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

REPLY BRIEF FOR THE PETITIONER

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Rather than invent a new test, the Court should adhere to its longstanding position that "[i]f an individual is possessed of state authority and purports to act under that authority, his action is state action." *Griffin* v. *Maryland*, 378 U.S. 130, 135 (1964). That rule—in addition to being historically and textually faithful to Section 1983—accounts for the various ways that public officials can affect rights even when not performing mandatory tasks or exercising official powers.

Freed's argument for a duty-or-authority test misunderstands how Section 1983 works. Freed worries (Br. 27), about "impos[ing] state liability for activity over which the state has no control." But concluding that a public official's social media use occurs "under color of" law does not mean the state *itself* is liable. Nor does it mean that the official "would lose editorial discretion over [his or her] speech" or would be "forced to allow all comments, including personal attacks." Pet. Br. 31, 47.

The Solicitor General offers a different test that turns on whether the government owns or controls property to which access has been denied. That test comes from case law involving *physical* exclusion from *real estate* owned by *private entities*. But public officials are not private entities; social media platforms offer services, not property; and disputes about online conduct often have nothing to do with denial of access.

In any event, Freed and the Solicitor General fail their own tests: Governmental employers *do* control whether and how employees invoke their official titles and perform job functions, even on private social media accounts.

A. State Action Is Not Limited to Duty or Authority

1. Duty

Most audaciously, Freed argues that state action is limited to a public official's formal duties. He asserts (Br. 21) that the phrase "'under color of law' was originally intended to only apply to people who were acting 'under authority of' and 'pursuant to' that authority." On this view, a public official is a state actor only when carrying out official responsibilities; actions that were *unauthorized*, but which invoked the pretense of authority, are categorically excluded.

Freed's position contradicts precedent. In *Monroe* v. *Pape*, 365 U.S. 167, 172 (1961), this Court rejected the argument that "under color of' … excludes acts of an official or policeman who can show no authority under state law, state custom, or state usage to do what he did." Freed calls *Monroe* "incorrect" (Br. 28), and relies on Justice Frankfurter's dissent there (Br. 22). Yet Freed stops short of calling for *Monroe*'s overruling.

In any event, Freed's argument is unpersuasive. He invokes (Br. 25) the "legislative history of Section 1983 [and] the language of the statute." But he skips over "six

centuries [of] Anglo-American jurisprudence," in which "'under color of' law was commonly used to describe those acts contrary to law but committed with the pretended authority of law." David Achtenberg, *A "Milder Measure of Villainy,"* 1999 Utah L. Rev. 1, 59 (Achtenberg). Numerous statutes and judicial decisions used the phrase in ways that could *only* refer to unauthorized acts. See Pet. Br. 19-21. In response, Freed identifies two cases (Br. 20 n.6) and a 1790 statute (Br. 25) that refer to legitimate exercises of state power as being "under color of law." But those examples merely show the term was applied *both* to authorized *and* to unauthorized conduct. See Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 Mich. L. Rev. 323, 359 (1992) (Winter).

In discussing the Ku Klux Act of 1871, Freed relies on one scholar's account of its enactment. See Eric H. Zagrans, *"Under Color Of"* What *Law*, 71 Va. L. Rev. 499 (1985) (Zagrans). But as more-recent scholarship explains, "Zagrans's analysis of the legislative history is filled with factual errors." Achtenberg 54 n.409; see Winter 325 (describing Zagrans's account as "wildly ahistorical"); Douglas Miller, *Off Duty, Off the Wall, But Not Off the Hook*, 30 Akron L. Rev. 325, 334 (1997) ("Winter has driven a stake through the heart of" Zagrans's position). Freed reproduces Zagrans's mistakes.

Like Zagrans, Freed argues (Br. 22-24) that the 1866 Civil Rights Act was the "model" for the relevant statutory language, and he quotes Senator Trumbull's explanation that the Act would be unnecessary "in a State where the law affords [a black citizen] the same protection as if he were white," Cong. Globe, 39th Cong., 1st Sess. 1758 (1866). But "th[at] passage makes equally good sense if Senator Trumbull understood *under color of law* to mean, for example, 'in wrongful application of the law.'" Winter 379. Freed is unable to identify contemporaneous evidence that "under color of" *excluded* unauthorized conduct—

and he ignores contemporaneous dictionaries showing that false "pretense" was the phrase's ordinary public meaning. Pet. Br. 24.

