No. 22-324

In the Supreme Court of the United States

MICHELLE O'CONNOR-RATCLIFF, ET AL., *Petitioners,*

v.

CHRISTOPHER GARNIER, ET UX.

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

BRIEF OF PROTECT THE FIRST FOUNDATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTRODUCTION AND INTEREST OF *AMICUS*[1]

The state action question in this case implicates two vital First Amendment rights: that of citizens to access government fora, and that of public officials to control with whom and how they communicate when they speak in their private capacities. As this case demonstrates, those rights are in tension when it is not immediately apparent whether a government representative is operating a social media account in her public or private capacity.

But Petitioners' solution is not the answer. They ask this Court to cut off crucial First Amendment protections regarding government officials' speech by holding that those officials *only* act in their capacity as state actors when their actions are affirmatively required as a state duty or when they invoke state authority. Pets.' Br. at 14. Petitioners would thus have this Court overturn its longstanding recognition that "no one fact can function as a necessary condition across the board for finding state action." *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Doing so would allow government officials to cut off citizens' right to petition and communicate directly with their elected representatives. That is an untenable result, and inconsistent with the First Amendment's "profound national commitment" to "debate on public issues"

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

that is "uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

Fortunately, that contraction of the public's First Amendment rights is not necessary to preserve the First Amendment rights of government officials. As the United States Congress has demonstrated, governmental bodies can and should adopt clear rules separating official accounts from private ones, thus "preserving an area of individual freedom" for officials and citizens alike. *See Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

These issues are of particular importance to *amicus* Protect the First Foundation ("PT1"), a nonprofit, nonpartisan organization that advocates for protecting First Amendment rights in all applicable arenas and areas of law. PT1 is concerned about all facets of the First Amendment and advocates on behalf of all people across the ideological spectrum, including people who may not even agree with the organization's views. The Court's continued proper interpretation of the state action doctrine is thus critical to PT1's mission, because a finding of state action is necessary for the First Amendment to apply.

STATEMENT

Petitioners Michelle O'Connor-Ratcliff and T.J. Zane ("Trustees") are members of the Poway United School District ("PUSD") Board of Trustees. Pet. App. 6a. When they ran for the Board, they created campaign Facebook pages. Pet. App. 7a. After they were elected, each continued to use those Facebook pages to post content regarding Board business and their activities on the Board. Pet. App. 8a–10a. O'Connor-Ratcliff changed the "About" section of that Facebook page to describe herself as a "Government Official" and listed her "Current Office" as president of the Board, and provided a link to her official Board email address. Pet. App. 8a. Zane changed the name of his campaign Facebook page to "T.J. Zane, Poway Unified School District Trustee," and changed the "About" section to read "the official page for T.J. Zane, Poway Unified School District Board Member, to promote public and political information." Pet. App. 8a–9a. He too described himself as a "Government Official" on that Facebook page. Pet. App. 9a.

Frustrated with the Board, Respondents Christopher and Kimberly Garnier began posting lengthy and repetitive comments on the Trustees' public Facebook pages. Pet. App. 11a–12a. Eventually, the Trustees blocked the Garniers from their public social media accounts. Pet. App. 12a. The Garniers sued, alleging that those social media pages were public fora, and that, by blocking them, the officials violated their First Amendment rights. Pet. App. 13a–14a. The district court granted judgment to the Garniers, and the Ninth Circuit affirmed. Pet. App. 15a.

SUMMARY OF ARGUMENT

To preserve the First Amendment rights of both citizens and government officials, this Court's precedents indicate that courts must consider *all* relevant circumstances when determining whether an individual acts under color of law. See *Brentwood*, 531 U.S. at 295. And here, three aspects of the Trustees' accounts are especially indicative of state action: their purposes, appearances, and facilitation of government duties. Almost every lower court to consider this question has recognized the importance of those factors. See, *e.g.*, *Davison* v. *Randall*, 912 F.3d 666, 680–81 (4th Cir. 2019). But Petitioners ask this Court to ignore those considerations and instead adopt a narrow test (adopted by only one circuit to consider the issue) focused exclusively on whether a social media account is used to fulfill official duties or invokes the authority of the office. Pets.' Br. at 14–15.

Adopting that cramped view of state action would allow Petitioners to restrict citizens' First Amendment right to access and comment upon government speech. And doing so is not necessary to preserve public officials' First Amendment right to control their *private* speech. Indeed, some lower courts have correctly used a more comprehensive inquiry to distinguish between campaign accounts and government accounts, even after an official took office. See, *e.g.*, *Campbell* v. *Reisch*, 986 F.3d 822, 826–27 (8th Cir. 2021).

