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 UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether and under what circumstances a city official engages in state action under the First and Fourteenth Amendments when the official blocks a member of the public from viewing or responding to posts on a social-media account.

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INTEREST OF THE UNITED STATES

This case and *O'Connor-Ratcliff* v. *Garnier*, cert. granted, No. 22-324 (Apr. 24, 2023), present the question whether and under what circumstances a local official's blocking of an individual from a social-media account constitutes state action under the First and Fourteenth Amendments. The United States has a substantial interest in the Court's resolution of that question. Federal government officials also use social-media accounts, and the same constitutional state-action analysis applicable to respondent would apply to federal government officials and employees. See, *e.g.*, *Biden* v. *Knight First Amendment Institute*, 141 S. Ct. 1220 (2021). In addition, the Court's resolution of this case would have implications for the closely related question whether respondent acted "under color of" state law

within the meaning of 42 U.S.C. 1983 when he blocked petitioner. See *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 935 n.18 (1982). The United States has authority to bring criminal prosecutions under 18 U.S.C. 242, which makes it a criminal offense to act willfully and "under color of any law" to deprive a person of rights protected by the Constitution or laws of the United States. The decision in this case could affect that authority because the Court has interpreted "under color of" law to have the same meaning under Section 242 as it does under Section 1983. See *Lugar*, 457 U.S. at 928 n.9. The United States has participated as amicus curiae in previous cases raising state-action and color-of-law questions. See, *e.g.*, *Brentwood Academy* v. *Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001); *Georgia* v. *McCollum*, 505 U.S. 42 (1992); *Polk County* v. *Dodson*, 454 U.S. 312 (1981).

STATEMENT

1. Respondent is the city manager of Port Huron, Michigan. Pet. App. 2a. Years before being appointed to that position, while still in college, respondent created a Facebook page. *Ibid.* Facebook is a social-media platform that enables accountholders to create online "posts" on which other users can comment. See *Twitter, Inc.* v. *Taamneh*, 598 U.S. 471, 480 (2023) (explaining that on Facebook and other social-media platforms, "users can upload messages, videos, and other types of content, which others on the platform can then view, respond to, and share"). Respondent initially limited the content to "friends"—individuals he accepted as followers. Pet. App. 2a. But sometime between 2010 and 2013, before he began working for Port Huron, respondent made his page publicly accessible to overcome the 5000-friend limit on private pages. *Ibid.*; see D. Ct. Doc.

23-2, at 7-8, 22 (Feb. 17, 2021). Respondent's page was titled with his name, "James Freed," and the account's username was "James.R.Freed1." Pet. App. 14a (citation omitted); J.A. 1.

After his appointment in 2014 as city manager of Port Huron, respondent updated his page to reflect his new position, such as by describing himself as "Daddy to [his daughter], Husband to [his wife] and City Manager" and by listing the city's website and general email address as the page's website and contact email. Pet. App. 2a (citation omitted); see J.A. 1. The page identified respondent as a "public figure," not as a "public official." See Pet. App. 14a; J.A. 287; D. Ct. Doc. 23-2, at 23-24. Respondent also began using his Facebook page to "share[] information about City programs, policies, and actions," Pet. App. 14a, including "some of the administrative directives he issued as city manager," *id.* at 3a. Those posts "amalgamated and shared information that originated from other sources," *id.* at 25a, such as by linking to, and sometimes offering brief commentary on, a news article or a city press release, see *id.* at 15a. For example, respondent shared "information regarding [the] installation of a new playground, reconstruction of a boat launch, and new basketball courts." *Id.* at 14a. Starting in March 2020, he also posted "about the COVID-19 pandemic and the City's response to it." *Ibid.* Although respondent posted about city affairs, the overall content of his posts "had a strong tendency toward [his] family life." *Id.* at 27a (internal quotation marks omitted). For example, respondent used his Facebook page to "post[] pictures of his family and their activities"; to "share[] updates on home-improvement projects, photos of outings with

friends, and scenic photos of downtown Port Huron"; and to "share[] Biblical verses." *Id.* at 14a.

Respondent operated the Facebook page himself—none of his staff had access to the page, and respondent "did not use any governmental employees, resources, or devices in maintaining his Facebook page." Pet. App. 24a; see *id.* at 10a, 15a, 26a; see also D. Ct. Doc. 23-2, at 15 ("I've never accessed this page on any city device or machine."). Only one of respondent's many posts was made during normal business hours, at 9:05 a.m., and respondent explained that he might have "come in later" that day. D. Ct. Doc. 23-2, at 19; see Pet. App. 26a. No law or practice made social-media activity part of respondent's official role. Pet. App. 9a; see *id.* at 8a. And no official account or website directed users to respondent's Facebook page. *Id.* at 11a.

Petitioner is a local resident who "didn't approve of how [respondent] was handling the pandemic." Pet. App. 3a. Petitioner "alleges that he commented on [respondent's] Facebook page between four and six times from three different profiles that he operated." *Id.* at 15a. For example, in response to a photo of respondent and the mayor picking up takeout from a local restaurant in the early days of the pandemic, petitioner "commented something to the effect of 'residents are suffering' and 'instead of city leaders being out talking to the community and being that face of the community in this,' they were at an expensive restaurant." *Id.* at 15a-16a (brackets and citation omitted). Petitioner also posted comments stating that the city's response to the pandemic "was 'abysmal' and that 'the City deserves better.'" *Id.* at 16a (brackets and citation omitted).

