No. 22-___

# In the Supreme Court of the United States

MICHELLE O'CONNOR-RATCLIFF AND T.J. ZANE,
*Petitioners*,

v.

CHRISTOPHER GARNIER AND KIMBERLY GARNIER,
*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

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

## PARTIES TO THE PROCEEDING

Petitioners Michelle O'Connor-Ratcliff and T.J. Zane were Defendants in the district court and Appellants and Cross-Appellees in the court of appeals.

Respondents Christopher Garnier and Kimberly Garnier were Plaintiffs in the district court and Appellees and Cross-Appellants in the court of appeals.

## STATEMENT OF RELATED PROCEEDINGS

United States District Court for the Southern District of California:

*Christopher Garnier & Kimberly Garnier v. Michelle O'Connor-Ratcliff & T.J. Zane*, No. 3:17-cv-00215-BEN-JLB (order granting in part and denying in part defendants' motion for summary judgment, Sept. 26, 2019; findings of fact and conclusions of law entered following bench trial, Jan. 14, 2021; order entering judgment, Jan. 15, 2021).

United States Court of Appeals for the Ninth Circuit:

*Christopher Garnier & Kimberly Garnier v. Michelle O'Connor-Ratcliff & T.J. Zane*, Nos. 21-55118, 21-55157 (affirming, July 27, 2022).

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The opinion of the United States Court of Appeals for the Ninth Circuit (Pet.App. 1a-54a) is reported at 41 F.4th 1158. The opinion of the United States District Court for the Southern District of California making findings of fact and conclusions of law after a bench trial (Pet.App. 55a-97a) is reported at 513 F. Supp. 3d 1229. The district court's summary-judgment opinion (Pet.App. 98a-128a) is unreported.

## JURISDICTION

The Ninth Circuit issued its judgment on July 27, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces relevant provisions of the First Amendment, U.S. Const. amend. I, the Fourteenth Amendment, U.S. Const. amend. XIV, and the Civil Rights Act of 1871 as amended, 42 U.S.C. § 1983.

## INTRODUCTION

Petitioners, two elected members of the Poway Unified School District Board of Trustees, used personal Facebook and Twitter accounts to communicate with the public about their jobs and the District. Respondents, parents of children attending schools in the District, spammed Petitioners' posts and tweets with repetitive comments and replies. So Petitioners blocked Respondents from the accounts.

In using the accounts and blocking Respondents, Petitioners were neither relying on any governmental authority nor carrying out any governmental duty. It is *undisputed* that the accounts were created and maintained by Petitioners without any direction, funding, support, or other involvement by the District. Nevertheless, the Ninth Circuit held that Petitioners' blocking of Respondents was state action that violated the First Amendment. The court reasoned that Petitioners had "us[ed] their social media pages as public fora" because "they clothed their pages in the authority of their offices and used their pages to communicate about their official duties." Pet.App. 6a, 26a. The court emphasized "appearance and content": the accounts prominently featured Petitioners' "official titles" and "contact information" and predominantly addressed matters "relevant to Board decisions." Pet.App. 22a-23a. In short, the court treated Petitioners' personal social-media pages as an exercise of *apparent* authority *related to* their duties. Pet.App. 25a-26a.

The Ninth Circuit's holding deepened a recent and acknowledged circuit split. Earlier this year, the Sixth Circuit held that a city manager "didn't

transform his personal Facebook page into official action by posting about his job," even though his page likewise addressed city policies and featured his official title and contact information. *Lindke v. Freed*, 37 F.4th 1199, 1201, 1207 (6th Cir. 2022). "Instead of examining [the] page's appearance or purpose," the Sixth Circuit explained that the proper state-action inquiry "focus[es] on the actor's official duties and use of government [authority]" (or lack thereof). *Id.* at 1206. The Sixth Circuit "part[ed] ways with other circuits' approach," *id.* (citing cases from the Second, Fourth, and Eighth Circuits); conversely, the Ninth Circuit "decline[d] to follow" the Sixth Circuit's "different analysis," instead "follow[ing] the mode of analysis of the Second, Fourth, and Eighth Circuits," Pet.App. 35a-36a.

The Ninth Circuit's approach is irreconcilable with this Court's precedents. "[W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2021). That is equally the case for individuals who make the private decision to use their personal social-media accounts to communicate with the public about their jobs as public officials. Neither the operation of such accounts nor the blocking of unwanted commenters involves "the exercise of [any] right or privilege created by the State," *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999), let alone an exercise "made possible only because the [official] is clothed with the authority of state law," *West v. Atkins*, 487 U.S. 42, 49 (1988). Instead, "citizen[s] who work[] for the

government" have a constitutionally *protected right* to "speak[] as citizens about matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). Regardless of whether social-media platforms may be considered a type of "modern public square," *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017), a public official's personal account is nothing of the sort when operated independent of the government's direction or authorization. It is the internet equivalent of "an official giv[ing] remarks" at her own private property and generally "allow[ing] for participation" by members of the public who wish to attend—which "would not require opening the floor" to those whom she specially chooses to bar from entering. *See Knight First Amend. Inst. v. Trump*, 953 F.3d 216, 229 (2d Cir. 2020) (Park, J., dissenting from denial of rehearing en banc).

The Ninth Circuit's error is also exceptionally important. "[I]t is now commonplace for politicians to use personal accounts to promote their official activities." *Id.* at 230. The Ninth Circuit's state-action ruling "will have the unintended consequence of creating less speech if the social-media pages of public officials are overrun with harassment, trolling, and hate speech, which officials will be powerless to filter." *Id.* at 231. That perverse result exemplifies this Court's admonition that breaching the "critical boundary between the government and the individual" enforced by the state-action doctrine would undermine "a robust sphere of individual liberty." *Halleck*, 139 S. Ct. at 1934.

This Court should thus grant certiorari, resolve the conflict among the circuits, and reverse the Ninth Circuit's misapplication of the state-action doctrine.