Also like Zagrans, Freed attempts to recast the significance of Senator Frelinghuysen's bill. Freed points (Br. 25) to Frelinghuysen's statement that "since Congress 'can not reach the Legislators' that pass laws violating privileges and immunities, the purpose of [his bill] was to allow an injured party 'relief against the party who *under color of* such law is guilty of infringing his rights.'" Zagrans 558-59 (quoting Cong. Globe, 42d Cong., 1st Sess. 501 (1871)) (emphasis added). But this passage proves the opposite of what Freed and Zagrans think: Frelinghuysen's bill *only* reached conduct "*under pretense of* any law, custom, or usage of any State." S. 243, 42d Cong. § 1 (1871) (emphasis added). The passage thus shows that "for Frelinghuysen, the phrases 'under color of' law and 'under pretense of' law were synonymous." Achtenberg 60.

2. Authority

Despite his ahistorical argument that Section 1983 only covers conduct affirmatively directed by the government (*i.e.*, official duties), Freed proposes (Br. 18-19) that it should also apply to conduct that a public official undertakes "pursuant to a source of state authority." Yet Freed offers no clear concept of what that might mean, and his attempts to give it content are vague, over- and underinclusive, and inconsistent.

Derived from state power. Freed argues (Br. 38) that exercises of "authority" are limited to circumstances where an official employs "power provided under state law." That rule would disqualify all conduct occurring on social media platforms: Since "Facebook is not a state-based company, and the ability to block and delete persons on Facebook is not derived from any state power," Freed

argues, nothing that happens on Facebook can amount to state action. Resp. Br. 25-26.

Freed's focus on state power proves too much. Even official governmental accounts, like the @WhiteHouse account on X (formerly Twitter), and the POTUS Facebook account, can be used to block and delete users "in the same way as millions of other Americans on social media." *Id.* at 26. Use of such an official account in a discriminatory manner—such as blocking Muslim users—would still violate the Equal Protection Clause, regardless of whether the decision was effectuated using a function available to "other Americans."

For similar reasons, Freed is wrong (Br. 38) that a public official's conduct must "carry the force of law" to merit constitutional scrutiny. That phrase describes relatively little of what most public employees do when interacting with the public. Though the Court upheld the legislative prayer at issue in *Town of Greece, N.Y.* v. *Galloway*, 572 U.S. 565 (2014), for instance, it did not question that First Amendment scrutiny was appropriate, even though the prayers were generalized, non-coercive "blessings" issued by "unpaid volunteers." *Id.* at 571. Indeed, even federal agencies routinely issue statements that "do not have the force and effect of law." *Shalala* v. *Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995). Yet such pronouncements are obviously made "under color of" law.

That remains true where a public official invokes his or her office in ways that affect constitutional rights, even if they fall short of legal coercion. If a professor at a state university posted to her private social media account that she dislikes Jewish students and hopes they drop her class, for instance, the fact that her posts are not backed by any state authority would not immunize them from constitutional scrutiny. See Pet. Br. 39. Nor could a teacher invite only his white students to an end-of-year graduation

party at his house and then defend his actions on the ground that they lacked "the force of law."

Couldn't happen the same way. Freed separately asserts that a public official acts under color of law only if the challenged activity "couldn't happen in the same way without the authority of the office." Resp. Br. 16 (cleaned up). That test is a nonstarter: This Court has squarely held that "[i]t is *irrelevant* that [a public official] might have taken the same action had he acted in a purely private capacity." *Griffin*, 378 U.S. at 135 (emphasis added). In any event, Freed never explains what it means for events to "happen in the same way." And insofar as the parameters of his proposed test can be discerned, it appears to be substantially under- and overinclusive.

Embedded in Freed's proposal is a counterfactual: How would events have transpired if the defendant were a private citizen? Any constitutional inquiry that depends on conjuring up events that never happened is inherently problematic. Cf. *Comptroller of the Treasury of Md.* v. *Wynne*, 575 U.S. 542, 574 (2015) (Scalia, J., dissenting) ("How did this exercise in counterfactuals find its way into our basic charter?"). Even assuming the counterfactual world can be imagined, Freed's test depends on a standard for comparing the imagined world to the real one.

