

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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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 operation

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

9 But that type of reasonable observer
10 inquiry is incapable of consistent application.
11 It is also fundamentally misguided because the
12 official's power to block does not invoke the
13 pages' 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 could 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
13 the 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 the school board's site and it's not on
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 -- is this
16 a 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 in other words, you go through the whole
4 analysis 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's
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 the -- why that follows from our
6 test is 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 -- it defines "duty" as something

1 stated 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. So we don't
13 dispute that point, and I don't think the Sixth
14 Circuit does either. But the critical point in
15 your --

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

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

20 JUSTICE SOTOMAYOR: Okay. That --

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

1 city administrator to do what on this page
2 because it's their personal property.

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

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

10 (Laughter.)

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

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

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

25 Under this Court's decision in Lane,

1 even though they're government officials, they
2 have the right to speak about the government in
3 their individual capacity.

4 JUSTICE SOTOMAYOR: Let me give you a
5 --

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

11 MR. MOOPPAN: That shouldn't matter,
12 and I'll give you two reasons why it shouldn't.

13 So the first, the conceptual reason,
14 is because the challenge here is they're
15 challenging blocking. And my clients' power to
16 block doesn't turn on the appearance.

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

23 Everyone on the street probably
24 assumes you're still doing your job and in hot
25 pursuit of a felon, but that's not state action.

1 You're acting in a purely personal capacity, and
2 your power to push someone out of the way
3 doesn't turn on your uniform.

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

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

19 MR. MOOPPAN: So --

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

1 town thinks the town manager is doing the right
2 thing?

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

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

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

23 JUSTICE JACKSON: But why would they
24 --

25 JUSTICE KAGAN: So that means

1 President Trump's Twitter account was also
2 personal?

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

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

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

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

21 Even when he wasn't, I mean, I -- I
22 don't think a citizen would be able to really
23 understand the Trump presidency, if you will,
24 without any access to all the things that the
25 President said on that account. It was an

1 important part of how he wielded his authority.
2 And to cut -- cut a citizen off from that is to
3 cut a citizen off from part of the way that
4 government works.

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

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

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

25 MR. MOOPPAN: So here's why I don't

1 think that's quite right, Your Honor. Imagine
2 he had put on his page a clear disclaimer, this
3 is my page that I'm using in my personal
4 capacity to talk about the government. This is
5 not an official page. Every single word on that
6 Twitter account could have been the same because
7 he's allowed --

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

20 MR. MOOPPAN: So I'll give you two
21 reasons, one conceptual and one practical.

22 The conceptual reason is because the
23 First Amendment generally doesn't compel speech.
24 It generally protects against compelled speech.

25 JUSTICE JACKSON: Yeah, but you -- you

1 can't have it both ways. I mean, you know, to
2 the extent that we know and we agree with you
3 that the person can operate in one or the other,
4 I don't understand why it would necessarily be a
5 compulsion to have them do so clearly.

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

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

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

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

24 Let me also give you a practical
25 reason why this is the right way to think about

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

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

17 JUSTICE KAGAN: Well, there -- there
18 --

19 JUSTICE BARRETT: Mr. Mooppan --

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

1 enabling citizens to access the important parts
2 of their -- of their government.

3 MR. MOOPPAN: Right. But --

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas?

1 Justice Alito?

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

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

9 JUSTICE ALITO: So it's the forum, so
10 to speak?

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

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

19 MR. MOOPPAN: Sure.

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

23 MR. MOOPPAN: Right. But they don't
24 have any First Amendment interest in accessing
25 private property. That's this Court's decision

1 in Halleck. And since this is a private
2 account, there is no question that this is not
3 owned by the government or controlled by the
4 government, and it's entirely in my clients'
5 plenary power whether to open it up to the
6 public.

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

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

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

9 CHIEF JUSTICE ROBERTS: Justice
10 Sotomayor?

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

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

24 So, if it's a personal account, then
25 you have to figure out whether it's being

1 used -- and I think you said that --
2 facilitated, being used for government business.
3 That was the government's example of, if a
4 private account starts doing notice-and-comment
5 on legislation, that process is governmental,
6 isn't it?

7 MR. MOOPPAN: Yes, Your Honor.

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

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

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

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

1 MR. MOOPPAN: Well, imagine --

2 JUSTICE SOTOMAYOR: He could exclude
3 Muslims, Jews, whoever he wanted to exclude,
4 blacks, whatever, women, because it -- that's a
5 social account?

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

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

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

1 JUSTICE SOTOMAYOR: Not every private
2 individual has the ability to put the mechanisms
3 of government into effect.

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

7 JUSTICE SOTOMAYOR: Well, the --

8 MR. MOOPPAN: My only point is that
9 the front-end --

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

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

23 The way to figure out whether they're
24 doing their job is to figure out whether they're
25 using government resources, whether the

1 government can control what they're doing,
2 whether they're doing something that only the
3 government can do. None of that is true here.

