

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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MICHELLE O'CONNOR-RATCLIFF, ET AL.,)

Petitioners,)

v.) No. 22-324

CHRISTOPHER GARNIER, ET UX.,)

Respondents.)
- - - - -

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10 Washington, D.C.

11 Tuesday, October 31, 2023

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13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:04 a.m.

16

17 APPEARANCES:

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19 behalf of the Petitioners.

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25 behalf of the Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-324, O'Connor-Ratcliff versus Garnier.

Mr. Mooppan.

ORAL ARGUMENT OF HASHIM M. MOOPPAN

ON BEHALF OF THE PETITIONERS

MR. MOOPPAN: Mr. Chief Justice, and may it please the Court:

Individuals who hold public office are still private citizens too. When acting in their personal capacity, they retain their First Amendment rights to decide who can participate in a community discussion that they host at their own property. They are thus free to block users from their personal social media pages, unless they chose to operate those pages in their official capacities instead.

The only principled and workable test to determine the capacity in which they acted is to ask whether they exercised any duties or authorities of their job. And the answer is plainly "no" where, as here, the state itself did not control or even facilitate their

1 operation of the pages. The officials thus
2 wielded no greater rights or privileges than any
3 other private citizen denying access to their
4 own property.

5 The Ninth Circuit instead held that
6 even if an official was not actually doing her
7 job, state action exists so long as the pages'
8 appearance made it look like she was. But that
9 type of reasonable observer inquiry is incapable
10 of consistent application. It is also
11 fundamentally misguided because the official's
12 power to block does not invoke the pages'
13 appearance at all.

14 Respondents alternatively insist that
15 Petitioners were doing their jobs simply because
16 they used the pages to communicate about their
17 jobs. But that is the type of excessively broad
18 job description this Court has repeatedly
19 rejected. Because officials can operate such
20 pages in either capacity, the state action test
21 should require clear and objective evidence that
22 is capable of differentiating between the two.
23 That is essential to preserving the robust
24 sphere of individual liberty the doctrine is
25 meant to protect.

1 I welcome this Court's questions.

2 JUSTICE THOMAS: Counsel, if you had
3 the exact same exchange here but from a -- an
4 official site of the school board, would it make
5 a difference?

6 MR. MOOPPAN: Yes, Your Honor. That
7 would be state action because that would be
8 exercising the power --

9 JUSTICE THOMAS: Okay. So let's
10 assume that the official has discretion to
11 either -- the option to either do this on the
12 school site or the school board site or on the
13 personal computer.

14 What's the difference in what the
15 communication is?

16 MR. MOOPPAN: So, in your first
17 hypothetical, the power that's being wielded is
18 the power to exclude someone from government
19 property. Just like if it was a government
20 building, the power to block someone from
21 entering main Justice is a -- is state action.

22 In the actual case, what is happening
23 is being excluded from private property. And
24 the power to exclude someone from private
25 property is private.

1 JUSTICE THOMAS: Well, let's -- let's
2 talk about that just briefly. What if the --
3 you can access the site remotely from
4 Petitioners' computer at home, but it is the
5 school board's site and it's not on the
6 government's computer?

7 MR. MOOPPAN: Well, the question is
8 who controls the account. And in this case,
9 it's undisputed that this is the account of --
10 belongs to Petitioners in their individual
11 capacity. It's an account that they created
12 before they held office. It is an account that
13 they will continue to hold after they leave
14 office. So --

15 CHIEF JUSTICE ROBERTS: Is this a
16 site-by-site determination or a
17 message-by-message? In other words, let's say
18 you have, you know, a site that's used every now
19 and then for what you might characterize as
20 official announcements, but the rest of the time
21 it's, you know -- you know, my -- my child got
22 a, you know, blue ribbon or something like that.

23 Do you say that, well, you look at
24 each episode of blocking or whatever as -- as
25 governmental because they use it for

1 governmental things from time to time, or do you
2 say, well, they blocked them for this -- in
3 other words, you go through the whole analysis
4 with respect to each back-and-forth?

5 MR. MOOPPAN: So the specific conduct
6 that's being challenged here is the blocking,
7 and so the question is, is the blocking official
8 action? In general, I think that that's going
9 to be answered at a site-wide level. It's
10 either a government account or it's a personal
11 account. And that's true even if some of the
12 speech could be viewed as official.

13 So if, for example, a government
14 official made an official announcement that --
15 at a campaign rally, the announcement, the
16 speech, might be viewed as official in some
17 sense. But that wouldn't convert the campaign
18 rally into a government forum where there was a
19 constitutional right to enter.

20 CHIEF JUSTICE ROBERTS: Well, I'm not
21 sure I follow the -- the answer. But let's say
22 -- what percentage of governmental blocking or
23 back-and-forth do you have to have before you
24 say, oh, the whole -- every -- every blocking
25 episode should be quickly characterized as state

1 action?

2 MR. MOOPPAN: Well, so I don't think
3 it turns on a percentage, Your Honor. In
4 general, when a public official is using their
5 personal property to engage in speech that they
6 can engage in either capacity, the right way of
7 thinking about that in general is that all of
8 that speech is personal.

9 Now I concede that if --

10 CHIEF JUSTICE ROBERTS: I'm just --
11 sorry. All of that -- all -- all of the speech
12 on that site?

13 MR. MOOPPAN: Yes.

14 CHIEF JUSTICE ROBERTS: Okay.

15 MR. MOOPPAN: Because that is speech
16 they can engage in in either capacity. Now I do
17 agree that there are certain things that they
18 could do on these pages that would be
19 governmental and for which there was a right of
20 access. So, for example, the SG's Office used
21 the example of doing notice-and-comment
22 rulemaking on a social media page. That's, of
23 course, inherently governmental, and if they're
24 excluded from that, that would be state action.

25 And I would agree that that would be

1 true whether they used the page in general for
2 notice-and-comment rulemaking or just once. But
3 the question --

4 JUSTICE SOTOMAYOR: Counsel, I -- I'm
5 having -- because I think the Chief has asked a
6 very important question, let's break that down
7 in examples, okay?

8 Facebook is somewhat easier because
9 people can be blocked from commenting, but
10 they'll still have access to looking at the
11 information, right? But let's assume that
12 there's -- something went wrong with the city's
13 website and the city is now asking the council
14 member to post all of their evacuation programs
15 and to have comments with respect to citizens
16 who might need assistance. They've converted it
17 into, basically, an official site.

18 So how does your test deal with that?

19 MR. MOOPPAN: So --

20 JUSTICE SOTOMAYOR: Because you said,
21 if it's mixed personal and business, then it
22 remains personal.

23 MR. MOOPPAN: Well, so, on that
24 hypothetical, I would agree that would be state
25 action. The way --

1 JUSTICE SOTOMAYOR: So the state would
2 be responsible for any blocking that this
3 individual had done of commenting people?

4 MR. MOOPPAN: Yes, but the critical
5 reason why and why that follows from our test is
6 because, in your hypothetical --

7 JUSTICE SOTOMAYOR: By the way, your
8 -- is your test identical to the Sixth Circuit's
9 duty and authority test or authority test, or --
10 you use the words "control" or "facilitate,"
11 which the Sixth Circuit didn't. So tell me
12 what's the difference --

13 MR. MOOPPAN: So --

14 JUSTICE SOTOMAYOR: -- in what you're
15 proposing.

16 MR. MOOPPAN: -- we think duty or
17 authority is the right test. The hard question
18 in these cases is figuring out whether you're
19 exercising duty or authority. Control and
20 facilitation is the way to figure that out. And
21 that's the answer to your initial question. The
22 way you know --

23 JUSTICE SOTOMAYOR: Well, the Sixth
24 Circuit is much narrower. It -- it -- it
25 defines -- it defines duty as something stated

1 by law.

2 But, frankly, in my experience,
3 there's a lot of customary laws, customary
4 actions that are not defined by law but are
5 expected of government officials --

6 MR. MOOPPAN: Yeah. And we --

7 JUSTICE SOTOMAYOR: -- like telling
8 the mayor to post this information.

9 MR. MOOPPAN: Right, so --

10 JUSTICE SOTOMAYOR: Nobody writes that
11 in law, but --

12 MR. MOOPPAN: Right. We don't dispute
13 that point, and I don't think the Sixth Circuit
14 does either. But the critical point in your --

15 JUSTICE SOTOMAYOR: Oh, it does.
16 It -- it -- it defines this much more narrowly.

17 MR. MOOPPAN: Your Honor, if they do,
18 we don't agree with that.

19 JUSTICE SOTOMAYOR: Okay. That --

20 MR. MOOPPAN: But -- but the critical
21 point is, in your hypothetical, how we know that
22 that state action is control. Your example was
23 the mayor told the city administrator do it. In
24 the next case, the mayor couldn't have told the
25 city administrator what to do on this page

1 because it's their personal property.

2 That's not what's happening in -- to
3 go back to our case, there is no evidence in
4 this case that anything --

5 JUSTICE SOTOMAYOR: So what do we do
6 with what was then Twitter? I'm going to
7 continue to call it Twitter because that's what
8 it is here, okay?

9 (Laughter.)

10 JUSTICE SOTOMAYOR: What do we do with
11 Twitter where the blocking blocks, especially
12 now, blocks access? Previously, you could still
13 look at the Twitter account, you just couldn't
14 post.

15 What happens now when, if you don't
16 have your own Twitter account, you can't even
17 look, and if you're blocked, you're not
18 permitted to look?

19 MR. MOOPPAN: Again, it depends what
20 you're being blocked from. And the critical
21 point in these cases is that my clients, all of
22 their speech was speech that they could perform
23 in their individual capacity.

24 Under this Court's decision in Lane,
25 even though they're government officials, they

1 have the right to speak about the government in
2 their individual capacity.

3 JUSTICE SOTOMAYOR: Let me give you --

4 JUSTICE ALITO: What if you -- what if
5 you showed a Facebook page to a thousand people
6 and 999 of them would think that this is an
7 official page? Under your test, that wouldn't
8 matter?

9 MR. MOOPPAN: That shouldn't matter,
10 and I'll give you two reasons why it shouldn't.
11 So the first, the conceptual reason, is because
12 the challenge here is they're challenging
13 blocking. And my client's power to block
14 doesn't turn on the appearance.

15 And here's a hypothetical that I think
16 will make that pretty clear. Imagine you're a
17 police officer and you finish your shift, you're
18 running late to pick up your kids from school,
19 so you go running down the street still in your
20 uniform and you push someone out of the way.

21 Everyone on the street probably
22 assumes you're still doing your job and in hot
23 pursuit of a felon, but that's not state action.
24 You're acting in a purely personal capacity, and
25 your power to push someone out of the way

1 doesn't turn on your uniform.

2 JUSTICE ALITO: Well, suppose the
3 town -- town manager has a page and the town
4 manager puts the official seal of the town and
5 says: This is the town manager's page. This is
6 the place to look to find information about what
7 the town manager is -- is doing, and this is the
8 place to express your views on the important
9 issues that come before the town manager.

10 And there's nothing personal on the
11 page, but the -- the town manager doesn't use
12 any public resources to create the page, and
13 there's nothing in his job description that says
14 that he has a duty to have such a page, and he's
15 not relying on any special authority in creating
16 this page.

17 MR. MOOPPAN: So --

18 JUSTICE ALITO: And you would say that
19 in that instance, the town manager can block
20 comments based on viewpoint, so the town manager
21 can block anybody who expresses criticism of
22 what the town manager is doing and thereby
23 create the impression that everybody in town
24 thinks the town manager is doing the right
25 thing?

1 MR. MOOPPAN: So with one possible
2 caveat. In your hypothetical, when you said
3 that this is the town manager's page, if he was
4 saying this is a page I'm running in my official
5 capacity, then I wouldn't take that position.
6 But by that -- that statement has substantive
7 content behind it.

8 When you say this is the town
9 manager's page in his official capacity, what
10 you're essentially admitting is the town
11 manager's boss could tell him what to do on the
12 page. He's admitting at that point that it is a
13 governmental page.

14 But, if instead, as I think your
15 hypothetical was meant to suggest, he's just
16 saying, I am the town manager, this is what I
17 think, this is where you want to talk to me,
18 that, under this Court's decision in Lane, is
19 what any government official can do in their
20 personal capacity.

21 JUSTICE JACKSON: But why would they
22 --

23 JUSTICE KAGAN: So that means
24 President Trump's Twitter account was also
25 personal?

1 MR. MOOPPAN: Yeah, I think that was a
2 harder question, Your Honor, because there was
3 in that case use of a government staffer to help
4 him run the page.

5 JUSTICE KAGAN: Suppose that there
6 wasn't. Suppose that, you know, he gave every
7 indication of writing his tweets himself, and
8 suppose he had also posted them, so there wasn't
9 a staffer involved.

10 MR. MOOPPAN: Yes, Your Honor, then I
11 think that he is engaging in his First Amendment
12 rights under this Court's decision in Lane to
13 talk about the government in his individual
14 capacity.

15 JUSTICE KAGAN: But he seems to be
16 doing, you know, a lot of government on his
17 Twitter account. I mean, sometimes he was
18 announcing policies.

19 Even when he wasn't, I mean, I -- I
20 don't think a citizen would be able to really
21 understand the Trump presidency, if you will,
22 without any access to all the things that the
23 President said on that account. It was an
24 important part of how he wielded his authority.
25 And to cut -- to cut a citizen off from that is

1 to cut a citizen off from part of the way that
2 government works.

3 MR. MOOPPAN: So a couple things about
4 that, Your Honor. The first is President Trump
5 could have done exactly the same thing from
6 Mar-a-Lago or a campaign rally. If he gave
7 every one of those speeches at his personal
8 residence, it wouldn't somehow convert his
9 residence into government property.