Petitioner alleges that respondent "deleted the comments and blocked" all three of petitioner's profiles

from the page. Pet. App. 15a. A Facebook user blocked from a public page can view posts on that page but cannot comment on or react to those posts. See *Garnier* v. *O'Connor-Ratcliff*, 41 F.4th 1158, 1164 (9th Cir. 2022) (describing the effects of blocking), cert. granted, No. 22-324 (Apr. 24, 2023). Petitioner filed suit under 42 U.S.C. 1983, alleging that the deletion of his comments and the blocking of his profiles violated his rights under the First Amendment, as incorporated against the States by the Fourteenth Amendment. Compl. ¶¶ 51-61; see Pet. App. 16a.

2. The district court granted summary judgment to respondent. Pet. App. 13a-29a.

As relevant here, the district court held that respondent did not engage in state action when he deleted petitioner's comments and blocked petitioner from his public Facebook page. Pet. App. 18a-29a. "[M]ost rights secured by the Constitution are protected only against infringement by governments." *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149, 156 (1978). That includes the rights secured by the First and Fourteenth Amendments. See *Manhattan Community Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1928 (2019). Accordingly, those constitutional guarantees "can be violated only by conduct that may be fairly characterized as 'state action.'" *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 924 (1982).

The district court observed that Section 1983's requirement that the defendant acted "under color of law" is, in this context, "the same as" the state-action requirement. Pet. App. 19a n.2. The court explained that both requirements are satisfied when the defendant "exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed

with the authority of state law." *Id.* at 19a (quoting *West* v. *Atkins*, 487 U.S. 42, 49 (1988)). In the specific context where a public official deletes comments on or blocks users from a social-media page, the court reasoned that many factors are relevant, such as "the use of government resources, including government employees, to maintain the page"; "whether creating the account is one of the public official's enumerated duties"; "whether the public official is identified on the page with the public position he or she holds"; "whether the public official solicits comments or invites constituents to have discussions on the page"; and "whether the account will become state property when the public official leaves office." *Id.* at 22a; see *id.* at 21a-22a. Applying those factors, the court concluded that respondent "administered his Facebook page in a private, not public, capacity" and thus "was not engaged in state action when he deleted [petitioner's] comments and blocked [petitioner] from the page." *Id.* at 29a; see *id.* at 22a-29a.

3. The court of appeals affirmed. Pet. App. 1a-12a.

The court of appeals explained that under its precedent, a public official engages in state action when he "is 'performing an actual or apparent duty of his office,' or if he could not have behaved as he did 'without the authority of his office.'" Pet. App. 5a (citation omitted). The court viewed that test as "track[ing] [this] Court's guidance" that "'[a] public employee acts under color of state law" either "'while acting in his official capacity or while exercising his responsibilities pursuant to state law.'" *Ibid.* (quoting *West*, 487 U.S. at 50). Applying those principles in the specific context of social media, the court stated that a public official engages in state action when he operates a social-media account "either

(1) pursuant to his actual or apparent duties or (2) using his state authority." *Id.* at 8a. "It's only then," the court explained, "that his social-media activity is 'fairly attributable' to the state." *Ibid.* (quoting *Lugar*, 457 U.S. at 937).

Applying that test, the court of appeals held that respondent's "Facebook activity was not state action." Pet. App. 8a; see *id.* at 8a-12a. The court observed that "no state law, ordinance, or regulation compelled [respondent] to operate his Facebook page," and it emphasized that operating the page "wasn't designated by law as one of the actual or apparent duties of [respondent's] office." *Id.* at 8a. The court rejected the argument that respondent engaged in state action by using his Facebook page for the "'essential' task of communicating with constituents," explaining that the "argument proves too much": "When [respondent] 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." *Id.* at 9a. The court also observed that respondent's Facebook page "did not belong to the office of city manager" and that respondent did not "rely on government employees to maintain" that page. *Id.* at 9a-10a.

The court of appeals rejected petitioner's contention that state action should be found because respondent "used the 'trappings of an official, state-run account' to give the impression that the page operated under the state's imprimatur." Pet. App. 11a (citation omitted). The court acknowledged that such trappings "resemble the factors [it] consider[s] in assessing when police officers are engaged in state action," such as "whether an officer is on duty, wears his uniform, displays his badge, identifies himself as an officer, or attempts to arrest an-

yone." *Ibid.* But the court found that resemblance "shallow" in this context, explaining that "[i]n police-officer cases, we look to officers' appearance because their *appearance* actually evokes state authority." *Ibid.* The court observed that the public is "taught" to obey police officers and that "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." *Id.* at 12a. In "those cases," the court explained, "appearance is relevant to the question whether an officer could have acted as he did without the 'authority of his office.'" *Ibid.* (citation omitted). The court found this case distinguishable because respondent "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." *Ibid.*

SUMMARY OF ARGUMENT

Like the operation of the social-media accounts at issue in *O'Connor-Ratcliff* v. *Garnier*, cert. granted, No. 22-324 (Apr. 24, 2023), respondent's operation of the Facebook account at issue here, which remained his private property, did not constitute state action.

A. State action subject to constitutional scrutiny generally requires the exercise of a right or privilege created by the government by someone who may fairly be described as a state actor. Being a public official is, however, neither necessary nor sufficient to engage in state action. A private entity might engage in state action when the government compels it to act; when it engages in joint action with the government; or when it carries out a traditional, exclusive public function. Conversely, because every public official is also a private

person, state action exists only when the official exercises power that he possesses by virtue of his position or because he is clothed with government authority. This Court has consistently refused to set forth a comprehensive test for state action and has instead articulated different factors or tests applicable in different contexts.

