No. 22-611

IN THE

Supreme Court of the United States

KEVIN LINDKE,

Petitioner,

—v.—

JAMES R. FREED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The **American Civil Liberties Union (ACLU)**, a nationwide nonprofit, nonpartisan organization with nearly two million members and supporters, is dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The **American Civil Liberties Union of Michigan** is a state affiliate of the national ACLU. The ACLU, its affiliates, and their attorneys have frequently appeared before this Court in First Amendment cases, both as direct counsel and as amici curiae. *See, e.g.*, *United States v. Hansen*, No. 22-179 (U.S. June 23, 2023); *Mahanoy Area Sch. Dist. v. B. L. ex rel. Levy*, 141 S. Ct. 2038 (2021).

The threshold question of when a government official acts under color of state law is critical for civil litigation seeking to protect freedom of speech and halt government censorship, as both Section 1983 and the First Amendment require state action. Proper development of the state action doctrine also ensures an appropriate balance between government officials' constitutionally constrained public acts and their constitutionally protected private acts, safeguarding individual liberties without permitting the government to improperly evade constitutional restraints. The development of the state action doctrine in this setting is therefore of immense concern to the ACLU, its affiliates, and its members.

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[1] No party has authored this brief in whole or in part, and no one other than Amici, their members, and their counsel have paid for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In today's world, social media is an important tool for communications of all stripes, from the silly (pet pictures) to the dead serious (emergency alerts). What's more, a single social media profile can contain multitudes—in respondent James Freed's case, supplying official news about a fast-moving public health crisis on the same page as updates about his slow-moving home improvement projects.

The First Amendment guarantees public officials' freedom to speak through these new tools in their private capacities. When public officials act under color of law, however, constitutional and statutory provisions constrain their behavior, including the First Amendment's restrictions on government censorship. The core issue here is how to distinguish between a government official's private-capacity use of these tools, which is entitled to First Amendment protections, and his public-capacity use of these tools, which is subject to First Amendment prohibitions.

In this case, the Sixth Circuit correctly recognized that the question whether a government official is acting "under color of law," and therefore subject to constitutional restrictions on government action, is distinct from the question whether a private entity ought to be treated as a state actor. A private party's actions will generally be private, and thus constitute state action only in limited circumstances. By contrast, much of what public officials do is "under color of law," as they are formally clothed in the authority of the state. This Court's precedents evaluating the presence of state action by private defendants are therefore of little use for

distinguishing between a government official's state and private acts.

The Sixth Circuit erred, however, in effectively demanding that public officials' governmental authority be the but-for cause of any alleged deprivation before their action will be deemed "under color of law." That approach defies precedent, would lead to a host of bizarre results, and conflicts with Congress's objective in passing Section 1983—to "prevent public authorities from violating constitutional rights through the use of nominally private means," *Rossignol v. Voorhaar*, 316 F.3d 516, 527 (4th Cir. 2003) (opinion of Wilkinson, C.J.).

Such a rigid test for holding public officials accountable as state actors would also undermine constitutional accountability and trench on important public interests. In this context, for example, constituents increasingly rely on social media to receive all sorts of critical information from their representatives and about official policies—including, in the case of respondent's page, life-and-death notices about the then-unfolding COVID-19 crisis. The Sixth Circuit's test would allow public officials to exclude constituents from such information expressly because they have expressed disfavored viewpoints, without applying any First Amendment scrutiny.

Instead, this Court should affirm its past reliance on two factors to distinguish between a public official's private and state actions: 1) whether he was engaged in official duties *and* 2) whether a reasonable observer would think he was cloaked in the authority of his office with respect to the action at issue. Although the state action doctrine does not admit of categorical

answers, typically either factor can establish that a public official has acted under color of law.[2]

Applying that test here, respondent took state action when he excluded a dissenting constituent from a Facebook profile he held out as an extension of his public office.

ARGUMENT

I. This Case Is Governed by Precedents Addressing When a Public Official Takes State Action, Not Those Addressing When a Private Entity Does So

The state action doctrine differentiates between cases addressing when an official's acts "can fairly be attributed to the State" and those "in which the defendant is a private party," *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982). Where, as here, the question is whether a government official engaged in state action, the Court has adopted a distinct analysis, reflecting the fact that it is much more often fair to attribute the actions of those granted official authority to the State than it is to do so for purely private actors.

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[2] Technically, any plaintiff bringing a constitutional claim under 42 U.S.C. Section 1983 must satisfy two threshold questions: 1) whether defendant acted "under color of" state law, as the statute requires; and 2) whether defendant took state action within the meaning of the Fourteenth Amendment. The Court has indicated that although the latter test may sometimes be more exacting, typically the analysis will be the same. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 935 n.18 (1982). In this context, there is no reason for any daylight, and the tests collapse. Amici therefore treat the concepts interchangeably.