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

13 JUSTICE SOTOMAYOR: Well --

14 CHIEF JUSTICE ROBERTS: Just --

15 JUSTICE SOTOMAYOR: -- I don't know
16 why they had personal accounts too then.

17 MR. MOOPPAN: That's to --

18 JUSTICE SOTOMAYOR: If it was a
19 personal account, they could have done both
20 things on it.

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

1 isn't their campaign page --

2 JUSTICE SOTOMAYOR: But they don't say
3 it's their campaign page.

4 MR. MOOPPAN: Well, the user --

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

7 MR. MOOPPAN: So I'll say two things
8 about that, Your Honor.

9 First of all, since the user names of
10 the pages, Moore for PUSD and Zane for School
11 Board, are both campaign slogans, that's a
12 pretty good indicia that it is a campaign page.

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

20 JUSTICE SOTOMAYOR: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?

22 JUSTICE KAGAN: So I guess just to
23 press on this a little bit and going back to
24 Justice Thomas's original question so I can make
25 sure I understand the answer to it, there's a

1 person and they become a school board member,
2 and they set up a private account, so they're
3 not using a preexisting account. They set up a
4 private account.

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

11 And there's also some commentary, you
12 know, the board would like to know what you
13 think about this, I would like to know what you
14 think about this, so please come to the meeting,
15 and, indeed, please give your comments to me on
16 this page about what you think of Agenda Number
17 3 -- Agenda Item Number 3 at our next meeting.

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

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

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

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

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

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

15 JUSTICE KAGAN: They are the state.

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

1 the next case, where it's the city administrator
2 who has a boss. He's got a mayor.

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

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

14 JUSTICE KAGAN: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

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

23 You've now had time to stew on this
24 case for a number of months and think about it.
25 What's your best advice for us on your side of

1 the v, what test you'd propose?

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

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

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

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

1 MR. MOOPPAN: So, in Griffin, the
2 officer was exercising the authorities of his
3 office. He was a deputy sheriff. He was
4 wearing a badge. And he arrested someone as the
5 deputy sheriff.

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

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

10 JUSTICE GORSUCH: -- in your -- in
11 your scheme?

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

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

24 JUSTICE GORSUCH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

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

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

15 Is that state action?

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

21 JUSTICE KAVANAUGH: Okay.

22 MR. MOOPPAN: And if you're --

23 JUSTICE KAVANAUGH: So that's very
24 important. I'm going to stop you there because,
25 you -- when you described how to implement the

1 test in response to Justice Gorsuch, you said
2 resources, supervision, exclusive duties.

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

7 MR. MOOPPAN: Not in and of itself.

8 JUSTICE KAVANAUGH: Okay. Well, we've
9 got to --

10 MR. MOOPPAN: Because --

11 JUSTICE KAVANAUGH: You -- you said --

12 MR. MOOPPAN: Right.

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

16 MR. MOOPPAN: I agree with that.

17 JUSTICE KAVANAUGH: So --

18 MR. MOOPPAN: So what I --

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

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

1 JUSTICE KAVANAUGH: Okay. So
2 announcing -- can't park on the even-numbered
3 side of the street during snowstorms, that's the
4 same?

5 MR. MOOPPAN: Yeah, but --

6 JUSTICE KAVANAUGH: State action?

7 MR. MOOPPAN: -- but, importantly, the
8 -- the start of your question --

9 JUSTICE KAVANAUGH: If it's only -- if
10 it's only --

11 MR. MOOPPAN: Right.

12 JUSTICE KAVANAUGH: Yeah. No, I'm
13 assuming --

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

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

20 MR. MOOPPAN: I agree. I agree.

21 JUSTICE KAVANAUGH: -- on the
22 announcing of rules, okay.

23 MR. MOOPPAN: Yeah.

24 JUSTICE KAVANAUGH: What about
25 notices, announcing notices? Okay, it's

1 snowing, schools are closed tomorrow, and it's
2 only on the personal site.

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

4 JUSTICE KAVANAUGH: That's not a rule,
5 but it's a notice.

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

10 JUSTICE KAVANAUGH: I know. I --

11 MR. MOOPPAN: -- and those sort of
12 things --

13 JUSTICE KAVANAUGH: That's not good
14 enough for the local officials who need
15 guidance.

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

23 And that might be, if it's a rule or
24 if -- you can have a lot of different things, I
25 just don't want to go so far as to say that

1 anytime a government official tells the public
2 anything, that is state action, because that's
3 too far, because there are lots of things that
4 the government official could be telling the
5 public purely in his personal capacity.

