No. 22-324

IN THE

Supreme Court of the United States

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

*Petitioner*s,

v.

CHRISTOPHER GARNIER AND KIMBERLY GARNIER,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether petitioners, elected members of the Poway Unified School District Board of Trustees, engaged in state action when they blocked two constituents from social media accounts that petitioners used primarily to communicate with the public about school district matters.

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INTRODUCTION

When government officials are doing their jobs, they must obey the Constitution. *Butz v. Economou*, 438 U.S. 478, 506 (1978); *United States v. Lee*, 106 U.S. 196, 220 (1882). Because a state "can act in no other way" than through its officers, their acts are "that of the State"; otherwise, the Fourteenth Amendment "has no meaning." *Ex parte Virginia*, 100 U.S. 339, 347 (1879). If officials choose to use some private resources to fulfill their responsibilities, that does not defeat their status as state actors.

Those simple propositions dispose of this case. Petitioners were government officials—elected members of the Poway Unified School District Board of Trustees. When they maintained social media pages "to inform constituents about goings-on at the School District and on the PUSD Board, to invite the public to Board meetings, to solicit input about important Board decisions, and to communicate with parents about safety and security issues at the District's schools," Pet. App. 5a, they were doing their job and had to obey the Constitution. Their choice of twenty-first century social media cannot change the fact that they were engaged in fulfilling a responsibility that has been part of an elected official's job since at least 1774 when Edmund Burke explained that "a representative ought always to rejoice to hear" the public's views. *Cook v. Gralike*, 531 U.S. 510, 522 n.16 (2001) (quoting Burke's "classic speech to the electors of Bristol"). Whatever the tools they used, the Trustees remained state actors.

Of course, saying that the Trustees were "engage[d] in state action" Pet. i, within the meaning

of the Fourteenth Amendment did not mean that they violated the Garniers' constitutional rights. The answer to that question turned on two issues of substantive First Amendment law: Did the way the Trustees operated their social media create designated public fora and did the Trustees then infringe the Garniers' "free-speech and/or government-petitioning rights," Pet. App. 101a, by unreasonably excluding them from those fora?

But as it comes to this Court, the case no longer presents those First Amendment issues. To the contrary: The Trustees expressly asked this Court to review *only* "the threshold state-action holding." Pet. 11. They deliberately chose to "advance no alternative arguments to challenge the final judgment below." *Id.* 34. In particular, they "d[id] not contest" the court of appeals' holdings that under the First Amendment, their particular social media were public fora and that their blocking the Garniers was not a reasonable time, place, or manner restriction. *Id.* 11; Petr. Br. 13.

Having gotten in the door, the Trustees now try to reinject the First Amendment into this case. They open their brief with the complaint that the Garniers "spammed Petitioners' posts with repetitive comments." Petr. Br. 2. But the Garniers' conduct has no bearing on whether the Trustees were state actors. The Garniers' comments bear solely on whether the Trustees violated the Garniers' First Amendment rights by blocking them. (Indeed, under the Trustees' constricted notion of what constitutes state action, they could have blocked the Garniers for posting even a single comment or for any other reason however silly or invidious.) The Trustees then ask this Court to elevate "their own First Amendment rights," *id.* 3, over

the Garniers', arguing that the court of appeals "*abridged Petitioners'* speech," *id.* 4 (emphasis in original), when it required them to reinstate the Garniers' ability to comment.

This Court should reject the Trustees' attempt to resuscitate First Amendment arguments they abandoned at the certiorari stage. *Cf. Visa Inc. v. Osborn*, 580 U.S. 993, 933 (2016) (per curiam) (dismissing certiorari as improvidently granted when petitioners, having persuaded the Court to grant certiorari on one issue, "chose to rely on a different argument in their merits briefing") (internal quotation marks and citation omitted).

Instead, this Court should leave for another day the thorny—but for now irrelevant—question of how the First Amendment should apply to elected officials' social media-based interactions with members of the public. All it needs to do here is recognize that the Trustees were engaged in state action when they operated, and then excluded the Garniers from, communications platforms "overwhelmingly geared toward" District affairs, Pet. App. 23a. The commonsense conclusion that the Trustees' conduct involving "job-related matters," Pet. i, did not lie solely within "the ambit of their personal pursuits," *Screws v. United States*, 325 U.S. 91, 111 (1945) (plurality opinion), is sufficient to affirm the judgment of the court of appeals.

STATEMENT OF THE CASE

A. Factual background

1. Respondents Christopher and Kimberly Garnier have lived in San Diego County, California, for most of their lives. Christopher holds a doctorate

in education from the University of Southern California and previously served for nearly a decade as a combat helicopter pilot in the United States Marine Corps. Tr. 17-18. Kimberly has a master's degree in forensic criminal behavior. Both Christopher and Kimberly attended public schools in the Poway Unified School District ("PUSD") from kindergarten through twelfth grade, and their three children attended PUSD schools as well. *Id.* at 87, 89.[1]

The Garniers regularly attended PUSD Board meetings and contacted members of the Board of Trustees to express their concerns regarding important topics such as financial mismanagement and racist bullying. *See* Tr. 19, 54-55, 90, 104-05, 144. For example, the Garniers were instrumental in bringing to light financial misconduct that resulted in the resignation and indictment of the District's former superintendent. *See id.* at 19, 54; Bob Ponting, *School Superintendent Accused of Stealing $345,000 Faces 7 Years in Prison*, Fox 5 San Diego (Jan. 29, 2018, 1:27 PM), https://perma.cc/E8R4-P2CG.

2. The petitioners in this case are Michelle O'Connor-Ratcliff and T.J. Zane (collectively "the Trustees"). O'Connor-Ratcliff has been an elected member of the Poway Unified School District Board of

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[1] "Tr." refers to pages in the September 21-22, 2021, trial transcript.

The children no longer attend PUSD schools because the family recently moved to a different part of the county.

Trustees throughout this litigation; Zane was a member during the proceedings below.[2]

In California, school board members like the Trustees are elected to govern a community's public schools. California law directs school boards to "[i]nform and make known to the citizens of the district, the educational programs and activities of the schools therein." Cal. Educ. Code § 35172(c); Pet. App. 24a. PUSD has an official policy directing the Board "to 'ensure that the district is responsive to the values, beliefs, and priorities of the community'" using "'a process that involves the community, parents/guardians, students, and staff.'" Pet. App. 24a-25a n.9 (quoting PUSD Board Bylaw BB 9000(a)).[3]

Maintaining "responsive[ness] to the values, beliefs and priorities of their communities" requires school board members to communicate regularly with their constituents. *See* Cal. Sch. Bds. Ass'n, *Governance and Policy Resources: Role and Responsibilities*, https://perma.cc/6ZA5-VLVV. At trial, the Trustees acknowledged the importance of this official duty. *See* Pet. App. 61a. Zane testified that it is "part of the job" to listen to and address constituents' concerns, J.A. 47, and O'Connor-Ratcliff

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[2] Zane is no longer a Trustee, as his term expired in December 2022. Petr. Br. 7 n.4. Since he is no longer a state actor, his appeal is moot. The Court should therefore dismiss the petition as to him. Zane has not sought vacatur, nor would that "extraordinary remedy," *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994), be appropriate; the mootness is entirely attributable to his choice to forego seeking reelection. *See id.* at 24-27; *Karcher v. May*, 484 U.S. 72, 82-83 (1987).

[3] The current version of the Board's policies is available at https://www.powayusd.com/en-US/board/Policy-Procedure.

agreed that it is "important to be accessible and responsive to your constituents," *id.* 51.

3. Traditionally, elected officials and constituents communicated with one another through face-to-face meetings, mailed surveys, bulletins, and the like. But as this Court has acknowledged, new social media platforms "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Indeed, "[f]rom local county supervisors and state representatives to the President of the United States, elected officials across the country" now use social media "to communicate with constituents and seek their input in carrying out their duties as public officials." Pet. App. 5a; *see also* Br. of Amici Curiae Electronic Frontier Foundation *et al.* 5-31 (setting out statistics and examples involving elected officials' use of Facebook and Twitter); Monica Anderson, *More Americans are using social media to connect with politicians*, Pew Research Center (May 19, 2015), https://perma.cc/M37A-KMLN.

