commenting on his Facebook page. Specifically, after the Ninth Circuit concluded that officials there acted as the State when they blocked constituents from posting on their personal social-media pages, the court proceeded to analyze the plaintiffs' free-speech claims under this Court's "forum analysis" precedents. *See Garnier*, 41 F.4th at 1177-79. But it is far from clear that those

precedents, which aid in the assessment of restrictions on access to *government-controlled property*, apply in the context of assessing restrictions on access to *privately controlled* social-media platforms like Facebook.

To the contrary, the social-media platforms have argued both here, NetChoice Br. 5-8, and in other cases before this Court that speech by their users is actually in some respect the speech or expressive conduct of the *platforms* themselves, *e.g.*, Petition for Writ of Certiorari at 12-20, *NetChoice v. Paxton*, No. 22-555 (U.S. Dec. 15, 2022) ("Cert. Petition"). That raises questions about how to determine *whose* expression is really at issue. In this case, the expression at issue would seem to be respondent's, not Facebook's. But if respondent was acting as a state actor at the time, then "blocking" petitioner may have been the speech of Port Huron, Michigan, and not subject to forum analysis at all.

Although the Free Speech Clause issue is not presented by—and should not be resolved in—this case, the Court should nevertheless reject petitioner's proposed appearance-and-function test for identifying state action in order to prevent his erroneous approach to state-action analysis from infecting other areas of law.

1. This Court's forum-analysis framework is a poor fit for assessing public officials' use of social media.

a. Once a court determines that government officials engage in state action when they block individuals from commenting on their personal social-media pages, it will be immediately presented with the question of how to analyze any underlying First Amendment claim. The Ninth Circuit in the companion case looked to this Court's forum-analysis precedents to assess the First Amendment claim, *Garnier*, 41 F.4th at 1177-79, but it was wrong to

reflexively apply them just because it concluded that state action was in play. Those precedents derive from the recognition that "[e]ven protected speech is not equally permissible in all places and at all times" and that "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985). As a result, this Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of *its property* to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Id.* at 800 (emphasis added).

Even assuming these precedents apply, "the extent to which the Government can control access depends upon the nature of the relevant forum." *Id.* at 799. And this Court has identified "three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Id.* at 802. "Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id.* at 800. Likewise, "when the Government has intentionally designated a place or means of communication as a public forum[,] speakers cannot be excluded without a compelling governmental interest." *Id.* But nonpublic fora stand on different footing: access "can be restricted as long as the restrictions are reasonable and [are] not an effort to

suppress expression merely because public officials oppose the speaker's view." *Id.* (quotation marks omitted).

Sifting through these three options, the Ninth Circuit—relying on factors strikingly similar to those that petitioner deployed to assess the state-action question in this case—concluded that the public officials' Facebook and Twitter pages fit most comfortably within the second category and therefore constituted a "designated public forum." *Compare Garnier*, 41 F.4th at 1177-79, *with* Petitioner's Br. 40-42. The court of appeals reasoned that the officials' "social media pages were open and available to the public without any restriction on the form or content of comments." *Garnier*, 41 F.4th at 1178. It noted that the officials even sometimes "solicited feedback from constituents through their posts and responded to individuals who left comments." *Id.* From there, the court determined that the officials' blocking of respondents from commenting on their Facebook and Twitter pages neither served a significant governmental interest nor was narrowly tailored. *Id.* at 1179-83.

b. The Ninth Circuit's conclusion ignored this Court's warning that "[h]aving first arisen in the context of streets and parks, the public forum doctrine should not be extended in a mechanical way to . . . very different context[s]." *Forbes*, 523 U.S. at 672-73. Forum analysis cannot be easily analogized to government officials' actions on their private Facebook pages for the same reason that respondent's conduct here was not state action: the State neither authorized nor controlled the activity.

Put another way, this Court has adopted forum analysis for a particular purpose: "assessing restrictions that the government seeks to place on the use of *its property*." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (emphasis added) (quoting *Int'l Soc'y for Krishna*

Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992)). The central focus is discerning the degree of a plaintiff's "right of access to *public property*," if any. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 44 (1983). Thus, it is "government-controlled spaces" that are the object of the analysis. *Mansky*, 138 S. Ct. at 1885.

But social-media websites like Facebook are not "government-controlled spaces" akin to parks and sidewalks. *See Knight*, 953 F.3d at 227 (Park, J., dissenting from denial of rehearing en banc). "Because [Facebook] is privately owned and controlled, a public official's use of its features involves no exercise of state authority." *Id.* Facebook—not respondent—"controls the platform and regulates its use for everyone," *id.*, subject to state or federal regulations like those at issue in the *NetChoice* litigation. *See generally NetChoice*, 49 F.4th at 439; *see also Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring) (indicating that social-media platforms may be regulated by States as common carriers). Respondent has no ability to ensure—and thus should have no liability for not providing—access to Facebook. True, users of those platforms may have some degree of control over the content that appears on their individual pages. But it is the platforms, not state or federal officials, that retain the ultimate "unrestricted authority to do away with" the forum entirely. *Biden*, 141 S. Ct. at 1221 (Thomas, J., concurring).