## STATEMENT OF THE CASE

**1.** This case involves actions by public officials on their personal Facebook and Twitter accounts.

Facebook is a social-media platform that allows individual account owners to disseminate content through online "posts." Pet.App. 63a. Each user has a personal "profile" where access can be limited to particular groups of people, and users also can create "pages" that are generally open to the public. Pet.App. 59a-60a. Other Facebook users with access to a user's page can respond to the user's posts by posting comments on the page (or by conveying non-verbal reactions through images such as a "thumbs up" icon). Pet.App. 63a. The original poster and other users can post replies to comments. Pet.App. 65a-66a. Facebook's interface truncates posts or responses that are lengthy, requiring an interested viewer to click a "See More" button to read the full text. Pet.App. 63a-65a.

The Facebook platform provides various ways for account owners to moderate comments on their pages. They can delete an individual comment or "hide" it, making it visible only to the owner and the commenter. Pet.App. 69a. They also can use a "word filter" to prevent comments containing certain words from appearing on their pages. Pet.App. 75a-76a. The platform further enables an account owner to "block" another Facebook user, which prevents that user from commenting on or otherwise reacting to posts on the owner's page, but does not prevent that user from continuing to view the page. Pet.App. 70a.

Twitter is a social-media platform that allows individual account owners to send short online

messages known as "tweets." Pet.App. 70a. Tweets appear on a user's "feed," which generally is accessible by all other Twitter users (and also by non-Twitter users with internet access). *Id.* Other Twitter users can respond to a user's tweets by posting replies on the user's feed (or by clicking a heart icon or "retweeting" the message on their own feeds). *Id.* When viewing a user's feed, replies to the user's tweets are not visible unless a specific tweet is selected. *Id.* The platform enables an account owner to "block" another Twitter user (among other options), which prevents that user from replying or otherwise reacting to the owner's tweets and also from viewing the owner's feed while logged into the blocked account. Pet.App. 72a-73a.

**2.** Petitioners Michelle O'Connor-Ratcliff and T.J. Zane are members of the Poway Unified School District Board of Trustees. Pet.App. 59a. Petitioners each created public Facebook pages before they were elected in late 2014, and O'Connor-Ratcliff also created a public Twitter page sometime before 2017. Pet.App. 59a-60a. While Petitioners had previously created private Facebook profiles to communicate with family and friends, they created the additional social-media accounts to communicate to the public about their campaigns and political activities. *Id.* After they were elected, Petitioners updated these personal accounts to feature their Board positions and provide information related to the Board and the District. Pet.App. 99a-100a.

Respondents Christopher and Kimberly Garnier are parents of children who are students in the District. Pet.App. 59a. They posted repetitious and non-responsive comments and replies to Petitioners'

posts and tweets. Pet.App. 73a. For example, Christopher made the same comment on 42 different posts by O'Connor-Ratcliff and the same reply on 226 of her tweets. *Id.* O'Connor-Ratcliff has blocked both Garniers from her Facebook page and Christopher from her Twitter page; Zane also was found to have blocked both Garniers from his Facebook page. Pet.App. 76a-78a.

**3.** Respondents filed suit under 42 U.S.C § 1983. Pet.App. 55a. They claimed that Petitioners had deprived them of their First Amendment speech rights by blocking them from commenting on Petitioners' Facebook and Twitter pages, which they characterized as public fora. *Id.*[1]

**a.** At the summary-judgment stage, the district court held that Petitioners were entitled to qualified immunity from damages, Pet.App. 108a-110a, but allowed Respondents' claim for injunctive and declaratory relief to proceed to trial in light of a disputed factual issue, Pet.App. 128a.

The court held as a matter of law, though, that Petitioners' blocking of Respondents satisfied the First Amendment's state-action requirement and the related § 1983 color-of-law requirement. Pet.App. 110a-115a. The material facts are undisputed. *See* Court of Appeals Excerpts of Record (CA.ER) 182-98 (parties' joint statement of undisputed and disputed facts on the state-action issue).

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[1] Although Respondents also claimed that Petitioners' conduct violated the California Constitution, they "did not offer evidence or argue the state law claim." Pet.App. 56a. The district court therefore denied relief on that claim, Pet.App. 56a, 97a, and Respondents did not contest that ruling on appeal.

On one hand, Respondents did not dispute that the District was not involved at all in the creation or maintenance of Petitioners' social-media accounts. The Facebook pages were created by Petitioners in their personal capacities as campaign tools before they even took office, and Petitioners thus will keep those personal accounts (as well as a personal Twitter account created while in office) even after they leave office. CA.ER 182, 191-92. The District has no control over the accounts, and the District has not used any personnel or funds to support the accounts' operation. CA.ER 186-87, 195-96.

On the other hand, Petitioners did not dispute that their personal social-media accounts featured their official status and communicated with the public about their jobs and District-related matters. The accounts prominently featured their official titles and contact information. CA.ER 187-88, 192-93; Pet.App. 99a-100a. And the accounts also predominantly addressed Board activities and information about the District. CA.ER 187-88, 194-95; Pet.App. 100a.

On these undisputed facts, the court concluded that state action existed. The court so held despite acknowledging that, "[b]esides [Petitioners], no [District] employee regulated, controlled, or spent money maintaining any of their social media pages." Pet.App. 100a. Nor did (or could) the court find that Petitioners' use of their personal social-media pages was required by their official duties. Instead, the court reasoned that, "[b]ecause [Petitioners] could not have used their social media pages in the way they did but for their positions on [the District]'s Board, their blocking of [Respondents] satisfies the state-action requirement." Pet.App. 115a. The court

emphasized that Petitioners "swathed" their pages in "the trappings" of their offices and that they frequently communicated with the public about "events which arose out of their official status," including matters they had the ability to discuss only "due to their positions." Pet.App. 114a-115a.

