No. 22-324

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 Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR PETITIONERS

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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 his or her job and communicate about job-related matters with the public, but does not do so pursuant to any governmental duty or authority.

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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OPINIONS BELOW

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. The certiorari petition was timely filed on October 4, 2022, and granted on April 24, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix to this brief 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, while elected members of a local school board, used personal Facebook and Twitter accounts to communicate with the public about their jobs and the school district. Respondents, parents of enrolled students, spammed Petitioners' posts with repetitive comments. So Petitioners blocked Respondents from the accounts.

In using the accounts and blocking Respondents, Petitioners' actions "neither derive[d] from the duties of [their] office[s] nor depend[ed] on [their] state authority." *Lindke v. Freed*, 37 F.4th 1199, 1204 (6th Cir. 2022). It is *undisputed* that the accounts were created and maintained by Petitioners without any direction, funding, support, or other involvement by the school district. Petitioners therefore actually operated the accounts "in [their] personal capacity, not [their] official capacity." *Id.*

The Ninth Circuit, however, held that Petitioners' blocking of Respondents was state action that violated the First Amendment. It reasoned that they 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 identified Petitioners as "government official[s]" 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. That state-action theory has no basis in law or logic.

The state-action doctrine inquires whether "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982). When the conduct of public officials is challenged, the inquiry requires distinguishing between actions "undertake[n] to perform their official duties" and those done "in the ambit of their personal pursuits." *Screws v. United States*, 325 U.S. 91, 111 (1945) (plurality op.). After all, public officials also remain "citizens" with their own First Amendment rights to "speak[] … about matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). Here, Petitioners' power to block Respondents from their personal social-media pages was not "possessed by virtue of state law and made possible only because [they were] clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988). Nor did the pages "lose [their] private character merely because the public is generally invited to use [them]." *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972). Since the pages "did not owe their existence to [Petitioners'] responsibilities," Petitioners acted in their "capacity as … private citizen[s]." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2424 (2022) (cleaned up).

The Ninth Circuit's broader focus on the content and appearance of the pages is legally unsound and practically unworkable. "[W]hen incumbent officials run for reelection, we ordinarily understand them to be expressing a mix of personal and official views." *Knight First Amend. Inst. v. Trump*, 953 F.3d 216, 227 n.3 (2d Cir. 2020) (Park, J., dissenting from denial of rehearing en banc). "[T]he mere fact that a citizen's speech concerns information acquired by

virtue of his public employment does not transform that speech into employee … speech." *Lane v. Franks*, 573 U.S. 228, 240 (2014). Likewise, the apparent "trappings of an official account … can quite obviously be trappings of a personal account as well." *Campbell v. Reisch*, 986 F.3d 822, 827 (8th Cir. 2021). And Petitioners "gain[ed] no authority by presenting" themselves as officials on social media, as their "posts do not carry the force of law." *Lindke*, 37 F.4th at 1206. Thus, because the pages were not "within the scope of [their] duties," *Lane*, 573 U.S. at 240, and did not "exercise[]" any of their "power[s]," *West*, 487 U.S. at 49, they cannot "be fairly treated as [action] of the State itself," *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

Finally, by "[e]xpanding the state-action doctrine beyond its traditional boundaries," the Ninth Circuit "restrict[ed] individual liberty." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1934 (2021). Rather than invoking the First Amendment *to protect* speech from governmental abridgment, the court *itself abridged Petitioners'* speech. The court barred them "from exercising editorial discretion over speech and speakers on their" pages. *Id.* at 1931. Also, by treating their pages as if operated "pursuant to their official duties," the court implied that the State itself can exercise plenary control. *Garcetti*, 547 U.S. at 421. And by using against them how they chose to express themselves on their pages, the court imposed "an unprecedented penalty" on speech. *Davis v. FEC*, 554 U.S. 724, 739 (2008). Indeed, rather than facilitating more speech by the public, the decision below will lead to self-censorship by citizens who are also officials. This Court should reverse.

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 creates a personal "profile," and the user may limit access to that profile to their selected "friends." Pet.App. 59a.[1] Users can also create "pages" that are generally open to the public. Pet.App. 59a-60a. Facebook describes "pages" as "places on Facebook where artists, public figures, businesses, brands, organizations and nonprofits can connect with their fans or customers."[2]

Other Facebook users can respond to the owner of a page's posts by posting comments on the post (or by conveying non-verbal reactions through images such as a "thumbs up" icon). Pet.App. 63a-65a. The original poster and other users can reply. 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 enables an account owner to "block" another Facebook user. Pet.App. 70a. Blocking on Facebook prevents the user from

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[1] *Control Who Can See What's on Your Facebook Profile,* https://www.facebook.com/help/167941163265974 (last visited June 20, 2023).

[2] *Differences Between Profiles, Pages and Groups on Facebook*, https://www.facebook.com/help/337881706729661 (last visited June 20, 2023).

commenting on or otherwise reacting to posts on the owner's page, but it does not prevent the user from posting about the blocker on the user's own page. *Id.* Account owners can also moderate comments in other ways—*e.g.*, by choosing to "hide" an individual comment (making it visible only to the owner and the commenter), Pet.App. 69a, or by using a "word filter" to prevent comments containing certain words from appearing on their pages, Pet.App. 75a-76a.

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 Twitter platform enables an account owner to "block" another Twitter user. Pet.App. 72a-73a. Blocking on Twitter prevents the 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. *Id.* But it does not prevent the user from continuing to view the page while logged into another account or no account (and also does not prevent the user from "tweeting" about the blocker's feed on the user's own feed). *Id.* Account owners can also moderate comments in other ways—*e.g.*, by "muting," which shields an account owner from

seeing the muted user's replies while allowing the user to continue to interact in the owner's feed with other users.[3]

2. Petitioner Michelle O'Connor-Ratcliff is a member of the Poway Unified School District Board of Trustees, and Petitioner T.J. Zane was a member during the proceedings below. Pet.App. 59a. While Petitioners had previously created private Facebook profiles to communicate with family and friends, they each created public Facebook pages while running for election in late 2014, and O'Connor-Ratcliff also created a public Twitter page sometime before 2017. Pet.App. 59a-60a.[4]

Respondents Christopher and Kimberly Garnier had children enrolled in the District. Pet.App. 59a. They provided 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 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-

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[3] *How to Mute Accounts on Twitter*, https://help.twitter.com/en/using-twitter/twitter-mute#:~:text=Mute%20is%20a%20feature%20that,unmute%20them%20at%20any%20time (last visited June 20, 2023).

[4] Zane unpublished his Facebook page over the summer of 2022 and his term expired in December 2022. This Court's review is not affected because O'Connor-Ratcliff's term will not expire until December 2026, *see* Supp. Cert. Br. 7, and the facts about their social-media accounts are materially indistinguishable, *compare* JA 14-30, *with* JA 30-41.

78a. But Petitioners "never attempted to prevent [Respondents] from speaking during the public comment period of a Board meeting," which is the official setting in which "members of the public can express their views to board members." Pet.App. 61a-62a.

3. Respondents filed suit under 42 U.S.C § 1983. Pet.App. 55a. They claimed that Petitioners had violated their First Amendment speech rights by blocking them from commenting on the Facebook and Twitter pages, which they characterized as public fora. *Id.*[5]

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 a bench 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* JA 13-41 (joint statement of undisputed and disputed facts on the state-action issue).

On one hand, Respondents did not dispute that the District was not involved at all in the creation or operation of Petitioners' social-media accounts.

[5] 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.

