No. 22-324

In the Supreme Court of the United States

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

v.

CHRISTOPHER GARNIER AND KIMBERLY GARNIER,
Respondents.

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondents' brief in opposition fails to refute the circuit split. Respondents concede that the Ninth Circuit expressly disagreed with the Sixth Circuit's legal test for determining when public officials' use of personal social-media accounts constitutes state action. They nevertheless assert that the Sixth Circuit would have agreed with the Ninth Circuit's state-action finding on the facts here. Tellingly, the Ninth Circuit never said that. And the Sixth Circuit deemed irrelevant the primary fact Respondents emphasize. They fixate on the Board's generic responsibility to communicate with the public about the District's work. The Sixth Circuit, by contrast, held that the official must either possess a specific state-law duty to communicate with the public using the social-media account or wield state-law authority in operating the account. Respondents tacitly admit that neither element is satisfied here.

Respondents' opposition brief likewise fails to rehabilitate the Ninth Circuit's merits decision. Respondents ignore that government employees have both official *and personal* reasons to communicate with the public about their jobs. While such civic engagement may be part of doing their jobs well, it also furthers their independent interest as private citizens in speaking on matters of public concern—including as candidates for re-election trying to persuade their constituents that they have done their jobs well. The only way to disentangle whether such social-media activity is governmental rather than personal is to determine whether governmental resources are used or the government itself is responsible for the message. The Ninth Circuit's

refusal to draw that line abridges public officials' own individual liberties, by deploying the First Amendment to constrain rather than protect their private speech.

Respondents' opposition brief also fails to identify any vehicle problem. Respondents tacitly concede that the state-action question is squarely presented. Although they object that Petitioners have not sought review of the additional question whether they violated First Amendment standards, that is a feature, not a bug: this Court can cleanly resolve the threshold state-action issue on which the circuits have split. Indeed, Respondents' discussion of how to craft constitutional social-media editorial policies for governmental pages starkly illustrates the burden on Petitioners' speech imposed by the Ninth Circuit's state-action error.

In sum, certiorari should be granted in this case. And Petitioners respectfully request that the Court do so at its January 6, 2023 Conference. Prompt review is necessary to enable a decision reversing the judgment below this Term—and thereby end the ongoing irreparable harm that the lower courts have inflicted on Petitioners by abridging their right to communicate with their constituents without being spammed by Respondents.

ARGUMENT

I. RESPONDENTS FAIL TO REFUTE THE ACKNOWLEDGED CIRCUIT SPLIT

Respondents do not and cannot dispute that the Ninth Circuit expressly rejected the Sixth Circuit's legal test, and that the Sixth Circuit expressly rejected the legal test adopted by the Second, Fourth, and Eighth Circuits, and by the Ninth Circuit thereafter. Pet. 2-3, 12-18. Respondents thus are left to argue that the difference in legal tests articulated was immaterial, and that the Sixth and Ninth Circuits would reach the same result on the facts of each case. That argument mischaracterizes both courts' decisions.

A. Respondents implausibly contend that the Ninth and Sixth Circuits did not really mean it when each refused to apply the other's legal test. Respondents assert that the courts used "different verbal formulations" of the same standard, BIO 19, and that they at most disagreed "on a subsidiary point" about whether off-duty-police cases were "analogous," BIO 18. But the disagreement was far more fundamental, and the courts made that clear.

The Ninth Circuit acknowledged that, "'instead of examining a social media page's appearance or purpose,'" the Sixth Circuit "'focused on the actor's official duties and use of government resources ….'" Pet.App. 35a (quoting *Lindke v. Freed*, 37 F.4th 1199, 1206 (6th Cir. 2022)) (cleaned up). And the Ninth Circuit further acknowledged that the Sixth Circuit had affirmatively "'parted ways'" with the Second, Fourth, and Eighth Circuits. *Id.* (quoting *Lindke*, 37 F.4th at 1206) (cleaned up).