10 And in terms of people being cut off
11 from it, people don't have a right to access
12 other people's personal property. The blocking
13 here doesn't turn on --

14 JUSTICE KAGAN: I have to say that
15 seems a little bit, you know, to focus on the
16 wrong end of the stick, if you will. I mean,
17 the fact that it was his personal property seems
18 neither here nor there. If really he was doing
19 government on it and wielding his authority on
20 it and announcing policy on it and -- and --
21 and, you know, it was part of the way government
22 operated.

23 MR. MOOPPAN: So here's why I don't
24 think that's quite right, Your Honor. Imagine
25 he had put on his page a clear disclaimer, this

1 is my page that I'm using in my personal
2 capacity to talk about the government. This is
3 not an official page. Every single word on that
4 Twitter account could have been the same because
5 he's allowed --

6 JUSTICE JACKSON: Right. But why --
7 why shouldn't we -- why shouldn't we require
8 that then if you're right? In other words, it
9 seems to me the problem that we're having is,
10 even if we agree with you that government
11 officials can operate in their personal capacity
12 and in their official capacity, why should they
13 get to choose whether or not they're doing one
14 or the other without, say, making a clear
15 disclaimer or making it clear to people that
16 this is actually happening in their personal
17 capacity?

18 MR. MOOPPAN: So I'll give you two
19 reasons, one conceptual and one practical. The
20 conceptual reason is because the First Amendment
21 generally doesn't compel speech. It generally
22 protects against compelled speech.

23 JUSTICE JACKSON: Yeah, but you -- you
24 can't have it both ways. I mean, you know, to
25 the extent that we know and we agree with you

1 that the person can operate in one or the other,
2 I don't understand why it would necessarily be a
3 compulsion to have them do so clearly.

4 MR. MOOPPAN: So, here, because what
5 is basically being said is, if everyone agrees
6 my clients could have said this in their
7 individual capacity and had First Amendment
8 rights to do so, but they will lose those rights
9 unless they put up a disclaimer, that is
10 basically saying --

11 JUSTICE JACKSON: No, no, no. I'm not
12 saying they lose the right, right? You can --
13 you can go down Road A or Road B. You -- you
14 have the freedom to do that.

15 The question in this case is, how do
16 we know which you have chosen?

17 MR. MOOPPAN: Right. And so the
18 disclaimer is essentially a condition that is
19 being required to go down Row A rather than Row
20 B. That is an odd thing to say that the First
21 Amendment of its own force compels.

22 Let me also give you a practical
23 reason why this isn't the right way to think
24 about it. You're setting up a trap for the
25 unwary. There are lots of government officials

1 in this country. They are probably not all
2 going to read this Court's decision. And if you
3 adopt a rule that the only way they can exercise
4 their rights under Halleck to exclude people
5 from their personal property is to include a
6 disclaimer, some of those people aren't going to
7 do it and they're going to lose their First
8 Amendment rights.

9 And that's the exact opposite of how
10 the First Amendment normally works. This Court
11 normally adopts presumptions and rules that
12 protect the First Amendment, that set up
13 prophylactic boundaries to ensure that you don't
14 inadvertently lose your rights through --

15 JUSTICE KAGAN: Well, there -- there
16 --

17 JUSTICE JACKSON: Mr. Mooppan --

18 JUSTICE KAGAN: This is a case where
19 there are First Amendment interests on both
20 sides. I mean, just as there may be First
21 Amendment interests in protecting the private
22 speech of government employees, there are also
23 First Amendment interests in -- in -- in
24 enabling citizens to access the important parts
25 of their govern -- of their government.

1 MR. MOOPPAN: Right. But --

2 JUSTICE KAGAN: That's what makes
3 these cases hard, is that there are First
4 Amendment interests all over the place.

5 MR. MOOPPAN: Well, but the difficulty
6 is, as Justice Jackson said, it is entirely in
7 my clients' control whether these pages are used
8 in their individual capacity or their official
9 capacity. So whatever First Amendment interest
10 is on the other side, it's extraordinarily weak
11 because all we had to do is put up a disclaimer
12 and their right goes -- completely evaporates.

13 So, on the one hand, you would be
14 adopting a rule that every government official
15 in this country runs the risk of inadvertently
16 losing control over their property because they
17 didn't put up a disclaimer.

18 On the other hand, you have a
19 disclaimer. Then our clients are still blocked
20 and everything else happens exactly the same.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas?

24 Justice Alito?

25 JUSTICE ALITO: Is the act that is at

1 issue in this case what the person who owns the
2 Facebook page says, or is the act that is at
3 issue the forum, so to speak, that is created by
4 enabling comments?

5 MR. MOOPPAN: The act that's being
6 challenged is the blocking from the page.

7 JUSTICE ALITO: So it's the forum, so
8 to speak?

9 MR. MOOPPAN: Well, the specific act
10 that's being challenged is being blocked from
11 the page. How you characterize the page,
12 whether you view it as a forum or not, is partly
13 a underlying merits question.

14 JUSTICE ALITO: Well, no, it could be
15 a private forum. It could be some sort of a --
16 of a public forum.

17 MR. MOOPPAN: Sure.

18 JUSTICE ALITO: And the First
19 Amendment issues on the other side are the free
20 speech issues of the people who are blocked.

21 MR. MOOPPAN: Right. But they don't
22 have any First Amendment interest in accessing
23 private property. That's this Court's decision
24 in Halleck. And since this is a private
25 account, there is no question that this is not

1 owned by the government or controlled by the
2 government, and it's entirely in my clients'
3 plenary power whether to open it up to the
4 public.

5 That's why I don't think they -- if
6 you have any interest, they have very minimal
7 interest, and it's one that could be wiped out
8 with a disclaimer. And there are a lot of good
9 reasons why the Court shouldn't require that.

10 The other thing I will say about a
11 disclaimer, though, Your Honor, is, if there is
12 concern about confusion, the right place to do
13 that is by the state regulating. Un- -- rather
14 than this Court adopting as a rule of
15 constitutional law that the First Amendment, of
16 its own force, somehow requires a disclaimer,
17 the much better way to handle this is the State
18 of California, if they think there's a problem,
19 if they think people are confused, they can
20 regulate. They can regulate my clients because
21 they're a government employer. My clients are
22 government employees. The state has broad power
23 to regulate in that capacity.

24 And that's the way to deal with this
25 issue if there's confusion. And that's

1 especially true because, to go back to a point I
2 made earlier, the blocking doesn't turn on the
3 confusion. My clients will be able to block
4 them whether or not they were confused about the
5 page, just like the officer running down the
6 street.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 JUSTICE SOTOMAYOR: You keep saying
10 that what matters is that this user, both a
11 personal user and a government user, could do
12 the same thing equally. I know that's important
13 to the government as well.

14 But I don't know why that matters,
15 meaning, if the issue -- and it seems that what
16 it's devolving down in this conversation is
17 whether this particular act in this context is
18 government action or not, not whether the
19 account is personal or business. Whether the
20 account is personal or business may inform
21 whether we have to take a second step or not.

22 So, if it's a personal account, then
23 you have to figure out whether it's being
24 used -- and I think you said that --
25 facilitated, being used for government business.

1 That was the government's example of, if a
2 private account starts doing notice-and-comment
3 on legislation, that process is governmental,
4 isn't it?

5 MR. MOOPPAN: Yes, Your Honor.

6 JUSTICE SOTOMAYOR: So let's assume a
7 mayor says, I'm setting up a hotline for
8 emergencies on my Facebook or Twitter, and if
9 you have an emergency, call that hotline, and I
10 will use the power of my office to set in motion
11 government response for your emergency.

12 Seems to me that that's government
13 action, isn't it? He's -- the -- the state is
14 facilitating by the duties it's given him his
15 ability to put government resources into action.

16 MR. MOOPPAN: The response to that
17 phone call is undoubtedly government action.
18 Whether setting up the phone call is depends.
19 So take, for example, Mayor Bloom --

20 JUSTICE SOTOMAYOR: So, if he
21 routinely uses or responds to those calls in an
22 official way, that process doesn't become
23 government action?

24 MR. MOOPPAN: Well, imagine --

25 JUSTICE SOTOMAYOR: He could exclude

1 Muslims, Jews, whoever he wanted to exclude,
2 blacks, whatever, women, because that's a social
3 account?

4 MR. MOOPPAN: Imagine if Mayor
5 Bloomberg, as an act of charity to the City of
6 New York, had set up in his personal capacity a
7 phone message or an Internet system like that.
8 He paid for it out of his own pocket, no
9 government resources were used for it, no one in
10 the State of New York could tell him how to run
11 that because it was his own personal phone
12 exchange. That would be personal capacity
13 action.

14 JUSTICE SOTOMAYOR: But why isn't that
15 -- isn't that account facilitating his duties as
16 a mayor? He's using it to now put the resources
17 of the government to use as mayor.

18 MR. MOOPPAN: No, he, like any other
19 private citizen, is helping people contact the
20 government. Any private citizen has the ability
21 to do that. And the question of whether the
22 government -- a government official is acting in
23 the capacity of a government official --

24 JUSTICE SOTOMAYOR: Not every private
25 individual has the ability to put the mechanisms

1 of government into effect.

2 MR. MOOPPAN: Right. That's on the
3 back end. I conceded that the back-end response
4 would clearly be state action.

5 JUSTICE SOTOMAYOR: Well, the --

6 MR. MOOPPAN: My only point is that
7 the front-end --

8 JUSTICE SOTOMAYOR: -- the problem I
9 have is that it's all intertwined.

10 MR. MOOPPAN: I don't think so, Your
11 Honor, because, again, you can have that exact
12 same phone system set up by some wealthy donor,
13 and that clearly wouldn't be state action. That
14 would be private charitable giving to help the
15 government run better. And just like as this
16 Court held in Lane, a government official could
17 be still acting in their individual capacity
18 even when they're speaking about information
19 they learn as part of their job. That doesn't
20 mean that they're doing their job.

21 The way to figure out whether they're
22 doing their job is to figure out whether they're
23 using government resources, whether the
24 government can control what they're doing,
25 whether they're doing something that only the

1 government can do. None of that is true here.

2 And to the contrary, these pages, the
3 user names of the pages are campaign slogans,
4 because my clients were elected officials who
5 have to run for reelection. So what they were
6 doing is what incumbent officials all over the
7 country do as a regular matter. They talk to
8 their constituents to show what a good job
9 they've been doing and why they should be
10 reelected.

11 JUSTICE SOTOMAYOR: Well --

12 CHIEF JUSTICE ROBERTS: Justice --

13 JUSTICE SOTOMAYOR: -- I don't know
14 why they have personal accounts too then.

15 MR. MOOPPAN: That's to --

16 JUSTICE SOTOMAYOR: If it was a
17 personal account, they could have done both
18 things.

19 MR. MOOPPAN: That's to talk to their
20 friends and family without letting every person
21 in town talk to them. The better point, I
22 think, Your Honor, is they don't have a campaign
23 account other than these ones. So, if this
24 isn't their campaign page --

25 JUSTICE SOTOMAYOR: But they don't say

1 it's their campaign page.

2 MR. MOOPPAN: Well, the user --

3 JUSTICE SOTOMAYOR: They say it's
4 their page as X official of Y city.

5 MR. MOOPPAN: So I'll say two things
6 about that, Your Honor. First of all, since the
7 user names of the pages, Moore for PUSD and Zane
8 for School Board, are both campaign slogans,
9 that's a pretty good indicia that it is a
10 campaign page.

11 Another good indicia of the fact that
12 it's a campaign page is that they didn't have
13 another campaign page. So they would either
14 have to be the only two officials in America who
15 decided not to have a social media page when
16 they were running for reelection or these were
17 those pages.

18 JUSTICE SOTOMAYOR: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAGAN: So I guess just to
21 press on this a little bit and going back to
22 Justice Thomas's original question so I can make
23 sure I understand the answer to it, there's a
24 person and they become a school board member,
25 and they set up a private account, so they're

1 not using a preexisting account. They set up a
2 private account.

3 And the only thing on this account are
4 things related to the school board. So it has,
5 you know, we're having a meeting, the agenda,
6 the resolutions, the meeting times, the minutes,
7 job postings, official reports, whatever. All
8 school board business.

9 And there's also some commentary, you
10 know, the board would like to know what you
11 think about this. I would like to know what you
12 think about this. So please come to the
13 meeting, and, indeed, please give your comments
14 to me on this page about what you think of
15 Agenda Number 3 -- Agenda Item Number 3 at our
16 next meeting.

17 And that's the content of the page.
18 State action or not?

19 MR. MOOPPAN: No state action because
20 that is speech that an individual could do in
21 their private capacity and there's no objective
22 evidence, not through any resources or anything
23 else, that they're being done through control.
24 Everything you just said could happen in my
25 clients' backyard. Everything you just said

1 could happen if my clients went to church and
2 asked their fellow congregants, hey, I have a
3 difficult issue coming up next week, what do you
4 think I should do?

5 JUSTICE KAGAN: And when you say the
6 control, I mean, I guess -- I mean, there are
7 some officials where there's a -- a -- a -- a
8 kind of line of command, but, you know, a -- a
9 school board member, well, they're a school
10 board member. They -- they are the control.

