IN THE SUPREME COURT OF THE UNITED STATES

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No. 22-611

KEVIN LINDKE, PETITIONER

v.

JAMES R. FREED

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

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# MOTION OF THE UNITED STATES FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AS AMICUS CURIAE AND FOR DIVIDED ARGUMENT

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Pursuant to Rules 21 and 28 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves for leave to participate in the oral argument in this case as amicus curiae and for divided argument, and respectfully requests that the United States be allowed ten minutes of argument time. The United States has filed a brief as amicus curiae supporting respondent. Respondent has consented to this motion and agreed to cede ten minutes of his argument time to the United States. Accordingly, if this motion were granted, the argument time would be divided as follows: 30 minutes for petitioner, 20 minutes for respondent, and 10 minutes for the United States.

This case presents the question whether and under what circumstances a public official's blocking of an individual from a social-media account constitutes state action under the First and Fourteenth Amendments. The Court is addressing a similar question in O'Connor-Ratcliff v. Garnier, No. 22-324. The United States has a substantial interest in the Court's resolution of those questions. Federal government officials also use social-media accounts, and the same constitutional state-action analysis applicable to respondent in this case would apply to federal government officials and employees. See, e.g., Biden v. Knight First Amendment Inst., 141 S. Ct. 1220 (2021). Here, respondent and the government have filed briefs emphasizing different aspects of the question presented. Respondent has argued that a public official's operation of a social-media account is not state action if it neither carries out a governmental duty nor relies on any governmental authority. See Resp. Br. 16-50. The United States has observed that because the challenged conduct involves denying access to (or use of) property, the state-action inquiry depends critically on whether the government owns or controls the property. See Gov't Amicus Br. 11-33. At the same time, the plaintiffs in the two cases before the Court have adopted different approaches. The O'Connor-Ratcliff respondents focus on whether petitioners were "doing their jobs," Resp. Br. at 1, while the petitioner here

emphasizes the "appearance" and "function" of the social-media page, see Pet. Br. 25-32.

The Court's resolution of this case would also 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.

And more generally, whether particular conduct constitutes state action (or is under color of state law) determines the applicability of a variety of federal constitutional constraints that the United States has a substantial interest in protecting. See, e.g., Manhattan Community Access Corp. v. Halleck, 139 S. Ct. 1921 (2019) (First Amendment); Skinner v. Railway Labor Execs.' Ass'n, 489 U.S. 602 (1989) (Fourth Amendment); Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952) (Fifth Amendment); West v. Atkins, 487 U.S. 42 (1988) (Eighth Amendment); Blum v. Yaretsky, 457 U.S. 991, 996 (1982) (procedural due process under Fourteenth

Amendment); Griffin v. Maryland, 378 U.S. 130 (1964) (equal protection under Fourteenth Amendment); Nixon v. Condon, 286 U.S. 73 (1932) (Fifteenth Amendment).

The federal government itself has been a party to cases raising the state-action question. See, e.g., Knight First Amendment Inst., supra; Skinner, supra. The United States has also participated as amicus curiae in previous cases raising state-action or color-of-law questions. See, e.g., Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001); American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999); Georgia v. McCollum, 505 U.S. 42 (1992); Polk County v. Dodson, 454 U.S. 312 (1981). And the United States frequently participates as amicus curiae in pairs of cases presenting similar questions and argued in tandem. See, e.g., Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 143 S. Ct. 2141 (2023), and Students for Fair Admissions, Inc. v. University of N. Carolina, No. 21-707 (O.T. 2022); Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023), and Gonzalez v. Google LLC, 143 S. Ct. 1191 (2023) (per curiam); Federal Republic of Germany v. Philipp, 141 S. Ct. 703 (2021), and Republic of Hungary v. Simon, 141 S. Ct. 691 (2021) (per curiam). The participation of the United States in the oral arguments in both this case and O'Connor-Ratcliff is therefore likely to be of material assistance to the Court.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

AUGUST 2023