Rather than denying or minimizing any difference, the Ninth Circuit affirmatively admitted that the Sixth Circuit had adopted a "different analysis," and it candidly "decline[d] to follow the Sixth Circuit's reasoning," instead "follow[ing] the mode of analysis of the Second, Fourth, and Eighth Circuits." Pet.App. 35a-36a. Accordingly, the Ninth Circuit found state action because Petitioners "clothed their pages in the authority of their offices and used their pages to communicate about their official duties." Pet.App. 26a. It so held despite recognizing that Petitioners created their publicly accessible social-media accounts "to promote their political campaigns," Pet.App. 6a, and that using their accounts to communicate with their constituents was "not required by[] their official positions," Pet.App. 20a, or "fund[ed] or authoriz[ed]" by the District, Pet.App. 26a. So the Ninth Circuit did not and could not hold that the accounts "derive[d] from the duties of [Petitioners'] office[s]" or "depend[ed] on [their] state authority," as the Sixth Circuit requires. *Lindke*, 37 F.4th at 1204.

Indeed, the Ninth Circuit neither suggested that the Sixth Circuit would reach the same result on these facts nor distinguished *Lindke* on its facts. These omissions are conspicuous because the panel expressly denied a conflict with *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021). The panel asserted that *Campbell*'s "general approach is in accord with ours," despite questioning whether "it was correctly decided on its facts." Pet.App. 34a n.11. If Judge Berzon had believed that no circuit conflict existed because her opinion could be reconciled with Judge Thapar's opinion in *Lindke*, she would have said so. *See, e.g.*,

United States v. Franklin, 904 F.3d 793, 802-03 (9th Cir. 2018); *Paeste v. Gov't of Guam*, 798 F.3d 1228, 1234 (9th Cir. 2015). The opinion's silence on that score speaks volumes.

B. Respondents fall well short of showing that "[t]he Sixth Circuit would agree with the Ninth Circuit that [Petitioners] here were acting under color of law." BIO 12. Unlike Judge Berzon, Respondents misconstrue *Lindke*.

Respondents' principal claim is that Petitioners' social-media activity would satisfy the Sixth Circuit's "duty" test because the Board's bylaws exhort Trustees to "'ensure that the [D]istrict is responsive' and 'involve[] the community' in decision-making." BIO 13; *cf.* BIO 2, 15 (citing a state statute giving the Board the authority, not the duty, to "'[i]nform … the citizens of the district'"). The Sixth Circuit, however, expressly *refused* to find state action based on the analogous acknowledgment of the City Manager that "'regular communication … is essential to good government.'" *Lindke*, 37 F.4th at 1205. Instead, the Sixth Circuit's "duty" test focused more narrowly on whether "state law requires an officeholder *to maintain a social-media account*." *Id.* at 1203 (emphasis added). There, "no state law, ordinance, or regulation compelled [the City Manager] to operate his Facebook page" or "task[ed] [him] with social-media activity." *Id.* at 1204-05. So too here, the Ninth Circuit admitted that Petitioners' "use of their social media accounts was … not required by[] their official positions." Pet.App. 20a; *see* Pet. 8 (District played no role in pages' operation).

The evidence Respondents invoke to demonstrate Petitioners' "duty" confirms that it "proves too much" in the Sixth Circuit's view. *Lindke*, 37 F.4th at 1205. Respondents stress that Petitioners "testified that receiving feedback from constituents is an important part of their governmental duties." BIO 13. But that is *always* true for public officials, whether or not codified in law or policy. That truism "can't render *every* communication state action." *Lindke*, 37 F.4th at 1205. Instead, Petitioners communicate with the public *in a governmental capacity* when they interact with citizens through Board meetings and other official channels of communication, Pet.App. 61a, not when they use personal social-media accounts that they created and maintained without any direction, funding, support, or other involvement by the District, *Lindke*, 37 F.4th at 1205.

Respondents retreat to the contention that the Sixth Circuit would deem Petitioners to be exercising "an apparent duty" given their pages' "official" indicia. BIO 15 (cleaned up). But that court used "apparent duty" to cover situations where an official acts (rightly or wrongly) as if "operating the account is within her job duties," which can be evidenced, for example, by "her use of state funds." *Lindke*, 37 F.4th at 1204. Here, by contrast, Petitioners have operated their accounts as personal campaign pages, not governmental pages. Pet. 30-32. As the Eighth Circuit recognized, "[t]he Twitter page of a political candidate does not convert itself into an official page just because the candidate chooses a handle that reflects the office she is pursuing." *Campbell*, 983 F.3d at 827. Likewise, the term "official page" on a public figure's social-media account designates

authenticity, not governmental status: the rapper T-Bone, for example, does not speak for any government. *See* @tboneoficial_, twitter.com/tboneoficial_ (last visited Dec. 19, 2022).