Petitioners created their Facebook accounts in their personal capacities, before they even took office, to support and promote their political activities; and when they leave office, they can keep their accounts (as well as O'Connor-Ratcliff's personal Twitter account created during her public tenure). JA 14, 30-31. They viewed themselves as "always running" for re-election and used their pages to portray themselves "in the most positive light," "hop[ing] [their pages] will win [them] support." JA 19, 22, 31-32. Moreover, "[n]o one at the District has any control" over Petitioners' accounts, JA 21, 38, and "[t]he District does not and has not spent any money to maintain" them, JA 21, 39. Accordingly, while the "District-Sponsored Social Media[] Policy" mandates that certain disclosures be displayed on all such accounts, Petitioners "ha[ve] never posted [the policy] on [their] social media accounts and ha[ve] never purported to act pursuant to [it]." JA 28-30, 39-41.

On the other hand, Petitioners did not dispute that their personal social-media accounts featured their official status and promoted District-related matters. Upon taking office, Petitioners updated their public pages "to reflect their Board positions" by identifying things such as their official titles and contact information. Pet.App. 99a-100a. And while in office, Petitioners used their pages "to provide information about their participation in [District] activities, as well as other [District] and Board information." Pet.App. 100a.

On these undisputed facts, the district 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 carrying out any official duties. Instead, the court anchored its analysis on the appearance and content of the pages. The court highlighted that Petitioners "swathed" their pages in "the trappings" of their offices and 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. On this basis, the court held that Petitioners' "blocking of [Respondents] satisfies the state-action requirement" because they "could not have used their social media pages in the way they did but for their positions on [the District]'s Board." Pet.App. 115a.

For similar reasons, the court held as a matter of law that Petitioners' job-related communications had converted their social-media accounts into designated public fora under the First Amendment. Pet.App. 115a-122a. But it concluded that there was a material factual dispute 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 limited the trial record on state action to the summary-judgment evidence and then reaffirmed the ruling that Petitioners acted under color of state law in blocking Respondents. JA 43; 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 the 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 was a 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 created in their private capacities "to promote their political campaigns," Pet.App. 6a, and were operated while in office without any "[District] funding or authorization," Pet.App. 26a. Indeed, while it emphasized that Petitioners' "use of their social media accounts was directly connected to … their official positions," it admitted that such use was "not required by" their official duties. 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 one page. Pet.App. 22a-23a. The court further asserted that Petitioners' "presentation of their social media pages" had "invok[ed] their governmental status" "to muster … public engagement." Pet.App. 23a-24a (cleaned up). The court treated all this as amounting to apparent authority to operate the pages, "whether or not the District had in fact authorized or supported them." Pet.App. 26a-27a. And it faulted Petitioners for not including "any disclaimer" that the pages were actually operated in their private capacities. *Id.*

The court also 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-24a (cleaned up). The court concluded that this public engagement "related in some meaningful way" to Petitioners' duties, even if not undertaken pursuant to any actual duty. Pet.App. 25a-26a. And despite admitting that "many of" these District-related posts contained "material that could promote the [Petitioners'] personal campaign prospects," the court deemed that immaterial because Petitioners "virtually never posted overtly political or self-promotional material." Pet.App. 26a.

In short, the court held that, "both through appearance and content, [Petitioners] held their social media pages out to be official channels of communication with the public about the work of the [District] Board." Pet.App. 23a. For support, the court invoked circuit precedent addressing the apparent authority of off-duty law-enforcement

officers, Pet.App. 21a-22a, and parallel decisions from three other Circuits, Pet.App. 29a-36a. While recognizing that the Sixth Circuit applies a "different analysis" that "focus[es] on the actor's official duties and use of government resources or state employees," the Ninth Circuit "decline[d] to follow [that court]'s reasoning." Pet.App. 35a.

The Ninth Circuit made quick work of the remaining elements of the First Amendment claim. It concluded that Petitioners' content-neutral blocking was not adequately tailored to an appropriate interest for excluding Respondents from a public forum. Pet.App. 37a-50a. And it also ruled that Respondents maintain a live claim despite Petitioners' use of word filters to effectively prevent most comments on their Facebook pages. Pet.App. 15a-18a. Petitioners do not contest those holdings in this Court, and the question presented is limited to the threshold state-action holding.

SUMMARY OF ARGUMENT

I. A public official's operation of a social-media page is not state action when it does not exercise any actual state duty or authority.

The state-action doctrine identifies conduct for which the State itself is constitutionally responsible, and protects the liberty of individuals to act free from constitutional restraints. Because public officials are individual citizens too, the key question is whether their challenged conduct was undertaken in an official or personal capacity. The First Amendment constrains their exercise of power held to fulfill their duties, but does not abridge their personal pursuits.

When officials use their own social-media pages to communicate with the public about their jobs, but without pursuing any state duties or invoking any state authorities, they act in a private capacity. Such action is not made possible only because they are clothed with state power. Any private party can open their property as a forum for speech. And that action cannot fairly be attributed to the State itself, which cannot control it and thus cannot be blamed for it.

Public officials retain their own First Amendment rights over such pages. Courts cannot limit their editorial discretion. Indeed, deeming the pages state action would mean the State itself could take over the pages completely. And authorizing any of that based on how officials chose to express themselves on their personal pages would penalize protected speech.

Here, Petitioners exercised no actual state duty or authority. They created their pages as campaign tools to get elected, and maintained them to get re-elected, all without any involvement by the District.

II. Neither the appearance nor content of a public official's social-media page can create state action absent any exercise of actual state duty or authority.

The Ninth Circuit erred at the outset by applying a vague, totality-of-circumstances "nexus" test. This Court's precedent requires more structured analysis.

The job-related appearance of a page is immaterial. No reasonable user could mistakenly believe that Petitioners' pages were governmental, especially given various features incompatible with that status. The Ninth Circuit faulted Petitioners for not including disclaimers, but the First Amendment, of course, does not compel speech—if anything, it prohibits requiring needless boilerplate. Regardless, unlike with off-duty law-enforcement officers, Petitioners gained no power from any hypothetical misperception. And while the court objected that the pages were more popular due to Petitioners' official status, this effect occurs wherever incumbents speak.

The job-related content of a page is immaterial too. Citizen officeholders routinely engage in speech related to their duties in their personal rather than official capacity. The only workable way to determine whether such speech carries out their duties is to consider whether the State requires, controls, or facilitates it—none of which happened here. The Ninth Circuit objected that Petitioners' pages were not overtly political, but the First Amendment neither prohibits subtle campaign messaging nor licenses courts to play communications director.

The Ninth Circuit's rationale is also self-defeating. Rather than facilitating more speech by the public, it will cause citizen-officials to censor their own.

ARGUMENT

I. A Public Official's Operation Of A Social-media Page Is Not State Action When It Neither Carries Out Any State Duty Nor Relies On Any State Authority

The state-action doctrine serves dual purposes: identifying acts for which the government is properly deemed responsible and protecting the liberty of individuals to act free from constraints imposed solely on the government. In applying that doctrine to public officials' use of their personal social-media accounts, a critical point is that public officials remain private citizens too.

A public official's decision to block users from a social-media account thus does not constitute state action when, as here, the official operates the account neither pursuing any actual state duty nor invoking any actual state authority. As a public official undertakes such conduct in a personal capacity, the State is not fairly responsible for it. And conversely, deeming it state action would abridge officials' own First Amendment rights to control the manner in which they use their personal social-media pages to communicate with the public—as private individuals seeking both to exchange information with their follow citizens and to persuade voters that they deserve to remain in office.

A. The State-Action Doctrine Identifies State Responsibility And Protects Individual Liberty

1. The First Amendment's Free Speech Clause provides that "Congress shall make no law … abridging the freedom of speech," U.S. Const. amend.