One frequently recurring context is when the challenged conduct involves a denial of access to or use of property (including intangible property), such as refusing to serve a customer or excluding someone from a forum. In that context, the existence of state action generally depends on whether the government itself owns or controls the property to which access has been denied. When *public* property is at issue, a denial of access by a public official generally will be state action; a denial by a private person may be state action depending on the degree of governmental involvement.

When *private* property—that is, property over which the government lacks ownership or control—is at issue, however, a denial of access will rarely be found to be state action. In the relatively rare circumstance of a denial of access to private property by a public official, courts should not find state action unless the official is invoking official powers or exercising a traditional and exclusive public function.

B. Here, the city indisputably lacks ownership or control over respondent's Facebook account; respondent created his Facebook page before taking office and will retain exclusive control over that account when he leaves. In operating his account, respondent did not exercise any power of his office. His power to block petitioner, for example, flowed from his control over the account features offered by Facebook to all users, irre-

spective of his status as city manager. Nor did respondent engage in a traditional, exclusive public function. Communicating with the public about matters of public concern is a traditional governmental function—but it is not *exclusive* to the government.

That some of the content of respondent's Facebook page reflected or derived from his governmental status is immaterial. The same could be said of any official's speech at a campaign rally, fundraising dinner, or church coffee hour, but that does not convert those quintessentially nongovernmental activities into state action.

C. Petitioner's contrary arguments are misplaced. Petitioner relies heavily on the history of Section 1983 to establish that state action extends to situations where an official acts under pretense of law. While actions by officers who overstep their official authority undoubtedly can constitute state action, it does not follow that respondent's conduct—operating a private social media account and blocking petitioner from that account—was state action. Respondent did not exercise, and so did not abuse, any power that was made possible because he was clothed with the authority of state law.

Petitioner's proposed test, which relies on the "appearance" and "purpose" of a particular social media profile, would make a public official's right to speak as a citizen turn on the content of the communication. The Court should decline to adopt a test that would transform communications in private spaces into official action—subject to constitutional constraints, on penalty of money damages—simply because those communications refer too heavily to an official's role or overlap too much with the interests the official seeks to further at work.

D. As this Court has recognized, an overly expansive state-action theory would be especially troublesome in the First Amendment context. Subjecting large amounts of the speech of government personnel to constitutional restrictions could both chill that speech and induce government employers to regulate the content of that speech more extensively. Those outcomes would undermine, not promote, First Amendment values.

At the same time, an expansive state-action theory would provide little benefit. Any speech found to be state action is arguably also government speech, to which constitutional speech constraints (including the ban on viewpoint discrimination) do not apply. And even if an official were found to have created a forum for debate, the official could permissibly impose reasonable content- and speaker-based restrictions in that forum, such as excluding anyone who made offensive comments. As a practical matter, therefore, the end result of much litigation would likely be the same as under a more constrained theory of state action.

ARGUMENT

The government's amicus brief in *O'Connor-Ratcliff* v. *Garnier*, No. 22-324 (June 30, 2023), explains that where the government neither owns nor controls personal social-media accounts operated by public officials, the operation of those accounts generally does not constitute state action. See U.S. Amicus Br. at 10-30, *O'Connor-Ratcliff*, *supra* (No. 22-324) (U.S. *O'Connor-Ratcliff* Br.). Under that analysis—which is equally applicable here—respondent's use of his personal Facebook page while he served as the Port Huron city manager was not state action.

A. Public Officials Who Deny Access To Private Property Engage In State Action Only If They Exercise Government Authority Or Perform A Traditional And Exclusive Public Function

1. The First Amendment's command "[t]hat 'Congress shall make no law abridging the freedom of speech, or of the press' is a restraint on government action, not that of private persons." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 114 (1973) (plurality opinion) (citation and ellipsis omitted); see *Manhattan Community Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1926 (2019) ("The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors."); *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 924 (1982) ("Because the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.'"). Similarly, 42 U.S.C. 1983 authorizes a cause of action to enforce constitutional guarantees only against persons who act "under color of" state law. Those limitations generally "converge" when, "as here, deprivations of rights under the Fourteenth Amendment are alleged." *American Manufacturers Mutual Insurance Co.* v. *Sullivan*, 526 U.S. 40, 50 n.8 (1999).

The distinction between state action and private conduct is vital to the correct application of the First Amendment, as incorporated against the States by the Fourteenth Amendment, and to the preservation of individual liberty. "[S]tate action requires *both* an alleged constitutional deprivation 'caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible,' *and* that 'the party

charged with the deprivation must be a person who may fairly be said to be a state actor.'" *American Manufacturers*, 526 U.S. at 50 (citation omitted). Although those "two principles are not the same," they are interrelated and generally "collapse into each other" when the defendant is a public official rather than a private party. *Lugar*, 457 U.S. at 937; see *id.* at 928 n.8 (noting lower court's recognition that when "the defendant is a public official * * * there is no distinction between state action and action under color of state law").

2. Under those principles, being a public official is neither necessary nor sufficient to engage in state action. See U.S. *O'Connor-Ratcliff* Br. at 11-14. It is not necessary because "a private entity can qualify as a state actor in a few limited circumstances," such as when the government compels it to act, the government acts jointly with the private entity, or the private entity "exercises a function 'traditionally exclusively reserved to the State.'" *Manhattan Community Access*, 139 S. Ct. at 1926, 1928 (citation omitted); see *id.* at 1929 n.1. For that reason, if a federal agency were to use someone's personal Facebook page (instead of a government website such as regulations.gov) to conduct notice-and-comment rulemaking, the accountholder's actions with respect to those posts and comments—including the blocking of a member of the public from viewing or commenting on the proposed regulation—would fairly be characterized as state action.