A. Cases Involving Whether Private Parties Are State Actors Have Limited Use Here

Much of this Court's state action doctrine has involved the question whether a private defendant has violated some constitutional or statutory prohibition that binds only the government. *See, e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001) (private athletic association); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) (private insurer); *West v. Atkins*, 487 U.S. 42 (1988) (private physician); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (private club). In those cases, the private party presumptively has not engaged in state action. There are only "a few limited circumstances" where private parties may "nonetheless" be subject to the restraints and obligations imposed on state actors. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019); *see also Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939 (1982) (canvassing those circumstances).

Here, by contrast, the defendant indisputably is a public official. And holding government officials accountable as state actors will more likely be the norm, rather than the exception. The tests this Court has developed to identify the narrow circumstances where private entities take state action are thus of little use.

Indeed, most tests the Court has applied to identify state action by private entities are virtually non-sequiturs as applied to public officials. Consider, for example, "public entwinement," the basis for this Court's holding in *Brentwood*, 531 U.S. at 297. To satisfy that test, the Court looks for "pervasive

entwinement of public institutions and public officials" in the "composition and workings" of a private entity, sufficient to "overb[ear]" its "nominally private character." *Id.* at 298. But of course there will always be "entwinement of . . . public officials," *id.*, inherent in acts taken by public officials. That inquiry sheds no light on when public officials act in their state versus private capacities.

Similarly, the Court has found state action where a private party's acts are compelled by a government actor. *Cf. Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (no state action where private school was regulated by government but its actions were not "compelled" by the state). Government officials, however, indisputably act "under color of law"—and thus are accountable to the Constitution—in many circumstances in which they are not literally compelled to act. A police officer's decision to search or arrest, for example, is discretionary, but plainly state action subject to the Fourth Amendment.

B. A Distinct Body of Caselaw Applies When Asking Whether a Public Official Engaged in State Action

A separate set of cases addresses the question presented here, namely whether a public official's conduct is attributable to the State and thus bound by the Constitution. Those cases, not ones concerning private parties, supply the appropriate framework for these facts. *Accord* Brief for Petitioners at 18–20, *O'Connor-Ratcliff v. Garnier*, No. 22-324 (U.S. June 23, 2023) (citing *Halleck*, 139 S. Ct. at 1926–27 (private cable company); *Sullivan*, 526 U.S. at 50 (private insurers); *Lugar*, 457 U.S. at 937

(private oil supplier); and *Moose Lodge No. 107*, 407 U.S. at 177 (private club)).

This Court first gave the matter sustained attention in a pair of criminal cases brought under what is now codified as 18 U.S.C. Section 242, a criminal statute that prohibits state officials from depriving individuals of constitutional rights while acting "under color of" state law.

In one, *United States v. Classic*, 313 U.S. 299 (1941), federal prosecutors charged state election officials with unconstitutional ballot tampering. Because the defendants had done so while fulfilling their specifically enumerated duty under Louisiana law to tabulate votes, this Court held the statute's state action requirement was satisfied. *Id.* at 325. The Court reasoned "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Id.* at 326.

In the other, *Screws v. United States*, 325 U.S. 91 (1945), state police officers arrested a Black man in his home, transported him to the steps of the county jail, and brutally beat him to death in a public square. *Id.* at 92–93. Concluding the officers acted under color of law, the Court looked to the arrest that preceded the fatal beating and reasoned "[w]e are not dealing here with a case where an officer not authorized to act nevertheless takes action." *Id.* at 111. The defendants instead "acted without authority only in the sense that they used excessive force" after detaining their victim. *Id.* "Acts of officers who undertake to perform their official duties" constitute state action, "whether they hew to the line of their authority or overstep it." *Id.*

Classic and *Screws* both involved government officials engaged in their official duties, and on that basis this Court rejected the defendants' contentions that they were not acting "under color of law." Subsequently, however, the Court also found state action where defendants had been vested with state authority, then engaged in private pursuits in such a manner that a reasonable observer would think they were exercising that authority.

In *Williams v. United States*, 341 U.S. 97 (1951), a private detective who possessed "a semblance of policeman's power" under state law, *id.* at 100, faced federal charges for constitutional deprivations allegedly committed while brutally interrogating men suspected of stealing from a lumberyard, *id.* at 98. The detective had been retained by a private company to investigate the thefts. *Id.* To determine whether the detective conducted the interrogations under color of law, however, the Court did not look to whether he had exercised his private or public duties at the time. Instead, it focused on the *appearance* of state action—including the presence of an observing police officer in the interrogation room and the detective's wielding of a government-issued "special police officer's card." *Id.* Based on these factors, the Court held the detective acted under color of law despite conducting the interrogations in the service of a private company. *Id.* at 99.