Freed does not supply that standard. If the question is whether the defendant used governmental capabilities unavailable to private citizens, then this formulation is merely a "derives-from-state-power" test by another name and is faulty for the reasons explained.

Even if the "couldn't-happen-the-same-way" test goes beyond formal exercises of state authority, it would eliminate the protection of Section 1983 in a category of cases on which both sides agree: off-duty police officers. Freed acknowledges that an off-duty police officer may act under color of law when he "wears his uniform, displays his

badge, or informs a passerby that he is an officer." Br. 38 (citation omitted). Yet a private citizen can also wear a police uniform, display a badge, or tell a passerby that he is an officer. See U.S. Br. 23 ("citizen arrests are authorized in some circumstances"). What matters is not merely what the defendant *could have done* as a private citizen, but whether the defendant *in fact* was a governmental official and purported to act in that capacity when undertaking the challenged conduct.

A "couldn't-happen-the-same-way" test would also be *overbroad* in certain respects. A defendant's public employment may play a causal role in the challenged conduct, even where the defendant did not invoke that governmental status in the relevant sense. In *Lane* v. *Franks*, 573 U.S. 228, 240 (2014), for instance, a public official testified under subpoena "concern[ing] information acquired by virtue of his public employment." Although his testimony was made possible by his governmental position, the Court noted, he had purported to testify as a private "citizen." *Ibid.*; see Pet. Br. 35-36 (additional overbreadth examples).

Control. Freed argues (Br. 14) that if the government "cannot control" a public official's off-duty activity, the government "cannot be blamed for it." Construing Section 1983 to reach public officials who invoke the *false* pretense of authority, he argues (Br. 27), "would impose state liability for activity over which the state has no control."

For starters, Freed misunderstands how Section 1983 works. Municipalities "cannot be held liable under § 1983 on a *respondeat superior* theory," and therefore face liability only when employees "act pursuant to official municipal policy." *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978); see *Ashcroft* v. *Iqbal*, 556 U.S. 662, 677 (2009) ("In a § 1983 suit … masters do not answer for the torts of their servants."). Where litigation challenges a public official's

private social media use, the question is whether the official himself or herself is liable (or can be ordered to stop).

Freed's argument also fails on its own terms: Governmental employers *do* have control over the private social media activity of their employees. Many governmental employers have official "polic[ies] regarding the use of social media by [their] personnel." *Grutzmacher* v. *Howard Cnty.*, 851 F.3d 332, 337 (4th Cir. 2017). Those that have no formal policy still routinely discipline employees for objectionable social media activity, such as posting "racially charged language" to a private Facebook account. *Bennett* v. *Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 977 F.3d 530, 534 (6th Cir. 2020); see, *e.g.*, *Kirkland* v. *City of Maryville, Tenn.*, 54 F.4th 901 (6th Cir. 2022) (police officer fired for Facebook activity); *Graziosi* v. *City of Greenville, Miss.*, 775 F.3d 731 (5th Cir. 2015) (similar); *Carr* v. *Dep't of Transp.*, 230 A.3d 1075 (Pa. 2020) (similar). As explained below, see pp. 17-19, *infra*, the employer's level of control will be at its zenith where, as here, the employee "took deliberate steps to link his [online activity] to his [official] work." *San Diego* v. *Roe*, 543 U.S. 77, 81 (2004) (per curiam).

B. The Solicitor General's Property-Based Approach Is Flawed on Multiple Levels

The Solicitor General proposes an alternative state-action test that turns on the status of the property involved in the alleged constitutional deprivation. She argues (Br. 9) that "[w]hen *public* property is at issue, a denial of access by a public official generally will be state action"; but where a plaintiff challenges the "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."

Neither Freed nor the Sixth Circuit endorsed this test, for good reason: It rests on inapposite case law regarding when *non*-governmental entities should be treated as state actors; is substantially underinclusive; and turns on arbitrary distinctions and often unanswerable questions of contract and property law. Regardless, the Solicitor General's test is satisfied here.

1. Most fundamentally, the Solicitor General errs in resting the state-action inquiry on "whether the government itself *owns* or *controls* the *property* to which *access* has been *denied*." U.S. Br. 9 (emphases added). Every aspect of that test is problematic.