Two of the most commonly used social media are the ones at issue in this case: Facebook and Twitter. Each of them enables an account holder (for example, Zane or O'Connor-Ratcliff) to create a descriptive "profile" and then one or more "pages," to decide whether a particular page will be generally accessible to the public or not, and to post content on that page. (The Twitter content is referred to as a "tweet.") Both Facebook and Twitter also provide ways for other users to comment on that content. Finally, both Facebook and Twitter give a page's administrator (either the account holder or a designee) multiple options for moderating what other users can post on

that particular page. *See generally* Pet. App. 7a-8a, 62a-73a.

On Facebook, a page's administrator can delete or hide specific comments from other users. Pet. App. 7a-8a. Deleting a comment removes the comment from the page altogether; hiding the comment makes it viewable only to the page administrator and the user who posted the comment. *Id.* And even before an administrator deletes or hides a comment, Facebook automatically truncates lengthy comments by leaving visible only a few lines of text; readers who want to see the full comment must use a "See More" option. *Id.* at 7a. In addition, an administrator can use the "word filter" function. *Id.* at 8a. When users try to post a comment that contains a word that appears on a list of words she has specified, that comment "doesn't appear on [her] Page." Facebook Help Center, *How do I block certain words from appearing in comments on my Facebook Page?*, https://perma.cc/UX23-YS2Z. By including commonly used words like "he, she, it, [and] that," Pet. App. 76a, an administrator can effectively prevent comments altogether.

Finally, page administrators can also ban or "block" individual users. Blocking a user means that the user can no longer comment, like, or respond to anything on the page. Pet. App. 8a. The user can, however, still view the contents of a page from which he has been blocked. *Id.*

On Twitter, a profile administrator can delete or hide individual reply tweets. Pet. App. 7a. And she can also can "block" particular users from replying to her tweets. Twitter is distinct from Facebook in that once a user is "blocked," often that user cannot view any content on the administrator's site. Pet. App. 8a; *see*

Trial Ex. 16 (showing how O'Connor-Ratcliff's Twitter looked to Christopher Garnier after he was blocked).[4]

3. At the time they were elected to the PUSD Board, both Zane and O'Connor-Ratcliff had Facebook accounts. After their election, they each continued to maintain "personal profile" pages that were accessible only to "family and friends" they chose. Pet. App. 59a-60a. But they also each administered a "public" Facebook page accessible to the public at large on which they discussed PUSD Board-related activities.

Zane entitled his page "T.J. Zane, Poway Unified School District Trustee" and added a picture of a PUSD sign. J.A. 10; *see* Pet. App.8a-9a, 99a. In the page's "About" section, Zane declared that the page was "the official page for T.J. Zane, Poway Unified School District Board Member, to promote public and political information." J.A. 10. At the time, Zane could have chosen from numerous labels to categorize this page. Tr. 126. *Id.* The labels included Politician and Government Official. Zane chose "Government Official." J.A. 49; Pet. App. 9a. On this public page, he listed his interests as "being accessible and accountable; retaining quality teachers; increasing transparency in decision making; preserving local

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[4] The Trustees state that blocking a Twitter user "does not prevent the user from continuing to view the page while logged into another account or no account." Petr. Br. 6. At some times, that was the case. At other times, including the summer of 2023, an individual who is not logged into a Twitter account cannot view a Twitter user's tweets. *See* Clare Duffy, *Twitter isn't letting users view the site without logging in*, CNN Business (June 30, 2023, 1:55 PM EDT), https://perma.cc/UA8U-S4LA.

standards for education; and ensuring our children's campus safety." J.A. 10; Pet. App. 9a.

On O'Connor-Ratcliff's public Facebook page, she labeled herself a "Government Official" in the "About" section. J.A. 12; Pet. App. 8a. She also created a public Twitter page in 2016, after her election to the PUSD Board. Pet. App. 6a-7a. On her Facebook page, she identified herself as "Board of Education, President, Poway Unified School District" and provided a link to her official PUSD email address. J.A. 12. On her Twitter page, she identified herself as "President, Poway Unified School District Board of Education" and chose the handle "@MOR4PUSD." Pet. App. 71a.

The Trustees made posts on Facebook and Twitter to share content regarding PUSD and to seek feedback. Pet. App. 39a. Their posts were "overwhelmingly geared toward" District affairs, including reports of visits to PUSD schools and requests for students and community members to apply for positions with the PUSD Representative Board. *Id.* 23a. They informed constituents about PUSD's public accountability plan, solicited public feedback through surveys, and provided information about future community meetings related to the PUSD planning process. *Id.* 10a. The Trustees also announced hiring and firing decisions, reminded the public about upcoming PUSD Board meetings, and used their pages to alert constituents in real time to safety and security issues at PUSD schools. *Id.*

At the time of the conduct giving rise to this case, the social media pages at issue "were open and available to the public without any restriction on the form or content of comments" and without any guidelines for commenters to follow. Pet. App. 39a.

Thus, any individual could write his or her own comments directly beneath the Trustees' posts or react to the Trustees' posts with a thumbs up, smiley face, or other available emoticon. *Id.* 7a. In their posts, the Trustees both "solicited feedback from constituents" and "responded to individuals who left comments" or reactions. *Id.* 39a; Tr. 186-88.

4. Because of a District rule largely precluding Board members from responding to constituents at in-person Board meetings, and because emails often went unanswered, the Trustees' social media were the best tool for interactive communication between the public and Board members. J.A. 43-44. So, like many of their neighbors, the Garniers engaged with the Trustees on Facebook and Twitter. As Christopher put it, "I utilized the only resource that I had for communication and engagement, and that was through social media." *Id.* 46.

The Garniers left comments exposing financial mismanagement by the former superintendent as well as incidents of racism. Kimberly testified that she posted on the Trustees' public pages because, in her words, "I have children of color in the District, and I don't want them going to school and seeing a noose or the profanity like that." Tr. 90. The Trustees have never disputed the importance of these concerns. The Garniers' comments never used profanity or threatened physical harm. Pet. App. 12a.

Only one moderation mechanism—blocking individual users—is at issue in this case. In 2017, O'Connor-Ratcliff blocked both Garniers from her Facebook page and blocked Christopher Garnier from

her Twitter account. Pet. App. 12a. Zane also blocked the Garniers from his Facebook page. *Id.* [5]

B. Procedural history

After the Trustees blocked them, the Garniers filed suit in federal district court under 42 U.S.C. § 1983. As is relevant here, they alleged that the blocking infringed their First Amendment rights to "free expression and to criticize the government" in the "public forums" the Trustees had created. J.A. 6.

Summary judgment. Based on undisputed facts, the district court concluded that the Trustees engaged in state action when they blocked the Garniers, Pet. App. 110a-115a. Pointing to this Court's decisions in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001), and *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), the court explained that "[t]here is no single formula for determining state action," and therefore courts must look carefully at all the facts. Pet. App. 111a (citation omitted).

Here, the district court found that the Trustees' "Facebook pages were used 'as a tool of governance' because they were used to inform the public about [O'Connor-Ratcliff] and Zane's official activities, as well as information related to PUSD and the Board." Pet. App. 113a (citation omitted). It further found that the Trustee's "ability to post about district events they

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[5] Zane's Twitter account is not at issue in this case. Nor are the Trustees' decisions to delete some of the Garniers' comments or to use word filters that effectively prevented any member of the public from commenting on the Trustees' posts, although non-blocked users could still use one of Facebook's reaction buttons. Pet. App. 13a.

attended and share Board information was due to their positions as public officials within PUSD." *Id.* 115a. The court also pointed to the Trustees' solicitation of feedback from constituents as evidence that the Trustees had been acting as public officials. *Id.* 114a. Finally, it rejected the Trustees' argument that the pages involved only unofficial campaign activities, finding that the content "went beyond" sharing "information about their campaigns for reelection." *Id.*

Turning to the substantive First Amendment issues in the case, the court held that the interactive portions of the Trustees' social media pages were public fora because the Trustees had posted "content related to their positions as public officials and had opened their pages to the public without limitation" at the time "when they blocked the Garniers." Pet. App. 119a. Finally, the court granted qualified immunity to the Trustees on the Garniers' damages claim. *Id.* 108a.