For similar reasons, the court held as a matter of law that Petitioners' social-media accounts had become designated public fora under the First Amendment. Pet.App. 115a-122a. But the court concluded that there was a genuine factual dispute, material to the standard of scrutiny, as to whether Petitioners' reasons for blocking Respondents were content-neutral. Pet.App. 125a-128a.

**b.** After a two-day bench trial, the district court concluded that Petitioners had violated Respondents' First Amendment rights. Pet.App. 97a. At the outset, the court incorporated into the trial record the summary-judgment evidence on the state-action issue, CA.ER 1498, and it reaffirmed that Petitioners acted under color of state law by blocking Respondents from designated public fora purportedly created through their personal social-media accounts, Pet.App. 81a-85a. Turning to the factual dispute, the court found that Petitioners had blocked Respondents because of the unduly repetitive manner of their comments and replies, without regard to their critical content. Pet.App. 85a-89a. Despite finding that the blocking was content-neutral, the court concluded that Petitioners' continued blocking of Respondents was not adequately tailored to an appropriate interest. Pet.App. 89a-96a. It therefore granted injunctive and declaratory relief. Pet.App. 97a.

**4.** The Ninth Circuit affirmed. Pet.App. 6a. The court held that the law had not been clearly established enough to defeat Petitioners' qualified immunity from damages, Pet.App. 50a-52a, but that there is an ongoing First Amendment violation warranting prospective relief, Pet.App. 15a-50a.

The court focused on the state-action issue. Pet.App. 18a-36a. It acknowledged the undisputed facts that Petitioners' personal social-media accounts were originally created in their private capacities "to promote their political campaigns," Pet.App. 6a, and have been maintained while in office without any "[District] funding or authorization," Pet.App. 26a. Indeed, it admitted that Petitioners' "use of their social media accounts was … not required by[] their official positions," albeit "directly connected" to those positions. Pet.App. 20a.

The court nevertheless held that Petitioners "have acted under color of state law by using their social media pages as public fora," because "they clothed their pages in the authority of their offices and used their pages to communicate about their official duties." Pet.App. 6a, 26a. The court emphasized that Petitioners "identified themselves" as government officials, "listed their official titles in prominent places," and "included [an] official [District] email address in the … contact information" of O'Connor-Ratcliff's Facebook page. Pet.App. 22a-23a. The court treated such indicia as apparent authority, "whether or not the District had in fact authorized" the pages. Pet.App. 26a. The court further stressed that the accounts were "overwhelmingly geared toward providing information to the public about the [District] Board's

official activities and soliciting input from the public on policy issues relevant to Board decisions." Pet.App. 23a (cleaned up). The court asserted that Petitioners used their "'governmental status' to influence … public engagement with their social media pages" and used the pages "to keep the public apprised" of District activities. Pet.App. 24a (cleaned up). The court treated such information provision as related to Petitioners' duties, even if not carried out pursuant to any actual duty. Pet.App. 25a-26a. In short, the court held that, "both through appearance and content, [Petitioners] held their social media pages out to be channels of communication with the public about the work of the [District] Board." Pet.App. 23a. In support, the court invoked circuit precedent addressing the apparent authority of off-duty law-enforcement officers, Pet.App. 21a-22a, and parallel decisions from the Second, Fourth, and Eighth Circuits, Pet.App. 29a-36a.

The Ninth Circuit made quick work of the remaining elements of the First Amendment claim. It concluded that Petitioners' social-media accounts are public rather than non-public government fora, Pet.App. 37a-41a, that Petitioners' content-neutral blocking of Respondents is not adequately tailored to an appropriate interest, Pet.App. 41a-50a, and that Respondents continue to have a live claim despite Petitioners' post-blocking use of word filters to effectively prevent most comments on their Facebook pages, Pet.App. 15a-18a. This petition does not contest those holdings, and the question presented is limited to the threshold state-action holding.

## REASONS FOR GRANTING THE PETITION

### I. THE DECISION BELOW PRESENTS AN ACKNOWLEDGED CIRCUIT SPLIT ON WHETHER PUBLIC OFFICIALS ENGAGE IN STATE ACTION WHEN BLOCKING INDIVIDUALS FROM THEIR PERSONAL SOCIAL-MEDIA ACCOUNTS

In this context, the Sixth Circuit's state-action test focuses narrowly on whether a public official's operation of a social-media account relies on any governmental *authority* or carries out any governmental *duty*. By contrast, the Ninth Circuit, along with the Second, Fourth, and Eighth Circuits, have more broadly considered whether the account has an official *appearance* and serves the *purpose* of informing the public about official business. The Sixth Circuit and Ninth Circuit each expressly acknowledged the conflicting legal standards, which led to directly conflicting results on materially indistinguishable facts. This Court should resolve the acknowledged circuit split.

#### A. The Authority-Or-Duty Test Adopted By The Sixth Circuit

**1.** In *Lindke v. Freed*, 37 F.4th 1199 (6th Cir. 2022) the Sixth Circuit confronted the same question that the Ninth Circuit faced a month later and answered it the opposite way. The case involved a city manager who used his personal Facebook page to communicate with the public about city business; he blocked a disconcerted citizen who had posted comments criticizing the city's COVID-19 policies. *Id.* at 1201-02.

The Sixth Circuit first held that a public official's operation of a social-media account is state action

"only" if it "either (1) [is undertaken] pursuant to his actual or apparent duties or (2) us[es] his state authority." *Id.* at 1204; *see id.* at 1202-04. And the court then concluded that the manager's "page neither derives from the duties of his office nor depends on his state authority." *Id.* at 1204.

On the authority element, the Sixth Circuit emphasized that the "page did not belong to the office of city manager." *Id.* at 1205. The manager "created the page years before taking office, and there's no indication his successor would take it over." *Id.* Moreover, the manager did not "rely on government employees to maintain [it]." *Id.* He "is the page's only administrator," and "there's no evidence that staffers were involved in preparing content." *Id.* Simply put, the manager's operation of the page did not depend on actual or apparent governmental authority because the page was his private property, not public property.

