NO. 23-229

In the Supreme Court of the United States

BRONSON MCCLELLAND,

Petitioner,

v.

KATY INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, Petitioner Bronson McClelland respectfully petitions this Court for an order (1) granting rehearing, (2) vacating the Court's October 30, 2023, order denying certiorari, and (3) holding the petition pending the Court's decision in *O'Connor-Ratcliff v. Garnier*, No. 22-324, and then grant the petition and review the judgment below.

REASONS FOR GRANTING THE PETITION

Rule 44.2 authorizes a petition for rehearing based on "intervening circumstances of a substantial . . . effect or [] other substantial grounds not previously presented." McClelland's petition explained why this Court's review was warranted in the first instance — namely, the existence of a clear circuit split on important questions regarding *Monell* liability and protected off-campus speech of K-12 public school students.

On October 31, 2023, the day after McClelland's petition for writ of certiorari was denied, the U.S. Supreme Court heard oral argument in *O'Connor-Ratcliff*. This Court's decision in that case is pending, and constitutes an "intervening circumstance of substantial . . . effect," because it provides an additional and independent justification for this Court's review that also raises "other substantial grounds not previously presented." Specifically, as it pertains to elected school board members, the Court has been

asked to determine what is and what is not considered state action for purpose of imposing § 1983 liability.

As relevant here, the Court granted certiorari in *O'Connor-Ratcliff* on the following question:

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

In his original petition, McClelland provided a *Monell* analysis, which began by showing that in the Fifth Circuit, there are

> three ways of establishing a municipal policy for the purposes of *Monell* liability. First, a plaintiff can show "written policy statements, ordinances, or regulations." Second, a plaintiff can show "a widespread practice that is so common and well-settled as to constitute a custom that fairly represents municipal policy." Third, even a single decision may constitute municipal policy in "rare circumstances" when the official or entity possessing "final policymaking authority" for an action "perform the specific act that forms the basis of the § 1983 claim."

Webb v. Town of St. Joseph, 925 F.3d 209, 214–15 (5th Cir. 2019) (internal citations omitted).

McClelland's petition focused on the first method, and he also provided convincing facts that demonstrated

that the third method was available with respect to the Superintendent and Principal as designees of the KISD Board's final policymaking authority. This Court's upcoming decision in *O'Connor-Ratcliff* raises the possibility of establishing liability through the actions of the KISD Board of Trustees via the third method — "perform[ing] the specific act that forms the basis of the § 1983 claim." Moreover, its application of the First Amendment to the social media context also raises questions in this case about how far the government can reach into and regulate private action on social media.

In *O'Connor-Ratcliff*, the Ninth Circuit affirmed the district court's judgment that individual trustees on a school board took state action where they used word filters and blocked specific users on their Facebook pages. *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1163 (9th Cir. 2022). In doing so, it held that "The protections of the First Amendment apply no less to the 'vast democratic forums of the Internet' than they do to the bulletin boards or town halls of the corporeal world." *Id.* at 1185 (citing *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017); *Reno v. American Civil Liberties Union*, 521 U. S. 844, 868 (1997)).

It also correctly based its state action analysis on the foundational principle that the defendant's actions must be "fairly attributable to the State." *Id.* at 1169 (citing *West v. Atkins*, 487 U.S. 42, 49 (1988)). It noted that

> "there is no rigid formula for measuring state action for purposes of section 1983 liability." *Gritchen v. Collier*, 254 F.3d 807, 813 (9th Cir. 2001) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000)). Rather,

> determining whether a public official's conduct constitutes state action "is a process of 'sifting facts and weighing circumstances.'" *Id.* (quoting *McDade*, 223 F.3d at 1139). "[N]o one fact can function as a necessary condition across the board." *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 751 (9th Cir. 2020) (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001)).