The court then set the Garniers' claim for declaratory and injunctive relief for trial to address two questions: (1) whether the decision to block the Garniers had been content neutral or had been based on their viewpoints and (2) whether the blocking could be justified under the applicable First Amendment standard. Pet. App. 125a-128a.

Trial. The subsequent bench trial was conducted before a different district judge. *See* Tr. 5. He agreed with the summary judgment holding that the Trustees had acted under color of law because the Trustees "'could not have used their social media pages in the way they did but for their positions on PUSD's Board.'" Pet. App. 83a (citation omitted). On the remaining First Amendment issue, the court determined that the

initial decision to block the Garniers was content neutral. *Id.* 85a-88a. While that decision had been reasonable, the court held that after three years, the continued blocking was no longer permissible. *Id.* 89a. The court awarded the Garniers declaratory and injunctive relief. *Id.* 97a.

Appeal. The Ninth Circuit affirmed. Pet. App. 53a-54a. As is relevant here, the court held that the Trustees had acted under color of law when they blocked the Garniers. In reaching that conclusion, the Ninth Circuit drew from this Court's decisions in *West v. Atkins*, 487 U.S. 42 (1988), and *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001), and emphasized the context-specific nature of the state-action inquiry. *See* Pet. App. 18a-19a.

"Given the fact-sensitive nature of state action analyses," the Ninth Circuit continued, "not every social media account operated by a public official is a government account." Pet. App. 28a (citation omitted). Here, however, the court "conclude[d] that, given the close nexus between the Trustees' use of their social media pages and their official positions, the Trustees in this case were acting under color of state law when they blocked the Garniers." *Id.* 20a.

The Ninth Circuit based its holding on the many ways in which the Trustees used their social media pages as tools for carrying out their official duties. Pet. App. 25a. The Trustees used their pages "to communicate about, among other things, the selection of a new superintendent, the formulation of PUSD's LCAP [local control accountability] plan, the composition of PUSD's Budget Advisory Committee, the dates of PUSD Board meetings, and the issues

discussed at those meetings." *Id.* 24a. Moreover, the court considered the pages' sizeable audiences, the Trustees' repeated solicitation of feedback from constituents, and the Trustees' response to comments as evidence of the pages' official character. *Id.* 23a. The court also pointed to the Trustees' choices to identify and emphasize their "official" positions on their pages as evidence of state action. *Id.*

In short, the court held that the Trustees' pages were used for and dedicated to official PUSD business. Accordingly, the Trustees acted under color of law when they blocked the Garniers from those pages.

With respect to the First Amendment issues, the Ninth Circuit held that the interactive spaces of the Trustees' social media accounts were public fora. Pet. App. 36a-37a. Even if the decisions to block the Garniers had been content neutral—a proposition the court doubted, *id.* 42a—the blocking was not sufficiently narrowly tailored to satisfy the First Amendment, *id.* 36a-37a, 43a. Accordingly, the Ninth Circuit concluded that the district court was "correct to grant the Garniers declaratory and injunctive relief." *Id.* 50a. The Trustees do not challenge those holdings here. Pet. 11, 34.[6]

[6] With respect to the Garniers' cross-appeal, which is not before this Court, the Ninth Circuit affirmed the district court's grant of qualified immunity. Pet. App. 50a-52a.

SUMMARY OF ARGUMENT

I. Because the Trustees were doing their job, they were engaged in state action.

This Court's precedents establish that when government officials are doing their job, they are state actors. First, this Court has provided a clear presumption in constitutional cases involving public officials: "[S]tate employment is generally sufficient to render the defendant a state actor." *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 n.18 (1982)).

Moreover, an official's identity as a state actor does not depend on there being express authorization for his or her conduct. To the contrary: for more than a century, this Court has held that the Fourteenth Amendment's state action requirement is satisfied even by actions that are *unauthorized* by (or even violate) state law as long as they occur while an official is doing his or her job. And this Court's Section 1983 jurisprudence establishes that an individual officer *can* be held liable for a constitutional violation even in situations where the government itself cannot "cannot fairly be blamed," *Lugar*, 457 U.S. at 936.

Common-law principles at the time the Fourteenth Amendment was ratified reinforce the conclusion that public officials are state actors when they are doing their job. It was settled law at the time that the acts of local officials were treated as the acts of their government if those acts fell within the scope of their employment. And the scope of employment included not just expressly authorized acts but also conduct usually done in connection with an official's formal duties.

Moreover, public records laws and the Westfall Act confirm the conclusion that government officials can still be doing their jobs even when they use private resources to engage in job-related communications.

Turning to the facts of this case, the Trustees were performing their jobs when they blocked the Garniers. So they were state actors.

Both California law and the bylaws governing the Trustees treat keeping the public informed and communicating with the public as responsibilities of school board members. At trial, the Trustees acknowledged that this was one of their responsibilities and that they maintained their social media pages in furtherance of this responsibility. The conclusion that the Trustees were engaged in state action when they operated their social media, and then blocked the Garniers, is reinforced by the way they presented and administered the pages.

II. The counterarguments offered by the Trustees and the United States lack merit.

Many of the arguments advanced by the Trustees and the United States share a flawed premise: that there was no state action here because the Poway Unified School District did not require, control, or facilitate the Trustees' social media. State control or facilitation may matter in a lawsuit against a private entity. But the Trustees are government officials, and the test the Trustees and the United States articulate has no purchase in such a case.

To begin, it does not defeat state action here that the Trustees may have hoped that maintaining these media would enhance their prospects for reelection. Government officials often act for both official and

personal reasons, but they nonetheless remain state actors while doing their jobs.

Nor does it matter that the Trustees chose to fulfill their responsibilities by using nongovernmental resources. While private individuals' use of their own property militates against finding state action, government employees often use their own property while doing their jobs, and that does not change their status as state actors.

In a similar vein, the fact that blocking someone from a Facebook or Twitter page is a product of those platforms' privately-owned architecture does not change the state action analysis.

Finally, when a public official is doing his job, as the Trustees were here, it does not matter that the challenged part of his job is not an *exclusive* public function.

III. Recognizing that the Trustees here were state actors leaves questions about the constitutionality of particular conduct where they belong: with substantive constitutional provisions. It both permits state actors to exercise legitimate and reasonable control over social media accounts and avoids the risk of invidious discrimination.

ARGUMENT

I. Because the Trustees were doing their job, they were engaged in state action.

The Constitution constrains public officials when they are doing their job. So the question in this case is whether the Trustees were doing their job as members of the Poway Unified School District (PUSD) governing body when they set up and operated a

mechanism for communicating with, and receiving comments from, members of the public about school board and school district affairs. They were. And their decision to block the Garniers from that mechanism was therefore state action.

The Trustees and the United States try to resist this commonsense reasoning with a series of arguments that boil down to this: Because the Trustees set up their accounts themselves and the PUSD Board did not require them to do so, and because (like most elected officials) the Trustees were motivated both by serving the public and by enhancing their prospects for reelection, the Trustees shed their identity as state actors even as they "inform[ed] constituents about" District and Board affairs, "invite[d] the public to Board meetings," and "solicit[ed]" public input "about important Board decisions." Pet. App. 5a.

Those arguments mischaracterize the state action inquiry. They also ignore several bodies of law that show that the Trustees were doing their jobs by using social media to communicate with the public.

A. Government officials are state actors when performing their jobs.

The state-action doctrine "draw[s] the line between governmental and private" for purposes of determining whether a party is covered by the constraints of the Constitution that apply only to state actors. *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). When government officials are performing their jobs, their actions are decidedly governmental in character. At a minimum, a public servant engages in state action

whenever he is "exercising his responsibilities pursuant to state law." *West v. Atkins*, 487 U.S. 42, 50 (1988).