11 What -- what -- why do you need
12 somebody, like, insisting on the content?

13 MR. MOOPPAN: Well, it's a --

14 JUSTICE KAGAN: They are the state.

15 MR. MOOPPAN: Well, so they are state
16 officials, but they could be acting in either
17 capacity. And the reason control matters is
18 it's a way of disentangling the two. If your
19 boss can tell you what to do, then we know
20 you're acting as an official. If your boss
21 can't tell you what to do, if when the boss
22 tells you what to do that's subject to First
23 Amendment balancing, then we know you're acting
24 as a personal capacity. I think it's clearer in
25 the next case where it's the city administrator

1 who has a boss. He's got a mayor.

2 Now you're right that in my case the
3 school board officials, there's limited
4 oversight above them, but that's just a matter
5 of positive state law. Imagine if the State of
6 California had a czar of official web pages.
7 All California official web pages are regulated
8 by the czar. He says put up the state motto, do
9 this, that, and the other thing, and don't do
10 these other things.

11 No one would think that that guy could
12 tell my clients what to do on these pages.

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 JUSTICE GORSUCH: Just curious on your
17 side of the v in both cases, we have a profusion
18 of possible tests to choose among. You've
19 offered one, the Solicitor General has offered
20 another, the Sixth Circuit has a slight
21 variance.

22 You've now had time to stew on this
23 case for a number of months and think about it.
24 What's your best advice for us on your side of
25 the v, what test you'd propose?

1 MR. MOOPPAN: So I continue to think
2 that the best test is that to look to duties and
3 authorities and to say that if duties -- if
4 there is neither the exercise of duty nor
5 authority, that's not state action. That's all
6 you need to do to resolve this case.

7 Now that raises the further question
8 of: Well, how do you know whether there are
9 duties and authorities? At that point, we're
10 not talking about a test. We're talking about
11 how to implement the test. And I think the
12 things that the Court should be looking at are
13 objective indicia that are capable of
14 disentangling the two capacities.

15 So things like the use of resources,
16 the exercise of supervision, the exercise of
17 exclusive duties, those are things that will
18 help you figure out is this actually exercising
19 duties and authorities of your office or is it
20 instead exercising your First Amendment rights
21 under Lane to talk about the government but not
22 as the government.

23 JUSTICE GORSUCH: And how does that
24 test interact with Griffin in your view?

25 MR. MOOPPAN: So, in Griffin, the

1 officer was exercising the authorities of his
2 office. He was a deputy sheriff. He was
3 wearing a badge. And he arrested someone as the
4 deputy sheriff.

5 JUSTICE GORSUCH: So that's an
6 authority case --

7 MR. MOOPPAN: That is an authority
8 case.

9 JUSTICE GORSUCH: -- in your scheme?

10 MR. MOOPPAN: And the counter-example
11 is the hypothetical I gave earlier. A police
12 officer in full uniform runs down the street,
13 pushes someone out of the way, but he's doing it
14 to pick up his kid. That may look like he's
15 doing his job, but he's not doing his job and
16 he's not invoking his power.

17 That would not be state action.
18 There's no lower court that would find state
19 action in a case like that. Lower courts have
20 rejected state action in much closer cases than
21 that.

22 JUSTICE GORSUCH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Kavanaugh?

25 JUSTICE KAVANAUGH: Just to press a

1 little bit on how you would apply the test, so
2 I'm assuming that the information that would be
3 posted is not also posted on a government site,
4 so it's only posted on the personal site. This
5 picks up a little bit on some of Justice Kagan's
6 hypotheticals.

7 But suppose the city manager on the
8 personal site says, we have new recycling rules,
9 you have to use a blue bin, has to be at the
10 curb, will be picked up on Wednesdays. If you
11 have any questions, contact me. That's only on
12 the personal site, not on the official site.

13 Is that state action?

14 MR. MOOPPAN: There might well be an
15 argument there because, in that point, I assume
16 that there is a duty as a state official to
17 announce the rules, right? People need to know
18 what the rules are.

19 JUSTICE KAVANAUGH: Okay.

20 MR. MOOPPAN: And --

21 JUSTICE KAVANAUGH: So that's very
22 important. I'm going to stop you there because,
23 when you described how to implement the test in
24 response to Justice Gorsuch, you said resources,
25 supervision, and exclusive duties.

1 So this is really important, I think,
2 because a lot of what local officials do is
3 announce rules. Is announcing rules state
4 action?

5 MR. MOOPPAN: Not in and of itself.

6 JUSTICE KAVANAUGH: Okay. Well, we've
7 got to --

8 MR. MOOPPAN: Because --

9 JUSTICE KAVANAUGH: You -- you said --

10 MR. MOOPPAN: Right.

11 JUSTICE KAVANAUGH: -- the local
12 officials around the country need guidance.
13 That is definitely true.

14 MR. MOOPPAN: I agree with that.

15 JUSTICE KAVANAUGH: So --

16 MR. MOOPPAN: So what I --

17 JUSTICE KAVANAUGH: -- announcing
18 rules is part of what they do. They need a
19 clear answer. What's the answer?

20 MR. MOOPPAN: So I think the clear
21 answer is, if this is the only place they are
22 announcing that rule, then that's going to be
23 state action.

24 JUSTICE KAVANAUGH: Okay. So
25 announcing you can't park on the even-numbered

1 side of the street during snowstorms, that's the
2 same?

3 MR. MOOPPAN: Yeah, but --

4 JUSTICE KAVANAUGH: State action?

5 MR. MOOPPAN: -- but, importantly, the
6 -- the start of your question --

7 JUSTICE KAVANAUGH: If it's only -- if
8 it's only --

9 MR. MOOPPAN: Right.

10 JUSTICE KAVANAUGH: Yeah. No, I'm
11 assuming --

12 MR. MOOPPAN: It is perfectly fine to
13 announce it officially and then amplify that
14 message on your personal page.

15 JUSTICE KAVANAUGH: So a lot of this
16 will depend on whether it's reposting or
17 exclusive posting, I think --

18 MR. MOOPPAN: I agree.

19 JUSTICE KAVANAUGH: -- on the
20 announcing of rules, okay.

21 MR. MOOPPAN: Yeah.

22 JUSTICE KAVANAUGH: What about
23 notices, announcing notices? Okay, it's
24 snowing, schools are closed tomorrow, and it's
25 only on the personal site.

1 MR. MOOPPAN: Again, Your Honor, I --

2 JUSTICE KAVANAUGH: That's not a rule,
3 but it's a notice.

4 MR. MOOPPAN: I think, in general, if
5 what is being -- the question to take a step
6 back is whether you're exercising a duty of your
7 office, and those sort of things --

8 JUSTICE KAVANAUGH: That's not good
9 enough for the local officials who need
10 guidance.

11 MR. MOOPPAN: I agree, Your Honor.
12 And so what -- what I'm trying to think through
13 on hypotheticals like that is, is it fair to say
14 that that is the exercise of a duty. And so, if
15 it's the announcement of something that you have
16 an obligation to inform the citizenry of, then,
17 yes, I agree.

18 And that might be, if it's a rule or
19 you can have a lot of different things, I just
20 don't want to go so far as to say that anytime a
21 government official tells the public anything,
22 that is state action, because that's too far
23 because there are lots of things that the
24 government official could be telling the public
25 purely in his personal capacity.

1 But, for most of the hypotheticals, I
2 think you were asking me in the line of
3 questions you were about to ask, yes, if you're
4 telling people things about the rules of the
5 road of the government, things that as a
6 governmental matter you have a duty to disclose
7 because you can't just spring rules on people or
8 tell people -- not tell people things they need
9 to know in their official capacity, then, if
10 that's the only place you announce that is your
11 government account, then I assume that that's
12 likely going to be a very strong indicia that
13 you're using the account for government
14 purposes.

15 JUSTICE KAVANAUGH: Your personal --

16 MR. MOOPPAN: If I could say one last
17 thing?

18 JUSTICE KAVANAUGH: -- personal
19 account you meant?

20 MR. MOOPPAN: Sorry, personal account.

21 JUSTICE KAVANAUGH: Yeah, yeah.

22 MR. MOOPPAN: One way of knowing that
23 is, in those hypotheticals, almost certainly
24 your boss could tell you what to do in there,
25 right? If --

1 JUSTICE KAVANAUGH: Well, you are the
2 boss to get back to I think Justice Kagan's
3 point.

4 MR. MOOPPAN: So, in -- on these -- in
5 this case, yes. Not in the next case. In the
6 next case, the mayor is the boss.

7 JUSTICE KAVANAUGH: And last -- last
8 one, just reminders, a reminder about there have
9 been a lot of thefts and burglaries in the -- in
10 the neighborhood. Lock your cars. If you're
11 going away for a few days --

12 MR. MOOPPAN: Right. See --

13 JUSTICE KAVANAUGH: -- tell the
14 police.

15 MR. MOOPPAN: -- that's --

16 JUSTICE KAVANAUGH: And it's only on
17 the personal site.

18 MR. MOOPPAN: Right. That's the line
19 I was trying to -- that sort of speech is
20 something you could do, any private citizen can
21 do it, and government officials don't have any
22 duty to do that.

23 They could do that in their official
24 capacity. So, for that sort of speech, you're
25 going to need something more. You're going to

1 need to see that they're either, like, using
2 staffers to prepare it or their bosses are
3 telling them to do it, but the speech by itself
4 isn't going to be enough for something like
5 that.

6 JUSTICE KAVANAUGH: So I think you've
7 distinguished announcing rules, if it's only on
8 the personal site, from notices of government
9 information. And that's kind of fuzzy. And
10 reminders would not be. Is that --

11 MR. MOOPPAN: I think that's right,
12 Your Honor. Look, again, to say --

13 JUSTICE KAVANAUGH: That's the kind of
14 practical information that people are going to
15 need, I think.

16 MR. MOOPPAN: I hope so if this Court
17 adopts the right test of duties and authority.

18 JUSTICE KAVANAUGH: All right. Thank
19 you.

20 (Laughter.)

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett?

23 JUSTICE BARRETT: So, Mr. Mooppan,
24 when you were having this colloquy with Justice
25 Kavanaugh, you all were talking post by post.

1 The Chief Justice asked you at the start, are we
2 looking at this as whose account is it or are we
3 looking at specific actions. It kind of sounded
4 to me when you were talking to Justice Kavanaugh
5 that your position, which I kind of understood
6 your initial position to be no, we're looking at
7 the account, but which is it?

8 MR. MOOPPAN: So I think it's true
9 that you're looking at the account and the
10 blocking, but as I told the Chief Justice at the
11 very end of our colloquy and now with Justice
12 Kavanaugh, if you use the account even in part
13 for what is an exclusive governmental duty to
14 give notice to the public or engage with the
15 public, I agree at that point it's going to be
16 state action.

17 The reason why I think it's important
18 to think about this at the account level is
19 there's a lot of speech that might be -- speech
20 that might be viewed as official but isn't an
21 official duty to provide information to people
22 in, like, the hypotheticals Justice Kavanaugh
23 was asking me.

24 And so a way of differentiating the
25 two, announcing, for example, that I'm going to

1 sign a bill, announcing I'm going to appoint a
2 judge, those sort of things are things you could
3 do in a -- even if you view those as official in
4 some sense, that doesn't mean that you're using
5 the property where you make that speech in an
6 official capacity. You can engage in that type
7 of speech at a campaign rally, at a church, in
8 your backyard, and --

9 JUSTICE BARRETT: So we are kind of
10 looking post by post, I think?

11 MR. MOOPPAN: If you're talking about
12 exclusive duties, I agree.

13 JUSTICE BARRETT: Okay. And -- and I
14 have a question about this word "duty." So what
15 is the point of talking about both duty and
16 authority? Because it seems to me that duty,
17 and this kind of runs throughout the brief,
18 sometimes it's described as obligations.

19 You described it just now as an
20 exclusive government duty, a requirement that
21 appears sometimes in the briefs, but sometimes
22 there are things you have the authority to do as
23 a government official that you're not required
24 or obligated to do.

25 So it seems to me that if you have the

1 authority to do them, something that you have a
2 duty to do is just a subset of authority.

3 So why are we talking about duty?

4 MR. MOOPPAN: So, look, I think -- I
5 think you're right that duties and authorities
6 sometimes are flip sides of the same coin in
7 general and that you can have exercise of
8 authority that are purposive but not required.
9 So I agree with all of that.

10 I think authority does add something
11 beyond duty. I think what it's helpful most for
12 is things like the use of staffing, the use of
13 resources, things like that that don't really
14 directly go to the question of is it duty or --
15 but it is the wielding of authority.

16 Now that sort of thing is relevant for
17 two reasons. One, it's good evidence that
18 you're wielding a duty or authority if you're
19 using government resources or staffing. And,
20 two, it's possible that at least in some cases
21 the mere use of those resources alone could be
22 state action.

23 JUSTICE BARRETT: See, I mean, I
24 guess, I just think using the word "authority"
25 -- I mean, I get in the -- in the Sixth Circuit

1 case that's what the opinion seems to be --
2 that's -- that's the -- I don't know -- that's
3 the value of authority, I think, in the Sixth
4 Circuit opinion, but it just seems to me like a
5 weird way to describe it.

6 I think of it more as evidence, right?
7 I mean, am I losing a whole lot if I don't want
8 to use the word "duty" and if I just say
9 authority? Maybe that would pick up some of
10 that stuff that you're talking about anyway?

11 MR. MOOPPAN: I don't think you're
12 losing a lot. I think you could frame it either
13 way. As I said, I think they are flip sides of
14 the same coin.

15 JUSTICE BARRETT: Okay. You were
16 talking a lot about property, which is the
17 government's focus. So you've articulated the
18 test. As Justice Gorsuch said, we have lots of
19 articulations on offer on your side of the v.