Ownership. The ownership status of a social media account is unclear. Whether users can be said to "own" their accounts in a manner comparable to physical property likely turns on the interaction between the platform's terms of service and state property law. The Solicitor General has criticized approaches to state action that "var[y] from jurisdiction to jurisdiction." U.S. Br. 23, *O'Connor-Ratcliffe* v. *Garnier*, No. 22-324 (June 30, 2023). Her own test has the same feature.

Control. The Solicitor General muddies things further by expanding her inquiry beyond mere ownership of a social media account to "whether the government itself owns *or controls*" the account. U.S. Br. 9 (emphasis added). To be sure, governmental control of an account is relevant to whether use of the account amounts to state action. But "[c]ontrol … is a matter of degree," *Denver & Rio Grande W. R.R. Co.* v. *United States*, 387 U.S. 485, 499 (1967), making it ill-suited to a test, like the Solicitor General's, that starkly divides cases into different buckets based on yes-or-no questions. In any event, as noted, even where public officials open social media accounts in their own names, the government may control important aspects of how those accounts are used. See p. 8, *supra*.

Property. The property status of an account is equally nebulous—and equally dependent on state law. Indeed, the Solicitor General is incorrect (Br. 9) to describe the dispute *in this case* as "a denial of access to private property." Facebook itself characterizes a user's access to an account *not* as property, but as a "service" performed by the company for the user. *Terms of Service*, https://facebook.com/legal/terms. Other social media platforms do too.[1]

Access. Disputes involving use of social media by public officials often have nothing to do with "access." See, *e.g.*, Steve Lash, *Orphans' Court Judge Quits Amid Facebook-Related Ethics Charges*, The Daily Record (Dec. 5, 2022) (judge "misused 'the prestige of his judicial office' on his Facebook page by posting a profile of himself in his judicial robe and engaging in partisan political discussion, giving legal advice and advertising his private business").[2] In the example above involving a teacher who makes disparaging remarks about Jewish students on her private social media account, denial of access to the account is not at issue. Yet it hardly makes sense to have *one* state-action test for a teacher accused of using social media to discriminate against students through disparaging posts, but a *different* test for a teacher accused of using social media to discriminate against those same students by denying them access to the account.

Denial. Nor is it clear what "*denial* of access" means more generally. Social media platforms are not directly analogous to physical property; they offer account-holders a bewildering—and ever-increasing—array of digital "functions" for interacting with others. A public official

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[1] See, *e.g.*, *Terms of Service*, https://twitter.com/en/tos; *Terms of Service*, https://www.youtube.com/static?template=terms; *Terms of Use*, https://help.instagram.com/581066165581870.

[2] https://thedailyrecord.com/2022/12/05/orphans-court-judge-quits-amid-facebook-related-ethics-charges/.

thus might use a private account in numerous ways that members of the public find objectionable:

- deleting comments posted by another user[3];
- "blocking" content from another user[4];
- "soft blocking," which involves blocking and then immediately unblocking another user, causing the other user to "unfollow" the primary user[5];
- "muting" content from another user, which removes them from the primary user's feed[6];
- asking the platform to "show less" of another user's content[7];
- creating preferred lists (such as Close Friends on Instagram[8]) to facilitate sharing certain content only with listed users;
- restricting content to "friends" rather than "followers"[9];

[3] https://help.instagram.com/289098941190483.

[4] https://support.tiktok.com/en/using-tiktok/followers-and-following/blocking-the-users.

[5] https://www.businessinsider.com/guides/tech/how-to-soft-block-on-twitter.

[6] https://www.pocket-lint.com/how-to-mute-someone-on-instagram/.

[7] https://about.fb.com/news/2022/10/new-ways-to-customize-your-facebook-feed/.

[8] https://help.instagram.com/476003390920140.

[9] https://support.tiktok.com/en/account-and-privacy/account-privacy-settings/video-visibility.

- limiting who can collaborate and engage with content, such as restricting who can "duet"[10] or "stitch"[11] videos;
- limiting who may send direct messages[12];
- using automatic "filters" to screen out comments with certain disfavored words[13];
- "reacting" negatively to a post (*e.g.*, giving it a "thumbs down") or selectively promoting *other* posts (*e.g.*, giving them a "thumbs up")[14];
- re-posting only favored content.[15]

The Solicitor General does not say which of these functions count as "denial of access," nor why those particular functions should be treated differently from others.