Conversely, because every public official is also a private citizen, merely being a public official is not sufficient to establish that the official has engaged in state action. Instead, public officials engage in state action that is subject to constitutional scrutiny only when they exercise "power 'possessed by virtue of state law,'" such

that their actions are "made possible only because [they are] clothed with the authority of state law." *West* v. *Atkins*, 487 U.S. 42, 49 (1988) (citation omitted). That standard is generally satisfied when a public official acts "in his official capacity" or "exercis[es] his responsibilities pursuant to state law." *Id.* at 50. In contrast, actions taken by officials "in the ambit of their personal pursuits"—that is, actions that require neither powers possessed by virtue of state law nor being clothed with the authority of state law—are "plainly excluded" from constitutional scrutiny. *Screws* v. *United States*, 325 U.S. 91, 111 (1945) (plurality opinion); see *United States* v. *Classic*, 313 U.S. 299, 326 (1941).

3. Determining whether any particular conduct is an exercise of government-granted authority or in the ambit of personal pursuits can be difficult, especially in the abstract. For that reason, rather than set forth a unified or comprehensive test for state action, this Court "has articulated a number of different factors or tests," each to be applied "in different contexts." *Lugar*, 457 U.S. at 939; see U.S. *O'Connor-Ratcliff* Br. at 14-18.

This case does not require the Court to fashion a new test for state action because it arises in a frequently recurring context: The challenged conduct involves denying access to (or use of) property, such as refusing to serve a customer or excluding someone from a forum. In that context, the existence of state action depends critically on the nature of the property—specifically, whether the government itself owns or controls the property to which access has been denied.

When the government itself owns or controls the property—that is, when *public* property is involved—"the question of the existence of state action centers in the extent of the [government's] involvement in [the al-

legedly unconstitutional] actions." *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 573 (1974); see U.S. *O'Connor-Ratcliff* Br. at 14-15.

When the government lacks ownership or control of the property to which access has been denied—that is, when it is *private* property—this Court has required a higher showing to establish state action: "the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use." *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 547 (1972); cf. *Manhattan Community Access*, 139 S. Ct. at 1931 n.3 (suggesting that even that might not be sufficient). Therefore, absent governmental compulsion or joint action, see, *e.g.*, *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 171 (1970), this Court has rarely found state action based on a denial of access to private property over which the government lacks ownership or control. See U.S. *O'Connor-Ratcliff* Br. at 15-16. And, of the two cases in which it did, one is factually obsolete and the other is no longer good law.

The first case was *Marsh* v. *Alabama*, 326 U.S. 501 (1946), which held that a private corporation that owned a "company town" had engaged in state action when it prohibited distribution of religious literature on a sidewalk. See *id.* at 506. The Court has since emphasized, however, that *Marsh* involved the unusual "economic anachronism" of a company town, and has explained that its holding there relied on the principle that a State "could not permit a corporation to assume the functions of a municipal government and at the same time deny First Amendment rights." *Central Hardware*, 407 U.S. at 545-546; see *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 561 (1972) (explaining that *Marsh* "involved an economic anomaly of the past").

The other case was *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), which held that a shopping center had engaged in state action when it sought to eject pro-union picketers from its parking lot. See *id.* at 316-317. The Court has since expressly overruled *Logan Valley* and rejected its core rationale that opening up private property to the public subjects the property to constitutional constraints on state action. *Hudgens* v. *NLRB*, 424 U.S. 507, 518 (1976); see *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 81 (1980); *Lloyd*, 407 U.S. at 561-563. As the Court observed in *Central Hardware*, the mere fact that privately owned property is "'open to the public'" is insufficient to convert the use of that property into state action subject to the First and Fourteenth Amendments, especially given that "[s]uch an argument could be made with respect to almost every retail and service establishment in the country." 407 U.S. at 547. The government is unaware of other decisions by this Court holding that a denial of access to private property over which the government lacks ownership or control can constitute state action absent governmental compulsion or joint action.

The Court's hesitation to find state action in that context extends to cases in which the private property at issue is intangible. See, *e.g.*, *Columbia Broadcasting*, 412 U.S. at 119 (plurality opinion); *Manhattan Community Access*, 139 S. Ct. at 1929; *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U.S. 522, 542-547 (1987); see also U.S. *O'Connor-Ratcliff* Br. at 17-18. As this Court has put it, "Benjamin Franklin did not have to operate his newspaper as 'a stagecoach, with seats for everyone.'" *Manhattan Community Access*, 139 S. Ct. at 1931 (citation omitted).

4. This Court does not appear to have squarely addressed the situation where a public official denies access to private property over which the government lacks ownership or control. Nevertheless, the principles set forth above can be applied, and they reinforce each other. See U.S. *O'Connor-Ratcliff* Br. at 18-19. For example, when a denial of access involves indisputably private property over which the government lacks ownership or control, that weighs in favor of finding that the public official is acting in his private capacity—which in turn should cause courts to require his conduct to be much closer to the exercise of a traditional, exclusive public function (as would be required of a private entity) before finding state action. By contrast, if an official is carrying out his official duties or exercising the powers of his office on private property, it is more likely that the government has "outsourced" one of its obligations to be discharged using that ostensibly private property (as in the hypothetical example of using a privately controlled social-media account to conduct notice-and-comment rulemaking). *Manhattan Community Access*, 139 S. Ct. at 1929 n.1.