Because social-media pages are not "government-controlled spaces" but instead privately controlled ones, the platforms do not fit naturally within this Court's forum-analysis framework, which was designed to apply in cases involving restrictions on access to government property. The Sixth Circuit never had to grapple with

this analytical difficulty because it correctly concluded that the First Amendment was not implicated. The Ninth Circuit never tried to do so but instead uncritically extended the forum-analysis framework to non-government-controlled spaces. *Garnier*, 41 F.4th at 1177-79. That was error. *Cf. Forbes*, 523 U.S. at 672-73 (declining to extend forum-analysis precedents into "the very different context of public television broadcasting").

Such an error was, however, largely forced by the Ninth Circuit's conclusion that public officials engage in state action by "present[ing] and administer[ing] their social media pages as official organs for carrying out their . . . duties." *Garnier*, 41 F.4th at 1172. Petitioner advocates for a similar rule here, and if adopted it may lead to similar errors in the First Amendment analysis. But by properly looking to state authorization or control before determining whether the challenged action—here, blocking petitioner from posting on respondent's personal Facebook page—is state action will prevent any need to address whether a government official's use of a common carrier's service makes that common carrier subject to all of the traditional obligations of a public forum as a matter of constitutional law. *Cf. NetChoice*, 49 F.4th at 469-80 (explaining why such obligations may be imposed by statute).

2. Petitioner's approach to state action may create friction with this Court's government-speech precedents.

Any conclusion that government officials engage in state action and potentially violate the First Amendment when they block individuals from commenting on their social-media pages would also stand in considerable tension with this Court's precedents holding that the First Amendment does not restrict the government's

expressive activity—particularly if the petitioners in *NetChoice* are correct that "blocking" a user from access to a forum is a form of protected speech. *See* Cert. Petition, *supra* at 12-20; NetChoice Br. 8.

a. This Court has long held that "[w]hen the government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009).

"That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech." *Walker*, 576 U.S. at 207. Indeed, "[t]he Constitution ... relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks." *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1589 (2022). As a result, "government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas." *Walker*, 576 U.S. at 207. And "[t]he First Amendment's Free Speech Clause does not prevent the government from declining to express a view." *Shurtleff*, 142 S. Ct. at 1589. "That must be true for government to work," *id.*: "'[i]t is not easy to imagine how the government could function if it lacked th[e] freedom' to select the messages it wishes to convey." *Walker*, 576 U.S. at 208 (citing *Summum*, 555 U.S. at 468).

b. Holding that public officials engage in state action when they block users from commenting on their personal social-media pages and that such conduct also

violates the First Amendment (as petitioner advocates here and Ninth Circuit held in the companion case) would be difficult to reconcile with these government-speech precedents. After all, if government officials are engaged in *state action* when they use their personal social-media pages, then presumably any expressive activity in which they are engaged is government—not private—speech, which is not subject to the First Amendment's strictures. As a result, analyzing petitioner's First Amendment claim would seem necessary to determine whether "blocking" another user is a form of expression.

The Ninth Circuit tried to sidestep this problem by alluding to a distinction between the "interactive portions of" petitioners' social-media pages where users could leave comments or other responses and other portions of the pages where only the government officials can speak. *Garnier*, 41 F.4th at 1179. But such "disaggregation of [Facebook's] features [is] wholly artificial—[Facebook's] own rules make no such distinction between 'individual [posts]' and 'interactive spaces.'" *Knight*, 953 F.3d at 229 (Park, J., dissenting from denial of rehearing en banc). After all, public officials can comment on the interactive portions of their pages, too. And besides, speech also includes certain "conduct that is inherently expressive," *Rumsfeld v. Forum of Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 61, 66 (2006), which may include the right to exclude others from interfering with one's own message, *see Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

Put another way, petitioner "cannot have it both ways," *Knight*, 953 F.3d at 228 (Park, J., dissenting from denial of rehearing en banc): unless "blocking" a user is entirely conduct (which the platforms hotly dispute in

the *NetChoice* cases), either public officials' use of personal social-media pages constitutes state action and therefore implicates this Court's government-speech precedents, or else is it is not state action. Either way, the Sixth Circuit rightly dismissed petitioner's claim against respondent.

* * *

In sum, petitioner's approach to adjudicating questions of state action ultimately raises more questions than answers, and it complicates the analysis in related areas of law. Because the proper approach to questions of state action, *supra* at 10-11, would avoid entangling the lower courts in such nebulous inquiries, the Court should reject petitioner's proposed appearance-and-function test.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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