20 What is the difference, what's the
21 daylight between the government's position and
22 your position, you know, their focus on is this
23 private property that the public official is
24 inviting you onto, you know, the test that they
25 propose, versus the authority, duty, control

1 test that you do?

2 MR. MOOPPAN: So I don't actually
3 think there's any daylight between our
4 positions, though you can ask my friend. I --
5 they've obviously emphasized property as sort of
6 this initial gating mechanism --

7 JUSTICE BARRETT: Uh-huh.

8 MR. MOOPPAN: -- whereas we view the
9 fact that it's private property as quite
10 relevant to determining are you exercising
11 duties or authorities of your office. But, at
12 the end of the day, I think the cases all sort
13 of cash out the same way. Whether you apply our
14 framework or theirs, you essentially end up in a
15 spot where, if you're using a private account
16 and you're not exercising an exclusive
17 governmental function and you're not using
18 government resource and the government can't
19 control it, then you're -- you should understand
20 that to be exercise -- acting in your personal
21 capacity because personal -- people have the
22 right as government officials to talk about
23 their jobs in their personal capacity, and you
24 should assume that when they do that on their
25 own personal property, they're acting in their

1 personal capacity.

2 JUSTICE BARRETT: Okay, last question.
3 At the beginning of your argument, you referred
4 to unless someone is choosing to use their
5 Facebook account, Twitter account, whatever, in
6 their official capacity. And Justice Kagan's
7 questions were getting to some of this.

8 I think it's very difficult when you
9 have an official who can in some sense define
10 his own authority. So I think, for a governor
11 or, you know, President Trump, it's a harder
12 call than someone like a police officer, who's a
13 subordinate. Or I could -- you know, my law
14 clerk could just start posting things and say
15 this is the official business of the Barrett
16 chambers, right?

17 (Laughter.)

18 JUSTICE BARRETT: And -- and that
19 wouldn't be okay. But if, you know, the -- that
20 wouldn't be okay.

21 (Laughter.)

22 JUSTICE BARRETT: If, you know,
23 Governor Newsom decides to do it, he has the
24 authority to define the scope of his authority.
25 I would have thought in your clients' context

1 they don't actually have full-ranging authority
2 just as board members, right, unless the board
3 said, we've taken a vote and you are the one
4 who's our communications person, you are the
5 point person on communications. Then you would
6 look at a source of authority, but if in that
7 context -- I mean, I guess it just kind of
8 depends official by official.

9 I guess I'm not understanding in your
10 specific, for your client, why there would be an
11 argument even. It seemed like you were
12 conceding a little bit in talking to Justice
13 Kavanaugh about official announcements and that
14 sort of thing. Would that be true for your
15 clients?

16 MR. MOOPPAN: Look, I -- yes, I think
17 if my clients -- you know, if -- if, for
18 example, there was a slush fund at the board to,
19 you know, use money for doing your job and my
20 clients used that money to, like, buy a Facebook
21 account or use advertising on Facebook, I -- I
22 don't think my clients would be acting in an
23 ultra vires fashion, and I think that that would
24 be exercising state action.

25 Now I do agree with you, Your Honor,

1 that on the control piece of using control as
2 evidence of whether it's governmental or not, it
3 becomes harder the higher up you go in the chain
4 because it's harder to identify a superior who
5 can tell you what to do.

6 But even take, for example, the
7 Governor of California. Well, the Governor of
8 California does have a boss. The boss is the
9 people of the State of California who could, for
10 example, amend their constitution, and they
11 could amend their constitution and say that even
12 the Governor, when he's using -- exercising his
13 official capacity, here's what he can and cannot
14 say on a social media page.

15 And they certainly could not do that
16 for this sort of page, for a page that he owned
17 before he was the Governor, that he will own
18 after he's the Governor, and that he uses only
19 to say things that, under Lane, he has a First
20 Amendment right to say in his individual
21 capacity.

22 JUSTICE BARRETT: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: So I guess I'm still

1 not clear why the onus isn't on the government
2 official to be clear about the capacity in which
3 they're operating. I mean, I take your point
4 that you can have an individual who's a public
5 official and they can operate in both worlds,
6 official and also personal.

7 But, to the extent that we're having a
8 problem or at least I'm having a problem, it's
9 because we can't identify whether this
10 particular action is occurring in one world
11 rather than the other. And we've said in -- in
12 lines of cases -- like the Pickering line of
13 cases, we've recognized that even though public
14 employees have a First Amendment right to speak,
15 they can be limited in that ability to speak.

16 So it doesn't seem responsive to me at
17 least for you to say: Well, they have a First
18 Amendment right, so they have -- they bear no
19 responsibility in making clear as to when they
20 are operating personally versus officially. So
21 can you just say more about that?

22 MR. MOOPPAN: Sure. I'll -- I'll try.
23 I'll say three things. So the first is, again,
24 the conduct that they're objecting to is the
25 blocking.

1 JUSTICE JACKSON: Right.

2 MR. MOOPPAN: They are -- this is not
3 a case where they're complaining because they
4 were confused, that they thought it was
5 official, and if they had known it was official,
6 something else would have happened. Everything
7 in this case would have been exactly the same if
8 that page was plastered with disclaimers.

9 JUSTICE JACKSON: Yeah, but -- but --

10 MR. MOOPPAN: So --

11 JUSTICE JACKSON: -- but it's not --
12 no, I guess what I'm trying to understand is,
13 when we isolate the blocking -- and you're
14 right, that is the claim -- we have to think
15 about, as Justice Kagan pointed out, the
16 implications of that on the First Amendment
17 rights of the people who want to see the page.

18 So what's happening is they're being
19 blocked from either commenting or seeing the
20 information that's being posted on this
21 particular page. And when the official says,
22 but that particular page is my private page and
23 I'm operating in a private capacity, then I
24 suppose we have one set of answers. But, if we
25 believe that that page is actually operating as

1 the official government page and the person is
2 being blocked, we might have a different set of
3 answers.

4 So the question is, with respect to
5 the blocking, is it happening in a personal or
6 an official capacity and why wouldn't it be the
7 -- the public official's responsibility to say,
8 if you're on this page and you're either seeing
9 or not seeing things, understand this is a
10 personal repository of information?

11 MR. MOOPPAN: Right. So, again, I
12 guess what I would say, Your Honor, is, if you
13 concede that my clients could have done this in
14 their personal capacity with disclaimers, the
15 question is where in the Constitution are they
16 obligated to put up the disclaimer if they want
17 to maintain those rights.

18 JUSTICE JACKSON: If they want us to
19 believe that they're doing it in their personal
20 -- I mean --

21 MR. MOOPPAN: Well --

22 JUSTICE JACKSON: -- how else are we
23 supposed to know?

24 MR. MOOPPAN: Well --

25 JUSTICE JACKSON: I mean, that's just

1 one set of questions.

2 MR. MOOPPAN: -- to be fair, they've
3 got the burden of proof. They are the
4 plaintiffs in this case. They are the ones who
5 are arguing it's state action. So the burden
6 should be on them to show the opposite, not on
7 my clients to disprove it.

8 The second point I would make --

9 JUSTICE JACKSON: So -- so you're
10 saying that a public official can just make a
11 decision sub silentio about which world they're
12 operating in, not let anybody know, and it would
13 be the burden on whoever is saying that you are
14 violating my constitutional rights to determine
15 that you were actually operating in the -- the
16 -- the official capacity?

17 MR. MOOPPAN: Yeah, in a case like
18 this, where there's no objective indicia that
19 they were doing it in their governmental role,
20 there's no staffing, there's no resources,
21 there's no control.

22 JUSTICE JACKSON: What about the page,
23 the way it looks, the way -- this is the other
24 argument, right?

25 MR. MOOPPAN: Everything about this

1 page's appearance is equally consistent with a
2 campaign page. That's exactly what happened in
3 the Eighth Circuit. A page that looked no
4 different than our page, the justices -- judges
5 just split, so --

6 JUSTICE JACKSON: Okay. Can I just
7 ask one more question? I'm sorry. Justice
8 Sotomayor came up with a private hotline example
9 to seek emergency help that I thought was really
10 interesting. I hadn't thought of it before.

11 And I understood you to say that the
12 response, the government rushes to your house as
13 a result of getting the communication, would be
14 official action. But I guess I'm not clear as
15 to the blocking that would occur by the -- by
16 the official from people that they didn't like
17 with respect to a page that was designated as
18 this is the opportunity to call for government
19 help. I'm creating this Facebook page so that
20 people can have a straight-through hotline to
21 government resources.

22 The person, I guess, is saying, this
23 is a private page, so I can block, you know,
24 Latinos. I don't want any Latinos on this page,
25 says the person. Is that a problem? I mean, is

1 that state action or not state action?

2 MR. MOOPPAN: I would think -- if
3 that's all there is, I would say it's not
4 because a private citizen could set up that
5 exact same page. Here -- this is a page to get
6 you access to government officials.

7 JUSTICE JACKSON: But, if they did,
8 wouldn't -- wouldn't that implicate all the
9 lines of cases where we talk about or we think
10 about whether or not a private citizen is
11 actually acting in a way that's fairly
12 attributable to the state? I mean, we don't
13 just stop at saying, oh, a private citizen --

14 MR. MOOPPAN: And I don't think any of
15 those tests would be met. The -- you know, if
16 we --

17 JUSTICE JACKSON: The one about joint
18 action between the private party and the state,
19 the Brentwood Academy line where you're looking
20 at is this facilitating the -- the -- the -- a
21 state service, you think would not apply?

22 MR. MOOPPAN: I don't think -- again,
23 if a purely private citizen, just think, you
24 know, a wealthy person in the city, said, I want
25 to make it more easy for people to call and get

1 access to government things and sets up a page
2 like that, that's not joint action. He's acting
3 wholly independent of the government.

4 JUSTICE JACKSON: All right. Thank
5 you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Joshi.

9 ORAL ARGUMENT OF SOPAN JOSHI
10 FOR THE UNITED STATES, AS AMICUS CURIAE,
11 SUPPORTING THE PETITIONERS

12 MR. JOSHI: Mr. Chief Justice, and may
13 it please the Court:

14 We agree with Petitioners that duty
15 and authority is the right way to figure out in
16 what capacity a -- a public employee defendant
17 is acting, but we think the Court should focus
18 on the subset of cases involving a denial of
19 access to property.

20 In those cases, if the defendant is
21 exercising an official duty to provide access,
22 like hosting an official school board meeting,
23 of course, that's state action. It doesn't
24 matter where it happens.

25 But, for other kinds of duties, and

1 most important, where it's ambiguous, where it's
2 the kind of thing a private citizen could do but
3 also within a broad description of the
4 official's responsibilities, there, we think the
5 nature of the property should be all
6 dispositive. So, if the defendant denies access
7 to government property, probably state action.

8 If the defendant denies access to her
9 own personal property, she's probably acting in
10 her capacity as a private property owner, not as
11 an agent of the state. And that framework,
12 especially insofar as it provides a default rule
13 for hard cases, we think, is more consistent
14 with the state -- with the purposes of the state
15 action doctrine, will resolve these cases today
16 and others like them, and will avoid the need
17 for this Court to set forth a one-size-fits-all
18 broader duty and authority test of -- of broader
19 applicability.

20 I welcome the Court's questions but
21 happy to talk about --

22 JUSTICE THOMAS: What exactly is the
23 property? The contract talks about terms of
24 services, I guess, with -- I'm not a Facebook
25 person, but I assume it -- they would not

1 consider this service a property.

2 So what exactly is a property?

3 MR. JOSHI: Well, I think the
4 property, it's a form of virtual property. But
5 it is the account. You can post speech on
6 there. You can have conversations on there.
7 You can open it up to -- to everyone or just to
8 friends. It is a form of -- of virtual
9 property.

10 It's like a virtual -- I -- I hate to
11 use the word "forum" because that term is sort
12 of overloaded in this context, but it's a --
13 it's a virtual forum of sorts.

14 It's no different from, say, a hotel
15 that offers its ballrooms for rent to people and
16 you might sign a contract and have terms of
17 service, but when you take that hotel, you have
18 a certain degree of control. You have one of
19 the sticks in the bundle of property sticks and
20 you can choose who gets invited, what you do
21 there. This is just a virtual space of the same
22 sort.

23 JUSTICE THOMAS: So did -- would you
24 -- just to follow up, do you think that you have
25 to take into consideration the role of the -- of

1 the provider, Facebook, too, since they can also
2 evict you from this room that you're in or this
3 account?

4 MR. JOSHI: Yeah, so not in these
5 cases. And I -- I agree that there are some
6 really difficult questions as to the extent of
7 ownership and control over this virtual property
8 as between Facebook and Twitter and Petitioners
9 in this case.

10 But what should be undisputed and is
11 undisputed is that the Poway Unified School
12 District has absolutely no ownership or control
13 over these pages, and that's the relevant
14 question for the state action question in these
15 cases.

16 JUSTICE ALITO: What if -- excuse me.
17 What if something that looks an awful lot like
18 an official event but is not labeled as such is
19 held on private property?

20 MR. JOSHI: I think the question in
21 these cases is the constitutional one of state
22 action. This Court has often said the
23 Constitution deals with substance, not shadows.
24 And I think these sorts of appearances are the
25 kind of shadows that shouldn't matter to the

1 substantive question of whether, to use
2 Petitioners' test, you know, it is an actual
3 official duty and authority being exercised on
4 that property.

5 And I think this Court has rejected,
6 to the extent Your Honor is invoking reasonable
7 observer kind of tests, this Court has rejected
8 in a variety of contexts, most recently in the
9 Coach Kennedy case.