B. Respondent's Blocking Of Petitioner Was Not State Action

Under the foregoing principles, respondent's blocking of petitioner from his Facebook account was not state action. Here, a public official has denied access to private property over which the government lacks ownership or control. Respondent's Facebook account indisputably is private property. Respondent created that account when he was a college student and converted his profile into a publicly accessible page before he was appointed as city manager for Port Huron. Pet. App. 2a; see pp. 2-3, *supra*. The account uses respond-

ent's own name, not his public office, as the page title and username. Pet. App. 9a, 14a. And respondent would continue to exercise exclusive control over that account even if he ceased to be the city manager. *Id.* at 9a. Respondent's job did not require him to operate a Facebook page. *Id.* at 8a-9a. Respondent did not use government employees or resources to maintain his Facebook page; none of his staff had access to the page; and he did not even post on the page using government devices. *Id.* at 10a; see p. 4, *supra*. As purely private property beyond the city's control, respondent's Facebook account is unlike an official government-controlled account, such as the Port Huron Police Department's Facebook page. See J.A. 30.

Nor can it be said that in using that nongovernmental account to communicate with constituents, respondent was performing a traditional, exclusive public function. Of course, public officials have a long tradition of communicating with the public about matters of public concern. But the Court has explained that "to qualify as a traditional, exclusive public function within the meaning of [this Court's] state-action precedents, the government must have traditionally *and* exclusively performed the function." *Manhattan Community Access*, 139 S. Ct. at 1929. When public officials communicate with the public, they do not "exercise[] 'powers traditionally *exclusively* reserved to the State.'" *Id.* at 1928 (emphasis added; citation omitted). Quite the contrary. The First Amendment expressly *prohibits* the government from reserving such powers to itself. And others—including nonincumbent seekers of public office, members of the media, and private citizens—also communicate with the public about the work of public officials and employees.

Respondent's operation of his Facebook account thus does not constitute "the exercise of some right or privilege created by the State." *American Manufacturers*, 526 U.S. at 50 (citation omitted). Instead, any right or privilege that respondent has to operate that account—including to block petitioner—flows from his personal ownership or control of the account (per the terms of service and functionality provided by Facebook), irrespective of his status as a city official.

For the same reason, respondent cannot "*fairly* be said" to have been a state actor when he blocked petitioner. *American Manufacturers*, 526 U.S. at 50 (emphasis added; citation omitted). Although respondent was a public official at the time, his power to operate his personal social-media account was neither a "power 'possessed by virtue of state law,'" nor one that was "made possible only because [respondent was] clothed with the authority of state law." *West*, 487 U.S. at 49 (citation omitted). Nor was respondent acting in his official capacity to "exercis[e] his responsibilities pursuant to state law" when he operated his Facebook page, including when blocking petitioner. *Id.* at 50; see *id.* at 49-50. Instead, like many individuals, respondent sought to inform others about his work and to address issues of public concern—in part to further his own career—and he chose to use his personal social-media page as one communications channel.

To be sure, some of the *content* of the communications on respondent's Facebook page reflected his unique status as city manager, and he prominently identified himself as such (including by listing his official position and other trappings, such as the city's website and a city email address, and by identifying himself with city initiatives, such as by describing the City's actions

as steps that "we" took). See J.A. 1-2; see also, *e.g.*, J.A. 164. But public officials, no less than private individuals, retain the right in their private capacities to engage in speech "'commenting upon matters of public concern,'" including discussing "information acquired by virtue of [their] public employment." *Lane* v. *Franks*, 573 U.S. 228, 231, 240 (2014) (citation omitted). And in that private capacity, they retain the rights that private individuals and entities enjoy to "exercise editorial control over speech and speakers on their properties or platforms." *Manhattan Community Access*, 139 S. Ct. at 1932. As the court of appeals explained, "[w]hen [respondent] 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." Pet. App. 9a. Speech in those private spaces does not become state action simply because of its subject matter.

For those reasons, excluding petitioner from those conversations, when held on properties over which the government lacks ownership or control, is not state action. Cf. *Biden* v. *Knight First Amendment Institute*, 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring) ("[G]overnment officials who informally gather with constituents in a hotel bar can ask the hotel to remove a pesky patron who elbows into the gathering to loudly voice his views."). That conclusion should not change simply because the private property at issue here is virtual rather than physical: Just as respondent would be free to remove a dinner guest from his home for expressing unwanted views about Port Huron's pandemic response, respondent was free to block petitioner from respondent's personal Facebook page.

C. Petitioner's Contrary Reasoning Is Unpersuasive

Petitioner's arguments to the contrary lack merit.

1. Petitioner relies heavily on the history of 42 U.S.C. 1983, urging (Pet. Br. 19-25) that its "under color of law" requirement—and state action under the Constitution—extends to situations where an official acts under pretense of law. That assertion is correct but has little bearing here. "Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." *Screws*, 325 U.S. at 111 (plurality opinion). At the same time, "acts of officers in the ambit of their personal pursuits are plainly excluded." *Ibid.*

For that reason, although state action does not require an official to hew to state law, state action does require "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Monroe* v. *Pape*, 365 U.S. 167, 184 (1961) (citation omitted). Unlike entering a person's home to conduct a search, see, *e.g.*, *id.* at 169, or invoking official authority to conduct an arrest, see, *e.g.*, *Screws*, 325 U.S. at 92 (plurality opinion); *Griffin* v. *Maryland*, 378 U.S. 130 (1964), an official who is operating a privately owned Facebook page does not exercise—and so does not abuse or exceed—any 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 (quoting *Classic*, 313 U.S. at 326).