I, and the Fourteenth Amendment extends that restriction to the States by providing that "No State … shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law," *id.* amend. XIV, § 1; *see Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2021). Under both text and precedent, these provisions "prohibit[] only *governmental* abridgment of speech" and thus "do[] not prohibit *private* abridgment of speech." *Id.*

When adjudicating claims under these and other similarly limited constitutional provisions, this Court uses the "state-action doctrine" to "distinguish[] the government from individuals and private entities." *Id.* And when plaintiffs bring First Amendment claims under the cause of action in 42 U.S.C. § 1983, satisfying the state-action doctrine is both necessary to meet the statute's constitutional-deprivation requirement and sufficient to meet its color-of-law requirement. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 935 n.18 (1982).

The state-action doctrine is no mere technicality compelled by the constitutional text. By enforcing the "time-honored principle" that the Fourteenth Amendment "prohibits only state action," *United States v. Morrison*, 529 U.S. 598, 621 (2000), the doctrine serves two critical, related functions under our constitutional structure.

First, the doctrine imposes constitutional liability "only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004

(1982). The doctrine thus "avoids the imposition of responsibility on a State for conduct it could not control," *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988), and "for which [it] cannot fairly be blamed," *Lugar*, 457 U.S. at 936. The ultimate question is whether the conduct is "fairly treated as that of the State itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

Second, the doctrine "protects a robust sphere of individual liberty." *Halleck*, 139 S. Ct. at 1928. "[B]y limiting the reach of federal law and federal judicial power," "the 'state action' requirement preserves an area of individual freedom." *Lugar*, 457 U.S. at 936. The issue is zero-sum: "[e]xpanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty." *Halleck*, 139 S. Ct. at 1934.

2. Consistent with these structural purposes, the bedrock principle underlying this Court's state-action precedent is "insiste[nce] that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." *Lugar*, 457 U.S. at 937. The Court has implemented that principle through a two-pronged test: "[S]tate action requires *both* [1] an alleged constitutional deprivation 'caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State …,' *and* [2] 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). "Although related, these two [prongs] are not the same," *Lugar*, 457 U.S. at 937, and plaintiffs "still must satisfy" each one, *Sullivan*, 526 U.S. at 50.

Prong one focuses on the *specific conduct* challenged, examining whether it involves state-created powers or duties. For example, this element is satisfied where a state statute provides a private party the right to garnish or attach the property of another party. *Lugar*, 457 U.S. at 937 (citing cases). By contrast, this element is not satisfied where a private club adopts its own discriminatory policy for serving guests, despite being licensed by a state liquor board. *Id.* at 937-38 (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972)).

Prong two focuses on the *specific actor* sued, examining whether that party can fairly be equated with the State itself. This Court has identified "a few limited circumstances" where a private entity qualifies, including where "[it] performs a traditional, exclusive public function"; "the government acts jointly with [it]"; or "the government compels [it] to take a particular action." *Halleck*, 139 S. Ct. at 1928 (citing cases); *see Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296-97 (2001) (asserting that cases further cover "significant encouragement" of the private entity by the State; and "public entwinement" in the private entity's operation). The common thrust is whether there are "circumstances that could point toward the State behind an individual face." *Brentwood*, 531 U.S. at 295. For example, state action was found in the rare scenario where a private entity assumed "all of the attributes of a state-created municipality," "function[ed] as a delegate of the State," and excluded individuals from what was essentially a "company town." *Lloyd Corp. v. Tanner*, 407 U.S. 551, 557-58, 569 (1972) (citing *Marsh v. Alabama*, 326 U.S. 501

(1946)). By contrast, a private "shopping center" that exercises no such "municipal functions or power" is not a state actor even though it "serves the same purposes as a 'business district' of a municipality." *Id.* at 568-69. Property does not "lose its private character merely because the public is generally invited to use it for designated purposes," *id.* at 569, and that is so even where the owner invokes state-conferred rights and powers to exclude trespassers, *id.* at 554; *accord Lugar*, 457 U.S. at 938-39.

This Court's recent decision in *Halleck* is especially relevant here. Film producers sued Manhattan Neighborhood Network (MNN), a private nonprofit corporation operating public-access channels on Time Warner's cable system in Manhattan, claiming that MNN violated their First Amendment rights by suspending them from the channels. 139 S. Ct. at 1926-27. The filmmakers contended that MNN's "operation of a public forum for speech is a traditional, exclusive public function" that constitutes state action. *Id.* at 1930. But that assertion flouted a "commonsense" reality: "Providing some kind of forum for speech is not an activity that only governmental entities have traditionally performed," and thus a private entity that does so "is not transformed by that fact alone into a state actor." *Id.* Consistent with "the constitutional basis on which private ownership of property rests in this country," the Court reaffirmed that the First Amendment 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 1931.

3. Of course, while most of this Court's state-action cases have addressed the conduct of private persons who are not formally part of the government, the state-action question in this case concerns private individuals who also hold public office. The status of public officials, however, does not alone transform all their conduct into state action. Because "a citizen who works for the government is nonetheless a citizen," *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006), the decisive issue for "*public officials*[]" is how to draw "the distinction between [their] governmental and personal activities." *Lindke v. Freed*, 37 F.4th 1199, 1202 (6th Cir. 2022). State-action precedents concerning individuals who work for the government establish two important precepts.

As a threshold matter, to be state action, even an official's conduct must involve "the exercise of some right or privilege created by the State." *West v. Atkins*, 487 U.S. 42, 49 (1988). Thus, in holding that "a physician employed" under a state contract "to provide medical services to state prison inmates" was a state actor, this Court reasoned that it was "only those physicians authorized by the State to whom the inmate [could] turn" to obtain medical care that the State "ha[d] a constitutional obligation … to provide." *Id.* at 54-55. By contrast, state action is lacking where the official's power is *not* "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.* at 49. For example, while a public official would engage in state action if he issued an edict under color of law directing government employees to remove a political opponent's election signs from public roads, he would not engage in 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," *id.*, that would be the type of private misconduct where "[a]nyone else could have done exactly what [the official] did," *Luce v. Town of Campbell*, 872 F.3d 512, 514 (7th Cir. 2017); *see, e.g.*, *id.* (no state action where police chief "[a]cted as a vigilante," albeit "while on duty and us[ing] an office computer," by disseminating personal information that was "available to the general public" in order to embarrass a police critic).

Moreover, 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.). To be clear, when "performing official duties," the "[m]isuse of power" remains state action even when done for personal reasons, such as the excessive force that the cops in *Screws* applied to an arrestee due to a grudge. *Id.* at 92-93, 109-11. By contrast, though, an official cannot "fairly be said to be a state actor" when he is *not* "exercising his responsibilities pursuant to state law," *West*, 487 U.S. at 49-50, and instead is engaged in "a private dispute" using powers that "[a]ny citizen could" wield under state law, *Myers v. Bowman*, 713 F.3d 1319, 1330-31 (11th Cir. 2013); *see, e.g.*, *id.* (no state action where magistrate judge "reported to police" the theft of his dog using a special "communications system" that was "government-issued" but not "proprietary"). Returning to the example of public officials and election signs, an official who invokes her state-law authority as a property owner to forcibly eject a trespasser placing signs in the yard of her residence

is not "undertak[ing] to perform [any] official duties." *Screws*, 325 U.S. at 111. And that is so even if she allows others to place signs in her yard, thereby "open[ing] [her] property for speech" and "exercising editorial discretion over speech and speakers on the[] property." *Halleck*, 139 S. Ct. at 1931. In short, the state-action doctrine does not strip citizens of their private property rights and speech rights merely because they also hold public office.

B. When No State Duty Or Authority Is Exercised, The State Itself Is Not Responsible For A Public Official's Use Of A Personal Social-Media Page

1. The application of state-action principles to social-media activity by citizens who are public officials is straightforward. Their personal social-media pages are operated in their private capacities, and cannot fairly be deemed the responsibility of the State itself, when the pages "neither derive[] from the duties of [their] office[s] nor depend[] on [their] state authority." *Lindke*, 37 F.4th at 1204.