On the duty element, the Sixth Circuit emphasized that "no state law, ordinance, or regulation compelled [the manager] to operate his Facebook page." *Id.* at 1204. Nor were there any "government funds" or other evidence "to suggest operating the page was [the manager's] official responsibility." *Id.* at 1205. Unsurprisingly, he had no actual or apparent governmental duty to use his private property to perform his public job; instead, he was using his own property for his own ends.

**2.** The Sixth Circuit considered and rejected the "purpose and appearance" approach that "several other courts have used." *Id.* at 1205-06 (citing cases from the Second, Fourth, and Eighth Circuits). The

Sixth Circuit "part[ed] ways with [those] circuits' approach" for essentially two reasons.

*First*, the court explained that whether a public official's personal social-media account depicts the "trappings" of office is irrelevant to whether blocking a user from the account is an exercise of actual or apparent state authority. Unlike an off-duty police officer's commands, a public official's Facebook and Twitter pages do "not carry the force of law" and generally "gain[] no authority" based on their "appearance." *Id.* at 1206. The court thus deemed it immaterial that the manager "updated his Facebook page to reflect his [official] title"; featured a photo "wearing his city-manager pin"; and listed "a city address, email, and website" as the page's contact information. *Id.* at 1201, 1206.

*Second*, the court explained that it would "prove[] too much" to treat a public official's personal social-media activity as a state duty based on the platitude that "'regular communication with [constituents] is essential to good government.'" *Id.* at 1205. After all, "[w]hen [a public official] 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.* The court thus deemed it immaterial that the manager "posted about some of the administrative directives he issued" and city "policies he initiated." *Id.* at 1201.

**3.** Accordingly, it is clear that Petitioners' blocking of Respondents from their Facebook and Twitter pages would not be treated as state action in the Sixth Circuit. The elements that the Sixth

Circuit deemed essential were acknowledged to be absent here by the Ninth Circuit; and the elements that the Ninth Circuit emphasized here were deemed irrelevant by the Sixth Circuit.

The Ninth Circuit recognized that Petitioners' operation of their personal social-media accounts did not rely on any state *authority* as the Sixth Circuit used that term: the accounts were created in Petitioners' private capacities "to promote their political campaigns," Pet.App. 6a, and have been maintained while in office without any "[District] funding or authorization," Pet.App. 26a. Likewise, the Ninth Circuit recognized that Petitioners' use of the accounts did not carry out any state *duty* as the Sixth Circuit used that term: the "use of their social media accounts was … not required by[] their official positions," despite being "directly connected" to those positions. Pet.App. 20a.

Conversely, whereas the Ninth Circuit stressed that Petitioners' accounts had an *appearance* featuring their "official identifications" and *content* "inform[ing] … the public" about "official activities," Pet.App. 23a, the Sixth Circuit rejected that approach. "Instead of examining a page's appearance or purpose, [it] focus[es] on the actor's official duties and use of government [authority]" (or lack thereof). *Lindke*, 37 F.4th at 1206. Indeed, the Ninth Circuit evidently reads the Sixth Circuit's opinion the same way. It flatly "decline[d] to follow the Sixth Circuit's reasoning," rather than claiming that state action exists on the facts presented here even under that "different analysis." Pet.App. 35a.

### B. The Appearance-And-Purpose Inquiry Applied By The Ninth, Second, Fourth, And Eighth Circuits

**1.** As to the other side of the circuit conflict, it is equally clear that the Ninth Circuit would find state action on the facts presented in the Sixth Circuit's case. Given that the city manager's Facebook page featured his official title, photo, and contact information, *Lindke*, 37 F.4th at 1201, 1206, the Ninth Circuit would conclude that he "held [it] out to be [an] official channel[] of communication" and thereby used its "appearance" to "influence … public engagement," Pet.App. 23a-24a. And given that the manager's page informed his constituents about city policies and administrative directives, *Lindke*, 37 F.4th at 1201, 1205, the Ninth Circuit would conclude that this "content" "related directly to [his] duties," Pet.App. 23a-24a. Tellingly, the Ninth Circuit did not even try to distinguish the Sixth Circuit's decision on those facts. Pet.App. 35a-36a.

**2.** As noted, the Ninth Circuit is not alone in its approach. It and the Sixth Circuit both recognized that the Second, Fourth, and Eighth Circuits have applied the same "mode of analysis" broadly considering an account's "purpose and appearance." Pet.App. 36a; *Lindke*, 37 F.4th at 1205-06.

The seminal case is *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019). The Fourth Circuit held that the Chair of a county Board of Supervisors acted under color of state law in violation of the First Amendment when she blocked a constituent from a Facebook page that she had created before taking office. *Id.* at 672-73. Laying the path followed by the Ninth Circuit,

the Fourth Circuit deemed the page "a tool of governance" because it was "swathed … in the trappings of her office" and was used to communicate with the public about the Board's "official activities" in a manner that "[a] private citizen could not" do. *Id.* at 680-81.

Next came *Knight First Amendment Institute v. Trump*, 928 F.3d 226 (2d Cir. 2019). The Second Circuit applied identical reasoning to the personal Twitter account that Donald Trump frequently used both before and while he was President. *Id.* at 234-36. Although the Supreme Court vacated that opinion as moot after he left office, *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220 (2021), the Ninth Circuit concluded that it retained "persuasive value." Pet.App. 31a n.10. Less persuaded by that opinion were Second Circuit Judges Park and Sullivan, who had urged their full court to reverse it based on reasoning that paralleled the Sixth Circuit's authority-or-duty test. *See Knight First Amend. Inst. v. Trump*, 953 F.3d 216, 226-28 (2d Cir. 2020) (dissenting from denial of rehearing en banc).