The Ninth Circuit itself did not claim that Petitioners acted as if they believed they had an "apparent duty" to operate their pages even apart from their personal political interests; it instead held that the pages' appearance and content conveyed apparent *authority* to the public. *See* Pet.App. 26a. The Sixth Circuit, however, correctly rejected that conclusion, recognizing that "posts do not carry the force of law simply because the page says it belongs to a person who's a public official." *Lindke*, 37 F.4th at 1206; *see* Pet. 28-30.

Respondents nevertheless argue that the Sixth Circuit's "authority" test is also satisfied because Petitioners were informing the public about the Board's work, including by sharing "information that they likely obtained before the general public by virtue of their positions on the Board." BIO 15. But the City Manager in *Lindke* likewise posted about "administrative directives," and the Sixth Circuit's state-action denial did not rest on any finding that those policies had already been officially disclosed. 37 F.4th at 1201, 1205. Instead, the court equated use of state authority with "use of government resources or state employees." *Id.* at 1206. Again, the Ninth Circuit conceded that nothing of the sort occurred here. Pet.App. 26a; *accord* Pet. 8.

C. Finally, Respondents fare no better in claiming that "the Ninth Circuit would agree with the Sixth Circuit that there was no state action in *Lindke*."

BIO 16. The panel below never said that, and it plainly disagreed with *Lindke* not just in reasoning but in result.

Respondents assert that *Lindke*'s facts would not satisfy the Ninth Circuit's "appearance" test because the City Manager "had only one page," primarily used it for "entirely personal" posts, and did not "request feedback" from constituents. BIO 16-17. None of this, however, negates that the City Manager's page still "reflect[ed] his [official] title," provided official "contact information," and posted about official "directives" and "policies." *Lindke*, 37 F.4th at 1201. Such "official identifications" and "regular[] post[s]" about "the work of the [government]" are the same features of "appearance and content" that led the Ninth Circuit to treat Petitioners' accounts as "official channels of communication." Pet.App. 23a.

Respondents also insist that *Lindke*'s facts would not satisfy the Ninth Circuit's "purpose" test because the City Manager did not "intend[]" his page to be an "official" governmental page. BIO 17. But neither did Petitioners, as the Ninth Circuit never disputed that they *intended* their pages to promote their political campaigns for re-election. Pet.App. 26a. The Ninth Circuit deemed that intent irrelevant, however, because their posts nevertheless "concerned official District business or promoted the District generally." *Id.* The same conclusion would follow for the City Manager's posts, which publicized "administrative directives he issued" and "policies he initiated." *Lindke*, 37 F.4th at 1201. Indeed, the Ninth Circuit strongly suggested that even the campaign page in *Campbell* was "a tool of

governance," *see* Pet.App. 34a & n.11, making it clearer still that the Ninth Circuit would also apply that label to the City Manager's page in *Lindke*.

In all events, even assuming the Ninth Circuit would not have found state action in *Lindke*, there is still a circuit split because the Sixth Circuit would not have found state action here. *See supra* at Part I.B. So if anything, Respondents' argument is a reason why this case is a *better vehicle* than *Lindke* to resolve the split.

Petitioners thus respectfully submit that, rather than awaiting a petition in *Lindke*, the Court should promptly consider this petition at its January 6, 2023 Conference. Deferring review would delay a decision until next Term, substantially extending the period that the erroneous state-action holding below will "restrict[] individual liberty" by constraining rather than protecting Petitioners' communications with the public. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1934 (2019). Given that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), the Court should grant certiorari now—the circuit split is undeniable, and there is no vehicle problem with this case, as we demonstrate next.

II. RESPONDENTS FAIL TO IDENTIFY ANY VEHICLE PROBLEM

Respondents do not and cannot dispute that the question presented was squarely pressed and passed upon below, was resolved on undisputed facts, and will be legally dispositive here. Pet. 34. Given all that, their few vehicle objections are makeweights.

Respondents principally criticize this vehicle because the "narrow Question Presented" covers only the "state-action doctrine," not the "substantive First Amendment law" addressing access to governmental social-media accounts. BIO 22-23. That objection is backwards. The circuit split involves the threshold state-action question, not application of well-established public-forum doctrine to pages properly treated as governmental.