2. Even whistling past these problems, the Solicitor General's test is a square peg in a round hole doctrinally. She relies exclusively on case law regarding when "*a private entity* may qualify as a state actor." *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1928 (2019) (emphasis added) (private nonprofit corporation); *Gilmore* v. *Montgomery*, 417 U.S. 556 (1974) (YMCA); *Cent. Hardware* v. *NLRB*, 407 U.S. 539 (1972) (private company); *Adickes* v. *SH Kress & Co.*, 398 U.S. 144 (1970) (private restaurant). Since few constitutional guarantees apply to private actors, there is a strong default presumption that

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[10] https://support.tiktok.com/en/account-and-privacy/account-privacy-settings/duets.

[11] https://support.tiktok.com/en/account-and-privacy/account-privacy-settings/stitch.

[12] https://www.linkedin.com/help/linkedin/answer/a547225.

[13] https://help.instagram.com/700284123459336.

[14] https://www.bustle.com/articles/115784-facebook-reactions-arent-exactly-a-dislike-button-but-they-definitely-allow-you-to-express-yourself-in.

[15] https://help.instagram.com/1013375002134043.

their affairs lie beyond the reach of Section 1983; that presumption can be overcome only through an atypical level of governmental involvement. This Court has accordingly restricted cases in which "a private entity can qualify as a state actor [to] a few limited circumstances." *Manhattan Cmty. Access*, 139 S. Ct. at 1928 (citations omitted).

That approach is not well suited, and has never been applied by this Court, to cases where the defendant is a public official. Since the question in that scenario is *in what capacity* did the official act, it makes little sense to start with a presumption against state action—particularly where (as here) the defendant himself purports to act as a public official.

3. Because the Solicitor General's test effectively deems a defendant's public-official status irrelevant, it is unduly narrow. She would recognize only two circumstances in which a public official's denial of access to private property—whatever that means—merits constitutional scrutiny: where the official "invoke[es] official powers or exercise[es] a traditional and exclusive public function." U.S. Br. 9. The former category is equivalent to Freed's "derived-from-state-power" test; it is faulty for reasons already explained. See pp. 4-6, *supra*.

As to the other category, "[t]he Court has stressed that 'very few' functions" qualify as an "exclusive public function." *Manhattan Cmty. Access*, 139 S. Ct. at 1929 (quoting *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 158 (1978)). For instance, "education [i]s not a uniquely public function," so private-school officials do not act under color of law. *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 836, 831 (1982). But it does not follow that a *public-school* official who throws an off-site graduation party only for white students is immune from constitutional scrutiny. Ultimately, the Solicitor General's attempt to impose "rigid simplicity" on the state-action inquiry is as misguided as Freed's.

Brentwood Acad. v. *Tenn. Secondary Sch. Athletic Assoc.*, 531 U.S. 288, 295 (2001).[16]

C. No Sound Reason Exists to Exclude Appearance and Function from the State-Action Inquiry

Freed and the Solicitor General criticize reliance on appearance and function when deciding whether a public official acts "under color of" law. But they fail to offer any historically or textually plausible account of the statutory text that would justify excluding those considerations, and their reasoning is unpersuasive.

1. This Court endorsed the relevance of appearance in *Griffin* v. *Maryland*. The security guard there occupied dual roles: "his private capacity" as a park employee, and a "limited capacity as a special deputy sheriff." 378 U.S. at 134 (citation omitted). Crucially, though, he "*purported* to exercise the authority of a deputy sheriff." *Id.* at 135 (emphasis added).

Freed attempts (Br. 36) to recast *Griffin* as a case of "'duty' and 'authority,'" but he identifies no power exercised by the defendant there unavailable to a purely private security guard. Besides, this Court *expressly* found it "irrelevant" that the guard "might have taken the same action had he acted in a purely private capacity." *Id.* at 135. Freed points (Br. 37) to the concurrence's statement that the case might be "different" if the defendant "had not

[16] The Solicitor General says that if "'a town temporarily relocated its public meetings to the home of a councilmember,' that would be an example of using private property for a traditional, exclusive public function." U.S. Br. 29 (quoting Pet. Br. 37) (brackets omitted). But what about a town that holds a seasonal festival on private property? Or an elected official who regularly opens his home to constituents for discussion of pending legislation? Those non-exclusive public functions would merit constitutional scrutiny if undertaken in a manner that excluded certain members of the public on impermissible grounds.

been a police officer." *Id.* at 138 (Clark, J.). That is true under Lindke's test as well: A defendant who invokes the prestige of a public office must in fact be a public official to act "under color of" law.