Then there is *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021). Without definitively resolving the question, the Eighth Circuit nominally applied the appearance-and-purpose approach adopted by the Second and Fourth Circuits. *Id.* at 825. But the panel majority did so in a very different way than those other courts. The majority concluded that a candidate's campaign Twitter account had *not* "become[] an organ of official business" after she was elected to the state legislature, because "[t]he overall theme of [her] tweets—that she's the right person for the job—largely remained the same after her

electoral victory." *Id.* at 826. The majority rejected the relevance of tweets that "report[ed] on events that occurred in the state legislature," based on the truism that they "were consistent with a desire to create a favorable impression of [the legislator] in the minds of her constituents." *Id.* at 827. Likewise, the majority dismissed the significance of the various ways the Twitter account identified her as a public official, because "even if these can be trappings of an official account, they can quite obviously be trappings of a personal account as well." *Id.*

As the Eighth Circuit dissent and the Ninth Circuit here recognized, the facts in *Campbell* are not materially different from the facts in *Davison*, *Knight*, *Lindke*, or this case. *See id.* at 828-29 (Kelly, J., dissenting); Pet.App. 34a n.11. Such inconsistent application of the appearance-and-purpose approach confirms the Sixth Circuit's observation that its authority-or-duty test offers more "predictable application for state officials and district courts alike, bringing the clarity of bright lines to a real-world context that's often blurry." *Lindke*, 37 F.4th at 1206-07; *see infra* at 28-32. In turn, that underscores why this Court should now resolve the circuit conflict and adopt the Sixth Circuit's clear and correct test.

## II. THE NINTH CIRCUIT'S STATE-ACTION HOLDING IS ERRONEOUS AND IMPORTANT

Under this Court's precedents, a public official does not engage in state action when blocking users from a social-media account where, as here, the account is not operated pursuant to any governmental authority or duty. The Ninth Circuit mistakenly engaged in further consideration of whether the account conveys

an official appearance and communicates with the public about official business. Those common attributes of public officials' social-media pages cannot somehow transform personal accounts into governmental public fora—especially where the challenged action is not itself the official-looking communication, but rather the blocking of a third-party's access. The state-action requirement exists to protect individual liberty, and that includes the liberty of individuals holding public office to control the manner in which they use their personal social-media accounts to communicate with the public about their jobs and the work of government.

### A. State Action Is Absent Where A Public Official Does Not Rely On Any State Authority Or Carry Out Any State Duty In Operating Social-Media Pages

**1.** The First Amendment's Free Speech Clause, which applies to the States through the Fourteenth Amendment, "prohibits only *governmental* abridgment of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2021). It "does not prohibit *private* abridgment of speech." *Id.* The Constitution thus permits people to "open their property for speech" without "los[ing] the ability to exercise what they deem to be appropriate editorial discretion within that open forum." *Id.* at 1930-31. When adjudicating claims under the Free Speech Clause and other similarly limited constitutional provisions, this Court uses the "state-action doctrine" to "distinguish[] the government from individuals and private entities." *Id.* at 1928 (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-96 (2001)); *see also Lugar v. Edmonson*

*Oil Co.*, 457 U.S. 922, 935 n.18 (1982) (holding that conduct satisfying the constitutional state-action requirement also satisfies the statutory color-of-law requirement under 42 U.S.C. § 1983).

"By enforcing th[e] constitutional boundary between the governmental and the private, the state-action doctrine protects a robust sphere of individual liberty." *Halleck*, 139 S. Ct. at 1928. It "limit[s] the reach of federal law and federal judicial power" and also "avoids imposing on the State … responsibility for conduct for which [it] cannot fairly be blamed." *Lugar*, 457 U.S. at 936. That is why the bedrock principle underlying this Court's state-action cases is the "insiste[nce] that conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." *Id.* at 937.

Under the two-pronged standard implementing that principle, "state action requires *both* an alleged constitutional deprivation 'caused by the exercise of some right or privilege created by the State …', *and* that 'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (quoting *Lugar*, 457 U.S. at 937). As to the latter prong, this Court has used various tests to determine whether a private actor is fairly deemed a state actor, including whether "the private entity performs a traditional, exclusive public function"; "the government compels the private entity to take a particular action"; or "the government acts jointly with the private entity." *Halleck*, 139 S. Ct. at 1928; *see Brentwood*, 531 U.S. at 295 (explaining that these tests seek to determine whether there exists "such a close nexus between the State and the challenged

action that the seemingly private behavior may be fairly treated as that of the State itself").

Of course, Petitioners here are private individuals who also hold public office. But that status plainly does not itself transform all their conduct into state action, for two reasons.

*First*, the alleged violation still "must be caused by the exercise of some right or privilege created by the State." *West v. Atkins*, 487 U.S. 42, 49 (1988). Although this generally will be the case for a public official when "acting in his official capacity" and "exercising his responsibilities pursuant to state law," that is not so when he acts in his private capacity, because such conduct is not "made possible only because [he] is clothed with the authority of state law" in his other, official pursuits. *See id.* at 49-50. For example, a public official would engage in state action if he issued an edict banning a competing candidate from placing election signs on public roads, or if he ordered his subordinates to remove such signs under color of law; but it would not be state action if he or his campaign staff simply stole the signs under color of night. Far from being a state-created "right or privilege," that would be the type of private theft that any nefarious candidate could perpetrate.

*Second*, even if state-created rights or privileges are invoked, the "acts of offic[ials] in the ambit of their personal pursuits are plainly excluded." *Screws v. United States*, 325 U.S. 91, 111 (1945) (plurality op.). In contrast to officials who use state-created rights or privileges "to perform their official duties," *id.*, an official cannot "fairly be said to be a state actor" when she merely invokes rights or privileges

available to ordinary citizens in order to effectuate her own private objectives, *see West*, 487 U.S. at 49. For example, a public official who uses force to eject a trespasser placing election signs on the yard of her private residence may be wielding state-law powers of property owners, but she plainly is not engaged in state action—whether or not she allows others to place signs on her yard. *Cf. Halleck*, 139 S. Ct. at 1930. This Court's state-action precedents do not support stripping individuals of their private property rights because they also hold public office.