10 I mean, I think maybe to a reasonable
11 observer, a lot of people would have thought
12 that that coach was acting in his official
13 capacity, but the Court didn't rely on
14 reasonable observers. At least as it saw the
15 facts, it said we're going to delve into the
16 facts and figure out exactly --

17 JUSTICE ALITO: Let's say in a -- in a
18 small town the population is bitterly divided
19 over an issue, let's say it's whether they're
20 going to close down their elementary school and
21 send the children to another school 25 miles
22 away to save money, and the mayor is in favor of
23 closing down the school.

24 So the mayor holds a meeting on -- on
25 public property and everybody can go and express

1 their views. And after that meeting, the mayor
2 says: Well, that didn't go well. The -- there
3 was an awful lot of opposition expressed to
4 this. Let's have another meeting, and this time
5 we're going to have it on my farm, and I'm going
6 to post people at the entrance, and we're going
7 to exclude the people who were -- who spoke
8 vociferously and articulately against my
9 proposal.

10 Is that allowed?

11 MR. JOSHI: So, with -- if I
12 understand --

13 JUSTICE ALITO: And the mayor's not
14 running for reelection. He's term-limited, so
15 this is not a -- a campaign event.

16 MR. JOSHI: So, if -- if I understand
17 it and if I can assume that when he does it on
18 his farm, he's not using any government
19 resources.

20 JUSTICE ALITO: Right, right.

21 MR. JOSHI: The security guards are
22 paid out of his own pocket.

23 JUSTICE ALITO: Right, right.

24 MR. JOSHI: Totally fine, I think.
25 Again, and then let me further assume that the

1 vote of the people on this farm meeting is not
2 somehow like conclusive, they don't actually
3 have the authority, he's just taking their views
4 into account.

5 It's no different than elected
6 officials anywhere or government officials
7 anywhere who choose to speak only to Republicans
8 or only to Democrats in order to get views on
9 what they ought to do when they exercise their
10 official duties. No one thinks that that's
11 state action.

12 And I understand you can think of a
13 lot of odious behavior by government officials
14 being discriminatory in whom they speak to and
15 whom they listen to, but, at the end of the day,
16 the Constitution does not prohibit even odious
17 behavior by private citizens.

18 And I want to return here now to a
19 point that Mr. Mooppan said, which I really do
20 think is maybe one of the most important points
21 in this case, which is that a lot of the scare
22 hypotheticals that the other side gives about
23 public officials behaving badly if you narrow
24 the state action doctrine can be taken care of
25 by their government employers or by the state

1 through statutes.

2 The government has employer -- as
3 employer, has much greater leeway to regulate
4 than government as sovereign. And so this Court
5 has decided a number of cases in which
6 government employees acting in their private
7 capacities can nevertheless be regulated by
8 their employers.

9 And so, if you're worried that there's
10 not a code of conduct for government officials
11 on how they comport themselves in their
12 personal/private capacities, such a code of
13 conduct is better if it comes from the
14 government employer than the state.

15 JUSTICE KAGAN: Mr. Joshi --

16 JUSTICE BARRETT: Counsel --

17 JUSTICE KAGAN: -- did -- did -- the
18 questions that Justice Kavanaugh was asking Mr.
19 Mooppan, do you agree with Mr. Mooppan's answers
20 to all those questions, announcements of rules,
21 policies, what have you?

22 MR. JOSHI: Yeah, I think that's
23 basically right. If the duty is to provide
24 access, so if there is a duty to say you must
25 promulgate this information or

1 notice-and-comment, for example, which means you
2 must --

3 JUSTICE KAGAN: No, no, no, no, no. I
4 mean, it's -- it's not like there's a duty that
5 says you -- you have to announce the road
6 closures. They're just you -- you know, you're
7 in charge of road closures, and you think it
8 would be a good idea if citizens knew about
9 them, so you're announcing the road closures on
10 your site.

11 MR. JOSHI: Yeah, and if there's not a
12 specific duty to announce the road closure,
13 which I gather is what you're saying, then, if
14 you choose to do it on your own site, that's
15 exactly the sort of thing where we think the
16 nature of the property --

17 JUSTICE KAGAN: Okay. That's not Mr.
18 Mooppan's answer. Mr. Mooppan said that as long
19 as there wasn't a government site where the road
20 closures were being announced, that that would
21 be state action.

22 MR. JOSHI: If there's a duty to
23 announce those. I took as you framed it --

24 JUSTICE KAGAN: There's not a duty to
25 announce. You're in charge of road closures and

1 you think it would be a very good idea if people
2 understood where the road closures were.

3 MR. JOSHI: Yeah, and it's -- again, I
4 don't -- I don't want to speak for Mr. Mooppan,
5 but that sounds like the kind of thing that a
6 private citizen could do.

7 Let me give you an example closer to
8 the school board case. There are often --

9 JUSTICE KAGAN: Well, why -- why don't
10 we do my example, because how are you going to
11 know --

12 (Laughter.)

13 JUSTICE KAGAN: -- where the road
14 closures are? I mean, now you're -- you're
15 being -- I thought that we were starting off
16 from a point of if -- if the only place that
17 somebody can know where the road closures are is
18 on your private site. Mr. Mooppan said that was
19 state action. I was going to go on from there,
20 but you seem to be contesting that.

21 MR. JOSHI: I -- I guess our view is
22 that if there's a specific duty to make that
23 information available and I --

24 JUSTICE KAGAN: There's not a specific
25 duty, Mr. Joshi.

1 MR. JOSHI: Then --

2 JUSTICE KAGAN: Duties don't work like
3 that. You're in charge of road closures.
4 That's your duty, to be in charge of road
5 closures.

6 MR. JOSHI: And if you are not
7 obligated to -- to talk about road closures and
8 tell the public about road closures, if you do
9 it on your private site, then I think that
10 you're -- you are probably acting in your
11 personal capacity.

12 Now I agree there may be duties to
13 inform, and, in those cases, if the only place
14 you do it is on your personal site, that may
15 well be state action, whereas, if you do it on
16 both sites, it wouldn't be.

17 JUSTICE SOTOMAYOR: Six of the --

18 JUSTICE KAVANAUGH: If you --

19 JUSTICE SOTOMAYOR: The Sixth Circuit
20 seems to think that the duties have to be
21 written. But many duties are customary,
22 meaning, no, you're right, I think, if you're in
23 charge of road closures, I have very little
24 doubt that there's a written law that says you
25 must inform the public. But that is what

1 everybody does. It's what tradition and -- and
2 process has always provided for.

3 You're suggesting that that would not
4 be taken into account?

5 MR. JOSHI: No, not at all. Quite the
6 opposite. We agree that customs can define the
7 duties. I think I was just saying --

8 JUSTICE SOTOMAYOR: So you don't agree
9 with the Sixth Circuit's narrow view that it has
10 to be a written duty?

11 MR. JOSHI: We do not agree with the
12 Sixth Circuit's view that it has to be written
13 down. We agree that customs can inform what the
14 duties are of an office. It's just, if there is
15 a duty to inform, then the discharge of that
16 duty will be state action no matter where it
17 takes place. But where there's doubt about it,
18 if what you're doing is denying access to
19 personal property, we ought to think you're
20 acting in your capacity as a private property
21 owner, not as an agent of the state.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas?

25 Justice Alito?

1 JUSTICE ALITO: Would it be practical
2 to require or adopt a rule that puts a lot of
3 pressure on public officials to separate their
4 Facebook pages, just to take that example? So
5 the official can have a -- a personal profile.
6 The official can have a -- a -- a campaign page.
7 The official can have an official page.

8 MR. JOSHI: Those all sound like
9 wonderful things that a state government can
10 impose in its capacity as an employer. I don't
11 think this Court should impose it as a matter of
12 federal constitutional law. And it certainly
13 shouldn't be the case that the Constitution
14 imposes that kind of precondition in order to
15 exercise your personal constitutional rights.

16 JUSTICE ALITO: Mr. Mooppan said that
17 would be unrealistic for -- that would be asking
18 too much of a lot of public officials.

19 MR. JOSHI: I do think it would. I
20 mean, take the example that Justice Jackson
21 brought up with disclaimers. You know, you
22 might think, well, all you need to do is put up
23 a disclaimer and that's it. Well, how good a
24 disclaimer do you need?

25 JUSTICE ALITO: All right. Thank you.

1 MR. JOSHI: Does it have to be on
2 every page? It's just going to chill speech.

3 JUSTICE ALITO: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor?

6 JUSTICE SOTOMAYOR: That's all.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?
8 Justice Gorsuch?

9 Justice Kavanaugh?

10 JUSTICE KAVANAUGH: To pick up on what
11 Justice Kagan was asking, which -- about the
12 road closures and announcements of rules,
13 announcements of information and what have you,
14 when I was discussing it with your friend, we
15 were assuming that it wasn't also posted on the
16 government's site, it was only posted on the
17 personal site, and then asking, okay, when --
18 where does it cross the line into governmental?

19 Why -- why does it matter that it's
20 posted on the government site or not?

21 MR. JOSHI: I -- I guess the -- it
22 would matter because that would inform, just as
23 you look at the facts of the case, whether
24 you're acting in your personal capacity or in
25 your official capacity, which metaphorical hat

1 you're wearing. And if you discharge your duty,
2 again, assuming there's a duty to inform the
3 public about these things, if you've discharged
4 a duty on the official site and then you're
5 amplifying it on your personal site, odds are,
6 when you do it on your personal site, you're
7 doing it in your personal capacity.

8 But, if your boss tells you go, you
9 know, inform the public about this road closure
10 and the only place you do it is on your personal
11 site, you're probably discharging your official
12 duties.

13 JUSTICE KAVANAUGH: Okay. So it
14 sounds like both of you would have in essence a
15 safe harbor that if you're reposting information
16 on your personal site, that that's probably not
17 going to be considered governmental.

18 MR. JOSHI: Yeah. And -- that's
19 exactly right. And I think -- you know, I take
20 the point that the other side makes that that
21 might be underinclusive in some cases, but I
22 think that's better because that is the purpose
23 of the state action doctrine, is to preserve an
24 area of individual freedom and not hold the
25 state responsible for conduct it really can't

1 control.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett?

5 JUSTICE BARRETT: So going to Justice
6 Kagan's questions about announcements, et
7 cetera, if individual posts on a personal site
8 can ever be state action because you have a duty
9 to make announcements, is that a situation in
10 which your property framework or the presumption
11 is just defeated because it's a personal account
12 and which you sometimes use for official
13 purposes?

14 MR. JOSHI: That's right. As I
15 mentioned at the outset, if the official duty or
16 authority you're exercising is one that requires
17 access, like notice-and-comment or an official
18 --

19 JUSTICE BARRETT: Yeah.

20 MR. JOSHI: -- school board meeting
21 where the public can speak, then, yes, that's
22 state action no matter where you do it. And
23 your blocking of someone from accessing that
24 particular action is going to be state action no
25 matter where it occurs.

1 JUSTICE BARRETT: But the word "duty"
2 is important to you. So I asked Mr. Mooppan
3 about duty and authority. You -- you're really
4 leaning on duty, and it seemed in your
5 interchange with Justice Kagan that you saw a
6 difference between duty and authority.

7 MR. JOSHI: Well, I think a duty --
8 it's less obvious in these cases and more
9 obvious in -- in the next case, where he's a
10 subordinate with a supervisor.

11 So duty is important because you need
12 to know is he actually discharging the thing
13 he's supposed to do. An elected official like
14 these school board members don't really have
15 much in the way of those duties, but they do
16 have authority. They can invoke the state's
17 power to do something that someone who doesn't
18 have the state power can't do.

19 And so, in that sense, duty and
20 authority might be different. In Griffin, for
21 example, that was a private security guard at
22 the -- at the Glen Echo Park, but the reason he
23 got his deputy sheriff certification was so that
24 he could make his arrests and his kicking out of
25 the trespassers more effective. People listen

1 to deputy sheriffs in a way they don't listen to
2 a --

3 JUSTICE BARRETT: But that was
4 authority, not duty, right? Because he --

5 MR. JOSHI: That was authority.

6 JUSTICE BARRETT: -- didn't have a
7 duty --

8 MR. JOSHI: That's right.

9 JUSTICE BARRETT: -- to arrest anyone?

10 MR. JOSHI: That's right.

11 JUSTICE BARRETT: Okay.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: So can I just go
15 back to Justice Alito's hypothetical, which I
16 thought was really good, and ask this question?
17 Suppose the public meeting doesn't occur, so we
18 have the mayor of the town and there's this
19 controversial policy, and there is no public
20 meeting to start because the mayor fears that
21 there's going to be quite a bit of acrimony with
22 people who want to come out differently than the
23 mayor does.

24 And so, instead of the public meeting,
25 the mayor says privately, I'm going to have a

1 meeting on my farm, or maybe he even announces
2 the meeting, but we're only letting in people
3 who are likely to agree with my view. Same
4 result? No state action in that situation?

5 MR. JOSHI: I think probably no state
6 action in that situation. I think it's
7 something that government officials actually do
8 all the time. They might not want to meet with
9 even their own constituents who disagree with
10 them. They might speak only to Democratic Party
11 meetings and only take feedback from Democratic
12 Party donors. And, you know, the solution for
13 that, as I said, for elected officials might be
14 the voters.

15 JUSTICE JACKSON: Yeah.

16 MR. JOSHI: And for appointed
17 officials and employees, the state as employer
18 can regulate that kind of behavior, even if it's
19 in its personal capacity the way --

20 JUSTICE JACKSON: But it doesn't have
21 to do so specifically? I mean, can we believe
22 that, say, the mayor's duties include receiving
23 feedback from the public if -- if there was a
24 duty to get feedback from the public? I
25 understand you to be saying that he would have

1 to.