1. This Court's precedents establish that when government officials are doing their job, they are state actors.

First, with respect to state action doctrine itself, this Court has provided a clear presumption in constitutional cases involving public officials: "[S]tate employment is generally sufficient to render the defendant a state actor." *West*, 487 U.S. at 49 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 n.18 (1982)). Of course, when government workers are not doing their jobs, they cease to be state actors. A city councilmember umpiring his daughter's softball game is not a state actor subject to the due process clause. And elected officials can be private actors even when they remain on government property. For example, Michigan's governor was not a state actor when he held his wedding at the Governor's official summer residence on Mackinac Island. *See Private wedding scheduled for Michigan governor*, UPI, Sept. 1, 1989, https://perma.cc/QWZ4-DEN9. But the general rule still stands: While a government official is doing his job, he is engaged in state action.

The presumption of state action in cases involving government officials doing their jobs stands in sharp contrast to the starting point in cases involving a very different issue: when "a *private* entity may qualify as a state actor," *Manhattan Community Access*, 139 S. Ct. at 1928 (emphasis added). In that situation, the Trustees are correct that "[t]his Court has identified 'a few limited circumstances'" where a "party can fairly

be equated with the State itself." Petr. Br. 19 (quoting *Manhattan Community Access*, 139 S. Ct. at 1928).

But it would be flatly untrue to say there are only "a few limited circumstances" where a government official can be equated with the state. To the contrary: Only once in its history has this Court held that a public official doing his or her job was *not* a state actor covered by the substantive constitutional prohibitions incorporated into the Fourteenth Amendment.

The exception is *Polk County v. Dodson*, 454 U.S. 312 (1981). In that case, the Court held that the "employment relationship" between the government and a public defender was "insufficient to establish that a public defender acts under color of state law within the meaning of § 1983" with respect to ineffective assistance of counsel claims by a client. *Id.* at 321. The Court emphasized that under those circumstances, "a public defender is not acting on behalf of the State; he is the State's adversary." *Id.* at 323 n.13. Even so, the Court took pains to clarify that in other roles, public defenders *would* be state actors. *Id.* at 324-25 (citing *Branti v. Finkel*, 445 U.S. 507 (1980)).

Polk County is thus a narrow exception to the general presumption that state action exists whenever there's an ordinary "employment relationship"—one in which a government official is expected to advance (not resist) the government's interests when she is doing her job.

Second, when it comes to government officials, there is a longstanding principle that "doing their job" is not limited to specific tasks that they are expressly required or authorized to perform. A public official

need not "show statutory provision for everything he does." *United States v. Macdaniel*, 32 U.S. 1, 14 (1833). The scope of a public official's employment encompasses conduct incident to formally defined duties as well as the express duties themselves. The Trustees are thus mistaken to suggest that the Trustees could not be state actors because "[n]o state or municipal law or policy obligated Petitioners to use their personal pages to engage with the public about their jobs," Petr. Br. 35.

Third, for more than a century, this Court has held that the Fourteenth Amendment (and since incorporation, the constitutional constraints it incorporates from the bill of rights as well) applies to actions by "state officers" that go beyond "the strict scope of the public powers possessed by them." *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 287-88 (1913). Indeed, since *Monroe v. Pape*, 365 U.S. 167 (1961), it's fair to say that the mine run of Section 1983 cases alleging constitutional violations involve acts that are not required by (and that may well violate) state law. Nevertheless, as long as a public official's actions occur on the job, they are state action.

Moreover, when it comes to Section 1983 suits against government officials in their individual capacity (like the Trustees here, *see* J.A. 2), *Monroe* and *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), together establish that an individual officer *can* be held liable for a constitutional violation even in situations where the government "cannot fairly be blamed," *Lugar*, 457 U.S. at 936. *Contra* Petr. Br. 18.

In *Monell*, this Court declined to subject local governments to *respondeat superior* liability under

Section 1983 for constitutional violations committed by their employees. *See Monell*, 436 U.S. at 691.

At the same time, the Court recognized in this situation that there would still *be* a "constitutional tort," *Monell*, 436 U.S. at 691—which necessarily means that the employee who committed the challenged conduct was a state actor (since if he were a private actor, there would be no constitutional tort at all). That recognition flows from the proposition that "Congress enacted § 1983 to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Hafer v. Melo*, 502 U.S. 21, 28 (1991) (internal quotation marks omitted) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974), and *Monroe*, 365 U.S., at 171-72).

Thus, the Trustees misunderstand the caveat that state action exists only when the government is "*responsible* for the specific conduct of which the plaintiff complains," because only then can the state "fairly be blamed" for the conduct. Petr. Br. 17-18 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis in original), and *Lugar*, 457 U.S. at 936). That caveat is designed to address cases involving private entities and it has no bearing on cases where the defendant is a public official.

2. Common-law principles at the time the Fourteenth Amendment was ratified reinforce the conclusion that public officials are state actors when they are doing their job.

"In a § 1983 action brought against a state official, the statutory requirement of action 'under color of

state law' and the 'state action' requirement of the Fourteenth Amendment are identical." *Lugar*, 457 U.S. at 929. Thus, as it does with respect to the scope of Section 1983, this Court should "look to 'common-law principles that were well settled'" when the Fourteenth Amendment was enacted to help "defin[e] the contours" of state action, *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019) (quoting *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997)).[7]

By the time the Fourteenth Amendment was ratified and Section 1983 was enacted, it "seem[ed] too well settled to be questioned" that the acts of local officials were treated as the acts of their government if those acts "were done bona fide in pursuance of a general authority to act for the city, on the subject to which they relate" even when those acts were not "expressly authorized" by the government. *Thayer v. City of Boston*, 36 Mass. 511, 516-17 (1837). Thus, as the California Supreme Court phrased it, when public officers are "acting within the scope of their employment, their act would be the act of the city." *Herzo v. City of San Francisco*, 33 Cal. 134, 148 (1867).

Surveying the caselaw, the Supreme Court of Rhode Island explained that officials' acts would be treated as the acts of a municipality *either* if "such acts were expressly authorized or subsequently ratified by the corporation or its government, *or* [if they] were done in good faith in pursuance of a general authority to act for the corporation in the matter to which they relate." *Donnelly v. Tripp*, 12 R.I. 97, 98 (1878)

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[7] For an excellent description of the broad original understanding of "under color of law, see Petr. Br. at 19-24, *Lindke v. Freed*, No. 22-611 (June 23, 2023).

(emphasis added) (citing cases). In language that presaged this Court's approach to state action in *Screws v. United States*, 325 U.S. 91 (1945), and *Monroe*, New York's high court explained that an employee's acts "in the course of his employment" are attributable to the government even when the government "did not authorize, justify, or participate in, or indeed know of such misconduct, or even if [it] forbade the acts, or disapproved of them." *Lee v. Village of Sandy Hill*, 40 N.Y. 442, 448 (1869). So too, the Wisconsin Supreme Court held it sufficient that the conduct "complained of is within the general authority of such officers or agents, if they had authority to act on the general subject matter, and acted in good faith, with an honest view to obtain for the public a lawful benefit or advantage." *Hamilton v. City of Fond du Lac*, 40 Wis. 47, 50 (1876). *Cf.* Restatement (First) of Agency § 229, comment a (1933) (The scope of an agent's employment includes "anything which is fairly and reasonably regarded as incidental to the work specifically directed or which is usually done in connection with such work.").

In short, at the time the Fourteenth Amendment was adopted, conduct that fell within the scope of an official's employment—which reached not only acts directly authorized by the government, but also acts incidental or related to an official's formal responsibilities—would have been understood to be covered by the Amendment. As this Court phrased it in *Ex parte Virginia*, 100 U.S. at 347, when an official acts in the course of his job, "his act is that of the State."

That is not to say that a government official *must* be acting within the scope of his employment to qualify

as a state actor. "The 'under color of law' category is broader than the 'scope of employment' category." *Graham v. Sauk Prairie Police Comm'n*, 915 F.2d 1085, 1093 (7th Cir. 1990); *see also* Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 Duke L.J. 1701, 1768 (2022). But, at a minimum, conduct by a public officer that satisfies the scope-of-employment test qualifies as state action.

3. Other areas of law—namely, public records laws and the Westfall Act—show that a government official remains a state actor even when she uses private resources to engage in job-related communications.