Griffin v. Maryland, 378 U.S. 130 (1964), cemented the appearance of state involvement as a component of the state action inquiry. Like *Williams*, *Griffin* addressed the constitutional status of an individual granted limited state authority: a privately employed security guard who had also been

"deputized as a sheriff." *Id.* at 132. The guard had ejected Black civil rights activists from a private amusement park on the basis of race; the state subsequently brought criminal trespass charges against them. *Id.* at 134. As a defense, the activists argued the guard violated their Fourteenth Amendment rights. *Id.* at 135. Once again, the Court looked beyond the security guard's execution of ostensibly private duties in the service of his private employer to assess whether he took state action when he ejected the activists. Instead, it held the activists could press their constitutional arguments because of the guard's appearance: he "wore, on the outside of his uniform, a deputy sheriff's badge," *id* at 132, and "consistently identified himself as a deputy sheriff rather than as an employee of the park," *id.* at 135.

Critically, the *Griffin* Court deemed it "irrelevant" that the security guard "might have taken the same action had he acted in a purely private capacity." *Id.* at 135. Rather, it explained, "[i]f an individual is possessed of state authority and purports to act under that authority, his action is state action." *Id.*[3]

[3] Both *Griffin* and *Williams* involved private individuals clothed with only part-time government authority. All government officials are private individuals clothed with government authority, however, and thus the state action inquiry is the same whether the authority vested is part-time or full-time. These cases establish that it is fair to attribute to the State actions of individuals it vests with official authority (whether full- or part-time) where those individuals purport to act in their official capacity, even if in fact they are engaged in private pursuits.

II. When a Public Official Holds Himself Out as Exercising Official Authority, He Acts "Under Color of Law"

Taken together, this Court's precedents analyzing when it is fair to attribute the actions of an individual vested with official authority to the state establish two primary considerations: 1) whether he was engaged in official duties *and* 2) whether a reasonable observer would think he was cloaked in the authority of his office with respect to the action at issue.

The opinion below jettisoned that approach. Instead, it applied a wooden but-for test, one which disregards the appearance of government involvement. This Court should reject that novel analysis, apply its prior cases, and reverse.

A. Government Officials Generally Act Under Color of State Law Where They Perform Official Duties *or* Appear to Exercise State Authority

Two major principles emerge from this Court's cases identifying when a public official takes state action. First, as *Classic* and *Screws* demonstrate, public officials generally act under color of law where they act pursuant to some specific statute, during the course of their official duties, or in some manner otherwise facilitated by public office. Thus, elections officials act under color of state law when they fulfill their statutory duty to count ballots. *Classic*, 313 U.S. at 325. Police officers act under color of state law when they bring arrestees to the local jail. *Screws*, 325 U.S. at 93.

That uncontroversial proposition, however, is not the end of the story. *Williams* and *Griffin* illustrate that an official vested with government authority can act under color of state law even while performing otherwise private duties—such as patrolling a private amusement park or investigating on behalf of a corporation—where he appears to perform those duties as an arm of the state. In other words, whether a defendant holds himself out under the authority of his public office has independent relevance in the state action analysis.

This is not to say that a plaintiff's subjective perception will suffice to constitutionalize obviously private behavior. In both *Williams* and *Griffin*, the relevant indications of government involvement were symbols that any reasonable observer would have taken to imply state sanction: in *Williams*, the defendant "flashing his badge" issued by the state, 341 U.S. at 99, and in *Griffin*, the defendant wearing his sheriff's badge and "consistently identify[ing] himself as a deputy sheriff rather than as an employee" of the private amusement park he patrolled, 378 U.S. at 135. But for individuals vested with official authority, the objective appearance of government involvement can establish state action.

Applying those principles here, evaluating whether a government official's decision to block someone from his social media account occurred "under color of law" requires considering whether the official used the page to conduct official business of his office *and* whether he held himself out on the site as a government official conducting official business. The inquiry in each case will turn on the particular facts, as is always the case in state action inquiries. But as

a general matter, if either one of the two elements above is satisfied, the official ought generally to be treated as acting under color of law.