2 MR. JOSHI: Yeah, I --

3 JUSTICE JACKSON: That even if it was
4 on his farm, he couldn't block people or it
5 would be considered an official state action.

6 MR. JOSHI: I think it would have to
7 be a pretty specific duty for that to constitute
8 state action. I think, if the duty is too broad
9 in general, like speak to constituents, I think
10 that's exactly the kind of case that our
11 heuristic, our test, has a lot of purchase,
12 which is, if it's something that a private
13 citizen can do, talk about a policy, get views
14 on a policy, advocate for a policy, but also
15 within a sort of broad conception of official
16 responsibilities, then I think the nature of the
17 property to which access had been denied really
18 --

19 JUSTICE JACKSON: All right. One
20 final question just as a sort of theoretical
21 matter. Does the government have any concern
22 about the potential privatization of government
23 functions that could occur? I mean, I suppose
24 I'm a little worried about city mayors deciding
25 to sort of shape the debate of the people in

1 their community by having their meetings in --
2 in private places so that others in the
3 community can't comment.

4 Do -- that seems to me problematic as
5 sort of a theoretical matter, but the
6 government, I'm taking, says as long as the
7 mayor chooses to do this on private property,
8 then he can exclude whoever he wants because
9 he's doing it in his personal capacity.

10 MR. JOSHI: Yeah, I mean, in the
11 brick-and-mortar world, I'm not aware of this
12 being a problem. And if it is a problem, I
13 think it's best handled by the state, which can
14 regulate its employees in ways that a state as
15 sovereign cannot. And I think that's the best
16 place to handle those concerns, not a rule of
17 conduct from this Court as a matter of federal
18 constitutional law.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Ms. Karlan.

23 ORAL ARGUMENT OF PAMELA S. KARLAN

24 ON BEHALF OF THE RESPONDENTS

25 MS. KARLAN: Mr. Chief Justice, and

1 may it please the Court:

2 I have three points to make. First,
3 the district court found as a factual finding
4 based on Petitioners' own testimony that
5 "receiving feedback from constituents is an
6 important part of their duties as trustees."
7 California law, both decisional and
8 constitutional and statutory, the PUSD bylaws,
9 to which I'll return in a moment, and the
10 content and appearance of the page confirms that
11 the finding -- the district court's finding that
12 these pages were "used as a tool of governance."
13 Because the trustees were doing their job when
14 they maintained and then blocked Dr. and
15 Mrs. Garnier from these pages, this case fits
16 comfortably within this Court's declaration in
17 West and Lugar that state employment is
18 generally sufficient to render the defendant a
19 state actor.

20 Second, the record in the district
21 court contains O'Connor-Ratcliff's entire
22 Facebook feed from the time she joined the --
23 the board through summary judgment. Of the
24 hundreds of posts, I found only three that were
25 truly non-job-related. Not only were the posts

1 all related to her job as PUSD trustee, but the
2 district court found that the content of many of
3 the posts was possible only because, as a
4 trustee, she was, in the district court's words,
5 "clothed with the authority of state law."

6 For example, O'Connor-Ratcliff's
7 official position was why she could enter into
8 classrooms during instructional time all over
9 the district, something that would get anybody
10 who was a private citizen arrested. Not only
11 did she use these pages to provide information
12 about her official activities that was available
13 nowhere else, but she frequently solicited
14 feedback from the public on board-related issues
15 and used the word "we" to do so.

16 And I'd like to direct the Court to
17 page 48 -- 46, Note 12 of the red brief, where
18 we cite the requirement by the board that you
19 have a disclaimer if you're speaking in your
20 personal capacity. She never put that
21 disclaimer anywhere. Instead, she asked people
22 to contact her using her official government
23 email account.

24 And, third, the pages at issue here
25 are in no sense campaign pages. The district

1 court rejected that argument on pages 114 to 115
2 of the petition appendix. She did have a
3 campaign website. That website had a personal
4 email address, unlike her official email address
5 here.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Ms. Karlan, the
8 Petition -- Petitioners here and Respondents in
9 the next case make much of the fact that if your
10 broad definition of a state action is accepted,
11 that it would actually reduce speech by public
12 officials.

13 I'd like your reaction to that.

14 MS. KARLAN: No, it would not. No one
15 has challenged the speech that was on these
16 pages at all. If they're speaking as government
17 officials, they have both the government's own
18 protection, so, for example, there are a number
19 of protections that go to government officials
20 when they speak in their official capacity, plus
21 they still have all of the First Amendment
22 rights as a backup.

23 And I think it's really important to
24 note here that all we're talking about is the
25 state action issue. And the idea that

1 government officials are not going to want to
2 talk about their jobs at all if you tell them
3 it's state action just seems to me to be
4 illusory.

5 CHIEF JUSTICE ROBERTS: But I'm not
6 sure about that. I mean, if it's a -- if it's
7 characterized as a state action governmental
8 site, then wouldn't anything they say be
9 categorized as governmental speech on which the
10 government could take a particular political,
11 social, whatever, view?

12 MS. KARLAN: Well, I think that it's
13 actually perhaps a little more complicated than
14 that, Mr. Chief Justice, because these are
15 elected officials, and part of their duty is to
16 talk about certain issues.

17 And I think, if the government told
18 them they're simply not allowed to talk about
19 their position on what the board is taking or
20 the like, that itself would violate at least the
21 California constitution and arguably the federal
22 Constitution as well.

23 CHIEF JUSTICE ROBERTS: Well, but just
24 -- just to make sure I understand, you're --
25 we're characterizing a particular site as

1 whether it's governmental, a source of
2 governmental authority or, you know, operated as
3 a governmental duty, or private.

4 Now, if it's private, the people
5 talking on it can say what they want. Their
6 speech won't be limited. If it's governmental
7 speech, you know, they have to do what the
8 government tells them to do on that site.

9 MS. KARLAN: Well, I think the one
10 thing that they do have to do, and I think this
11 is fair and there were a number of questions of
12 the folks representing the Petitioners here,
13 they do have to have a disclaimer here to say
14 this is a personal site.

15 They did not have this disclaimer.
16 Ms. O'Connor-Ratcliff instead says, if you want
17 to contact me, contact me on my official
18 government email account, which she's not
19 allowed to use for personal or political
20 purposes.

21 JUSTICE ALITO: Your test is --

22 JUSTICE KAGAN: What about the claim

23 --

24 MS. KARLAN: Sorry?

25 JUSTICE ALITO: Your test is whether

1 government officials are doing their jobs,
2 right?

3 MS. KARLAN: That's the starting
4 point, and it -- it creates what I would say is
5 a kind of rebuttable assumption that when a
6 government official is doing her job, she is a
7 state actor.

8 JUSTICE ALITO: All right. So the
9 mayor is in the grocery store and is repeatedly
10 approached by constituents. And the mayor
11 listens to -- really doesn't want to be bothered
12 but listens to supporters and people who are
13 sympathetic to the mayor's program, but when
14 somebody who is a known opponent approaches the
15 mayor, the mayor says, look, please call my
16 office.

17 Is the mayor doing his job when he's
18 doing that?

19 MS. KARLAN: I -- I think the answer
20 to that question, which is, I think, different
21 than the answer I would give in our case, is
22 that when they're clearly off duty, that is, you
23 know, pushing the shopping cart down the aisle,
24 arguably, they're not doing their job.

25 But, when they create an ongoing site

1 like the site here, they maintain a forum, if
2 you will, in which people can comment and people
3 can talk to each other, they're not just talking
4 to the mayor, then, yes, that would be state
5 action.

6 JUSTICE ALITO: I mean, elected
7 officials have told me they're always on call.
8 They're always doing their job. They're always
9 being approached by constituents.

10 MS. KARLAN: But, if they say they're
11 doing their job, then, yes, I would say the
12 starting point is they're state actors.

13 Now can they say, I don't want to talk
14 to you right now, you know, the ice cream is
15 melting, of course, they can, because that's not
16 violating somebody's First Amendment rights.

17 JUSTICE ALITO: Well, yeah, but if
18 they're discriminating on the basis of viewpoint
19 and they're doing their job, then there's a
20 problem, right?

21 MS. KARLAN: Arguably, yes.

22 JUSTICE ALITO: So --

23 MS. KARLAN: But that's why I was
24 saying that I think, when you are clearly off
25 duty, you're not doing your job. Even if you

1 say you're doing your job, you're not -- you're
2 not acting in your official capacity.

3 But, here, there was a website. There
4 was a Facebook page. The Facebook page says, if
5 you want to talk to me, call -- you know,
6 contact me at my official office.

7 JUSTICE ALITO: Well, what if she put
8 all --

9 MS. KARLAN: And then --

10 JUSTICE ALITO: -- what if all of her
11 posts were done in the evening? They were all
12 done between midnight and 1 a.m. is she on duty
13 then? Is she doing her job then?

14 MS. KARLAN: Yes, in the same way that
15 if you stay up until midnight and you're reading
16 briefs at home, you're doing your job. You're
17 under color of law. Nobody has a First
18 Amendment right to come into your house, but, of
19 course, you're a state actor.

20 JUSTICE KAGAN: Could we go back to
21 what you said about disclaimers? Would a
22 disclaimer turn this immediately into private
23 action?

24 MS. KARLAN: No, but it would be a
25 much harder case for my clients to win.

1 JUSTICE KAGAN: Why no?

2 MS. KARLAN: Well, because you could
3 say on the top of your website, this is my
4 personal website, but then be operating it as a
5 tool of governance.

6 JUSTICE KAGAN: Yes. So that's my --
7 if -- if -- if it's the same content and if you,
8 in fact, are operating it as a tool of
9 governance, but you have a disclaimer saying
10 that you're not, that this is just you as a
11 person.

12 MS. KARLAN: Well, I'm not sure that
13 the Court wants to have a magic words test for
14 state action. And so you would still, I think,
15 have to look, but at least there the public
16 would know and -- and be able to take into
17 account that you are not using this as a public
18 website.

19 Here, I think putting the disclaimer
20 there but then saying things like we want you to
21 respond to our surveys on whether we should
22 change the election system, we want you to
23 respond to our survey, we are working hard,
24 she's not using "I."

25 And if you compare this to her

1 campaign website, which is a website, not a
2 Facebook page, there, she uses "I." Here, she
3 uses "we." And, honestly, as Mark Twain said,
4 the only people who should use "we" in the
5 singular are royalty and people with tapeworms.
6 And, you know, I don't think she's either of
7 those.

8 (Laughter.)

9 JUSTICE BARRETT: Ms. Karlan, do you
10 think you could win under the test proposed by
11 the government and Mr. Mooppan? Because, I
12 mean, I feel like you're talking about doing
13 your job and it seems like you're saying that
14 she's exercising the authority of her office,
15 whereas the Ninth Circuit focused on this
16 appearance and function test of the website, but
17 it seems to me that you're saying she was doing
18 something more.

19 MS. KARLAN: I think we obviously win
20 under the Ninth Circuit test.

21 JUSTICE BARRETT: Sure.

22 MS. KARLAN: But I think we win even
23 under the Sixth Circuit test because of the
24 duty. And I can -- if you want me to tick
25 through the different places where in state law

1 and board rules and the like are --

2 JUSTICE BARRETT: That's okay, because
3 that was in your briefs. So I -- I --

4 MS. KARLAN: Yeah.

5 JUSTICE BARRETT: But that's what made
6 me think that you're saying it doesn't really
7 matter, you would win under that test --

8 MS. KARLAN: Sure.

9 JUSTICE BARRETT: -- because she had
10 the authority.

11 MS. KARLAN: Yeah. I think we win
12 under every test except under a strong version
13 of the Solicitor General's test because, under
14 that, because Facebook itself -- the Facebook
15 account itself was not owned by the government,
16 that's a hard test for us to win under.

17 Now we still do have our --

18 JUSTICE SOTOMAYOR: Well, but they've
19 given -- they've given that up because they're
20 talking about function really.

21 MS. KARLAN: Yeah.

22 JUSTICE SOTOMAYOR: Yeah.

23 MS. KARLAN: I'd kind of like to think
24 so.

25 JUSTICE SOTOMAYOR: Yeah. I mean,

1 they said, if you do notice-and -- and-comment,
2 whether you have other postings is irrelevant,
3 you're looking at the function of what's
4 happening, correct?

5 MS. KARLAN: Yeah.

6 JUSTICE SOTOMAYOR: So tell me how
7 your test doing your job differs from the
8 authority or duty test of the Sixth Circuit.

9 MS. KARLAN: Well --

10 JUSTICE SOTOMAYOR: What -- what --
11 what -- do you --

12 MS. KARLAN: Yes.

13 JUSTICE SOTOMAYOR: Okay.

14 MS. KARLAN: Yes. I think the Sixth
15 Circuit has a much narrower sense of what "duty"
16 means and what "authority" means than we would
17 say is encompassed in doing your job. As this
18 Court --

19 JUSTICE SOTOMAYOR: I -- I agree with
20 you on duty.

21 MS. KARLAN: Yes.

22 JUSTICE SOTOMAYOR: They require a
23 written law on duty.

24 MS. KARLAN: Yes.

25 JUSTICE SOTOMAYOR: And the government

1 has already conceded that you can't look just to
2 written law. So let's take Justice Barrett's
3 point that authority is doing most of the work
4 and authority has a meaning. So go ahead.

5 MS. KARLAN: So, as I read authority
6 in both the government's brief and the Sixth
7 Circuit, they're treating authority as you're
8 exercising some coercive control over a member
9 of the public.