In resisting that straightforward application of this Court's precedents, petitioner relies (Br. 34-35) on *Griffin*. In that case, the defendants challenged their criminal-trespass convictions, incurred for conduct in protesting a private amusement park's racial-

segregation policy. *Griffin*, 378 U.S. at 131. The park employed a security guard who had also been deputized by the county police department as a special deputy sheriff; in that capacity, he had the "'same power and authority as [a] deputy sheriff[],'" and he "wore, on the outside of his uniform, a deputy sheriff's badge." *Id.* at 132 & n.1 (citation omitted). When the defendants boarded a ride at the amusement park, the security guard "ordered [them] to leave," informing them "that it was the park's policy 'not to have colored people on the rides, or in the park.'" *Id.* at 132. When defendants declined to leave the park, the guard informed them that "they were under arrest for trespassing," and he "transported" them to the police station. *Id.* at 133. In doing so, he "consistently identified himself as a deputy sheriff rather than as an employee of the park." *Id.* at 135. At the police station, he filled out an "Application for Warrant by Police Officer" form that declared, under oath, that he was a member of the county "deputy sheriff department," and that, "as a member of the Montgomery County Police Department," he observed certain conduct and believed that defendants were violating a state criminal-trespass statute. *Id.* at 133 (emphasis omitted). After charges were issued by a justice of the peace, an amended warrant was filed, which described the guard as "Deputy Sheriff," but characterized defendants' conduct as "unlawfully entering the park after having been told not to do so by 'an Agent,' of the corporation which operated the park." *Id.* at 134. This Court held that the amended warrant had "little, if any, bearing on the character of the authority which [the guard] initially purported to exercise," that his conduct amounted to state action, and that his participation in enforcing a policy of racial segregation violated the

defendants' Fourteen Amendment equal-protection rights. *Id.* at 135-136.

In petitioner's view, *Griffin* shows that this Court's statement in *West* that state action "requires" the exercise of power "'made possible only because the wrongdoer is clothed with the authority of state law,'" 487 U.S. at 49 (citation omitted), cannot be taken literally, because he says that the security guard in *Griffin* "could have undertaken the same conduct even in absence of his governmental powers." Pet. Br. 34 (emphasis omitted). But in finding state action, the *Griffin* Court explained that the power that the guard, as a special deputy sheriff, "initially purported to exercise" in ejecting the defendants from the park and transporting them to the county police station was an exercise—and misuse—of official power. 378 U.S. at 135. Ordering individuals to leave and carrying out an arrest while "w[earing] a sheriff's badge and consistently identif[ying] [one]self as a deputy sheriff" is the exercise of a power possessed by virtue of state law. *Ibid.* And that is so even though citizen arrests are authorized in some circumstances. It is easy to see why. As the court of appeals explained, "[w]e're generally taught to stop for police, to listen to police, to provide information police request." Pet. App. 12a. Although a private security guard, and at times an ordinary private citizen, can take superficially similar actions, the act of invoking an official status as a formally deputized officer of the county when conducting an arrest or otherwise demanding submission transforms the character of the authority exercised, whether it occurs on public or private property.

Providing information about governmental actions and policies, by contrast, does not exercise a power that is "made possible only because the" speaker "is clothed

with the authority of state law." *West*, 487 U.S. at 49 (citation omitted). The government does not have a monopoly on discussing non-confidential information about its activities. Even apart from social-media accounts associated with traditional media outlets for news, accounts that seek to amplify or aggregate information about official activities abound. See, *e.g.*, @oyez on X (formerly known as Twitter), https://twitter.com/oyez (providing argument audio and other materials related to this Court); @HouseFloor on X, https://twitter.com/housefloor (providing updates about the official business of the U.S. House of Representatives); @CoCapWatch on X, https://twitter.com/cocapwatch (tracking bills in the Colorado legislature). Individuals who serve as public officials may likewise wish to discuss official activities. They might do so for purposes of their own reputation or career advancement—such as when an assistant district attorney links to a press release announcing a successful conviction on her LinkedIn page, or when an elected official describes her accomplishments on a Facebook page owned by her campaign. Or they might do so out of a desire to help their communities by amplifying information they view as important, or simply out of an interest in discussing topics that overlap with the subject matter of their jobs.

Petitioner suggests that when a public official emphasizes his official role in communicating otherwise publicly available information, "invoking the 'prestige' of [his] office" might give "additional weight and influence" to his views. Br. 39 (citation omitted). In petitioner's view, that transforms the public official's action just as the coercive authority exercised by an individual is transformed when he invokes his status as a law-enforcement officer. *Ibid.* But that is a false equiva-

lence. Nobody is required to view or comment on a city manager's Facebook posts, no matter how official-looking the page might appear. To be sure, a public official's expression may carry more clout, and a public official may have speaking opportunities, including invitations by private groups, that the average citizen might not have. But that does not automatically convert otherwise private speech activities into state action subject to constitutional constraints.