This test ensures government officials cannot improperly evade the constraints that apply to their office through post-hoc assertions that they were acting in a private capacity. But it also provides officials with a relatively easy way to ensure their freedom as private citizens to engage in private conduct unencumbered by the restrictions that attach to their office. No reasonable observer, for instance, would think a Spandex-clad local alderman acts under color of law on her weekend bike ride, even if she stops along the way to discuss trail improvements with a constituent. By the same token, so long as her social media profile does not invoke the trappings of public office and refrains from engaging in official business, the same official can have reasonable confidence that private photographs she posts of her grandchildren will avoid constitutional scrutiny.

Experience within the federal government suggests this test is workable. For years, the Department of Justice has adopted a similar approach in advising its employees about social media use. It provides that government officials will be free to act without the constraints that apply to state actors if they maintain a distinct personal site for their personal communications, do not use government resources or conduct government business on that site, and do not describe their site as an official site or otherwise create the appearance that they are operating under the authority of the state. Memorandum from James M. Cole, Deputy Att'y Gen., on Guidance on the Personal Use of Social Media by

Dep't Employees to the U.S. Dep't of Just. (Mar. 24, 2014) (available at https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-memo-personal-use-social-media.pdf).

B. The Sixth Circuit Was Wrong to Ignore the Appearance of Government Involvement by Applying a Rigid But-For Test

Disregarding this Court's prior cases considering the exercise of government duties *and* the objective appearance of government involvement, the Sixth Circuit suggested a public official acts under color of law only where he could not have acted as he did "without the authority of his office," Pet. App.12a. Put differently, the opinion below determined that state action by a public official must either "derive[] from the duties of his office" or "depend[] on his state authority." *Id.* at 8a. Under this formulation, the appearance of government involvement, as opposed to actual reliance on formal duty or authority, is not relevant. *Id.* at 12a.

That approach is wrong. To start, it conflicts with this Court's statement in *Griffin* that whether a public official "might have taken the same action had he acted in a purely private capacity" is "irrelevant." 378 U.S. at 135. It is true that a causal link between the defendant's government status and an alleged constitutional deprivation will generally be *sufficient* to establish state action. *See Classic*, 313 U.S. at 326. But this Court has never said but-for causation of this sort is a *necessary* pre-requisite for finding state action. Quite the opposite: *Griffin* considered that argument head-on and rejected it. 378 U.S. at 135.

Instead, *Griffin* affirmed that even where an official is *not* conducting his official duties, the appearance of state involvement may establish that he acted under state law. *Id.*

The Sixth Circuit's reliance on but-for causation to determine when a government official acts under color of law also fails on its own terms. For one, it is simultaneously under-inclusive and overinclusive, leading to a range of patently incorrect outcomes. It is easy to posit circumstances where a public official's status does not literally facilitate actions that nevertheless ought to satisfy the threshold state action inquiry. Recall, for instance, the facts of *Screws*. There, the officers killed their victim on the courthouse steps following an arrest at his home. Given that precipitating arrest, the exact chain of events would not have been possible but for the defendants' official positions. *Screws*, 325 U.S. at 107. But what if the officers, still clad in their uniforms, merely laid in wait and ambushed their victim, then beat him to death? Surely those officers would be acting under color of law, even though a private posse (or the same individuals, not wearing their uniforms) might have done the exact same without the benefit of public office. Not so in the Sixth Circuit.

On the other side of the coin, a but-for test would also sweep in inarguably private acts committed by public officials using the incidents of government office—imposing constitutional restraints on spheres of an official's life where constitutional liberties ought to carry the day. Take, for instance, personal text messages that a public official sends from his government-issued cell phone. He could not send those messages but for his status as a public official.

Yet no one would seriously contend a public official engages in state action when he messages his wife about a scheduled car repair or checks with the family babysitter to confirm her schedule, merely because by happenstance he uses his work device. Unsurprisingly, the lower courts have long disclaimed state action where officials merely use the tools of state authority in other private contexts. *See, e.g.*, *Bonsignore v. City of New York*, 683 F.2d 635, 638–39 (2d Cir. 1982) (off-duty officer's murder-suicide with service revolver did not occur under color of law); *Barna v. City of Perth Amboy*, 42 F.3d 809, 818 (3d Cir. 1994) (off-duty officer's use of police night-stick in private family dispute "not enough," even though he was "legally entitled to possess it only because of his position as a police officer").