The U.S. Congress, moreover, has shown how government bodies can adopt transparent policies to ensure that distinction is clear, and in doing so, can protect the First Amendment rights of officials *and* the public. Because it looks to the public's reasonable

expectations based on multiple relevant factors, the more comprehensive approach to determining state action encourages other government actors to follow Congress's lead. That approach vindicates both the First Amendment rights of officials to control their private accounts and those of citizens to access government fora.

Petitioners, by contrast, simply wish to have their cake and eat it too—by speaking with the authority of government, but erasing the access of their critics to that speech. The First Amendment does not allow them to do so, and this Court should affirm.

ARGUMENT

I. The State Action Inquiry in This and Similar Cases Should Look to An Account's Purpose, Its Appearance, And Whether it Facilitates Fulfillment of Governmental Duties.

This Court's precedents suggest that, in determining which social media accounts are operated under color of law—and therefore subject to the First Amendment—courts must look to *all* relevant circumstances, as this Court has instructed in other state action cases. *Brentwood*, 531 U.S. at 295. Under that precedent, no single factor is required to establish state action; rather, all relevant factors must be considered together to determine whether an account was operated under color of law. *Id.*[2]

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[2] While no factor is necessary to establish state action, some factors may be sufficient to do so. For example, the mere fact that speech appeared on a government-owned website would likely support a finding of state action.

Amicus writes to highlight three key factors that should be examined to determine state action in the social-media setting, both in general and in this case: an account's facilitation of actual or apparent government duties, its purpose, and its appearance. Because each of those factors points to government action here, the public had a reasonable expectation that the Trustees' accounts were government fora, with accompanying First Amendment protections.

1. First, consistent with this Court's presumption that "[s]tate employment is generally sufficient to render the defendant a state actor," *West* v. *Atkins*, 487 U.S. 42, 49 (1988) (citations omitted), courts should examine whether the social media page or account at issue was created to perform an actual or apparent duty of the official's office. Pet. App. 36a.

Petitioners acknowledge this criterion in one breath, but in the next propose an interpretation of it so narrow that it would virtually never apply. Pet. Br. at 24. As Petitioners would have it, courts should presume there is no state action so long as "no law or policy *requires* maintaining a social-media page." *Ibid.* (emphasis added). But that is the wrong test. While it may be quite rare that a law or regulation affirmatively compels the use of social media as an official duty in its own right, there are all kinds of duties that may be performed using social media, such as general requirements to communicate with the public or provide notice. And once an official chooses to use social media—whether compelled by duty or not—for office-related purposes, he acts under color of law, just as if the duty was compelled.

The Ninth Circuit thus properly determined that the Trustees here "acted under color of state law by

using their social media pages as public fora in carrying out their official duties." Pet. App. 6a. The Trustees' posts included topics such as the selection of a new superintendent, specific school district plans, and dates and agendas of school board meetings. Pet. App. 34a–35a. In making posts about school board duties, the Trustees also fulfilled a duty under the California Educational Code to keep citizens apprised of the district's "educational programs and activities." Pet. App. 24a. That fulfillment of an official duty was strong evidence that the Trustees acted under color of law in their social media activities.

2. Next, courts should consider an account's purpose, including whether it was used "as a tool of governance." Pet. App. 30a. This factor is critical because it reflects the expectations of both the public and the official for the social media activity. Even if communication was not a required duty of the Trustees' offices (though here it was, as explained above), by using their social media accounts to communicate about government business, the Trustees made clear that their accounts served a public, not private, purpose. The court below thus appropriately held that the Trustees engaged in state action because they "routinely used their social media as a tool of governance" to "notify the public about PUSD board meetings and the subjects discussed during those meetings, to inform parents about significant public safety issues such as fires and active shooters, [and] to announce policy decisions and initiatives such as the selection of a new PUSD superintendent." Pet. App. 34a–35a (internal quotation marks and citations omitted).

Other circuits have also recognized the importance of this criterion. For example, the Fourth Circuit recognized that a municipal official used a Facebook account "as a tool of governance" by "provid[ing] information to the public" about her official activities, "solicit[ing] input from the public" on decisions, "inform[ing] the public about serious public safety events," and "keep[ing] her constituents abreast" of governmental responses to severe weather events. *Davison*, 912 F.3d at 680 (citation omitted). Posts like these signal to the public that an account's purpose is to communicate about official government business—and that the public can expect access to the forum on which that communication takes place.

To be sure, however, an account's purpose is not governmental simply because it discusses politics and an official's accomplishments. As the Eighth Circuit recognized in *Campbell*, posts about policy accomplishments often evince a private campaign purpose when an official uses her account "in the main to promote herself and position herself for more electoral success down the road." *Campbell*, 986 F.3d at 826. But this Court need not adopt Petitioners' overly narrow test to preserve that distinction—the *Campbell* decision proves that courts are capable of doing so without adopting Petitioners' crabbed approach.