Indeed, as this Court has repeatedly made clear, "citizens do not surrender their First Amendment rights by accepting public employment." *Lane*, 573 U.S. at 231; see, *e.g.*, *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968). Outside the scope of their ordinary job responsibilities, public employees retain the "right to disseminate" information "related to or learned through public employment," and that right also benefits "the public's interest in receiving informed opinion." *Lane*, 573 U.S. at 236 (citation and internal quotation marks omitted). That assurance would ring hollow if a public official lost the right "as a citizen," *id.* at 238, to discuss office initiatives at a dinner hosted at a friend's house, at a church happy hour, at a private country club, in a ballroom rented by her campaign, or in front of a local grocery store whenever the audience, knowing the speaker's official position, would give such views additional weight and influence.

The same is true for the large group of public officials who have, among their responsibilities, some role in "keep[ing] constituents apprised" about government actions and "engag[ing] with the public" on matters of public concern, Pet. Br. 30. Those officials do not lose their right to communicate with the public about matters of public concern in their private capacity. Of

course, to the extent that an official communicates using a platform that the government owns or controls—for instance, holding a press conference at City Hall, using a government website, or posting on an official social-media account—the communication relies on the exercise of a power made available only by virtue of the official position. But if the official communicates the same information on private property without using official resources, those communications will generally not amount to state action.

2. For similar reasons, petitioner's proposed "appearance" and "function" test, see Br. 30-32, is not the right approach for identifying state action in a public official's operation of a social-media profile. As the court of appeals explained (Pet. App. 11a) appearance might be relevant in cases involving police officers who abuse their authority (say, by flashing badges) because the officers' "*appearance* actually evokes state authority"—but it has no bearing in this context. See U.S. *O'Connor-Ratcliff* Br. at 26-27. And although state action may be found where the public official is carrying out his official duties (which respondent was not doing here, see Pet. App. 8a-9a), that is not what petitioner means by "function." Instead, he uses that term to refer to the *purpose* of the social-media use, inquiring whether it is one a state actor might share. See Pet. Br. 31 (referring to the test as the "appearance and purpose" test); see *id.* at 32 (measuring function by how similar the private account is to a hypothetical official account).

That approach provides no workable standard for public officials to measure when their conduct becomes subject to constitutional constraints. Petitioner never elaborates what standards a public official should use in

assessing whether the appearance and purpose of a communication treads so close to matters that relate to the official's employment that the official should be on notice that constitutional requirements apply. Indeed, rather than offering a test that would avoid serious chilling effects on public officials, petitioner urges (Br. 16-19, 40) the Court to issue a narrow decision that would provide little guidance. Petitioner claims (Br. 42) that respondent crossed the line here because "City business dominated [respondent's] Facebook page" in the early weeks of the pandemic and "garnered increased public attention and feedback," but petitioner provides no guideposts for a court to evaluate how many posts about "City business" are too many, or how much "attention and feedback" is too much. Nor does petitioner offer guidance on how an official could identify what content is related to business in the first place. On petitioner's view, for instance, a photo of respondent's daughter playing at home during the pandemic becomes official in character when it urges the reader to "[s]tay home" and "[s]tay safe," because that overlaps with a message the city may wish to convey, see *ibid.*—even though countless privately employed individuals made similar remarks in the pandemic's early days.

Petitioner's amorphous "appearance and purpose" standard would inevitably chill public officials' speech—even when on private time and using private property—for fear of potential lawsuits and damages liability, thereby infringing on the "robust sphere of individual liberty" that "the state-action doctrine protects," *Manhattan Community Access*, 139 S. Ct. at 1928. See Cert. Reply Br. 9 (suggesting that even in this case, which warranted this Court's intervention, "qualified immunity does not apply" and that money damages are availa-

ble against respondent). Tellingly, although petitioner dismisses as "far-fetched" the suggestion that an official's speech with a neighbor at a hardware store or at church will be deemed state action under his approach, Br. 40, petitioner offers no principled basis for distinguishing those conversations, which can be intimately connected to the official's job and which will often carry more weight and influence than would views expressed during similar conversations with those who are not public officials. Compare, *e.g.*, Pet. Br. 41 (suggesting that respondent's answers to some comments asking for information about city policies are indicative of state action), D. Ct. Doc. 23-2, at 14 (testimony by respondent that he answered those questions "[l]ike I would with anyone, if a neighbor asked me or something like that[;] I knew the answer so, yes, I responded back").

Although petitioner suggests (Br. 32) that the appearance of a social-media page can illustrate that the official is "*deliberately*" blurring the line between official and private social-media use, the test he proposes does not actually require the defendant to have a particular state of mind. Even if it did, adding a subjective component to the state-action inquiry finds no support in this Court's precedents, and would potentially require many or most cases to proceed to discovery to probe the defendants' subjective beliefs about the purposes of their social-media use in order to answer the threshold state-action question. In any event, even if it were relevant whether officials are deliberate in blurring the official–private line, respondent here testified, without contradiction, that "if [he] couldn't use [the Facebook page] as a personal page, [he] wouldn't have had one" because he "d[id]n't want an official city manager page." D. Ct. Doc. 23-2, at 18-19; see Pet. App. 24a-25a.

3. Petitioner does not identify any persuasive reason to reject a "property-based" approach, such as the one offered by the government. See Pet. Br. 36-38; pp. 12-21, *supra*. Petitioner first suggests that the nature of the property cannot matter to the state-action inquiry because it is relevant to the First Amendment question whether the page in question was a "temporary public forum." Br. 37 (brackets omitted). But there is no reason that certain considerations cannot be relevant to both questions. For instance, "the public's likely perception as to who (the government or a private person) is speaking" is relevant to the First Amendment question whether the government is speaking for itself. *Shurtleff* v. *City of Boston*, 142 S. Ct. 1583, 1589-1590 (2022). But it also bears a close resemblance to petitioner's proposed inquiry (Br. 40-41) into whether a social-media account "convey[ed] the impression that" it "was an official communication."