State-action analysis "begins by identifying 'the specific conduct of which the plaintiff complains.'" *Sullivan*, 526 U.S. at 51 (quoting *Blum*, 457 U.S. at 1004). The "specific action[]" in cases like this is "blocking" someone from the account. Pet.App. 25a. That "power," however, is not "possessed by virtue of state law and made possible only because the [official] is clothed with the authority of state law." *West*, 487 U.S. at 49. Blocking is a generally available function of the platforms that Facebook and Twitter offer, Pet.App. 70a, 72a, and so "[a]nyone else" with an account "could have done exactly" the

same, *Luce*, 872 F.3d at 514. The only way that blocking can even potentially be considered state action is by broadening the lens to *the operation of the account*—*i.e.*, by treating the account itself as governmental rather than personal, and thus treating the blocking as official exclusion from a public forum. Pet.App. 28a-29a.

Even viewed more broadly, though, when operation of the social-media page does not "fulfill any actual or apparent duty of [the] office," the presumption should be that the official is acting in a "personal capacity." *Lindke*, 37 F.4th at 1207. If no law or policy requires maintaining a social-media page, officials' use of their *own* accounts to talk about their jobs is typically done "in the ambit of their personal pursuits." *Screws*, 325 U.S. at 111; *see Lindke*, 37 F.4th at 1204-05. After all, it is neither ordinary nor appropriate for government employees to use their own personal resources to perform their government work.

And the presumption should be conclusive when the official also "didn't use [any] governmental authority to maintain" the page. *Lindke*, 37 F.4th at 1207. The lack of any state funding, staffing, or control confirms that the page was not "undertake[n] to perform [any] official duties" to communicate with constituents. *Screws*, 325 U.S. at 111; *see Lindke*, 37 F.4th at 1205. Such lack of involvement by the State itself demonstrates both that the page is a private "initiative[]" for which the State is not "responsible," *Blum*, 457 U.S. at 1004-05, and that the State "cannot fairly be blamed" for the official's editorial choices, *Lugar*, 457 U.S. at 936.

Indeed, even if an official uses some state funds or employees, that alone does not rebut the presumption that a personal social-media page is operated in a private capacity. *See Brentwood*, 531 U.S. at 295-96 (no "set of circumstances [is] absolutely sufficient" to establish state action, "for there may be some countervailing reason against attributing activity to the government"); *cf. Polk Cnty. v. Dodson*, 454 U.S. 312, 320, 325 (1981) (public defenders, despite being employed by the State, are not state actors when performing their "traditional function[s]," which "are adversarial" to the State). Use of resources *may* indicate that the State itself views operation of the page as furthering an official duty. But the inference would be unwarranted for "de minimis help," *Lindke*, 37 F.4th at 1205, or where the resources were fringe benefits or private misappropriation.

For example, given the demands on the Chief Executive's time, *see Clinton v. Jones*, 520 U.S. 681, 697-98 (1997), White House employees have long assisted Presidents in fulfilling personal errands. Yet the mere use of government aides does not convert private commercial dealings into official transactions: the government does not foot the bill for the President's purchases, disputes are not litigated under federal-contracting laws, etc. Or consider the "franking privilege," pursuant to which the federal government pays for certain mail sent by Members of Congress. The privilege's scope has varied over time and often been abused, *see* Matthew Glassman, Cong. Rsch. Serv., RL34274, *Franking Privilege: Historical Development and Options for Change* 1, 13-14, 17 (2016), but such "subsidiz[ation]" does not alchemize private correspondence like

campaign mailers into official communiqués, *Halleck*, 139 S. Ct. at 1932 (citing *Blum*, 457 U.S. at 1011).

In all events, when *neither* governmental duty *nor* governmental authority is involved, the official's personal account cannot possibly "lose its private character." *Tanner*, 407 U.S. at 569. The "power" to operate the page in such circumstances plainly is not "possessed by virtue of state law and made possible only because the [official] is clothed with the authority of state law." *West*, 487 U.S. at 49. The page thus cannot be "fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351.

2. Both caselaw and commonsense confirm that conclusion. This Court has recently rejected similar state-action claims, and accepting this one would lead to absurd results.

Just last year, this Court confronted the question whether a public-school football coach who knelt to pray at midfield after games was acting "in his capacity as a private citizen." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2415-16, 2423-24 (2022). Answering affirmatively, this Court emphasized that Mr. Kennedy "was not engaged in speech ordinarily within the scope of his duties as a coach"; did not "speak pursuant to government policy" or "seek[] to convey a government-created message"; and chose to pray at a time when "coaches were free to attend briefly to personal matters." *Id.* at 2424-25. "Simply put," the Court summarized, "Mr. Kennedy's prayers did not 'owe their existence' to Mr. Kennedy's responsibilities as a public employee." *Id.* at 2424 (quoting *Garcetti*, 547 U.S. at 421) (cleaned up). In other words, the Court held that the prayer did not

"fulfill any actual or apparent duty of his office." *Lindke*, 37 F.4th at 1207.

Halleck reinforces the point. In addition to holding that MNN retained editorial control over the channels that it opened up to public access, 139 S. Ct. at 1930-31, 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," *id.* at 1933. Although the City's franchise agreement with Time Warner gave it the power to select MNN as the channels' operator, that did not mean that MNN was "in essence simply managing government property." *Id.* Of course, unlike here, MNN was not *itself* a public official, but *Halleck* would have been no different if the channels were operated by Bloomberg L.P. when Mr. Bloomberg was Mayor Bloomberg. Given that the City's authority to select MNN as the public-access operator was insufficient to transform the channels into public property, the same result should follow if the channels were operated by an individual who merely happened to be a City official (even if he also used the channel to feature his office and his administration's achievements). The City *itself* still would "not control" how Bloomberg chose to operate that private enterprise. *Tarkanian*, 488 U.S. at 191.

Another hypothetical drives the point home, literally. Public officials personally own all sorts of *real property* that they can use in their private capacities to communicate with the public about the government. 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. While such a townhall *could* be run using governmental resources to further governmental objectives, it *need not* be: these individuals could host such an event using their own personal funds and staff to further their own private objectives as candidates for re-election and concerned citizens. *See Knight First Amend. Inst. v. Trump*, 953 F.3d 216, 227 & n.3 (2d Cir. 2020) (Park, J., dissenting from denial of rehearing en banc); *see also infra* Part I.C (detailing public officials' own First Amendment interests in using their personal social-media pages to communicate with the public about their jobs). In the latter scenario, no one could seriously contend that their "property los[t] its private character merely because the public [was] generally invited to use it for [a] designated purpose[]," purportedly abridging their own protected right to exclude "[dis]invited guest[s]." *Tanner*, 407 U.S. at 568-69.

The same logic applies to digital property like social-media accounts. Whether or not such websites constitute "the modern public square" in "the Cyber Age," *Packingham v. North Carolina*, 582 U.S. 98, 105, 107 (2017), nothing about this new epoch abrogates "the constitutional basis on which private ownership of property rests in this country," *Halleck*, 139 S. Ct. at 1931. Indeed, if Facebook and Twitter accounts carried monthly fees, or could be valued and traded on an exchange, everyone would recognize the problem with deeming a public official's personal account to be a public account notwithstanding that she operated it without using governmental resources

or pursuing governmental duties. Regardless of whether it is the accountholder herself or the social-media company that technically "owns" the account, the critical fact is that *the State* "does not own or lease the [accounts]" or possess any "other property interest in [them]." *Id.* at 1933.