The Solicitor General's take on *Griffin* is self-contradictory. She admits (Br. 23) that "an ordinary private citizen" could have done what the defendant did there, but then asserts that his "act of invoking [his] official status as a formally deputized officer" somehow "transform[ed] the character of the authority exercised." That ipse dixit is unclear. Claiming public-official status does not invest conduct with any new *legal* authority, only *apparent* authority. Indeed, there is no other explanation for this Court's repeated use of the word "purported," see *id.* at 135 (employing some version of the word three times in one paragraph), which can *only* refer to appearances. And again, the Court deemed the lack of state power to be "irrelevant."

2. Freed (Br. 37-38) and the Solicitor General (Br. 26) admit that appearance *does* matter when deciding whether an off-duty police officer acts "under color of" law. They nevertheless insist that police officers are constitutionally unique in this respect because a police officer's appearance "actually evokes state authority." Resp. Br. 38 (citation omitted).

Notably, neither Freed nor the Solicitor General identifies a *legal* distinction between off-duty police officers and other governmental officials. Indeed, the Solicitor General acknowledges (Br. 23) that "private citizen[s]" often *can* engage in the same conduct as off-duty officers, including making arrests. Freed argues (Br. 38) that officers are different because "an officer exudes authority," but that impressionistic judgment hardly qualifies as constitutional law. The court below observed that "[w]e're generally taught to stop for police, to listen to police, to provide information police request." Pet. App. 12a. True enough.

But most Americans are also "generally taught" to respect and comply with directives from other public officials, including teachers, paramedics, health officials, safety workers, court personnel, and elected officials. These officials, too, can affect rights through conduct invoking their governmental status.

An example is *Harris* v. *Harvey*, 605 F.2d 330 (7th Cir. 1979). There, after a black police officer was cleared of "baseless" witness-tampering charges, a county judge vowed to "get that 'black bastard'" and engaged in various "non-judicial acts motivated by racial animosity." *Id.* at 333-35. Among other things, the judge recited over the radio an arrest warrant for the officer, fed negative stories to the press, and "wrote a letter to the Chief of Police accusing [the officer] of destroying police records." *Id.* at 334-35.

On appeal, the judge argued that he had engaged in the relevant conduct "as a private citizen." *Id.* at 337. But the court determined he had "act[ed] under color of law by using the power and prestige of his state office to damage" the officer:

> Letters were written on official stationery. Press releases were disseminated by the defendant, identified as a county judge, through the media. The defendant brought to bear his influence as a county judge on those to whom he wrote and spoke.

Ibid. Though none of those acts carried legal force, they nevertheless invoked "the pretense of his standing as a county judge." *Ibid.*

Now imagine that the judge had instead pursued his racist campaign via private social media, repeatedly invoking his judicial office in his profile and posts. Police officers are not the only public officials whose appearance matters.

3. Appearance and function also speak to the level of governmental control over public officials' private social media use. As noted, see p. 8, *supra*, governmental employers routinely adopt policies regulating how employees use their private accounts and may penalize such conduct even in absence of a policy, so long as they abide by appropriate constitutional principles. See *Pickering* v. *Bd. of Educ.*, 391 U.S. 563 (1968). Notably, those constitutional principles—which are designed "[t]o reconcile the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission," *Roe*, 543 U.S. at 82—*expressly* take appearance and function into account.

In *Roe*, for instance, this Court upheld San Diego's right to terminate a police officer who sold videos on eBay of himself performing sexually explicit acts in a police uniform. The officer "took deliberate steps to link his videos and other wares to his police work," the Court explained, and the resulting role-blurring was "injurious to his employer." *Id.* at 81; see *ibid.* (noting officer's "use of the uniform, the law enforcement reference in the Web site, the listing of the speaker as 'in the field of law enforcement,' and the debased parody").[17] By contrast, in *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 465 (1995), the Court explained that governmental employers have *less* control over employees' off-duty speech if it "has nothing to do with their jobs."