**2.** The application of these principles in the context of public officials' social-media activity is straightforward. And the conclusion is clear that Petitioners' challenged conduct is not state action.

Petitioners "exercise[d] [no] right or privilege created by the State" in operating their personal social-media accounts. *Sullivan*, 526 U.S. at 50. As to "the specific conduct of which the plaintiff complains," *id.* at 51, Petitioners' *ability to block Respondents* is a feature of the platforms that Facebook and Twitter have granted to all account owners—not just public officials and entities. Pet.App. 70a, 72a. More generally, Petitioners' *creation and maintenance of the accounts* have been done "in the ambit of their personal pursuits," not in "perform[ing] their official duties." *Screws*, 325 U.S. at 111. Neither the Ninth Circuit nor Respondents dispute that the accounts were originally created by Petitioners in their private capacities as campaign tools—in fact, the Facebook pages were created before Petitioners were elected to office, and all the pages will still be owned by Petitioners after they leave office. Pet.App. 6a; CA.ER 182, 191-92.

Likewise, neither the Ninth Circuit nor Respondents dispute that, even while Petitioners have been in office, they have continued to maintain the pages without any direction, funding, support, or other involvement by the District. Pet.App. 20a, 26a; CA.ER 186-87, 195-96. Such "private behavior" cannot "be fairly treated as that of the [District] itself," *Brentwood*, 531 U.S. at 295, and the District "cannot fairly be blamed" for it, *Lugar*, 457 U.S. at 936. Because Petitioners' operation of their pages "neither derives from the duties of [their] office[s] nor depends on [their] state authority," they acted "in [their] personal capacit[ies], not [their] official capacit[ies]." *Lindke*, 37 F.4th at 1204.

*Halleck* strongly supports that conclusion. In that case, a filmmaker brought a First Amendment suit against MNN, the nonprofit corporation that operates the public-access channels on Time Warner's cable system in Manhattan. 139 S. Ct. at 1926-27. This Court held that the First Amendment does not constrain MNN's ability to "exercise editorial discretion over the speech and speakers" on its public-access channels, because "merely hosting speech by others is not a traditional, exclusive public function" that "transform[s] private entities into state actors." *Id.* 1930. The Court further held that "the public access channels are not the property of New York City" because the City "does not own or lease" the channels or "possess a formal easement or other property interest" in them—notwithstanding that the City's franchise agreements with Time Warner gave it the power to select MNN as the channels' operator. *Id.* at 1933. To be sure, MNN is not itself a public official, but that is an immaterial distinction. The

case would be no different if, instead of MNN, the channels were owned by Bloomberg L.P. during the period when Mr. Bloomberg was also Mayor Bloomberg. Given that the City's ability to select MNN as the operator was insufficient to transform the public-access channels into public property, it would be insufficient a fortiori if the channels were owned by an individual who merely happened to be a City official—that would provide the City itself no control over how he operated that private enterprise.

A final hypothetical drives the point home. While this case concerns personal social-media accounts, nothing about the state-action analysis is limited to the online arena. Private citizens who are also public officials own all sorts of real property that they can use to communicate with the public about their official activities. For example, to conduct a town-hall discussion about past and future administration initiatives, President Bush could have invited members of the public to his Crawford ranch and Governor Pritzker could do likewise at one of the Hyatt resorts owned by his family. But if they did not rely on any governmental resources or carry out any governmental obligations, no one could seriously conclude that they had transformed their private properties into temporary public fora, thereby losing their rights as property owners to exclude unwanted visitors from the events. Even when such officials' interaction with the public is itself done in an official capacity, that does not mean the private property where it occurs becomes a governmental forum. *Knight*, 953 F.3d at 229 (Park, J., dissenting). Moreover, such officials often are still acting only in a personal capacity, "speaking as citizens about

matters of public concern" and "promoting the public's interest in receiving the well-informed views of government employees engag[ed] in civic discussion." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006); *accord Lindke*, 37 F.4th at 1205.

**3.** Finally, and relatedly, applying the authority-or-duty test for state action in this context is essential to "protect[] a robust sphere of individual liberty." *Halleck*, 139 S. Ct. at 1934. Where public officials do not operate their social-media accounts pursuant to any state authority or duty, the Constitution does not deprive them of the "rights to exercise editorial control over speech and speakers on their properties or platforms" that other individuals possess. *Id.* at 1932.

Indeed, the contrary conclusion could have the perverse "consequence of creating less speech if the social-media pages of public officials are overrun with harassment, trolling, and hate speech, which officials will be powerless to filter." *Knight*, 953 F.3d at 231 (Park, J., dissenting). Blocking such speech from a purported "public forum" on content-based and viewpoint-based grounds will inevitably fail under strict scrutiny, especially given that the Ninth Circuit here even rejected under intermediate scrutiny content-neutral blocking of repetitive and non-responsive spammers, Pet.App. 41a-50a. Faced with "the unappetizing choice of allowing all comers or closing the platform altogether," *Halleck*, 139 S. Ct. at 1931, many public officials will choose the latter, as the district court below admitted may be the "sad" effect of its judgment, Pet.App. 97a.

Moreover, treating officials' personal social-media accounts as public fora will directly abridge their own speech. "[W]hen public employees make statements pursuant to their official duties, [they] are not speaking as citizens for First Amendment purposes," and the governmental employer may exercise "control over what [it] itself has commissioned or created." *Garcetti*, 547 U.S. at 421-22. If Petitioners' Facebook and Twitter pages were truly public fora of the District, that would seem to imply that the Board as a whole could *mandate* what they say and do not say on those pages—even though those pages have been created and maintained by Petitioners without any involvement by the District. Officials also would run an inevitable risk of suit under the Establishment Clause if they were to include "statements about their faith" in a manner perceived by some as too sectarian or too prominent. *Knight*, 953 F.3d at 227 n.3 (Park, J., dissenting).