Treating an official's personal social-media page as a public forum is particularly nonsensical because that official's tenure will eventually end. At that time, people who have been blocked from the page have no viable claim: The official's successor has no control over the page; the blocked users have no basis to challenge the successor's conduct on any separate account he or she may have; and the former official no longer wields state power at all. Accordingly, after President Trump's term expired, this Court ordered that a suit against the blocking of users on his personal Twitter account be dismissed as moot. *See Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220 (2021), *vacating as moot Knight First Amend. Inst. v. Trump*, 928 F.3d 226 (2d Cir. 2019). Critically, though, the blocked users *continue to suffer* the same alleged abridgement of speech with respect to the former official's *posts made while in office*. Individuals whom Mr. Trump blocked on his Twitter account, for example, still cannot respond to the tweets that the Second Circuit cited in characterizing his "[a]ccount as an important tool of governance and executive outreach." *Knight*, 928 F.3d at 236. This confirms that, even while the account owner was in office, the blocked users were challenging only a "*private* abridgment of speech," not a "*governmental*" one. *Halleck*, 139 S. Ct. at 1928. Rather than magically "transform[ing]" from

private page to public forum and back again, such accounts are operated in the owner's "personal capacity" the whole time. *Lindke*, 37 F.4th at 1207.

C. When No State Duty Or Authority Is Exercised, Public Officials Retain Their Own First Amendment Rights In Using Personal Social-Media Pages

1. In this context, enforcing the state-action "boundary" is particularly "critical" to "protect[ing] a robust sphere of individual liberty." *Halleck*, 139 S. Ct. at 1934. Public officials possess their own First Amendment interest in "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*, 547 U.S. at 419. They also have a personal interest in "promot[ing]" themselves and the government they serve in order to "position" themselves and/or the administrations that employ them "for more electoral success down the road." *Campbell v. Reisch*, 986 F.3d 822, 826 (8th Cir. 2021). In fact, "it is now commonplace for politicians to use personal accounts to promote their official activities." *Knight*, 953 F.3d at 230 (Park, J., dissenting). Deeming their personal social-media pages to be official accounts, without their invoking governmental duty or authority, would abridge their own speech rights in multiple ways.

First, they "would lose the ability to exercise what they deem to be appropriate editorial discretion" in the speech forum they personally created. *Halleck*, 139 S. Ct. at 1931. Not only will they be unable to declare certain topics off-limits on their own social-

media pages, but those pages can be "overrun with harassment, trolling, and hate speech, which [they] will be powerless to filter." *Knight*, 953 F.3d at 231 (Park, J., dissenting). When the State itself is acting, rules that "target speech based on its communicative content" are "presumptively unconstitutional," and "discrimination among viewpoints" is especially "egregious." *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 168 (2015). While content-neutral time, place, and manner rules for comments may be able to address certain forms of online abuse like spamming, they by definition cannot protect against invidious content—unless they are made so draconian as to exclude *virtually all* comments. Such a blunderbuss response could well fail to survive the lower standard of intermediate scrutiny applicable to content-neutral speech restrictions, as the decision below illustrates. *See* Pet.App. 41a-50a. And even if that option were viable, it would require officials to stifle their communication with many in order to restrain the wrongs of a few. While all this is a price that must be paid by officials when "undertak[ing] to perform their official duties," it is an intolerable cost to impose on them "in the ambit of their personal pursuits." *Screws*, 325 U.S. at 111.

Second, their own speech would be exposed to "expand[ed] governmental control." *Halleck*, 139 S. Ct. at 1934. After all, if "it can be said that the State is *responsible*" for the pages, *Blum*, 457 U.S. at 1004, and can "fairly be blamed" for them, *Lugar*, 457 U.S. at 936, then the State *itself* must be able to "control" them, *Tarkanian*, 488 U.S. at 191. That is precisely why this Court in *Garcetti* held that "when public employees make statements pursuant to their official

duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. at 421. It is likewise why *Kennedy* addressed the capacity in which the coach's prayers were made. The school argued that the prayers were "government speech attributable to [it]" and thus subject to its unfettered "control and discipline" under *Garcetti—not* the balancing test under *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 574 (1968), that applies to employee speech. *Kennedy*, 142 S. Ct. at 2423-24. Accordingly, if an official's social-media page were deemed a governmental account, that necessarily would mean the government itself could *dictate* what the official can, cannot, and must say on the page. Were that not bad enough, add the chilling effect from the threat of claims (valid or not) that posts about religious faith violate the Establishment Clause, *see Knight*, 953 F.3d at 227 n.3 (Park, J., dissenting), and that posts with "racial overtones" create Equal Protection Clause problems, *see Harris v. Harvey*, 605 F.2d 330, 337-38 (7th Cir. 1979).

Third, the rationale for finding operation of the pages to be state action absent governmental duty or authority *itself* "imposes an unprecedented penalty" on the official's speech. *Davis v. FEC*, 554 U.S. 724, 739 (2008). The Ninth Circuit's reasoning hinged on Petitioners' use of their personal pages (1) to feature their jobs and (2) to promote the District's work, without including (3) private-capacity disclaimers or (4) express electoral advocacy. *See infra* Part II.B-C. But those are *all* First-Amendment-protected "choices of what to say and what to leave unsaid,"

Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc., 515 U.S. 557, 573 (1995), when "addressing matters of public concern," *Garcetti*, 547 U.S. at 417. Thus, the Ninth Circuit's holding that Petitioners' editorial choices triggered First Amendment scrutiny *itself rests* on a "[c]ontent-based" rule that is "presumptively unconstitutional" *under* the First Amendment. *Reed*, 576 U.S. at 163. And that, in turn, will have a "resulting drag on First Amendment rights," burdening officials who choose to speak this way and incentivizing them to express themselves differently. *Davis*, 554 U.S. at 739.

For all these reasons, it would turn the First Amendment against itself to treat officials' personal social-media pages as governmental fora based on their content, without invocation of governmental duty or authority. As in *Kennedy*, "a sure sign" that the Ninth Circuit's "jurisprudence ha[s] gone off the rails" is that, "[i]n the name of protecting [speech], [that court] would … suppress it." 142 S. Ct. at 2431. This Court again should refuse to read the First Amendment as "warring" with itself. *Id.* at 2426.

2. All the more so because Respondents come to battle for, at most, a Pyrrhic victory. If this Court were to adopt their state-action theory, the result will not be that public officials across the land all feel compelled to expose their personal social-media pages to the degradations of political opponents and abusive trolls. Rather than more speech, the result will be worse speech, less speech, or even no speech.

Officials who wish to continue engaging with the public about their jobs while blocking certain commenters can simply make even clearer that they

are operating their pages in their personal capacities. They will slap on boilerplate disclaimers, openly solicit votes, include gratuitous personal-interest posts, and otherwise make it impossible to deem their pages fairly attributable to the State itself. *See* Pet.App. 25a-26a (stressing absence of such factors).

Other officials who do not wish to self-censor that way can instead try to shut down comments from everyone. They can take steps to convert their pages into the equivalent of electronic distribution lists for their own posts, by using sweeping "word filters" to prevent comments or enforcing "formal rules" to ban comments. *See* Pet.App. 39a (recognizing that such policies would close any alleged public forum). Still other officials, of course, may decide the juice is not worth the squeeze and simply "clos[e] their public pages entirely." *See* Pet.App. 97a (admitting that could be the "sad conclusion" of the judgment below). In fact, for their Facebook pages, O'Connor-Ratcliff chose the former option and Zane chose the latter option. *See supra* pp. 7 n.4, 13. And even for those officials hardy enough to accept all comers to their personal pages, other members of the public may choose to disengage from pages "overrun with harassment, trolling, and hate speech." *See Knight*, 953 F.3d at 231 (Park, J., dissenting).