10 I take authority to be something quite
11 different than that.

12 JUSTICE SOTOMAYOR: Give me a --

13 MS. KARLAN: So -- so the -- the --

14 JUSTICE SOTOMAYOR: You're going to
15 have to explain that better.

16 MS. KARLAN: Okay. So, if -- if I
17 understand the government's brief correctly,
18 what the government says is, well, of course,
19 even if you're using private property, if you're
20 using it to coerce somebody, so on your private
21 website you said to somebody: You're fired, and
22 that -- and -- and that has the force of law,
23 that would be state action because you're using
24 an authority that only you have.

25 JUSTICE SOTOMAYOR: All right. But --

1 MS. KARLAN: Right. I -- I as a --

2 JUSTICE SOTOMAYOR: -- but they --
3 they --

4 MS. KARLAN: -- private citizen do
5 not.

6 JUSTICE SOTOMAYOR: -- admit that
7 notice-and-comment would not be coercing
8 someone, so --

9 MS. KARLAN: No, but I -- I mean, I --
10 I -- I take it what they're talking about there
11 is a particular kind of authority. Now some of
12 the posts here are because of her authority as a
13 state actor. The modal post on the site, I
14 would say, the thing that is most common on the
15 site, is that she goes and visits a classroom
16 with the superintendent or with a -- a principal
17 during instructional time.

18 The only reason she can ask to do
19 that, the only reason she has the power to do
20 that, is because of her official capacity. No
21 person could do that. No -- no member of the
22 public could do that.

23 JUSTICE SOTOMAYOR: And, presumably,
24 that's not put on the official site, whatever
25 that might --

1 MS. KARLAN: The -- no, as far as --

2 JUSTICE SOTOMAYOR: It exists -- it
3 exists only on this site.

4 MS. KARLAN: As far as we know, the
5 only place you could go to find out about her
6 class --

7 JUSTICE SOTOMAYOR: So, basically,
8 your argument is that it facilitates.

9 MS. KARLAN: Yes.

10 JUSTICE SOTOMAYOR: Her government
11 authority facilitates her doing a government
12 function and permits her to video it and put --
13 put -- put it on the site?

14 MS. KARLAN: Yeah, I'm not sure how
15 many videos there are, but yes --

16 JUSTICE SOTOMAYOR: If you could
17 answer --

18 MS. KARLAN: -- she has reports of
19 them.

20 JUSTICE SOTOMAYOR: Okay.

21 JUSTICE KAGAN: Just if I could get
22 you to say that in one bit, if you said, you
23 know, the right way to think about duty and
24 authority if you want to use those words is
25 what?

1 MS. KARLAN: The right way to think
2 about duty is to look at the various -- various
3 sources of state law that tell you what
4 somebody's duty is. And here we've got the
5 California Constitution, the board bylaws --

6 JUSTICE KAGAN: Right, but stepping
7 back from your case, which --

8 MS. KARLAN: Okay.

9 JUSTICE KAGAN: -- you know, I know
10 you want to win your case and -- good.

11 MS. KARLAN: I do. I do.

12 JUSTICE KAGAN: But just stepping back
13 and saying what's -- is -- does the Sixth
14 Circuit have too narrow a view, I thought you
15 were saying yes.

16 MS. KARLAN: Yes.

17 JUSTICE KAGAN: How is that true? Why
18 is that true?

19 MS. KARLAN: Because the Sixth Circuit
20 says, unless there is an affirmative command
21 that obligates you to do the specific thing you
22 are doing in the specific form you are doing it,
23 you're not doing your duty.

24 And we think that duty has a much
25 broader conception. And I want to be clear --

1 JUSTICE KAGAN: Which is what?

2 MS. KARLAN: Which is you look to what
3 does state law tell you what to do, what does
4 history and tradition tell you what to do, what
5 do the bylaws of your organization tell to you
6 do? If there's a handbook, what does the
7 handbook tell you to do?

8 And those things can be optional.
9 They can be acting in your discretion. This
10 Court has repeatedly said in a number of
11 different contexts, going back to the MacDaniel
12 case in 1833, if you're talking about really
13 people with -- with important government jobs,
14 it's not all going to be written down.

15 JUSTICE GORSUCH: Counsel, I'm -- I
16 guess I'm --

17 MS. KARLAN: Yeah.

18 JUSTICE GORSUCH: -- I'm -- I'm a
19 little confused as to what's at stake here
20 because I hear you saying now it isn't a matter
21 of appearances and whether a reasonable person
22 might make a mistake, which was kind of the
23 Ninth Circuit's reasoning. It really does boil
24 down to duties and authorities.

25 And you -- you -- you're positing that

1 those duties and authorities include beyond
2 what's in a handbook and must take account of
3 custom. But I had understood the Solicitor
4 General to say exactly the same thing.

5 So are we coalescing around a test
6 that everybody more or less agrees on?

7 MS. KARLAN: Well, I want to be very
8 clear. I was talking about duties and
9 authorities in the context of Justice Barrett's
10 question. We think that the appearance and
11 function are also relevant to whether someone is
12 engaged in state action.

13 I took her question to be: If you
14 take the Sixth Circuit's verbiage --

15 JUSTICE GORSUCH: Yeah. My -- my --
16 my --

17 MS. KARLAN: -- do you win the case?

18 JUSTICE GORSUCH: I'm asking, you
19 know, what's wrong with something like that? Is
20 there a problem with it? I mean it seems like
21 --

22 MS. KARLAN: Well, I think --

23 JUSTICE GORSUCH: This discussion --

24 MS. KARLAN: Yes.

25 JUSTICE GORSUCH: -- does seem like

1 it's coalesced around an understanding of duties
2 and authorities, and there's some discussion
3 about how capacious that has to be. But,
4 really, the discussion seems to me like you and
5 the Solicitor General are on --

6 MS. KARLAN: Here -- here's the --

7 JUSTICE GORSUCH: -- all fours.

8 MS. KARLAN: Here's the one thing that
9 worries --

10 JUSTICE GORSUCH: What am I missing?

11 MS. KARLAN: Here's the one thing that
12 worries me there. And it goes back to this
13 Court's decision in Home Telephone & Telegraph
14 in 1912 but also involves Monroe against Pape,
15 which is lots of times people do things that
16 they're forbidden to do in the course of their
17 job and they are nonetheless acting under color
18 of law.

19 JUSTICE GORSUCH: Sure.

20 MS. KARLAN: Yeah. So --

21 JUSTICE GORSUCH: We're all sensitive
22 to --

23 MS. KARLAN: Yeah.

24 JUSTICE GORSUCH: -- Monroe versus
25 Pape and the Griffin case --

1 MS. KARLAN: Yeah.

2 JUSTICE GORSUCH: -- and all of that,
3 everybody is.

4 MS. KARLAN: Yeah.

5 JUSTICE GORSUCH: But, given that,
6 would -- do you see a problem with what we've
7 been articulating here and you have with Justice
8 Kagan as -- as to any of that?

9 MS. KARLAN: I have no problems with
10 the things I've said so far. I just think it's
11 more capacious than just -- that in trying to
12 figure out whether someone is acting as a state
13 actor, when you start with someone who's a
14 government official -- and I think it's really
15 important to remember that this Court has had in
16 its entire history, as far as I can tell, about
17 three or four cases where the question was
18 whether a government official was a state actor.
19 And in all of those cases except Polk County
20 against Dodson, which was the case about public
21 defenders, the Court said of course you're a --
22 you're a state actor if you're a government
23 official.

24 So I think the presumptions and the
25 rules of thumb and the like operate a little bit

1 differently here than they would operate in a
2 case that involved someone who was clearly just
3 a private actor and you're asking can you push
4 them over the line into being a state actor?

5 Here we start with somebody who looks
6 like a state actor, says e-mail me on my
7 government official account if you've got any
8 questions, says I -- this is the official page
9 of me, uses the photo and the like. I do think
10 all of that helps.

11 JUSTICE ALITO: Well, I --

12 JUSTICE BARRETT: But she had the --

13 JUSTICE ALITO: -- I understand you --
14 I understand you want to win your case, as you
15 said to Justice Kagan, but we have to be
16 concerned about -- about the test. Now, I
17 understand you to have said that you would
18 define duty to include custom, a
19 well-established custom.

20 And is it not a well-established
21 custom for any elected public official to inform
22 constituents about what he or she is doing? So
23 if that's how you understand "duty," then are
24 you not saying that anything that a -- an
25 elected public official, let's leave it at that,

1 tells constituents about what that person is
2 doing falls -- constitutes state action?

3 MS. KARLAN: I think the starting
4 point is yes, they could rebut that. For
5 example, talking -- you know, at Thanksgiving
6 dinner somebody says pass the gravy and you say:
7 And I also passed a bill last month. Yes, that
8 would be --

9 (Laughter.)

10 MS. KARLAN: -- that would be private;
11 whereas -- whereas when you set up -- and this
12 is what the -- this is what the Ninth Circuit
13 says on page 28a of the Pet. App., is the state
14 action here is maintaining an ongoing site for
15 the -- for the exchange of information.

16 JUSTICE ALITO: Well, I understand
17 that, but what I'm -- my -- my -- what I'm
18 getting from this is that you have taken the --
19 the Sixth Circuit's test and the Petitioners'
20 test and you have broadened it by defining
21 custom, by defining duty so broadly. And maybe
22 this is right. But you have made it into a very
23 broad test. A very inclusive test.

24 MS. KARLAN: I think if you want to
25 use the words that the Sixth Circuit used as

1 your guidance, you have to broaden, and our case
2 would clearly fall on the side of --

3 JUSTICE ALITO: All right. Well --

4 MS. KARLAN: -- a state action.

5 JUSTICE ALITO: -- let me go back to
6 -- to your wording --

7 MS. KARLAN: Yeah.

8 JUSTICE ALITO: -- and ask you to
9 finish this sentence for me.

10 MS. KARLAN: Yeah.

11 JUSTICE ALITO: A public official is
12 doing his or her job when?

13 MS. KARLAN: When, if you look at
14 state law and you look at the bylaws, they
15 presuppose that they will engage in precisely
16 the kind of action that you're challenging.

17 Well, I have two last points.

18 JUSTICE KAVANAUGH: If you're -- if
19 you're a -- the White House press secretary and
20 you have a dinner at your house and you invite
21 over certain members of the press and not other
22 members of the press, because part of what you
23 think makes you a good press secretary is to get
24 feedback and develop good relations with members
25 of the media, is that state action?

1 MS. KARLAN: Can I take that question
2 and -- and kind of flip it around and go
3 backwards into it? There would be no
4 constitutional claim by anybody, no meritorious
5 constitutional claim that they have a right to
6 come to your dinner.

7 JUSTICE KAVANAUGH: Someone who's
8 excluded on the basis of viewpoint, so you're
9 inviting friendly reporters or who you perceive
10 to be friendly reporters.

11 MS. KARLAN: I think --

12 JUSTICE KAVANAUGH: Or comment --
13 commentators?

14 MS. KARLAN: I -- I think that anybody
15 who looked at just a dinner, as opposed to you
16 don't allow people to show up at press briefings
17 altogether, I would be prepared to say that
18 there you are enough off duty and you are
19 clearly enough off duty because people --

20 JUSTICE KAVANAUGH: How about a
21 regular meeting, no -- no -- no food is served,
22 but a regular meeting off-site, so not at the
23 White House, with certain members of the press
24 and not others?

25 MS. KARLAN: I think the members of

1 the press put us in a somewhat different
2 position because already you're entitled to
3 limit that in a variety of ways. But if you had
4 a public meeting -- for example, in California,
5 a lot of our elected representatives have what
6 they call sidewalk office hours, and they'll sit
7 in the bank parking lot next to the farmers'
8 market and they'll talk to anybody and they'll
9 hand out stuff.

10 If they decided, simply because they
11 were sitting on the bank's parking -- bank's
12 parking lot instead of in their office, I'm not
13 talking to black people, I'm not talking to
14 Muslims, I'm not talking to evangelicals, yes,
15 they'd be engaged in state action and, yes, they
16 would be violating the Constitution.

17 JUSTICE KAVANAUGH: And a different
18 tack now. On the reposting question I was
19 asking your friends on the other side about, if
20 you're -- a government agency issues a notice
21 and you then repost it?

22 MS. KARLAN: Well -- well, our case is
23 not about particular posts at all --

24 JUSTICE KAVANAUGH: They just -- your
25 thoughts on that issue if you have any. If you

1 don't want to answer it --

2 MS. KARLAN: You know, I haven't --

3 JUSTICE KAVANAUGH: -- that's fine.

4 MS. KARLAN: I haven't given a lot of
5 thought to it because it's not relevant to our
6 case in particular, but I think --

7 JUSTICE KAVANAUGH: It's going to be
8 very relevant to the opinion -- well --

9 MS. KARLAN: Yes. And --

10 JUSTICE KAVANAUGH: -- how this is
11 interpreted.

12 MS. KARLAN: And so what I would say
13 is there, if what you're talking about is
14 whether a particular post is state action or
15 not, it may well be that simply reposting
16 something isn't itself state action such that
17 you could challenge your being -- your being --
18 your having your comments to that post deleted.

19 But if you were blocked altogether
20 from a website on which they have invited the
21 entire public to share across the public as well
22 as with you, what they think, then, yes, that
23 would be state action and it would be actionable
24 under the First Amendment.

25 JUSTICE BARRETT: Ms. Karlan, do I --

1 I just want to be sure that I'm clear about your
2 position. In your test, you're doing your job
3 test, so you agree it seems like that the Ninth
4 Circuit test of appearance and function is
5 enough, you wouldn't go with that?