3. Finally, the appearance of an official's social media pages or profile can also indicate state action. If an official has "clothed [the profile] in 'the power and prestige of [the] state office,'" it is strong evidence that he acts under color of law. *Davison*, 912 F.3d, at 681 (quoting *Harris* v. *Harvey*, 605 F.2d 330, 337 (7th Cir. 1979)). When an official gives his profile an air of

governmental legitimacy, the public comes to rely on it for state-provided information.

The Trustees here took every opportunity to cloak their social media accounts with the aura of government authority. Rather than categorizing their Facebook pages as those of a "Politician"—an option Facebook provides—each selected "Government Official."[3] Resps.' Br. at 8–9. Zane titled his Facebook page "T.J. Zane, Poway Unified School District Trustee"—not, for example, "Re-Elect T.J. Zane to the PUSD Board of Trustees." Pet. App. 8a–9a. And he even described the page as "the *official* page for T.J. Zane, Poway Unified School District Board Member,

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[3] Although official categorization like the "Government Official" category the Trustees adopted is strong evidence of state action, courts must also look to other elements of an account's appearance. Different social media platforms have varying ways of indicating different types of accounts, making it difficult to rely on platform designations to distinguish official accounts from private ones. For example, although Facebook has "pages" in addition to "profiles" that act and look functionally distinct to indicate public-facing digital spaces versus private ones, other platforms sometimes have fewer options to make such a distinction. On Instagram, for example, profiles for businesses and public officials look similar to profiles for private individuals, with the difference mostly on the backend where professional marketing insights are available. Compare Facebook Help Center, *Differences Between Profiles, Pages and Groups on Facebook*, https://www.facebook.com/help/337881706729661, (last accessed Aug. 9, 2023) with Instagram, *About Professional Accounts on Instagram*, https://help.instagram.com/138925576505882/?helpref=related_articles (last accessed Aug. 9, 2023). Thus, the core question must be whether, based on the factors discussed above, a reasonable person would perceive that public officials are "h[olding] their social media pages out to be official channels of communication." Pet. App. 3a.

to promote public and political information." Pet. App. 9a (emphasis added). And O'Connor-Ratcliff too invoked her office, listing herself as "President of the PUSD Board of Education" and providing a link to her official PUSD email address, not a campaign account. Pet. App. 8a. In short, the Trustees thus made clear that they were speaking as agents of the state—not as private citizens or as candidates seeking another term.

In short, where as here a government official has used a social media account to facilitate actual or apparent government duties, purposed his social media account to communicate about government business, and clothed it in the appearance of official authority, he cannot then cut citizens off from that account. Adopting Petitioner's restrictive test would require courts to ignore these crucial factors and permit government officials to abridge citizens' First Amendment rights. This Court should reject that approach, and instead look to the three factors discussed above.

II. As Illustrated by Congress's Practice, A More Comprehensive Approach Is Workable and Encourages Government Bodies to Adopt Clear Standards Regarding Official Speech.

To be sure, not all social media activities of those who hold public office are state action, and the public has no claim on private speech. As the Eighth Circuit recognized, this Court's holding in *Hurley* compels the conclusion that a candidate's "own First Amendment right to craft her campaign materials necessarily trumps [a citizen's] desire to convey a message on her [social media] page that she does not wish to convey," *Campbell*, 986 F.3d at 827 (8th Cir. 2021) (citing

Hurley v. *Irish-American Gay, Lesbian & Bisexual Grp. of Bos.,* 515 U.S. 557, 559 (1995)). That recognition satisfies the "judicial obligation *** to preserve an area of individual freedom by limiting the reach of federal law and avoid[ing] the imposition of responsibility on a State for conduct it could not control." *Brentwood*, 531 U.S. at 295 (cleaned up). But that judicial obligation does not extend to ignoring key factors that indicate state action.

Nor need courts do so: As explained below, Congress has shown that developing clear standards for distinguishing between official government accounts and private accounts is workable. Such standards are consistent with the more comprehensive state action inquiry called for by this Court's precedents, and they prevent confusion as to what speech triggers First Amendment protections, and what speech does not.

A. A More Comprehensive State Action Inquiry Adequately Distinguishes Between Public and Private Accounts.

As this case illustrates, courts will sometimes be confronted with social media accounts used for both government and private purposes. And in some cases, like this one, those mixed-purpose accounts will have begun their life as indisputably private campaign accounts, for which only the candidate's First Amendment rights—not the public's—are at issue. That is no reason, however, to constrain judicial review to the limited factors urged by Petitioners. The fact that speech fairly attributable to the state *can* be entwined with private speech is precisely why a more comprehensive test is necessary.