In sum, this case exemplifies "the unappetizing choice" that would result from "[e]xpanding the state-action doctrine beyond its traditional boundaries." *Halleck*, 139 S. Ct. at 1931, 1934. This Court should stop the parade of horribles before it gets going.

D. Petitioners Operated Their Pages Without Exercising Any Actual State Duty Or Authority

The undisputed facts compel judgment in Petitioners' favor under the correct legal rule. The courts below did not, and could not, find that Petitioners' operation of their personal social-media accounts was carrying out any actual state duty or relying on any actual state authority.

To begin, as the Ninth Circuit conceded, Petitioners' "use of their social media accounts was … not required by[] their official positions." Pet.App. 20a. No state or municipal law or policy obligated Petitioners to use their personal pages to engage with the public about their jobs. Nor is there any exclusive public function that Petitioners chose to fulfill using their personal pages. *Cf.* Cal. Educ. Code § 35145 (requiring that Board meetings be open for public comment); Pet.App. 61a-62a (finding that this duty was satisfied). To the contrary, Petitioners created their Facebook pages "before assuming office" in order "to promote their campaigns." Pet.App. 8a; *accord* JA 14, 30-31. And once in office, they used those pages (and a later-created Twitter page) to discuss the District's work in ways that, as the Ninth Circuit also conceded, "could promote [their] personal campaign prospects." Pet.App. 26a. That is no surprise since, as Respondents admitted, Petitioners viewed themselves as "always running" for re-election and used their pages to portray themselves "in the most positive light," "hop[ing] [their pages] will win [them] support." JA 19, 22, 31-32.

Moreover, as the district court found, "[b]esides [them], no [District] employee regulated, controlled, or spent money maintaining any of their social media pages." Pet.App. 100a; *accord* JA 21, 38-39. Nor did Petitioners display on their personal pages the disclosures mandated by the "District-Sponsored Social Media[] Policy." JA 28-30, 39-41. None of that would make sense if the pages were actually District accounts or if Petitioners were actually using their own pages to carry out District duties. And all of it makes clear that Petitioners were not invoking any District authority when operating their personal pages in their private capacities.

The final confirmation is that O'Connor-Ratcliff's pages will remain her personal accounts whenever her tenure in office ends. The same would have gone for Zane's page, if he had not unpublished it before his term even expired. And his unilateral decision only further proves that the page was his rather than the District's all along.

"Simply put," as in *Kennedy*, Petitioners' pages "did not owe their existence to [their] responsibilities as … public [officials]." 142 S. Ct. at 2424 (cleaned up). They acted "in the ambit of their personal pursuits," *Screws*, 325 U.S. at 111, and in a manner that was not "made possible only because [they were] clothed with the authority of state law," *West*, 487 U.S. at 49. Accordingly, the District was not "*responsible* for the[ir] specific conduct," *Blum*, 457 U.S. at 1004, and they retained their "individual liberty" to exercise "editorial discretion" over their pages as "they deem to be appropriate," *Halleck*, 139 S. Ct. at 1931, 1934.

II. Neither The Appearance Nor Content Of A Public Official's Social-Media Page Can Create State Action Absent The Exercise Of State Duty Or Authority

The Ninth Circuit insisted that public officials' operation of personal social-media accounts can constitute state action even when they neither pursue any actual governmental duties nor invoke any actual governmental authorities. The court reasoned that a totality-of-circumstances inquiry is necessary to determine whether a sufficient nexus exists between the official's conduct and the State itself. And it concluded that such a connection is established merely because an official's personal page conveys an official appearance and communicates with the public about official business. In short, the court treated Petitioners' pages as an exercise of apparent authority related to their duties.

That is a misguided and unworkable approach to state action in this context. These common attributes of personal pages cannot transform them into governmental fora—especially when the specific action challenged is not the official-looking content but rather the blocking of third-party access. The Ninth Circuit's reasoning also underscores that it is weaponizing the First Amendment to abridge speech: it penalizes disfavored speech choices of officials as citizens and candidates, by using those choices to subject their personal social-media pages to editorial constraints that apply only to the government.

A. This Court's Precedent Does Not Support A Totality-Of-Circumstances Inquiry In The Social-Media Context

At the outset, the Ninth Circuit's decision rested on a misreading of this Court's decision in *Brentwood*. *See* Pet.App. 19a-20a. The court of appeals stressed *Brentwood*'s observation that "no one fact can function as a necessary condition across the board for finding state action." 531 U.S. at 295. And the court construed *Brentwood* to mean that state action exists when, all things considered, "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Id.* (quoting *Jackson*, 419 U.S. at 351). But this Court has not adopted "close enough to government work" as a vague legal standard for state action.

For starters, *Brentwood* and *Jackson* used the "close nexus" language in discussing the issue covered by prong two of the Court's state-action test—*i.e.*, "'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" *Compare Sullivan*, 526 U.S. at 50 (quoting *Lugar*, 457 U.S. at 937), *with Brentwood*, 531 U.S. at 295-96, *and Jackson*, 419 U.S. at 350-31. *Halleck*, though, recently emphasized that this element is met only in "a few limited circumstances." 139 S. Ct. at 1928. Indeed, *Jackson rejected* state-actor status for a utility company with "monopoly status" to "provide[] an essential public service," as its powers were not "traditionally exclusively reserved to the State." 419 U.S. at 351-53. And a bare majority in *Brentwood* held that an association that "regulate[d] interscholastic athletic competition among public and

private secondary schools" should be deemed a state actor only due to "the pervasive entwinement of state school officials in [its] structure." 531 U.S. at 290-91. The Court stressed that, "to the extent of 84% of its membership, the [a]ssociation is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling." *Id.* at 299-300. That novel "fact-specific analysis" of "'entwinement'" was cogently criticized at the time, *id.* at 314 (Thomas, J., dissenting); *see id.* at 305-14, and the intervening decision in *Halleck* applies a more concrete approach. This Court should thus make clear that *Brentwood*'s use of the "close nexus" phrase does not license a free-wheeling, all-things-considered inquiry into state-actor status—let alone one that asks whether a public official's personal social-media page *looks too similar* to an actual governmental account.

In addition, even when a defendant is deemed a state actor under prong two of the state-action test, prong one still "requires … an alleged constitutional deprivation 'caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State….'" *Sullivan*, 526 U.S. at 50 (quoting *Lugar*, 457 U.S. at 937). And *that*, to repeat, is the critical issue here: determining whether Petitioners operated their "page[s] in [their] official or [their] personal capacity." *Lindke*, 37 F.4th at 1203. *Brentwood* sheds no light on this issue: as *public schools themselves* were association members, they were plainly being "represented by their officials acting in their official capacity." 531 U.S. at 299-300.

The Ninth Circuit instead deemed "most similar to this case" its own "line of precedent" addressing

whether "off-duty governmental employees are acting under color of state law." Pet.App. 21a. Notably, however, the only cases it cited finding state action involved *invocation of state authority*. In one, a state employee "abused her responsibilities" by "access[ing] confidential information" about her husband's ex-wife "through a government-owned computer database" while "acting under the pretense of performing her official duties." *McDade v. West*, 223 F.3d 1135, 1139-41 (9th Cir. 2000). In the other, an off-duty jail commander "pretended to act in performance of his official duties" by "invok[ing] his law enforcement status to keep bystanders from interfering with his assault on" a driver who had rear-ended him. *Anderson v. Warner*, 451 F.3d 1063, 1068-69 (9th Cir. 2006). These cases simply reflect that even "[m]isuse of power" is state action when "made possible only because the wrongdoer is clothed with the authority of state law." *Screws*, 325 U.S. at 109. And that occurs when the mere appearance of off-duty cops "actually evokes state authority," because "[w]e're generally taught to stop for police." *Lindke*, 37 F.4th at 1206; *cf. Griffin v. State of Md.*, 378 U.S. 130, 132, 135 (1964) (where company's security guard "had been deputized as a sheriff" and "consistently identified himself as a deputy sheriff rather than as an employee," he acted under color of state law "in ordering [patrons] to leave the park and in arresting and instituting prosecutions against them").