6 MS. KARLAN: I think that the function
7 part of the Ninth Circuit's test, because they
8 quote this language that the district courts
9 findings made about this being a tool of
10 government is the appearance and function. When
11 they're talking about function, they're talking
12 about are these people doing their job as the
13 function of this is for them to do their job of
14 getting --

15 JUSTICE GORSUCH: How about the
16 appearance part?

17 MS. KARLAN: Well, the appearance is
18 really helpful in figuring out what is the
19 function.

20 JUSTICE GORSUCH: So the -- it boils
21 down to the function in your mind?

22 MS. KARLAN: Yes.

23 JUSTICE GORSUCH: Okay.

24 MS. KARLAN: Yes.

25 JUSTICE KAGAN: But the function is

1 sort of another word for duty in your sense,
2 like a duty is a responsibility, is a function.
3 They're all kind of tied up together?

4 MS. KARLAN: Yeah.

5 JUSTICE KAGAN: I mean, your -- your
6 duty is to do your job and that's your function.

7 MS. KARLAN: When you're doing your
8 job, you're doing the function of being a
9 Trustee of the Poway School District.

10 JUSTICE BARRETT: Which brings us back
11 to this is all a question of how broadly do we
12 define authority or duty?

13 MS. KARLAN: I think you have to
14 define it more broadly than Petitioners --

15 JUSTICE BARRETT: Oh no, I understand
16 that.

17 MS. KARLAN: Yes.

18 JUSTICE BARRETT: But I'm just saying
19 that -- that is the nub of the case as you see
20 it, the --

21 MS. KARLAN: Yes.

22 JUSTICE BARRETT: -- case totally
23 boils down to how you define it.

24 And I asked the other side a bunch of
25 questions about what work does duty do. It's

1 all an authority. I think you would say, if I
2 understand your position correctly, it's just
3 about authority, we're not really looking at
4 duties?

5 MS. KARLAN: No, we are looking at
6 duty. That's exactly what I'm trying to say is
7 duty -- are you performing the duty of your job
8 as a Trustee? If you are, then you are
9 presumptively a state actor. That's what the
10 Court's statements in West and Lugar turn --
11 turn to. So --

12 JUSTICE KAVANAUGH: You would say duty
13 is -- having conversations with citizens is
14 always part of your duties --

15 MS. KARLAN: Well, I -- I --

16 JUSTICE KAVANAUGH: -- or almost
17 always part of your duties, which converts every
18 conversation you have.

19 MS. KARLAN: No, I would say having
20 some mechanism by which you can interact with
21 your constituents is part of your duty -- is
22 part of your duty.

23 And the Board bylaws say this. They
24 say in bylaw 9010(a) the responsibility of Board
25 members in their role as community leaders is to

1 participate in public discourse and then they
2 say Board members have a responsibility to
3 identify personal viewpoints as such, and not as
4 the viewpoint of the Board.

5 And here what you have is both of the
6 Petitioners using "we" and "our" when they
7 talked about what the Board is doing and anybody
8 who looks at that is going to think: This is an
9 official website. It looks like an official
10 website. It performs all the functions of an
11 official website.

12 There's no disclaimer anywhere. She
13 has a separate campaign website. She uses her
14 government e-mail. All --

15 JUSTICE KAGAN: Now, suppose there's
16 an official website too and this, you know,
17 partly, largely, entirely duplicates it. So
18 this goes back to the question that Justice
19 Kavanaugh was asking.

20 How does that matter or does it
21 matter?

22 MS. KARLAN: I -- I don't think it
23 would matter if it was the website at issue
24 here. And I really do urge you to take a look
25 at ECF 3511, which has the entire feed from the

1 day she took office until the day of the summary
2 judgment motion.

3 And I defy anyone to look at that and
4 think this wasn't an official website. Indeed,
5 when she wants to give you her personal opinion,
6 she sends you a link to her campaign website.

7 JUSTICE KAGAN: And I take it that
8 this is the crucial difference between you and
9 the government, right, that they just say
10 Facebook says it's her private property?

11 MS. KARLAN: Yeah.

12 JUSTICE KAGAN: And so it's not an
13 official website by definition.

14 MS. KARLAN: Right.

15 JUSTICE KAGAN: And you're saying no.

16 MS. KARLAN: That's correct.

17 JUSTICE BARRETT: And I'm sorry to be
18 hung up on this duty question but what if the
19 bylaws or the state law doesn't say it's your
20 duty to communicate with constituents, give
21 announcements, et cetera, but he she decides,
22 hey, constituent communication would be a good
23 idea. This is the kind of like, well, the
24 governor decides to do this, or the President
25 decides to do this.

1 Is that not, even if it's not formally
2 in her job description, and even if she's the
3 first one to do it, so it's not custom, but we
4 would say she has the authority to decide to be
5 a mouthpiece for government.

6 Would you agree that that would be a
7 test?

8 MS. KARLAN: Yeah. I -- I -- I -- if
9 I can just say, it's a little complicated in our
10 case because the Board has specifically said she
11 doesn't have the authority to speak for the
12 Board and that's why she's supposed to have a
13 disclaimer.

14 But if you're talking about a
15 hypothetical of someone in another jurisdiction
16 where there's nothing that says anything either
17 way and she decides she has the authority, then
18 it would come down to a question of, as a matter
19 of state law, did she have that authority.
20 Because if she had that authority, then, yes,
21 she would be a state actor.

22 Now, most government workers, most
23 government employees do not have the authority
24 to speak for the government. And so it wouldn't
25 be part of their duty to run a personal website,

1 and so for most government officials, you know,
2 if you're -- if you're the janitor or the school
3 bus driver --

4 JUSTICE KAVANAUGH: Yeah, but that --
5 I mean, that's making it too easy. There are
6 vast number of government officials around the
7 country at the local town, city level, so I
8 don't think you can --

9 MS. KARLAN: Right, but I --

10 JUSTICE KAVANAUGH: -- minimize -- you
11 can minimize this by saying oh, it's not going
12 to affect certain categories.

13 MS. KARLAN: No --

14 JUSTICE KAVANAUGH: It's going to
15 affect a lot of people.

16 MS. KARLAN: But -- but at the very
17 least, the other -- you know, the other side
18 says here at the very least, you know, if the
19 state wants to tell you not to do this, they can
20 do that. And the answer here is the Poway
21 School District told her not to do this. Told
22 her not to have a website that looked as if she
23 was speaking officially.

24 And this website did exactly that.

25 JUSTICE KAVANAUGH: Just on the custom

1 question, to follow up on Justice Barrett, it's
2 usually I think, as you're describing it, going
3 to be part of the custom of most of these jobs
4 that are elected officials or appointed
5 officials who have some authority to communicate
6 with constituents.

7 MS. KARLAN: I don't think that that's
8 necessarily true at all.

9 JUSTICE KAVANAUGH: When wouldn't it
10 be true?

11 MS. KARLAN: It would be true for
12 elected officials. It would be true for some
13 government officials, but let me give you a
14 hypothetical that I think will illustrate this.

15 So if a public school teacher in Poway
16 had a website that was communicating with the
17 parents of children in her class, that would
18 clearly be state action. And I think that would
19 be true regardless of what she called the
20 website.

21 If she then also wanted to talk about
22 things like whether the Board should be elected
23 at large or by districts, which was a big issue
24 here, or she wanted to talk about whether the
25 schools were being mismanaged, which is

1 something that for a while there was a real
2 problem, that would be her speaking in her
3 personal capacity, because that wouldn't be
4 coming from her job and her duties as a -- as a
5 school teacher.

6 So just to kind of wrap up, I think --
7 JUSTICE KAGAN: Do you think -- this
8 is -- a little bit anticipates the next case.
9 If there were also some personal things on this
10 site, how far does that take you?

11 Can you dilute the site and turn it
12 into non-state action by putting up your kids'
13 pictures?

14 MS. KARLAN: I don't think one picture
15 of your children turns something into not a
16 state website. Here, I really do think if you
17 look at this website, you will find one picture
18 of her children on Christmas, one picture of her
19 children at some school-related event, one
20 picture of her grandfather at -- on Veterans
21 Day, and nothing else that is personal, that is
22 clearly personal as opposed to coming out of her
23 job.

24 You know, here's the thing to
25 understand. And this goes back to something

1 Justice Kagan said earlier, which is there are
2 First Amendment issues on both sides of this
3 case. And here the First Amendment provides a
4 tremendous backstop for members of school boards
5 and the like who want to regulate their sites.

6 There are rules about public forums,
7 there are rules about time, place and manner and
8 the like, and they have a lot of control over
9 what goes on on these web sites.

10 But if you decide the threshold state
11 action question against my clients here,
12 refusing to have -- to find state action would
13 have devastating consequences for the -- for the
14 public because they would be denied access to
15 the sites on which their officials are talking
16 to them and asking for their reactions.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas?

21 Justice Alito?

22 Justice Sotomayor?

23 JUSTICE SOTOMAYOR: In some ways,
24 you've complicated things.

25 MS. KARLAN: I'm sorry.

1 (Laughter.)

2 JUSTICE SOTOMAYOR: No, really.

3 Because what we're being asked to find is
4 whether the state was acting when these
5 government officials turned off these sites.

6 So we're being asked to hold the state
7 responsible for ultravirus activities because
8 these officials were told specifically you're
9 telling us now, don't do this and they did it
10 anyway.

11 MS. KARLAN: No, ma'am. Just as in --
12 and we talk about this in -- in the red brief,
13 in Monell, the Court said you can't hold the
14 government responsible, the municipal government
15 responsible unless the unconstitutional action
16 was pursuant to a policy.

17 But there was nonetheless a
18 constitutional tort there for which individual
19 government actors could be held responsible.

20 JUSTICE SOTOMAYOR: Okay, thank you.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?
22 Justice Gorsuch?

23 JUSTICE GORSUCH: No, thank you.

24 CHIEF JUSTICE ROBERTS: All right.

25 Justice Kavanaugh?

1 Justice Barrett?

2 Justice Jackson.

3 Thank you, counsel.

4 MS. KARLAN: All right. Thanks.

5 CHIEF JUSTICE ROBERTS: Rebuttal?

6 REBUTTAL ARGUMENT OF HASHIM M. MOOPPAN

7 ON BEHALF OF THE PETITIONERS

8 MR. MOOPPAN: Thank you, Your Honor.

9 So, first, on the appearance question,
10 I -- you know, I think my friend said appearance
11 is relevant in assessing whether there's duty or
12 authority but basically gave up the notion that
13 the Ninth Circuit adopted that you can use
14 appearance as a freestanding trump over duty and
15 duty. I think that concession is basically
16 right because otherwise -- the power to block
17 doesn't come from the appearance, and I think
18 she would have to concede my hypothetical where
19 the police officer runs down the street in his
20 uniform is not state action.

21 So then I think the action really does
22 come to how do we define duty and authority?
23 And I think the fundamental problem with
24 Ms. Karlan's submission is that she's defining
25 it too broadly. She's doing exactly what this

1 Court said in Kennedy, in Lane, you should not
2 do, because you have to recognize that
3 government officials have the right to speak in
4 their personal capacity about their jobs.

5 That's even true with -- about
6 information that they only learned because of
7 their jobs. Ms. Karlan emphasized several times
8 that my client spoke about stuff they learned in
9 the classroom. That's this Court's decision in
10 Lane. The square holding of Lane was that it
11 was individual speech, not citizen -- employee
12 speech, even though it was information learned
13 while in office.

14 And the flip side of that problem is
15 that if you treat this too broadly, the problem
16 that this Court recognized in both Kennedy and
17 Garcetti, and the Chief Justice adverted to
18 this, if you treat this as duty and authority
19 just because you're talking about your jobs,
20 that means it's controlled by the state. It
21 amounts to government speech, which means the
22 state itself could tell individuals what to say
23 on their pages.

24 And that's the harm with creating this
25 sort of you have to have a disclaimer rule. If

1 -- if individuals don't put up a disclaimer, all
2 of a sudden not only do they lose their right to
3 exclude people from their pages, they have now
4 opened themselves up to having the state itself
5 tell them what to say on their page, not as a
6 regulation, because I agree with the federal
7 government that the state has a lot of power to
8 regulate them as employees, but Ms. Karlan's
9 position means that they could regulate them as
10 such. They could tell them exactly what to do
11 or say on the page. And that would be a serious
12 First Amendment problem, and to say that the
13 First Amendment does all of that because they
14 didn't put up a disclaimer would, I think, turn
15 the First Amendment on its head.

16 Finally, a few points about the facts
17 of my case because I too would like to win for
18 my clients.

19 (Laughter.)

20 MR. MOOPPAN: So the -- the first
21 point I'll make is that if -- this is laid out
22 in our reply brief -- if you look through the
23 citations to the record, the only duty that my
24 clients had to interact with the public was at
25 their board meetings, which they complied with.

1 And no one was ever blocked from that.

2 Everything else is the same sort of
3 overbroad, "it's your duty to talk to people,"
4 that would cover a campaign rallies, talking to
5 your neighbors at church, the stuff that cannot
6 possibly be viewed as governmental unless you
7 swallow individuals' -- individual First
8 Amendment rights.

9 The last -- she suggested that the
10 page was somehow their duty. One of my clients
11 closed the page, just shut it down. No one
12 thinks he was acting in breach of his office, he
13 was in dereliction of duty.

14 Your Honor, I see my time is up.

15 CHIEF JUSTICE ROBERTS: Yes, thank
16 you, counsel.

17 The case is submitted.

18 (Whereupon, at 11:45 a.m., the case
19 was submitted.)

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