Moreover, although Respondents emphasize that governments retain some "tools" to constitutionally "exercise editorial control over their social media pages," BIO 23, the limited options underscore why officials' *personal* accounts for engaging with the public should stay free from the First Amendment's restrictions. For example, Respondents highlight that governments can avoid "harassment, trolling[,] and hate speech" on their Facebook pages by preventing the entire public from responding with anything besides non-verbal reactions. *Id.* But that is a Hobson's choice for "citizen[s] who work[] for the government" and seek to use their personal accounts to "speak[] as citizens about matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). Nor can officials bar such abuse through "clear rules of etiquette" under reasonable "time, place, and manner" rules, BIO 23-24, because *content-based* restrictions do not qualify, *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). Respondents' purported solutions instead illustrate the problem created by invading the "robust sphere of individual liberty" protected by state-action doctrine. *Halleck*, 139 S. Ct. at 1934.

Respondents similarly err in asserting that Petitioners "have very little at stake." BIO 21. Although the decision below does not reach Petitioners' private social-media profiles restricted to family and friends, BIO 22, Petitioners are elected politicians seeking to regain their own First Amendment right to communicate with constituents using publicly accessible social-media accounts that they personally operate without any governmental involvement, Pet.App. 26a. The decision below requires such officials to either (1) expose themselves to online abuse, (2) impose blunderbuss restrictions on online comments, or (3) censor their own online speech. Pet. 25-26, 28-29, 31-32. Before the district court entered judgment, Petitioners chose the second option for Facebook by applying "word filters that essentially prevent everyone … from commenting on their posts." BIO 21. But as the Ninth Circuit held, a vital controversy persists, because reversing the judgment would enable Petitioners to resume blocking abusive commenters like Respondents while communicating freely with the rest of the public (and also because such filters are unavailable on Twitter). Pet.App. 16a-18a.

III. RESPONDENTS FAIL TO REHABILITATE THE NINTH CIRCUIT'S ERRONEOUS DECISION

Respondents' defense of the decision below reprises the flaws permeating their opposition brief. They contend that, because it is part of Petitioners' jobs to "interact[] with their constituents," it is immaterial that the District "neither required, nor controlled, nor facilitated [Petitioners'] social media accounts." BIO 26. Critically, however, Respondents beg the question by insisting that Petitioners were

"doing their jobs" when operating the social-media pages. *Id.* "[P]rovid[ing] a forum for speech" about the Board's work is "not a traditional, exclusive public function." *Halleck*, 139 S. Ct. at 1930. Public officials also have a private interest in "speaking as citizens" to provide "well-informed views" as part of "civic discussion." *Garcetti*, 547 U.S. at 419. Candidates for re-election have an additional private interest in "position[ing] [themselves] for more electoral success." *Campbell*, 986 F.3d at 826. Such non-governmental interests fall within "the ambit of … personal pursuits." *Screws v. United States*, 325 U.S. 91, 111 (1945) (plurality op.). And Respondents disregard that these are the very "motivation[s]" behind Petitioners' pages. *Compare* BIO 31, *with supra* at 6-7.

In short, "public officials aren't just public officials—they're individual citizens, too." *Lindke*, 37 F.4th at 1203. The only way to disentangle whether an official "operated his Facebook page in his personal capacity" rather than "his official capacity" is to determine whether the page "derives from the duties of his office" or "depends on his state authority"—*i.e.*, whether the government "compelled [him] to operate [the] page" or he used "government funds" or "government employees to maintain [it]." *Id.* at 1204-05. Otherwise, the official's social-media activity cannot "be fairly treated as that of the State itself." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001).

Accordingly, Respondents go astray in repeatedly invoking cases involving *assertions of police power*. *Compare* BIO 27, 29, 31, *with supra* at 7. And their suggestion that "elected official[s]" act under color of

law when merely placing "individual phone calls to each constituent" is self-refuting. BIO 26. Likewise, although they profess ignorance about how a public official could operate a "townhall discussion" about his administration in a personal capacity, BIO 32, they ignore that the official could employ solely his own personal resources (including property and employees), to further his own interests as an electoral candidate and concerned citizen, Pet. 24-25. Respondents thus fail "[t]o draw the line between governmental and private" for the acts of individuals who are public officials. *Halleck*, 139 S. Ct. at 1926.

CONCLUSION

The certiorari petition should be granted.

December 20, 2022

Respectfully submitted,

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