As demonstrated next, nothing of the sort occurs in the context of personal social-media activity. And the Ninth Circuit's misplaced analogy invites an inquiry that defies any principled and consistent application.

B. The Job-Related Appearance Of An Official's Personal Social-Media Page Does Not Evoke Apparent Authority

The Ninth Circuit claimed that Petitioners "clothed their pages in the authority of their offices." Pet.App. 26a. It asserted that, "both through appearance and content, the Trustees held their social media pages out to be official channels of communication," "whether or not the District had in fact authorized or supported [the pages]." Pet.App. 23a, 26a-27a. This attempted analogy to apparent authority is flawed in both premise and conclusion.

1. To begin, no reasonable social-media user could mistakenly believe that Petitioners' accounts were *actually* or even *purportedly* governmental. The features emphasized by the Ninth Circuit are equally consistent with the pages being personal, and other features make their personal status crystal clear.

The Ninth Circuit highlighted innocuous things about the pages: Petitioners "identified themselves" as government officials; "listed their official titles in prominent places"; "included [an] official [District] email address in the … contact information" of one page; "regularly posted … about the work of the [District] Board"; and "actively solicited constituent input about official [District] matters." Pet.App. 22a-24a. But "even if these can be trappings of an official account, they can quite obviously be trappings of a personal account as well." *Campbell*, 986 F.3d at 827. As the Eighth Circuit has observed, "[t]he Twitter page of a political candidate does not convert itself into an official page just because the candidate chooses a handle that reflects the office she is

pursuing" or depicts "herself working at the job she was elected to perform and hopes to be elected to perform again." *Id.*; *cf. Magee v. Trustees of Hamline Univ.*, 747 F.3d 532, 536 (8th Cir. 2014) ("While his editorial noted he was an officer, this recites his occupation and does not necessarily indicate he was acting in his official capacity."). The public knows that "it is now commonplace for politicians to use personal accounts to promote their official activities." *Knight*, 953 F.3d at 230 (Park, J., dissenting).

Tellingly, Respondents themselves never claimed to be confused as to the pages' true nature. Nor did they provide evidence that anyone else was confused. After all, the Facebook pages' usernames were campaign slogans, *see* JA 10, 12, and their timelines made apparent to all that they were created *before* Petitioners took office and were used to promote their political activities, *see* Pet.App. 99a. Moreover, one page said that it was "the official page for T.J. Zane, Poway Unified School District Board Member, to promote public *and political* information." Pet.App. 23a (emphasis added). It obviously did not purport to be a government account that engaged in *prohibited* partisan conduct. *See* JA 28-29 ("political activity" barred on "District-Sponsored Social Media"). Rather, the term "official page" was clearly intended and understood to be an assertion of *authenticity*, which public figures of all stripes include on social media to convey that a page is really theirs.[6]

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[6] *See, e.g.*, LeBron James, https://www.facebook.com/LeBron/ (last visited June 20, 2023) ("The Official LeBron James Facebook page."); T-Bone, https://www.twitter.com/tboneoficial_ (last visited June 21, 2023) ("Official Page" of a rapper).

Indeed, Petitioners' pages did not display the disclosures mandated for "District-Sponsored Social Media." JA 28-30, 39-41. That is further reason the public would know these pages are personal rather than governmental. And that also shows the District neither viewed itself as responsible for these pages nor saw any need to direct Petitioners to clarify the capacity in which they were operating the pages.

The Ninth Circuit nevertheless faulted Petitioners for not unilaterally choosing to post a "disclaimer" that these are personal-capacity accounts. Pet.App. 26a. But on these facts, it is far from clear the State would have power to require a disclaimer, and it is absurd to suggest the First Amendment *itself* would ever so require. Because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," state-compelled disclaimers are generally *themselves* "subject to exacting First Amendment scrutiny." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795, 798 (1988). And while the District here may have more latitude based on its "needs as an employer," the lack of any plausible confusion by members of the public means that the District's "side of the *Pickering* scale [would be] entirely empty." *Lane v. Franks*, 573 U.S. 228, 242 (2014); c*f. Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2377 (2018) (likely First Amendment violation where "government-scripted, speaker-based disclosure requirement" was "wholly disconnected from [a State's] informational interest"). Simply put, as the First Amendment arguably *prohibits* the District from mandating disclaimers in these circumstances, it cannot possibly *require* disclaimers of its own force.

Once again, *Kennedy* is instructive. The Court admonished that "in no world may a government entity's concerns about phantom constitutional violations"—there, faux Establishment Clause problems—"justify actual violations of an individual's First Amendment rights." 142 S. Ct. at 2432. Here, *a fortiori*, Petitioners' right to depict themselves as they prefer on their personal social-media pages cannot be abridged based on unfounded concerns about misperception of the pages—let alone by a court using the First Amendment as a sword rather than a shield. That would be a truly "unprecedented penalty" requiring Petitioners "to choose between" self-censoring their own content or surrendering their editorial discretion over third-party content posted on their pages. *Davis*, 554 U.S. at 739.

2. In all events, the Ninth Circuit's fixation with appearance is legally misplaced in this context. Even implausibly assuming that someone somewhere fails to see that Petitioners are actually operating their pages in their personal capacities, that mistake would not evoke any state authority.

As for "the specific conduct of which the plaintiff[s] complain[]," *Blum*, 457 U.S. at 1004, Petitioners' ability to block Respondents was a *unilateral* power granted by the Facebook and Twitter platforms. It in no way depended on how Respondents or the public *perceived* the pages. Regardless, "[a]nyone else" with a Facebook or Twitter account "could have done exactly" the same. *Luce*, 872 F.3d at 514.

Ditto for Petitioners' operation of the pages more generally. Their "power" to use their personal pages to communicate with the public about their jobs was

not "made possible only because [they had] clothed" the pages with indicia of their offices. *West*, 487 U.S. at 49. Their posts did "not carry the force of law simply because [each] page sa[id] it belongs to a person who's a public official." *Lindke*, 37 F.4th at 1206; *cf. Griffin*, 378 U.S. at 135 (security guard "consistently identified himself as a deputy sheriff"). Nor is this a situation where a member of the public complied with a statement on one of the pages due to a misperception that it was an official decree of the Board rather than the personal view of one Board member. *Cf.* Pet.App. 22a (citing case where off-duty jail officer "prevented bystanders from intervening in [an] attack by claiming that he was 'a cop'").

The Ninth Circuit nevertheless objected that Petitioners "invok[ed] their governmental status" "to muster … public engagement with their social media pages," by "actively solicit[ing] constituent input" and "regularly post[ing]" District news. Pet.App. 23a-24a (cleaned up). That, however, "proves too much." *Lindke*, 37 F.4th at 1205. A familiar advantage of incumbency is that elected officials can muster greater public engagement *wherever* they speak about the jobs for which they seek reelection. Petitioners could have communicated with their constituents in exactly the same way on personal social-media pages plastered with "private capacity" disclaimers, at real property that they personally owned or rented and used to promote their political agendas, or in any other speech forum. Speech that "[e]xploit[s] the personal prestige of one's public position is not state action" unless it "exercise[s] governmental power" or at least "threaten[s]" to do so. *Hall v. Witteman*, 584 F.3d 859, 866-67 (10th Cir.

2009) (immaterial to state action that county attorney's use of "official *title*" gave "particular clout" to defamatory advertisement). In merely interacting with constituents, Petitioners exercised no "right or privilege created by the State." *West*, 487 U.S. at 49.