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[17] *Roe*'s emphasis on the officer's "deliberate" attempt to link his online conduct to his job, *ibid.*, answers the Solicitor General's argument (Br. 28) that adding a "subjective component" to the inquiry would unduly complicate litigation. But the "subjective" question is not whether a government employee "didn't *want* an official" social media account. U.S. Br. 28 (emphasis added; cleaned up). It is whether the employee deliberately blurred the line between official and private use.

Case law applying *Pickering* to social media activity thus reflects the significance of appearance and function. See, *e.g.*, *Graziosi*, 775 F.3d at 735 ("Graziosi spoke as a police officer [on Facebook] because she identified herself as a member of the [police department] by using words such as 'we' and 'our.'"); *Shepherd* v. *McGee*, 986 F. Supp. 2d 1211, 1214 (D. Or. 2013) (employee posted about job performance on Facebook page, where "she identified herself as a 'Child Protective Services Case Worker'"); *Carr*, 230 A.3d at 1088 ("Carr identified herself as a Department employee in her Facebook profile and in her posting."). When public officials blur the line between official and private social media activity, the government's control over such activity grows correspondingly.

Port Huron could thus prevent its employees from invoking their official titles or performing the duties of their office—such as communicating with constituents about town business—on private social media accounts. See U.S. Dep't of Justice, *Off-Duty Conduct* 6 (Jan. 29, 2016) ("Your position or title shall not be used … to give the appearance of governmental sanction.").[18] Freed himself asserts (Br. 33) that "[t]he U.S. government prohibits [Representatives] from serving constituents through an unofficial account." That is what Freed did in this case.

For related reasons, there is no merit to Freed's criticism (Br. 32) that taking appearance and function into account would be "unworkable." As the case law makes clear, *Pickering* balancing requires a court to consider whether government officials have linked their social media use to their jobs. See U.S. Br. 29 ("[T]he public's likely perception as to who (the government or a private person) is speaking is relevant to the First Amendment question.") (quotation marks omitted). There is no reason to think courts will

[18] https://www.justice.gov/d9/pages/attachments/2018/03/30/off-duty_conduct0002_-_accessible.pdf.

struggle to evaluate those same considerations when deciding whether social media activity occurred "under color" of law.

4. Appearance and function also bear on whether a public official was acting within the scope of his or her employment. As respondents in *O'Connor-Ratcliff* v. *Garnier* explain, "public officials are state actors when they are doing their job." Resp. Br. 15, No. 22-324 (Aug. 8, 2023). Using social media within the scope of employment is thus sufficient—though not necessary—for a public official's conduct to occur "under color of" law.

That happened here. Freed used Facebook "*as city manager* [to] reverberate [his] message out to get it to as many people in the community as possible." C.A. Rec. 672 (emphasis added). He also corresponded directly with constituents and answered City-related questions. Pet. Br. 9 (providing examples). Indeed, much of his Facebook activity—such as posting press releases from other City officials or offices, *id.* at 7—served no apparent purpose *other than* performing his job.

Freed now denies that interacting with constituents was a job responsibility. That assertion is hard to credit, given the overwhelming evidence of Freed's tireless communication about City business. Freed's argument (Br. 42-43) depends on creatively reinterpreting the Port Huron City Code, which, fairly read, requires the City Manager to interact with the public—*especially* during emergencies. See City Code § 20-12(3) (Mayor implements quarantine procedures "through the City Manager"); *id.* § 20-13 ("the City Manager will provide direction for media releases"); *id.* § 20-15 (Director of Public Safety "reports to the City Manager" regarding "all media activities" during emergencies).

In any event, an elected official's job responsibilities "are not confined to those directly mentioned by statute."

Council on Am. Islamic Rels. v. *Ballenger*, 444 F.3d 659, 665 (D.C. Cir. 2006) (per curiam) (citation omitted). As the United States has explained, "an office holder responsible to the electorate is acting within the scope of his office when he responds to accusations" that bear on his official conduct. U.S. Br. 31, *Carroll* v. *Trump*, No. 20-3977 & 20-3978 (2d Cir. Jan. 15, 2021); see *id.* at 33 (elected official "acts within the scope of his office when he responds to public critics"); see also *Does 1-10* v. *Haaland*, 973 F.3d 591, 601 (6th Cir. 2020) ("the act of communicating one's views to constituents" falls within scope of elected official's job).