Public records cases. The "basic purpose" of statutes like the Freedom of Information Act, 5 U.S.C. § 552, and analogous state laws, is "to create a broad right of access to 'official information.'" *U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press*, 489 U.S. 749, 772 (1989) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976), and *EPA v. Mink*, 410 U.S. 73, 80 (1973). *See also, e.g.*, Cal. Const. art. I, § 3(b)(1) (declaring that, because "[t]he people have the right of access to information concerning the conduct of the people's business," the "writings of public officials and agencies shall be open to public scrutiny").

As the California Supreme Court has recognized, "in today's environment, not all employment-related activity occurs during a conventional workday, or in an employer-maintained workplace." *City of San Jose v. Superior Court*, 389 P.3d 848, 852 (Cal. 2017). Therefore, that court held that "writings concerning the conduct of public business" were not beyond the California Public Records Act's reach "merely because

they were sent or received using a nongovernmental account." *Id.* Courts across the nation have reached a similar conclusion with respect to their states' public records laws. *See, e.g.*, *Toensing v. Att'y Gen.*, 178 A.3d 1000, 1002 (Vt. 2017) (Vermont's public record law covers digital documents stored in private accounts); *Nissen v. Pierce County*, 357 P.3d 45, 49 (Wash. 2015) ("text messages sent and received by a public employee in the employee's official capacity are public records of the employer, even if the employee uses a private cell phone"); *Barkeyville Borough v. Stearns*, 35 A.3d 91, 95-96 (Pa. Commw. Ct. 2012) (in exchanging emails discussing development plans, council members were "acting in their official capacity" even though the emails "were composed on personal accounts").

Treating job-related communications sent from nongovernmental accounts as official action makes total sense: Disclosure statutes would "be drastically undermined" if officials could "circumvent" them "by using their home computers for government business." *O'Neill v. City of Shoreline*, 240 P.3d 1149, 1155 (Wash. 2010). Implicitly rebutting the United States' assertion here that the Trustees' use of "private property" insulates them from constitutional scrutiny, the D.C. Circuit offered this analogy: "It would make as much sense to say that the department head could deprive requestors of hard-copy documents by leaving them in a file at his daughter's house and then claiming that they are under her control." *Competitive Enter. Inst. v. Off. of Sci. & Tech. Pol'y*, 827 F.3d 145, 150 (D.C. Cir. 2016). The fact that the daughter might have authority to exclude the public from her home has no bearing on whether the public official was doing

his job, and thus engaged in state action, when he created the documents.

The Westfall Act. Under the Westfall Act, the United States will substitute itself as the party defendant in cases brought against a federal government employee acting "within the scope of his office or employment." 28 U.S.C. § 2679(b)(1). When the Government substitutes itself, it does so because the claim against the Government employee involved his "official conduct." *Hui v. Castaneda*, 559 U.S. 799, 806 (2010).[8]

This Court long ago observed that statements by public officials involving "matters of wide public interest and concern" can constitute "action in the line of duty." *Barr v. Matteo*, 360 U.S. 564, 575 (1959). In Westfall Act cases, courts have consistently deployed that principle to hold that communicating with the public lies within the scope of elected officials' employment—and that they are doing their job even when they use privately owned facilities. This is seen most clearly in defamation cases brought against members of Congress.

The "duty to 'inform[] constituents and the public at large of issues being considered" is "a primary obligation of a Member of Congress in a representative democracy." *Does 1-10 v. Haaland*, 973 F.3d 591, 600 (6th Cir. 2020) (quoting *Williams v. United States*, 71 F.3d 502, 507 (5th Cir. 1995)). Courts applying the

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[8] To be clear, the Westfall Act (like the Federal Tort Claims Act more generally) does not provide a remedy for constitutional violations. But it does speak directly to the question whether a particular government employee was doing his job—the question relevant to the state action inquiry.

Westfall Act to such actions thus treat them as within the scope of the Member's government employment. *Id.* They recognize that the duties of Members of Congress "are not confined to those directly mentioned by statute or the Constitution" and can include speaking to the public, either directly or through the media, about "[m]atters of public concern." *Council on Am. Islamic Rels. v. Ballenger*, 444 F.3d 659, 665 (D.C. Cir. 2006) (quoting *Williams*, 71 F.3d at 507). And they do so even though even though "one motive" for a legislator's remarks may be to "help generate the votes he need[s] to remain in office," because when a legislator speaks about public issues, he is also "providing political leadership and a basis for voters to judge his performance in office—two activities that public officials are expected, and should be encouraged, to perform." *Operation Rescue Nat. v. United States*, 975 F. Supp. 92, 108 (D. Mass. 1997), *aff'd*, 147 F.3d 68 (1st Cir. 1998); *see also Wuterich v. Murtha*, 562 F.3d 375, 384 (D.C. Cir. 2009) (speaking with reporters on war-related issues was "unquestionably" the kind of conduct a Member of Congress is "employed to perform"); *cf. Moreno v. Visser Ranch, Inc.*, 241 Cal. Rptr. 3d 678, 691 (5th Dist. Ct. App. 2018) (even if "the predominant motive" of an employee is "to benefit himself," this "does not prevent the act from being within the scope of employment").

Of particular salience to this case, courts have treated Members' statements as within the scope of their employment even when the Members used private, nongovernmental resources to make their communications. In *Haaland*, for example, then-Representative Haaland sent an allegedly defamatory

tweet "from her campaign Twitter account." 973 F.3d at 594. In *Wuterich*, Representative Murtha made the allegedly defamatory remarks during interviews "conducted in Congressman Murtha's campaign office." 562 F.3d at 379. And in *Operation Rescue*, Senator Kennedy made the allegedly defamatory remarks in a room at the Park Plaza Hotel following "a campaign fund-raising luncheon." 975 F. Supp. at 98.

In short, in a wide variety of contexts, elected officials' communications with the public are understood to be part of their job.

B. The Trustees were performing their jobs when they blocked the Garniers and so were state actors.

As Part I.A showed, a public servant engages in state action whenever he is "exercising his responsibilities pursuant to state law." *West*, 487 U.S. at 50. As a matter of California law, "[a] governmental officer's discussions with the public or press regarding the functioning of his office" involve "duties incident to the normal operations of that office." *Sanborn v. Chron. Pub. Co.*, 556 P.2d 764, 769 (Cal. 1976). Here, communicating with the public about "District-related matters," Petr. Br. 9, was one of the Trustees' responsibilities. Therefore, they were state actors when they conducted that communication but blocked the Garniers.

1. California law expects school boards to "[i]nform and make known to the citizens of the district, the educational programs and activities of the schools therein." Cal. Educ. Code § 35172(c). As the Trustees acknowledge, this statute "empowered" them

"to inform the public about District activities." Petr. Br. 49-50. Put in terms that parallel this Court's language in *West*, school board members in California have "a responsibility to involve the community in appropriate, meaningful ways." Cal. Sch. Bds. Ass'n, *School Board Leadership: The Role and Function of California's School Boards* at 6, https://perma.cc/3C24-CTYA.

To fulfill that responsibility, the PUSD Board's bylaws direct members to "ensure that the district is responsive" and "involve[] the community" in decision-making. Pet. App. 24a-25a n.9 (quoting PUSD Board Bylaw 9000(a), https://perma.cc/A3EH-7JYW). In this era of social media, the Bylaws expressly recognize that Trustees may do so through "social networking sites," PUSD Board Bylaw BB 9010(a), https://perma.cc/325K-PULK, and that "permissible electronic communications concerning district business include, but are not limited to, dissemination of Board meeting agendas and agenda packets, reports of activities from the Superintendent, and reminders regarding meeting times, dates, and places," PUSD Board Bylaw BB 9012(a), https://perma.cc/5ZAF-B7B4—precisely the kind information the Trustees posted on their media, *see* Pet. App. 10a, 23a, 24a, 113a-114a.