This Court should stop the parade of horribles before it gets started. State action is absent where, as here, public officials operate personal social-media accounts without relying on any state authority or carrying out any state duty.

### B. The Ninth Circuit's Consideration Of Appearances And Purposes In This Context Is Misguided and Unworkable

**1.** As a threshold matter, the Ninth Circuit misread this Court's precedent. It deemed "satisfaction" of a "nexus test"—*i.e.*, whether there is "'such a close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself'"—to

be "sufficient to find state action." Pet.App. 19a-20a (quoting *Brentwood*, 531 U.S. at 295). But this Court has not adopted a vague "close enough to government work" standard as a legal test for state action.

Rather, the quoted language from *Brentwood* is a generic restatement of the conclusion that private activity "is fairly attributable" to the State. 531 U.S. at 295. This Court has drawn that conclusion, though, only "in a few limited circumstances" based on more concrete analysis—*e.g.*, where the private entity "performs a traditional, exclusive public function"; is "compel[ed] … to take a particular action" by the government; or "acts jointly" with the government. *Halleck*, 139 S. Ct. at 1928; *see Brentwood*, 531 U.S. at 295-96 (similar).

Moreover, here, Petitioners are private individuals and also themselves public officials, so the real issue is how to draw "the distinction between [their] governmental and personal activities." *Lindke*, 37 F.4th at 1202. The question is whether their conduct is "the exercise of some right or privilege created by the State" for public officials, *Sullivan*, 526 U.S. at 50, or instead is merely "act[ion] of offic[ials] in the ambit of their personal pursuits," *Screws*, 325 U.S. at 111. The proper way to answer that question is to focus on whether the conduct relies on governmental authority or carries out governmental duties. *Lindke*, 37 F.4th at 1203.

The only state-action cases the Ninth Circuit cited to support its "[n]exus [a]nalysis" addressed "off-duty governmental employees," Pet.App. 20a-22a, but those cases do not support its position. To be sure, they considered the *apparent* authority and duty of

law-enforcement officers. But that is because even individuals who merely appear to be acting as law-enforcement officers "actually evoke[] state authority" over members of the public who comply with their commands, *Lindke*, 37 F.4th at 1206, whether or not they "misused" or "overstep[ped]" their actual authority, *Screws*, 325 U.S. at 110-11.

**2.** By contrast, the *appearance* of Petitioners' social-media pages does not create *apparent authority* supporting a state-action determination.

*First*, regardless of how much the Facebook and Twitter pages depicted and discussed Petitioners' jobs, it would be patently unreasonable to mistakenly believe that these accounts are *actually* or even *purportedly* governmental rather than personal. "[I]t is now commonplace for politicians to use personal accounts to promote their official activities," *Knight*, 953 F.3d at 230 (Park, J., dissenting), and the pages' content extends back before Petitioners were elected to office, Pet.App. 6a; CA.ER 182, 191-92. Tellingly, Respondents themselves never claimed to be confused as to the true nature of the pages, and there is no evidence that any other member of the public ever was either. *See Campbell*, 986 F.3d at 827 ("even if these can be trappings of an official account, they can quite obviously be trappings of a personal account as well"). The Ninth Circuit nevertheless faulted Petitioners for not posting "any disclaimer" that these are private-capacity accounts. Pet.App. 26a. But *requiring private individuals* holding public office *to alter their own speech*, in order to avoid a purported violation of the First Amendment's constraints on *governmental abridgement* of speech, would turn that provision on its head. Indeed, while

the First Amendment (sometimes) barely tolerates compelled disclosures imposed by statute, *see Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795-801 (1988), it invalidates them where, as here, they are not justified by a plausible informational deficit, *see National Inst. of Fam. & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377 (2018).

*Second*, even implausibly assuming that someone somewhere may be confused, Petitioners would have "gain[ed] no authority" from that mistake, as the challenged conduct plainly "do[es] not carry the force of law" regardless. *Lindke*, 37 F.4th at 1206. Petitioners' *unilateral* ability to block Respondents obviously did not depend on how Respondents or the public *perceived* the pages. The same goes for Petitioners' operation of the pages more generally. This is not a situation, for example, where a member of the public complied with a statement by Petitioners on their pages due to a misperception that it was an official command of the Board rather than the personal view of one Board member. Rather, the Ninth Circuit merely objected that, because of their positions on the Board, Petitioners are uniquely able to announce and discuss the Board's work and members of the public are especially likely to engage with their pages. Pet.App. 23a-24a. But of course, all that is true *wherever* public officials speak about their jobs—whether it be on a personal social-media page plastered with "private capacity" disclaimers, at real property that they personally own and use to promote their political agendas, or in any other forum for speech. Indeed, the Ninth Circuit's own invocation of off-duty police officers illustrates the flaw in its analogy.

Imagine if a beat cop's personal social-media page equally featured indicia of her job (displaying her title, uniformed photos, etc.) and equally focused on communicating with the public about her job (discussing recent arrests, crime-prevention policies, etc.). No one could seriously conclude that the cop's page was an exercise of actual *or* apparent governmental authority, even it was the most widely followed page about policing *because of* her job.

**3.** Likewise, that the content of Petitioners' pages is *related to* Petitioners' duties is not remotely the same thing as their operating the pages as a means of *carrying out* those duties.