Petitioner next relies (Br. 37) on *Marsh*, *supra*, for the proposition that the status of the property interests cannot settle the question of state action. But, as explained above, see p. 15, *supra*, *Marsh* addressed the economic anachronism of a company town and presented a highly unusual situation where, unlike here, ownership and control of property carry less weight.

Finally, petitioner raises (Br. 37-38) the specter that a property-based approach would too easily permit the government to evade First Amendment constraints. But none of his examples support that fear. If, as petitioner posits (Br. 37), a town "temporarily relocate[d] its public meetings to the home of a councilmember," that would be an example of using private property for a traditional, exclusive public function, such that state action would exist even on private property, see p. 13,

supra. Petitioner suggests (Br. 37) that officials might have a "perverse incentive * * * to use their personal accounts in order to evade their constitutional obligations." But an official who uses a personal account for a traditional and exclusive public function, or to carry out his official job responsibilities by exercising his governmental authority, or who uses meaningful government resources to maintain a personal account, will, under our proposed framework, have usually engaged in state action. By contrast, if the official neither discharges official obligations through his account nor uses public resources to operate it, there is nothing nefarious about the official's maintaining a social-media account, even one discussing the subject matter of his job, in a private capacity, with the concomitant right to exclude those whose comments he does not wish to display on his page.

D. An Overly Expansive Theory Of State Action In This Context Would Undermine, Not Promote, First Amendment Values

As the analysis above indicates, this Court's precedents wisely reflect a limited theory of state action in this context. Whether particular conduct constitutes state action (or is under color of state law) determines the applicability of a variety of constitutional constraints. See, *e.g.*, *Manhattan Community Access*, *supra* (First Amendment); *Skinner* v. *Railway Labor Executives' Association*, 489 U.S. 602 (1989) (Fourth Amendment); *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952) (Fifth Amendment); *West*, *supra* (Eighth Amendment); *Blum* v. *Yaretsky*, 457 U.S. 991, 996 (1982) (procedural due process under Fourteenth Amendment); *Griffin*, *supra* (equal protection under Fourteenth Amendment); *Nixon* v. *Condon*, 286 U.S. 73

(1932) (Fifteenth Amendment). An appropriately limited state-action doctrine "'preserves an area of individual freedom by limiting the reach of federal law' and avoids the imposition of responsibility on a State for conduct it could not control." *NCAA* v. *Tarkanian*, 488 U.S. 179, 191 (1988) (citation omitted).

That salutary aim is especially important in the First Amendment context. This Court has explained that an overly expansive "theory of state action" "would be especially problematic in the speech context, because it could eviscerate certain private entities' rights to exercise editorial control over speech and speakers on their properties or platforms." *Manhattan Community Access*, 139 S. Ct. at 1932. The same holds true for public officials and employees like respondent.

Moreover, subjecting large amounts of the speech of public officials and employees to constitutional restrictions could make those officials and employees less willing to speak in the first place. That sort of chilling effect would thus reduce, not enhance, free speech and public discourse. Indeed, respondent testified that "he would not have operated a Facebook page if he could not use it as his personal account or if he were required to allow all comments on the page." Pet. App. 24a-25a (citing D. Ct. Doc. 23-2, at 18-19). It is hard to see how, on balance, that promotes First Amendment values.

In addition, an overly expansive theory of state action in this context might well lead to overregulation of public employees' speech. As this Court has recognized, government "[e]mployers have heightened interests in controlling speech made by an employee in his or her professional capacity." *Garcetti* v. *Ceballos*, 547 U.S. 410, 422 (2006). To say that the speech of a public employee on a personal social-media account constitutes

state action—meaning that the speech is "fairly attributable to the [government]," *Lugar*, 457 U.S. at 937—would be to say that the government could regulate the content of that speech. See *Garcetti*, 547 U.S. at 422-423; cf. *Pickering*, 391 U.S. at 573-574. And because many government employers are potentially exposed to liability whenever their employees engage in state action, see *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), the urge to regulate would be substantial. Again, it is difficult to see how that would promote First Amendment values.

At the same time, an expansive state-action theory would carry few if any benefits in this context because a plaintiff who is blocked from a public official's social-media account is unlikely to prevail under substantive First Amendment law even if he can show that the blocking constitutes state action. For example, when the government itself is doing the speaking, it may craft its own message and exclude others from the opportunity to present dissenting views. See *Shurtleff*, 142 S. Ct. at 1587, 1589. So if public-official defendants were to assert, as respondent did here, that they intended to use their social-media accounts to provide one-way communication from themselves to those following their accounts, and not to "invite" responses there, Pet. App. 27a; D. Ct. Doc. 23-2, at 11-12, and that assertion were credited, then a finding that the officials engaged in state action might well imply that the posts on their accounts (including the comments attached to the posts) constituted government speech outside the reach of the First Amendment's speech constraints. See *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of

private speech; it does not regulate government speech.").

The point here is not to engage in substantive First Amendment analysis, which is beyond the scope of the question presented. See Pet. Br. I, 16-43 (addressing only state action). Instead, the point is that there is little to be gained, and much to be lost, by adopting an overly expansive theory of state action that would extend to the use of nearly every public official's private social-media account. As noted, that scenario would undermine, not promote, First Amendment values, and as a practical matter the end result of any litigation would likely be the same as under a more constrained theory of state action.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2023