At trial, the Trustees recognized the importance of their duty to communicate with constituents. *See* Pet. App. 61a. Zane testified that it is "part of the job" to listen to and address constituents' concerns. J.A. 47. O'Connor-Ratcliff agreed that it is "important to be accessible and responsive to your constituents." *Id.* 51-52. The Trustees, therefore, "used Facebook for interactive purposes by replying to comments on their

posts from other constituents about PUSD issues." Pet. App. 60a.

The Trustees also conceded that they maintained their social media pages in furtherance of this duty. O'Connor-Ratcliff testified that it was her practice to respond to constituents on her Facebook page. J.A. 52. Zane explained that he used his Facebook account to disseminate important public information about board matters, including live updates on lockdowns at schools, *id.* 49-50.

On these pages, the Trustees invited the public to give input at in-person hearings. *See* Pet. App. 64a. They "posted announcements soliciting students and community members" to apply for board positions. *Id.* 9a. They "invited the public to fill out surveys" related to the budgetary formulation process and the hiring of a new superintendent. *Id.* And they asked for the public's thoughts on proposed changes to the board's electoral mechanism. *Id.* 11a.

On the whole, the Trustees' operation of their social media had the purpose and effect of furthering their work as members of the PUSD. In operating these media, they were doing their job and were therefore state actors.

2. The conclusion that the Trustees were engaged in state action when they operated their social media, and then blocked the Garniers, is reinforced by the way they "presented and administered their social media pages as official organs for carrying out their PUSD Board duties." Pet. App. 25a.

Appearance matters. When "an individual is possessed of state authority and purports to act under that authority, his action is state action." *Griffin v.*

Maryland, 378 U.S. 130, 135 (1964). In *Griffin*, a security guard at a racially segregated private amusement park was deputized by the Montgomery County sheriff and permitted to wear a department badge. He subsequently ejected a group of Black individuals who were protesting the park's policy and took them to a police station where he pressed trespass charges against them. The Court held that guard was a state actor, notwithstanding his private employment, because he "consistently identified himself as a deputy sheriff rather than as an employee of the park." *Id.* at 135. If that consistent identification served to make the private security guard in *Griffin* a state actor, it is true *a fortiori* when elected public officials like the Trustees consistently "swathe" their social media "in the trappings of [their] office," Pet. App. 30a (citation omitted), that they remain state actors.

Just take a look at their pages. J.A. 10, 12; Pet. App. 71a. In the "About" sections of their Facebook pages, both Zane and O'Connor-Ratcliff chose "Government Official" among the menu of options that Facebook offers for users to categorize the nature of their pages. Pet. App. 8a-9a. Zane titled his Facebook page "T.J. Zane, Poway Unified School District Trustee" and included a banner picture of the school district building. He described the page as "the official page for T.J. Zane, Poway Unified School District Board Member, to promote public and political information." Pet. App. 9a; J.A. 10. Similarly, O'Connor-Ratcliff listed her "Current Office" on her Facebook page as "Board of Education, President, Poway Unified School District" and provided a link to

her official PUSD email address. J.A. 12; Pet. App. 8a. Her Twitter page was similar. Pet. App. 71a.

In their posts, the Trustees often used the collective pronouns "we" or "our" to refer to actions by the District and school employees. *See* Compl. Ex. H. (Page.ID 39; 49; 55). It is difficult to imagine those collective pronouns referring to anything other than official PUSD leadership. And the ongoing presentation of these Facebook and Twitter pages as a key channel for communications between the Trustees and their constituents matters. This case does not involve off-the-cuff comments by an elected official in a nonpublic setting. It involves sites on which they "established a government presence," Pet. App. 118a, to discuss District issues, and little else, again and again. Having asked the public "what say you?," Pet. App. 11a, blocking the Garniers from saying anything was state action.

3. The contrast between the social media pages involved in this case and the Trustees' other social media pages confirms that the challenged pages involve state action. Both Zane and O'Connor-Ratcliff maintained separate Facebook profile pages for interacting with family and friends in their capacity as private citizens. Pet. App. 59a-60a. Zane also had an additional separate page for his business. Tr. 129-30. The Trustees' own acts drew "the line between governmental and private." *Manhattan Community Access*, 139 S. Ct. at 1926. And neither the Garniers—nor anyone else—have ever claimed that the Trustees' operation of those other non-public social media pages was state action. These pages, however, were.

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In sum, it has been true since the time the Fourteenth Amendment was ratified that one of an elected official's most important responsibilities is to communicate with the public; as Edmund Burke put it in 1774, a representative ought to welcome "the most unreserved communication with his constituents."[9] A representative needs "to be cognizant of" the public's concerns because "[s]uch responsiveness is key to the very concept of self-governance through elected officials." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 227 (2014) (plurality opinion). And so, when the Trustees first set up, and then excluded the Garniers from, the means they used to communicate with the public, they were acting within the scope of their employment. They were state actors.

II. This Court should reject the arguments for not finding state action here.

The barrage of counterarguments advanced by the Trustees and the United States for not finding state action is the product of mistakenly trying to force a case involving elected officials into a framework designed to determine whether private parties qualify as state actors. None of their arguments defeats the presence of state action here.

1. While the "personal pursuits" of government officials do not qualify as state action, *Screws v. United States*, 325 U.S. 91, 111 (1945) (plurality opinion), it does not matter here that the Trustees may have hoped that maintaining these media would

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[9] Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), *in* The Founders' Constitution Ch. 13, Doc. 7 (Philip B. Kurland & Ralph Lerner eds. 2001) (online edition), https://perma.cc/BNT6-CMH6.

enhance their prospects for reelection. *Contra* Petr. Br. 35.

After all, this Court treated Sheriff Screws as a state actor even though his conduct was the product of a purely personal motive—namely, a "grudge" against his victim. *Screws*, 325 U.S. at 93 (plurality opinion). And it might be fair to say that virtually any time an elected official communicates with the public, "one motive" for his remarks may be to "help generate the votes he need[s] to remain in office." *Operation Rescue Nat. v. United States*, 975 F. Supp. 92, 108 (D. Mass. 1997), *aff'd*, 147 F.3d 68 (1st Cir. 1998). But that does not change the fact that he is also doing his job. *Id.* Doing one's governmental job well in the hopes of retaining it is not the kind of "merely private conduct" against which the Fourteenth Amendment "erects no shield." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

2. It also does not matter that the Trustees chose to fulfill their responsibility to communicate with the public by using means that can be characterized as "private property." *Contra* Petr. Br. 23; U.S. Br. 8, 14-18.

As an empirical matter, the Trustees are mistaken when they assert that it is not "ordinary" for state actors "to use their own personal resources to perform their government work." Petr. Br. 24. For example, more than forty percent of federal workers work from home at least one day a week. U.S. Office of Pers. Mgmt., *2022 Federal Employee Viewpoint Survey Results* 22, https://perma.cc/D8TE-P6U5. And they use their own personal resources: While the Government may provide *some* of the equipment these employees need—for example, computers and funds for DSL lines—it does not pay for a teleworker's

"increased use of electricity" or the cost of furnishing a home office. U.S. Office of Pers. Mgmt., *Frequently Asked Questions, Pandemic FAQ/Managers*, https://perma.cc/RPM4-9YCU. And yet no one could deny that these workers remain bound by the Constitution when they discuss government business with their colleagues or the public by the privately funded light coming from their privately owned lamp.

Using private resources while doing one's government job is even more prevalent when it comes to local officials and government employees. For example, public schoolteachers notoriously dip into their own pockets to fund classroom supplies. And yet they remain state actors whose choices about how to use those supplies in the classroom are governed by the Fourteenth Amendment. A teacher who bought crayons only for the white children in her classroom could not defend herself by claiming there was no state action since the school neither required her to buy the crayons nor subsidized her purchase.

This example also shows why the United States is wrong to insist that there is no state action here because the Trustees "did not coerce anyone into doing anything," U.S. Br. 9; *see also id.* 26. The teacher did not coerce students to do anything either. Similarly, if an elected official were to hold "office hours" at a local nonprofit to "discuss state and legislative issues that affect the community," *see* Gregg Hart, *Guadalupe Sidewalk Office Hours*, https://perma.cc/6ZEV-FBEN (announcing such office hours for a member of the California Assembly), he would not be coercing anyone into attending. But if he were to post a "No Muslims" sign at the entrance to the facility, the Fourteenth

Amendment would surely have something to say. The same rule should obtain here.