Indeed, the Ninth Circuit's own analogy to off-duty police officers illustrates the flaw in its reasoning. Imagine that a beat cop's personal social-media page featured indicia of her job (displaying her title, uniformed photos, etc.) and focused on engaging with the public about her job (announcing recent arrests, soliciting community views on crime-prevention policies, etc.) to the same extent Petitioners' pages did here. As long as the cop's page was neither pursuing any official duty nor using any official resources, no one could seriously contend that it was an exercise of actual *or* apparent governmental authority—even if it was the most widely followed page about policing *because of* her job. That would be the precise type of action taken "in the ambit of [her] personal pursuits" that is "plainly excluded" from constitutional scrutiny by the state-action doctrine. *Screws*, 325 U.S. at 111. So too here.

C. The Job-Related Content Of An Official's Personal Social-Media Page Does Not Evince An Official Duty

The Ninth Circuit further claimed that Petitioners "used their pages to communicate about their official duties." Pet.App. 26a. It asserted that the pages "related directly to the Trustees' duties" because the posts "ke[pt] the public apprised of goings-on at [the District]." Pet.App. 24a. This sweeping conception of Petitioners' duties is fundamentally flawed.

1. Wholly apart from any official duties, government employees often speak with the public about their jobs for personal reasons, as both well-informed citizens and self-interested vote-seekers. *Garcetti*, 547 U.S. at 419; *Campbell*, 986 F.3d at 826-27. The fact that the content of Petitioners' pages is *related to* their duties is thus not remotely the same thing as their operating the pages for the purpose of *carrying out* those duties.

This Court already held as much in *Lane*. There, a public employer fired an employee for truthful testimony given under oath. 573 U.S. at 238. The employer argued that, because the testimony "relate[d] to" the job and "concern[ed] information learned during" the job, *Garcetti* "require[d] that [the] testimony be treated as the speech of an employee rather than that of a citizen." *Id.* at 238-39. This Court unanimously rejected that position as "read[ing] *Garcetti* far too broadly." *Id.* at 239. "[T]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech." *Id.* at 240.

The law could not be otherwise. "After all, public employees do not renounce their citizenship when they accept employment," and "[t]his remains true when [their] speech concerns information related to or learned through public employment." *Id.* at 236. Accordingly, "when public officials deliver public speeches, we recognize that their words are not exclusively a transmission from *the* government because those 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.").

Staring at the *content* of public officials' speech to determine the *capacity* in which it is spoken is thus futile. That is well illustrated by the Eighth Circuit's *Campbell* decision. Applying the "more holistic" state-action approach that considers a social-media page's content and appearance in addition to the official's duty and authority, the panel majority viewed a legislator's Twitter page as "more akin to a campaign newsletter." 986 F.3d at 825-27. Yet the dissent, and the Ninth Circuit here, viewed that page as a "tool of governance." *Id.* at 828-29 (Kelly, J., dissenting); *see* Pet.App. 34a n.11. The judges viewed the same facts so very differently because, in this context at least, an appearance-and-content standard can be resolved only in the eye of the beholder. It is the type of "reasonable observer" inquiry that is destined to "invite[] chaos in lower courts, le[ad] to differing results in materially identical cases, and create[] a minefield for legislators." *Kennedy*, 142 S. Ct. at 2427 (cleaned up).

2. The proper inquiry is "whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane*, 573 U.S. at 240. And rather than engage in a hopeless labeling game, the only workable way to disentangle the capacity in which the official is speaking is to consider whether the State itself requires the speech, controls its content, or facilitates its dissemination. *Lindke*, 37 F.4th at

1204-05; *see id.* at 1206-07 (noting that this "bright line[]" rule "offer[s] predictable application for state officials and district courts alike"). This approach recognizes that an official's social-media activity cannot have been "undertake[n] to perform [his] official duties," *Screws*, 325 U.S. at 111, if the State "plays absolutely no part in establishing or [operating]" the page, *Moose Lodge*, 407 U.S. at 175.

Here, as discussed, 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* JA 21, 38-39. Far from any "close nexus," there is no connection at all supporting the view that Petitioners' general operation of the pages—much less their specific blocking of Respondents—"may be fairly treated as [action] of the [District] itself." *Jackson*, 419 U.S. at 351.

Of course, as the Ninth Circuit observed, the Board's bylaws do obligate Petitioners to "ensure that the district is responsive to … the community" and to set "the direction for the district through a process that involves the community." Pet.App. 24a-25a n.9. Petitioners comply with that duty, and communicate with the public *in an official capacity*, when they hold formal Board meetings that are open for public comment. Pet.App. 61a; *see* Cal. Educ. Code § 35145. In *that* setting, "[i]t's part of the job" to listen to constituents, JA 47, which is why "[Petitioners] never attempted to prevent [Respondents] from speaking during the public comment period," Pet.App. 62a. To be sure, even outside of Board meetings, Petitioners were empowered to inform the public about District

activities, Cal. Educ. Code § 35172, and they deemed it "important to be accessible and responsive" to constituents and "hear their feedback" and "their criticisms," JA 51-52. But none of that remotely implies, as the Ninth Circuit suggested, that Petitioners were carrying out official duties *whenever and wherever* they "ke[pt] the public apprised of goings-on at [the District]." Pet.App. 24a.

Once more, that view "proves too much." *Lindke*, 37 F.4th at 1205. Although "regular communication" with constituents is "essential to good government," a public official "isn't engaged in state action merely because he's 'communicating'—even if he's talking about his job." *Id.* The Ninth Circuit thus repeated "the error of positing an excessively broad job description" that would subject all work-related communication "to government control." *Kennedy*, 142 S. Ct. at 2425 (cleaned up). Again, "[p]roviding some kind of forum" to engage with public officials "is not an activity that only governmental entities have traditionally performed," *Halleck*, 139 S. Ct. at 1930, and Petitioners' pages did not "lose [their] private character merely because the public [was] generally invited to use it," *Tanner*, 407 U.S. at 569.

The Ninth Circuit insisted, however, that the accounts cannot be "personal campaign pages" since they "virtually never posted *overtly* political or self-promotional material." Pet.App. 26a (emphasis added). By now, it should be clear why that was a non sequitur twice over. Wholly apart from politics, elected officials may "spe[ak] [as] citizens on matters of public concern," and "[t]here is considerable value … in encouraging, rather than inhibiting," them from doing so because they "are often in the best position

to know what ails the [entities] for which they work." *Lane*, 573 U.S. at 235-36. Plus, just fixating on politics, elected officials may 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, the Ninth Circuit *conceded* that Petitioners' posts "could promote [their] personal campaign prospects." Pet.App. 26a. That the court still penalized Petitioners for their editorial choices illustrates the threat its state-action theory poses to individual liberty. *Halleck*, 139 S. Ct. at 1932; *Davis*, 554 U.S. at 739. The Ninth Circuit invoked the First Amendment's ban on governmental abridgment of speech as a license to grab the censor's pen itself.

* * *

In sum, the Ninth Circuit effectively held that, even if an official's personal social-media account is not an actual "public forum," it may nevertheless become an "apparent" public forum "related to" the official's duties. And by this, the court meant simply that the same appearance and content *could be present* on a hypothetical page that actually carried out governmental duties and relied on governmental authorities—even when the real page *in fact did not*. That position is both unprincipled and unworkable. It makes a mockery of the First Amendment's boundary between governmental and private action, imposes responsibility unfairly on the State for public officials' personal pursuits, and infringes the individual liberty of the officials themselves. It thus imposes all the harms that the state-action doctrine is meant to prevent. This Court should reject it.

CONCLUSION

The judgment below should be reversed.

June 23, 2023

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United States Constitution
Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution
Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

42 U.S.C. § 1983
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.