"[A] citizen who works for the government is nonetheless a citizen," and so the First Amendment *protects rather than constrains* the right of public officials to "speak[] as citizens about matters of public concern." *Garcetti*, 547 U.S. at 419. Looking to the content of the speech to determine the capacity in which it is spoken is thus futile. "[W]hen public officials deliver public speeches, we recognize that their words are not exclusively a transmission from *the* government because these oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity." *Van Orden v. Perry*, 545 U.S. 677, 723 (2005) (Stevens, J., dissenting); *accord Knight*, 953 F.3d at 227 n.3 (Park, J., dissenting) ("[W]hen incumbent officials run for reelection, we ordinarily understand them to be expressing a mix of personal and official views."). That explains why the Eighth Circuit panel majority in *Campbell* viewed the legislator's Twitter page as "more akin to a campaign newsletter" while the dissent (and the Ninth Circuit here) viewed it as

"an organ of official business." *Compare* 986 F.3d at 826-27, *with id.* at 828-29 (Kelly, J., dissenting), *and* Pet.App. 34a n.11.

Instead of a hopeless labeling game, the workable way to decide whether an official's communication with the public is carrying out a public duty is to look at whether the government requires the speech, controls its content, or facilitates its dissemination. *Lindke*, 37 F.4th at 1204-05. Here, it is undisputed that Petitioners' "use of their social media accounts was … not required by" the District, Pet.App. 20a, and that "no [District] employee regulated, controlled, or spent money maintaining any of their social media pages," Pet.App. 100a; *accord* CA.ER 186-87, 195-96. Petitioners' social-media activity cannot "be fairly treated as that of the [District] itself," *Brentwood*, 531 U.S. at 295, when the District "plays absolutely no part in establishing or [operating]" the accounts, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972).

Despite all this, the Ninth Circuit objected that, after Petitioners were elected, they "virtually never posted overtly political or self-promotional material," instead focusing on "official District business or promot[ing] the District generally. Pet.App. 26a. That is a non sequitur twice over. Wholly apart from politics, it ignores that elected officials have a First Amendment right to "speak[] as citizens about matters of public concern," including especially where they have "well-informed views [as] government employees" that they wish to share by "engaging in civic discussion." *Garcetti*, 547 U.S. at 419. And even just fixating on politics, elected officials also have a First Amendment right to employ *subtle messaging*

"consistent with a desire to create a favorable impression of [themselves] in the minds of [their] constituents." *Campbell*, 986 F.3d at 827. Indeed, it is undisputed that Petitioners viewed themselves as "always running" for re-election, that they used their pages to portray themselves "in the most positive light," and that they "hoped [their pages] will win [them] support." CA.ER 185, 187, 192. Once more, the Ninth Circuit's approach is unworkable for courts and also an infringement on public officials' own speech to the public.

**4.** In sum, the Ninth Circuit effectively held that, even if an official's personal social-media account is not *actually* a "public forum," it can still be an "apparent" public forum. And by this, the court essentially meant that the same appearance and content *could have occurred* on a hypothetical page that carried out governmental duties and relied on governmental authorities, even when it is undisputed that the real page *in fact did not*. This Court should decisively reject that position, which makes a mockery of the "constitutional boundary between the governmental and the private" as well as the "robust sphere of individual liberty" that the state-action doctrine protects. *Halleck*, 139 S. Ct. at 1928.

Indeed, *Halleck* all but forecloses that position already. Again, if Bloomberg L.P. had owned the public-access channel, labeled it "the Mayor's channel for public dialogue," plastered his official photo in the corner of the screen, and ran constant programming about his administration's achievements, the state-action analysis would be no different. The channel still would "not [be] the property of New York City," because *the City itself* would "not own or lease" the

channel, would "not possesses a formal easement or other property interest" in it, and indeed would have no control over it based on the Mayor's private ownership. *Halleck*, 139 S. Ct. at 1933. And thus Mayor Bloomberg, no less than any other private property owner in the City, would not have been constrained by the First Amendment in "exercis[ing] editorial discretion over the speech and speakers in the forum." *Id.* at 1930. Although that hypothetical is admittedly unrealistic, whereas public officials' use of personal social-media pages is ubiquitous, the legal conclusion should be the same: in either case, the speech forum is operated "in [a] personal capacity, not [an] official capacity," because it "neither derives from the duties of [the] office nor depends on [any] state authority." *Lindke*, 37 F.4th at 1204.

## III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED

Because "it is now commonplace for politicians to use personal accounts to promote their official activities, … this case is just one of several similar lawsuits." *Knight*, 953 F.3d at 230-31 (Park, J., dissenting). Within the span of the last three years, five circuit courts have directly confronted the question presented in reasoned opinions that fully ventilate the competing positions. *See supra* at Part I. Additional cases are currently pending in district courts in other circuits (involving officials at all levels of government), and more will inevitably follow.[2]

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[2] *See, e.g.*, *Czosnyka v. Gardiner*, No. 21-3240, 2022 WL 407651, at *2-3 (N.D. Ill. Feb. 10, 2022) (declining to dismiss claim against city alderman for Facebook blocking); *Buentello v. Boebert*, 545 F. Supp. 3d 912, 916-21 (D. Colo. 2021) (denying

This case is ideally postured for the Court to provide a definitive resolution. The question presented was squarely pressed and passed upon in both lower courts. *See supra* at 8-11. The material facts were undisputed at summary judgment, and the answer to the legal question is dispositive of whether state action exists. *See supra* at 7-8, 14-15. In turn, the absence of state action is fatal to Respondents' sole claim, while Petitioners advance no alternative arguments to challenge the final judgment below. *See supra* at 7 & n.1, 11. Accordingly, the question presented is cleanly teed up, and there is no impediment to this Court's ability to decide it.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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preliminary injunction for claim against congresswomen for Twitter blocking); *see also Charudattan v. Darnell*, 510 F. Supp. 3d 1101, 1107-09 (N.D. Fla. 2020) (granting summary judgment to county sheriff on claim for Facebook blocking), *aff'd*, 834 F. App'x 477 (11th Cir. 2020) (per curiam).