The Eighth Circuit's decision in *Campbell* shows that a more comprehensive approach is workable and an adequate tool to distinguish between public and private speech. 986 F.3d 822 (8th Cir. 2021). Applying the approach of the majority of circuits, the court there decided that there was no state action where a public official's social media account was used "to promote herself and position herself for more electoral success down the road," not to conduct "official governmental activity." *Id.* at 826.

Applying that same test commands the opposite result here. Like the public official in that case, the Trustees here began their accounts as campaign accounts. Pet. App. 5a. But the "essential character" of a social media account is not "fixed forever," and "a private account can turn into a governmental one if it becomes an organ of official business[.]" *Campbell*, 986 F.3d, at 826. Unlike the "occasional stray messages" that could be conceived of as conducting the government's business, *id.* at 827, once the Trustees took office, their accounts were dedicated almost entirely to communicating government business, including soliciting applications for government volunteers and government surveys regarding school district issues. Pet. App. 9a–10a.

B. Affirming the Decision Below Will Encourage Government Actors to Adopt Clear Policies for Official Accounts—and Congress Has Led the Way.

Adhering to a more comprehensive analysis of the state action inquiry will not, as Petitioners argue (at 33–34), lead to a decrease in speech by government officials. Instead, considering factors like the appearance of the account's pages will encourage

public officials to make intentional distinctions in their official and private social media activity—and to be sure that, when they wish to retain the right to limit speech within a forum they create, they do not swathe that forum with the trappings of government authority.

1. Congress has marked the path for other government actors to follow. Both chambers have developed clear standards to distinguish between their members' official accounts and their private accounts—including campaign accounts. The Senate's policies state that official accounts are those "a Senate Office uses for official business," and can be used *only* for official business—not for campaigning, fundraising, or any other private purpose.[4] In turn, official business is clearly defined as:

> activities and duties which directly or indirectly pertain to the legislative process or to any congressional representative functions generally, or to the functioning, working, or operating of the Congress and the performance of official duties in connection therewith, and shall include, but not be limited to, the conveying of information to the public, and the requesting and collection of the views of the public (including through surveys, opinion polls, and web data analytics), or the views and information of other governmental entities, as

[4] Senate Committee on Rules and Administration, Internet Services and Technology Resources Usage Rules (Nov. 9, 2015), https://www.senate.gov/usage/internetpolicy.htm.

> a guide or a means of assistance in the performance of those functions.[5]

In other words, Senate rules require that official accounts can be used only to facilitate Senate duties or to communicate with the public about government business.

Likewise, on the House side, the Members' Congressional Handbook instructs that official congressional social media accounts should only post content that is "germane to the conduct of the Member's official and representational duties" and "not include personal (outside of incidental references) *** information."[6] It further instructs representatives to "ensure their social media URLs and account names reflect their position" and provides that former House members "may retain their personal accounts provided the name (and other identifying information) of such accounts clearly do not convey the impression that the former Member is still a Member of the House, or that the account is an official account of the House."[7]

That kind of clarity is good for everyone. It draws clear lines for government officials to ensure that their private speech remains private. And it protects citizens from being cut off from government speech, which

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[5] *Id.*

[6] Members' Cong. Handbook, Committee on House Administration, 118th Congress U.S. House of Representatives 38 (last updated Mar. 31, 2023), https://cha.house.gov/member-services/handbooks/members-congressional-handbook.

[7] *Id.* at 39.

they have a First Amendment right to both access and address.

2. Congress' practice reflects all three considerations described in Section I, and thus ensures that official accounts are accessible to the public, while Congress's members retain the prerogative to govern access to their private campaign accounts. As noted, under Congress's rules, an official account must be used only to facilitate government duties; its purpose must be to communicate about government business; and its appearance must make clear that the senator or representative speaks with the authority of his office. A private account, in contrast, is used to facilitate private functions like campaigning and fundraising; its purpose is to promote the official, enhance his reelection prospects, and fulfill other non-governmental purposes; and its appearance must not include the trappings of governmental authority. By implicitly incorporating all three of those criteria, Congress makes clear to the public when its members speak under color of law, and when they do not.

In sum, continuing to apply the comprehensive test adopted in *Brentwood*—with a focus on the three factors discussed here—will encourage other government actors to follow Congress's lead and adopt clear policies governing the use of official accounts. Application of that framework will protect the First Amendment rights of officials and citizens alike.

CONCLUSION

Petitioners ask this Court to reduce the complex question of state action to a rigid examination of only two aspects of a government official's social media activity. Doing so would stymie the debate on public issues that takes place on the most important forums of our time. This Court should decline that invitation and affirm the decision below.

Respectfully submitted,

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