Here, consistent with his practice of responding to constituent comments on Facebook, Freed originally engaged directly with Lindke's criticisms of his job performance. C.A. Rec. 1448. Freed later changed his approach, deleting Lindke's comments and blocking Lindke from his page. *Ibid.* But Freed's shift from engaging Lindke to avoiding him did not alter the scope of his employment as City Manager.

5. Freed and the Solicitor General decry the perceived practical effects of taking appearance and function into account, but their arguments—which contradict one another—are unpersuasive.

Freed again conflates the state-action question (Br. 29-30) with the separate question of employer liability. He also falsely assumes (Br. 30) that if a public official's social media activity occurs "under color of" law, that would give a governmental employer "the right to unbridled censorship" over it.[19] Officials' private social media use is subject

[19] The Solicitor General asserts (Br. 32) that "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." An obvious non-sequitur: A state-action

to *Pickering* balancing, which affords adequate "First Amendment protection." *Roe*, 543 U.S. at 80. Indeed, it makes more sense to safeguard officials' speech rights within a First Amendment framework specifically calibrated for competing interests, rather than under a state-action framework that functions as a blunt on-off switch.

Freed's dire predictions (Br. 3) about "chill[ing] the social media speech of 21 million public sector employees" are similarly overblown. Freed (Br. 29) predicts a flood of litigation from "rogue characters and Internet trolls," whereas the Solicitor General predicts (Br. 32) that plaintiffs will be "unlikely to prevail under substantive First Amendment law." In fact, the majority of circuits have taken appearance and function into account for years, with zero evidence for either prediction. And Freed's complaint (Br. 47) that facing constitutional scrutiny would force him "to allow all comments, including personal attacks against himself and his family" reflects a misunderstanding of the *substantive* First Amendment standard.

Finally, exempting public officials' private social media use from constitutional scrutiny would create "perverse incentives for officials to rely on [such] accounts as a means of evading accountability." Pet. Br. 14. The Solicitor General responds (Br. 30) that the Constitution would still apply where an official performs a "traditional and exclusive public function" or "official job responsibilities," or "uses meaningful government resources," but those caveats are narrow—and easily sidestepped. For instance, an elected official who created a Facebook "group chat"[20] to regularly discuss pending legislation with constituents could exclude members of disfavored groups with impunity. Indeed,

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finding does not transform off-duty employee speech into government speech, just as government employers "cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell*, 436 U.S. at 691.

[20] https://www.facebook.com/help/messenger-app/1759354747722950.

Freed's unduly narrow conception of his own job duties shows how easy it would be for public officials to disclaim responsibility for their conduct.

D. Freed's Facebook Activity Constituted State Action

This Court should "remand" for the courts below to "sift[] facts and weigh[] circumstances" under the appropriate standard. *Gilmore*, 417 U.S. at 574 (citation omitted). Freed (Br. 48) calls remand "[r]edundant" because the district court already ruled in his favor while taking appearance and function into account. Actually, it failed to consider the appropriate factors and mishandled the ones it *did* consider. Lindke C.A. Br. 27-36. Regardless, this Court remands to courts of appeals, not district courts. The Sixth Circuit, because it adopted a duty-or-authority test, never considered the record under the appropriate test.

If the Court evaluates the record itself,[21] it should conclude that Freed's conduct occurred under color of law. Freed designed his Facebook page to appear as an extension of his position as City Manager; particularly during the pandemic—out of which his dispute with Lindke arose—Freed used his account as the official mouthpiece for his office. See Pet. Br. 40-42. Freed claims (Br. 46) he was "merely sharing his every day, commonplace thoughts, observations, and activities." But few outside government post "COVID-19 Daily Media Update[s]" and announce municipal initiatives using first-person language and phrases like "I hereby direct." *Id.* at 8-9. At minimum, the nature of Freed's social media activity is a factual issue that precludes summary judgment.

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[21] Freed inappropriately makes accusations about Lindke (Br. 10) that are factually false—such as the claim that he has been convicted of cyberstalking—and plainly irrelevant to the state-action question.

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The court of appeals' judgment should be reversed.

Respectfully submitted,

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