The PUSD did not provide the Trustees with individual office space. So they had to do things like preparing for meetings elsewhere. Nevertheless, when they did so, they were still doing their jobs. To be sure, they—like the federal teleworkers described above—were undoubtedly entitled to keep the public out of their homes. But that entitlement to exclude rests on a combination of state property law and First Amendment law: Working from home does not create any kind of public forum. It does not defeat the conclusion that even if a government worker is doing her job in a t-shirt and leggings, she is still "clothed with the State's power," *Screws*, 325 U.S. at 110 (plurality opinion) (citation omitted); *see also supra* pp. 25-27 (discussing the application of public records acts to materials maintained on government employees' personal computers and email accounts).[10]

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[10] This is why the Trustees' hypothetical about President Bush or Governor Pritzker holding town hall meetings at their own ranch or resort (Petr. Br. 27-28) misses the mark. They contrast two forms of "townhall." In one, the officials "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." *Id.* 28. We can all agree that they are not state actors. But in the other, the event is "run using governmental resources to further governmental objectives." *Id.* In this situation, the Trustees seem to agree that the officials *would* be state actors. The key is that they would be state actors even if they chose to conduct the event on their own land.

Whether they could exclude particular individuals from attending is a separate question. Government officials are entitled to exclude people even from government-funded public

3. This Court should also reject the Trustees' argument that blocking someone from their social media accounts is not state action because blocking "is a generally available function of the platforms that Facebook and Twitter offer" rather than something "'made possible only because'" they were ""clothed with the authority of state law.'" Petr. Br. 23 (quoting *West v. Atkins*, 487 U.S. 42, 49 (1988)). The fact that the ability to block someone from a Facebook or Twitter page is a product of those platforms' privately-owned architecture does not change the state action analysis.

To begin, that argument proves too much. Even on government-owned and government-operated social media accounts, the ability to block comes from a generally available function that any account holder can use. But no one could argue with a straight face that using the "remove" function on Zoom to remove a member of the public from an actual school board meeting would not be state action.

Moreover, like the blocking feature on social media, the right to deny unwanted visitors access to a physical space extends to individuals who are not government officials. But when government officials exercise this right in the course of government

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events for a variety of legitimate reasons. *See, e.g.*, *Villegas v. City of Gilroy*, 363 F. Supp. 2d 1207 (N.D. Cal. 2005) (explicitly holding that a police officer acted under color of law but nonetheless finding no First Amendment violation in officer's expulsion of motorcycle club members from the Garlic Festival due to violations of festival dress code). But whether a particular exclusion is permissible is a question of substantive constitutional law—were individuals excluded arbitrarily or invidiously?—not a question of state action.

business, they engage in state action. Take, for instance, an official who locks his office door to exclude a group of constituents from entering to offer feedback. This official clearly engages in state action, despite the fact that pretty much "anyone else" (Petr. Br. 23) has access to comparable locks. In short, it is the characteristics of the *actor*, not the characteristics of the *technology*, that determine whether there is state action.

"[W]hatever the challenges of applying the Constitution to ever-advancing technology," basic constitutional principles do not change "when a new and different medium for communication appears." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011). Using the "remove" function of a private Zoom account to remove constituents from a virtual townhall or informal Q&A is the digital analog of physically expelling or excluding constituents from an in-person meeting. It would be nonsensical to treat the latter but not the former as state action simply because the former occurs through a publicly available digital tool. Blocking someone from social media pages used for a public official's job responsibilities and that present themselves as official pages is the digital equivalent of locking a door in the office or removing a constituent from a town hall; in all cases, an official is a state actor.

4. The United States' argument that this Court should ignore scope-of-employment cases in thinking about state action is meritless.

To start, the fact that scope of employment "finds its roots in the common law and varies from jurisdiction to jurisdiction," U.S. Br. 23, is a virtue, not a vice. Figuring out whether there is state action in a

particular situation can turn on a "host of facts," *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001), and the United States provides no reason why one of those facts should not be whether, under state law, a particular government official was acting within the scope of his employment. Recall that in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the Court rejected the idea that there would be "universal truths on the basis of which every state leasing agreement is to be tested," *id.* at 725; instead, state action "can be determined only in the framework of the peculiar facts or circumstances present," *id.* at 726. If the presence of state action can turn on the particulars of a contractual relationship, which varies from jurisdiction to jurisdiction, it can also turn on scope of employment law.

This Court clearly thinks scope of employment is relevant. For example, in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022)—a case the Trustees cite repeatedly, Petr. Br. 3, 26, 32-33, 36, 44, 48, 50—this Court protected the coach's right to pray on the field after the game precisely because he was not "offer[ing] his prayers while acting within the scope of his duties." 142 S. Ct. at 2425. But if, in some other school district, offering prayers *were* "within the scope" of the job a football coach was hired to do, there would be state action when he offered those prayers and an Establishment Clause problem. That explains why in *Wallace v. Jaffree*, 472 U.S. 38 (1985), this Court held that it violated the Clause for Alabama to write "a prescribed prayer" and then "authorize[] teachers to lead" students in it. *Id.* at 40. *See also Haywood v. Drown*, 556 U.S. 729, 736-37 (2009)

(holding that a state cannot shield corrections officers from potential § 1983 claims "arising out of conduct performed in the scope of their employment" because that would be "contrary to Congress' judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages").

The United States' claim that scope-of-employment doctrine is unilluminating because "a State might generously choose to expand the scope of employment to include the purely private actions of its agents," U.S. Br. 23, is hard to take seriously. It points to not a single example where this implausible municipal munificence has occurred. The Court can worry about this issue if it ever arises. But for today, the Trustees here did act within the scope of their employment in operating the social media accounts at issue. They were therefore state actors when they blocked the Garniers.

5. The United States acknowledges the obvious: "Democratically accountable officials of course have a long tradition of communicating with the public about matters of public concern." U.S. Br. 20. But it then argues that this is not sufficient because all sorts of private actors "also communicate with the public about the work of public officials." *Id.* 21. The United States is wrong. It does not matter whether communicating with constituents is "a traditional, exclusive public function," *id.* 20; *see also* Petr. Br. 35.

Here, as with virtually all its other arguments, the United States relies on a test developed to determine whether "a *private entity* may qualify as a state actor," *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) (emphasis added). Under that test, this Court "has stressed that

'very few' functions fall into [the] category" of "exclusive" government functions. *Id.* at 1929 (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978)).

That test simply cannot be transplanted to cases where the defendant is a public official without gutting the Constitution altogether. To see why, consider the list of conduct that does not qualify as state action when engaged in by a private party and ask yourself the following questions: If "running sports associations and leagues" is not state action because it is not an "exclusive government function," *Manhattan Community Access*, 139 S. Ct. at 1929, then does the Constitution have nothing to say about the rules a public school athletic league sets for wearing a hijab at a track meet? If providing "electric service" is not state action because it is not an "exclusive government function," *id.* (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352-54 (1974)), can a municipally owned utility cut off a customer arbitrarily or because it dislikes his politics? If "special education" is not state action because it is not an "exclusive government function," *id.* (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982)), can a public school's discriminatory treatment of a student with a disability escape constitutional scrutiny? Those questions practically answer themselves. Of course not. The "exclusively" requirement makes sense when the question is whether to transform a private entity into a state actor. It doesn't when asking whether a government official has somehow shed his status as a state actor even as he performs a function that democratically accountable officials have traditionally performed since the Founding.

III. Recognizing that the Trustees here were state actors leaves questions about the constitutionality of particular conduct where they belong: with substantive constitutional provisions.

Finding state action is only the first step in a case challenging the conduct of a government official. A plaintiff still must show that the conduct violated some substantive provision of constitutional law—the First Amendment's Free Speech or Free Exercise Clauses, the Fourth Amendment, the Equal Protection Clause, and so on. Those substantive doctrines strike the proper balance between the government's interests and individual rights. This Court should leave those issues where they belong instead of tinkering with state action doctrine. Stuffing every concern into the "threshold state-action" inquiry, Petr. Br. 13, is both unnecessary and dangerous.