Id. Ultimately, it noted, "what is fairly attributable to the state is a matter of normative judgment, and the criteria lack rigid simplicity." *Id.* (cleaned up) (citing *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003), quoting *Brentwood*, 531 U.S. at 295)). In this analysis, there are four tests used to identify state action; the two relevant tests here are the "public function" test and the "nexus test." *Id.*; *see Brentwood*, 531 U.S. at 295 (nexus test), *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (public function test).

Like *O'Connor-Ratcliff*, McClelland's case also involves a public school district, its Board of Trustees, school district policy, social media, and the First Amendment. If this Court affirms the Ninth Circuit's decision that the conduct of the *O'Connor-Ratcliff* defendants was state action, McClelland submits that when the KISD Board of Trustees released the "KISD Statement" in compliance with the Texas Education Code and its own Media Policy, that the KISD Board, as an entity, took state action as well. Specifically, as reflected in the record:

1) the KISD Board of Trustees released the KISD Statement, which was official district

communication from their official school district email account, and,

2) the KISD Statement notified the public that McClelland would be disciplined for violating the KISD Student Code of Conduct and the KISD Athletic Code of Conduct for his off-campus speech on social media.

The state action doctrine seems simple on its face. The provisions of the U.S. Constitution and its amendments apply to the government and those acting on its behalf. The action at issue is either taken directly by the state or bears a sufficient connection to the state to be attributed to it. As noted above, the Court has developed several technical tests for determining when the conduct of a person or entity constitutes state action, including, as relevant here, the public function test, and the nexus test.

Here, the public-function test is clearly satisfied in regards to McClelland's claim brought under 42 U.S.C. § 1983. The public function test states that where an individual or entity performs functions that are typically reserved for the government, their actions can be considered state action and subject to constitutional scrutiny. The KISD Board, as an entity, performed actions reserved for the government — specifically, speaking on behalf of the government and applying KISD policy in order to levy a punishment. In addition to and in the alternative, the KISD Board's actions also bear "such a close nexus with the State" that its "behavior may be treated as that of the State itself." *O'Connor-Ratcliff*, 41 F.4th at 1169. Specifically, as described in the original petition, using the official KISD email account to send the "KISD Statement," signing the Statement "Katy ISD," and

relying on KISD board-approved policies that are directly attributed to the school district, all create "such a close nexus with the State" that the actions of the KISD Board of Trustees should "be treated as that of the State itself."

In *O'Connor-Ratcliff*, the question of state action stems from actions of board members who "blocked" private citizens from their Facebook page. In McClelland, the determination of state action and its direct correlation to establishing *Monell* liability stems from the KISD Board as an entity that is the lawful policymaker for a Texas school district, which, acting pursuant to KISD Policy and relying on the Student Code of Conduct (SCC) and the Athletic Code of Conduct (ACC) as their authority and control, released official communication to the general public that confirmed McClelland would be "disciplined" for his off-campus speech for allegedly violating the KISD SCC and ACC.

As described above, the actions taken by the KISD Board of Trustees are clearly that of state action. Thus, because the KISD Board is KISD's final policy-maker, and its actions, as discussed in McClelland's original petition and *ante*, formed the basis of the First Amendment violation at issue, *Monell* liability must attach.

Therefore, the pending intervening opinion of the Court in *O'Connor-Ratcliff* is extremely significant in McClelland. Specifically, if the Court determines that the actions taken by the board members in *O'Connor-Ratcliff* were state action, then the actions of the KISD Board of Trustees must also be considered state action. As pled and as described herein, McClelland submits that based on the KISD Board of

Trustees' clear state action, KISD's *Monell* argument is misguided and disingenuous. KISD has admitted to its reliance on the SCC and the ACC, both of which are official district policies approved by the KISD Board of Trustees; KISD then used these policies as its authority to punish McClelland for his off-campus speech. Furthermore, if KISD and its Board of Trustees did not rely on these official district policies, then they had no authority to punish McClelland in the first place.