The Sixth Circuit's rigid approach to distinguishing between a public official's state and private acts also cannot be squared with Congress's goals in enacting Section 1983. Although the statute covers virtually all manner of constitutional deprivations, it arose against a very specific historical backdrop. In the wake of the Civil War, "private forces" arrayed across the former Confederacy to "subjugate the newly freed slaves . . . through a wave of private violence." *McDonald v. City of Chicago*, 561 U.S. 742, 855 (2010) (Thomas, J., concurring in part). This "reign of terrorism and bloodshed did not require the formal processes of law." *Briscoe v. LaHue*, 460 U.S. 325, 340 (1983) (internal quotation marks omitted). Nevertheless, it occurred "often with the assistance of local governments." *McDonald*, 561 U.S. at 855 (Thomas, J., concurring in part). Civil complicity contributed to the Klan's rise to such an extent that one Representative warned of "a pre-

concerted and effective plan" by which public apparatuses were colluding with private power to thwart Reconstruction. Cong. Globe, 42d Cong., 1st Sess. 459 (1871) (Rep. Coburn).

In direct response, Congress passed the Ku Klux Klan Act. *District of Columbia v. Carter*, 409 U.S. 418, 426 (1973). Most sections of the Act targeted the Klan itself. *Id.* But the provision now known as Section 1983 took aim at the state and local governments which had sustained this wave of private violence. *Id.*

Section 1983 could not have effectively redressed local officials' role in facilitating Klan violence if it were limited to actions taken solely by virtue of public office. One of the law's primary concerns, after all, was official *inaction*, *Carter*, 409 U.S. at 426, not affirmative steps facilitated by dint of state authority. But such an interpretation also clashes with the statute's historical backdrop in more fundamental way. In the years following the Civil War, the Klan's rise blurred the boundaries between ostensibly neutral civil structures and extralegal systems bent on undermining the new Southern order through violence and terror. Formal apparatuses that honored unpopular new minority protections buckled to informal systems where mob rule carried the day. *Id.* Along the way, whatever easy demarcations might have previously existed between state authority and private spheres of influence eroded. Concluding Section 1983 has nothing to say about deprivations public officials could also have taken in their private capacities would ignore the deep intertwinement between public officials and private violence that spurred the law's enactment.

Even setting aside precedent and history, there would still be good reason to give the appearance of official action weight in the "under color of law" inquiry. Whether an official actually acts within the formal constraints of his office or not, where he "participate[s] in the interference with the exercise of federal rights," his actions "assume[] a far graver cast than [they] otherwise would have." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 221 (1970) (Brennan, J., concurring in part). For example, it is one thing to be subjected to racial or sexual harassment by a private party; it is another matter entirely to be subjected to such treatment by an officer of the state reasonably understood to be holding himself out as exercising his official authority. Yet these sorts of actions do not require official authority, and so would not be state action under the Sixth Circuit's test.

In short, this Court should not abandon its existing approach for distinguishing between public officials' state and private acts in favor of the crabbed but-for test adopted by the Sixth Circuit below. Instead, it should continue to take a fact-specific look at the same factors it has previously considered: a defendant's performance of official duties *and* his appearance as a government actor.

C. Respondent Maintained His Social Media Site in a Manner That Would Cause a Reasonable Observer to Believe He Was Exercising State Authority

As with any legal test, there will be close calls as to whether a reasonable observer would conclude a public official's social media page appears as an

extension of the state on his social media page. Close calls, however, are not foreign to the state action doctrine, which "frequently admits of no easy answer." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974).

But this case is not a close call, particularly in its summary judgment posture. Respondent Freed repeatedly cloaked his page in the authority of his office: holding himself out as the city manager, J.A. at 1; identifying himself as a "Public Figure," *id.*; listing his contact information as a government email address and the city's official website, *id.*; soliciting applications for a new administrative assistant, *id.* at 115; making personnel announcements, *id.* at 119, 125; posting updates on public works projects, *id.* at 105; and providing press releases and timely information about the city's response to pressing current events, including official COVID-19 rules and guidance, *id.* at 2, 51–54, 67, 87–91, 123, 133. Based on these indicia, a reasonable viewer of the page would conclude they were engaging with a government official on matters of government business. *See Williams*, 341 U.S. at 100; *Griffin*, 378 U.S. at 132. Freed's actions maintaining his Facebook page, including the steps he took to curate and remove certain speech from that page, therefore occurred under color of law—and are subject to the constitutional and statutory guardrails that entails.

Whether the First Amendment prohibited Freed from curating his page by blocking petitioner Lindke is a separate matter, not presented here. Answering that question will require a separate set of inquiries—for example, whether the page constitutes a public forum or a channel through which to petition one's

representatives and whether Freed curated his page in a viewpoint neutral manner. Still further questions include what sorts of equitable relief might be proper, whether Lindke can overcome qualified immunity, and if he can prove actual damages. But this Court has granted review only on the threshold question of whether respondent acted under color of law. Applying its own precedents distinguishing public officials' state and private actions, the answer is clear: he did.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

DATED: June 30, 2023

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