1. The Trustees and the Government suggest this Court must read state-action doctrine narrowly because otherwise public officials will be denied both their ability to control appropriate behavior on their social media and their own First Amendment rights to express their views. *See* Petr. Br. 30-34; U.S. Br. 27-29. Both arguments are mistaken.

The First Amendment, and not state action doctrine, is the way to consider these concerns. The First Amendment empowers state actors—whether individual government officials or local government bodies themselves—to enforce reasonable and non-discriminatory time, place, and manner restrictions on the ability of members of the public to communicate with the government. For example, the Poway Unified School District (PUSD) had established time, place,

and manner rules for their in-person meetings, restricting each speaker to three minutes at the microphone. *See* Pet. App. 61a. Government actors can likewise create reasonable time, place, and manner rules for any online fora: for example, they could set reasonable maximum word limits, forbid posts that are threatening or defamatory or disruptively repetitive, and the like. And they can exclude commenters who do not abide by the rules. Moreover, they can configure their social media in ways that do not create fora open to public comments in the first place—for example, by using Facebook's word filter feature. *See supra* p. 7.

Put another way, the First Amendment does not require state actors to create social media pages that maximize the ability of the public to communicate with government officials. This is true even when state action is uncontested. *See, e.g.*, *Miller v. Goggin*, 2023 WL 3294832 at *17 (E.D. Pa. May 5, 2023) (rejecting constitutional challenge to school board's policy of disabling the comment function altogether on district's social media pages); *Krasno v. Mnookin*, 2022 WL 16635246 at *15 (W.D. Wis. Nov. 2, 2022) (holding that a state university could "limit[] the comment threads" on its institutional social media pages "to discussion of or reaction to the specific topic of the University's post" and could therefore remove or hide the plaintiff's off-topic comments).[11]

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[11] Moreover, in any case where it is unclear whether conduct involving social media violates the Constitution, government officials enjoy the protection of qualified immunity. The Ninth Circuit affirmed the grant of qualified immunity on the Garniers'

But the Trustees here "never adopted any formal rules of decorum or etiquette for their pages that would be 'sufficiently definite and objective to prevent arbitrary or discriminatory enforcement.'" Pet. App. 39a (quoting *Am. Freedom Def. Initiative v. King County*, 904 F.3d 1126, 1130 (9th Cir. 2018)). They simply blocked the Garniers from their sites based on an "unspoken policy." *Id.* And whatever the merits of that action, the Trustees deliberately decided not to contest in this Court the Ninth Circuit's holding that applying their unspoken policy to the Garniers was unconstitutional. Perhaps the Trustees made that decision because "[t]he record in this case" refutes any "contention that the Garniers' comments actually disrupted [the Trustees'] pages or interfered with their ability to host discussion on their pages." Pet. App. 44a. Whatever the reason, this Court should not contort state action doctrine to provide protections that the Trustees do not deserve as a matter of First Amendment law.

2. It is unnecessary to inject state-action doctrine into the analysis of public employee speech to protect the free-expression rights of government employees because the distinctive First Amendment doctrine this Court has developed to deal with public employee speech protects those rights by itself. Neither the Trustees nor the United States has identified a single case where this Court previously needed—or should have needed—to layer a state-action analysis atop the "complexity [already] associated with the interplay between free speech rights and government

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damages claims, Pet. App. 50a, and the Garniers have not challenged that holding.

employment" in First Amendment doctrine, *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2423 (2022). Even when government employees are in the office doing their job, the First Amendment can protect their personal expression on matters of public concern. *See, e.g.*, *Rankin v. McPherson*, 483 U.S. 378 (1987). Conversely, even when government employees are *off* the job (and thus not even arguably engaged in state action), there is distinctive First Amendment law applicable to their expressive activities. *See, e.g.*, *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (per curiam) ("a governmental employer may impose certain restraints on the speech of its employees" even when that speech is off the job—"restraints that would be unconstitutional if applied to the general public").[12]

This case illustrates the point that First Amendment law standing alone, without a state-action sidecar, is enough to protect the expressive interests of elected officials like the Trustees. No one has ever questioned the Trustees' right to say whatever they wanted on the Facebook and Twitter pages at issue here. The Garners challenged only the

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[12] The PUSD Board Bylaws impose such a restraint by directing Trustees, "[w]hen speaking to community groups, members of the public, or the media," to "identify personal viewpoints as such and not as the viewpoint of the Board," PUSD Board Bylaw BB 9010(a), https://perma.cc/325K-PULK.

The Trustees concede that their social media pages failed to provide any such disclaimer, but then illogically suggest that the absence of a disclaimer somehow confirms that their pages were "personal-capacity accounts," Petr. Br. 43, before floating the erroneous suggestion that requiring them to make clear they were acting in a nongovernmental capacity could somehow violate the Constitution, *id.*

Trustees' decision to block the Garniers from also speaking in those fora. J.A. 6.

In fact, the Trustees draw exactly the wrong lesson from this Court's recent decision in *Kennedy*. *See* Petr. Br. 26-27. There, the Court explained that Kennedy's personal religious expression was entitled to First Amendment protection precisely because he "did not" offer "his prayers while acting within the scope of his duties as a coach." 142 S. Ct. at 2425. The Court's declaration that this is "what matters," *id.*, confirms that a court trying to figure out whether the Constitution constrains a public official should ask whether he was acting within the scope of his duties when he engaged in the challenged conduct. After it makes that determination, it can turn to whether his conduct implicates his own constitutional interests.[13]

3. Using state action doctrine to address the Trustees' complaints about being required to reinstate the Garniers is also dangerous. In contrast to First Amendment doctrine, the state action doctrine is too

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[13] The Trustees are also fearmongering when they argue that "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." Petr. Br. 32. That is just not true. For example, no one could doubt that when a Trustee uses her government-supplied email account to explain her views on District policy to a constituent, she is engaged in state action. *Cf.* U.S. Br. 24. Yet the government clearly cannot compel her to say a potential policy is a good idea if she believes it isn't. The First Amendment protects her expression even on government media (and that's even before we get into whether she has absolute legislative immunity for some of her job-related speech).

blunt an instrument for regulating how public officials use public media to do their jobs.

First, if the Constitution does not apply at all—the rule the Trustees and the United States seek for situations like this—then elected officials would be permitted to discriminate against members of the public based on viewpoint alone. The minute a constituent voices opposition to the government official's stated policy or course of action in a comment or reaction to a post—however pertinent and respectful the comment—the official can block that individual forever from interacting with, or perhaps even viewing, that official's online content. And on an interactive social media site, that blocking prevents both the blocked individual and all other members of the public from learning one another's views.

Second, because the state action doctrine also determines whether the antidiscrimination principles of the Equal Protection Clause and the Free Exercise Clause apply, finding no state action here would also give state and local elected officials carte blanche as a constitutional matter to discriminate on invidious bases such as race, sex, or religion—in both the digital and physical realms.

Return to the example of the elected official who holds what he calls "sidewalk office hours" where he invites constituents to approach him at a local nonprofit to talk about matters of public concern. *See supra* p. 36. If the Court were to hold that these offsite meetings are not state action because the representative is on nongovernmental property when he holds them, then a refusal to speak to someone who is Latino or female or evangelical would be protected from constitutional scrutiny.

Third, if this Court were to hold that there is no state action here, it would create an incentive for government officials to insulate themselves from constitutional scrutiny by relocating their interactions with constituents to ostensibly "private" social media accounts. That holding could lead local governments to enact policies that leave all social media to be run by officials setting up individual accounts, even as more and more members of the public use social media to present their views to their representatives. That cannot be right. *Cf. Smith v. Allwright*, 321 U.S. 649, 666 (1944) (overruling *Grovey v. Townsend*, 295 U.S. 45 (1935), which had permitted white primaries, even though primary elections were otherwise pervasively regulated, so long as the state left control over who could participate to political parties).

Instead, this Court should hold that the Trustees here were engaged in state action and allow the outcome of cases involving social media accounts like the ones here to be governed by substantive constitutional doctrines.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

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