Beyond the state action issue at hand is this Court's determination of the scope of First Amendment protections in the social media context in *O'Connor-Ratcliff*. Although that case addresses the question from the perspective of whether a public official's account is a public forum, McClelland's case addresses the opposite question and a necessary corollary to that potential answer — can a State actor, including school officials, reach into, regulate, and punish expression made in private on social media? Here, there was no nexus to the school in any way, and the school officials did not stand *in loco parentis*. In spite of that fact, the KISD Board, as a State actor, reached into what can only be described as private, off-campus communication that coincidentally occurred on social media, and unconstitutionally determined that such communication was within its authority to punish. Stated differently, if a State actor is restricted by the First Amendment in their ability to regulate a public forum they create on a public social media page, how can they possibly extend their authority to private, direct communication between two private parties that merely happens to use a social media platform's private messaging functionality? Such communication

that is unquestionably made in a private, non-governmental forum should and must be protected under the First Amendment.

CONCLUSION

McClelland understands that State Action can occur without attaching *Monell* liability. For example, if a police officer, without justification, approaches a stranger and assaults them, that would be state action, but *Monell* liability would not attach without more. However, in McClelland, the KISD Board of Trustees — the official policymaker for the school district — did prepare, approve, and release the KISD Statement, which by doing so, confirmed that the Student Code of Conduct and the Athletic Code of Conduct were official policies of KISD; the same policies KISD used as their authority to punish McClelland in violation of his First Amendment rights. Thus, McClelland asserts that the release of the KISD Statement from the Board of Trustees and the punishment he received for his off-campus speech is undisputed state action, for which *Monell* liability must attach.

Furthermore, as stated in McClelland's petition for writ of certiorari, a similar *Monell* argument was put forth by the Mahanoy Area School District. There, the district court squarely addressed that *Monell* argument, and concluded that "[t]his argument can be dismissed out of hand" because the district "approved or ratified" the cheerleading rules under which B.L. was punished, and delegated its authority to those

that punished her. *B.L. v. Mahanoy Area Sch. Dist.*, 376 F.Supp.3d 429, 438 (M.D. Pa. 2019). As reflected throughout the record, McClelland precisely followed the example set in *Mahanoy* in regards to establishing *Monell* liability against the school district. In McClelland, not only did the Board of Trustees release the "KISD Statement" confirming McClelland's punishment to the general public, the Board of Trustees, akin to Mahanoy Area School District, delegated final policy making authority to other school officials to "develop and enforce extracurricular standards of behavior," — *i.e.* the ACC — and the KISD Board of Trustees, exactly like the Mahanoy Area School District, "approved or ratified" the ACC, the athletic rules under which McClelland was punished, and delegated its authority to those that punished him. Therefore, as a matter of law, McClelland and *Mahanoy* should be treated identically in regards to state action and the attachment of *Monell* liability. Student-athlete Brandi Levy and student-athlete Bronson McClelland were both punished according to official school district policies for their off-campus speech via social media. With the prevailing law on his side, McClelland's case should have easily survived a Rule 12(b)(6) motion to dismiss, and this Court can just as easily correct such a conspicuous failure by the lower courts that reflects a clear misapprehension of the motion to dismiss standard. *See Salazar-Limon v. City of Houston*, 581 U.S. 946, 947 (2017); *Tolan v. Cotton*, 572 U.S. 650, 659 (2014) (per curiam).

For the foregoing reasons, and those stated in the petition for writ of certiorari, the Court should grant rehearing, hold the petition pending the Court's decision in *O'Connor-Ratcliff*, and then grant the petition and review the judgment below.

Respectfully submitted,

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November 22, 2023

RULE 44.2 CERTIFICATE

Pursuant to Rule 44.2, I, Randall L. Kallinen, counsel for Petitioner Bronson McClelland, hereby certify that the petition for rehearing is restricted to the grounds specified in Rule 44.2. I further certify that the petition for rehearing is presented in good faith and not for delay.

/s/ Randall L. Kallinen
Randall L. Kallinen

November 22, 2023