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

20 JUSTICE KAVANAUGH: Your personal --

21 MR. MOOPPAN: If I could say one last
22 thing?

23 JUSTICE KAVANAUGH: -- personal
24 account you meant?

25 MR. MOOPPAN: Sorry, personal account.

1 JUSTICE KAVANAUGH: Yeah, yeah.

2 MR. MOOPPAN: One way of knowing that
3 is, in those hypotheticals, almost certainly
4 your boss could tell you what to do in there,
5 right? If --

6 JUSTICE KAVANAUGH: Well, you are the
7 boss to get back to the -- I think Justice
8 Kagan's point.

9 MR. MOOPPAN: So, in -- on these -- in
10 this case, yes. Not in the next case. In the
11 next case, the mayor is the boss.

12 JUSTICE KAVANAUGH: And last -- last
13 one. Just reminders, a reminder about there
14 have been a lot of thefts and burglaries in
15 the -- in the neighborhood. Lock your cars. If
16 you're going away for a few days --

17 MR. MOOPPAN: Right. See --

18 JUSTICE KAVANAUGH: -- tell the
19 police.

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

21 JUSTICE KAVANAUGH: And it's only on
22 the personal site.

23 MR. MOOPPAN: Right. That's the line
24 I was trying to -- that sort of speech is
25 something you could do, any private citizen can

1 do it, and government officials don't have any
2 duty to do that.

3 They could do that in their official
4 capacity. So, for that sort of speech, you're
5 going to need something more. You're going to
6 need to see that they're either, like, using
7 staffers to prepare it or their bosses are
8 telling them to do it, but the speech by itself
9 isn't going to be enough for something like
10 that.

11 JUSTICE KAVANAUGH: So I think you've
12 distinguished announcing rules if it's only on
13 the personal site from notices of government
14 information, and that's kind of fuzzy. And
15 reminders would not be. Is that --

16 MR. MOOPPAN: I think that's right,
17 Your Honor. I -- look, again, to take --

18 JUSTICE KAVANAUGH: That's the kind of
19 practical information that people are going to
20 need, I think.

21 MR. MOOPPAN: I hope so if this Court
22 adopts the -- the right test of duties and
23 authorities.

24 JUSTICE KAVANAUGH: All right. Thank
25 you.

1 (Laughter.)

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett?

4 JUSTICE BARRETT: So, Mr. Mooppan,
5 when you were having this colloquy with Justice
6 Kavanaugh, you all were talking post by post.
7 The Chief Justice asked you at the start, are we
8 looking at this as whose account is it or are we
9 looking at specific actions. It kind of sounded
10 to me when you were talking to Justice Kavanaugh
11 that your position, which I kind of understood
12 your initial position to be no, we're -- we're
13 looking at the account, but which is it?

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

23 The reason why I think it's important
24 to think about this at the account level is
25 there's a lot of speech that might be -- speech

1 that might be viewed as official but isn't an
2 official duty to provide information to people
3 in, like, the hypotheticals Justice Kavanaugh
4 was asking me.

5 And I -- so a way of differentiating
6 the two, announcing, for example, that I'm going
7 to sign a bill, announcing I'm going to appoint
8 a judge, those sort of things are things you
9 could do in a -- even if you view those as
10 official in some sense, that doesn't mean that
11 you're using the property where you make that
12 speech in an official capacity. You can engage
13 in that type of speech at a campaign rally, at a
14 church, in your backyard, and --

15 JUSTICE BARRETT: So we are kind of
16 looking post by post, I think?

17 MR. MOOPPAN: If you're talking about
18 exclusive duties, I agree with you.

19 JUSTICE BARRETT: Okay. And -- and I
20 have a question about this word "duty." So what
21 is the point of talking about both duty and
22 authority? Because it seems to me that duty,
23 and this kind of runs throughout the brief,
24 sometimes it's described as obligations.

25 You described it just now as an

1 exclusive government duty, a requirement, that
2 appears sometimes in the briefs, but sometimes
3 there are things you have the authority to do as
4 a government official that you're not required
5 or obligated to do.

6 So it seems to me that if you have the
7 authority to do them, something that you have a
8 duty to do is just a subset of authority.

9 So why are we talking about duty?

10 MR. MOOPPAN: So, look, I think -- I
11 think you're right that duties and authorities
12 sometimes are flip sides of the same coin in
13 general and that you can have exercises of
14 authority that are permissive but not required.
15 So I agree with all of that.

16 I think authority does add something
17 beyond duty. I think what it's helpful most for
18 is things like the use of staffing, the use of
19 resources, things like that that don't really
20 directly go to the question of is it duty or --
21 but it is the wielding of authority.

22 Now that sort of thing is relevant for
23 two reasons. One, it's good evidence that
24 you're wielding a duty or authority if you're
25 using government resources or staffing. And,

1 two, it's possible that at least in some cases
2 the mere use of those resources alone could be
3 state action.

4 JUSTICE BARRETT: See, I mean, I
5 guess, I just think using the word "authority"
6 -- I mean, I get in the -- in the Sixth Circuit
7 case that's what the opinion seems to be --
8 that's -- that's the -- I don't know -- that's
9 the value of authority, I think, in the Sixth
10 Circuit opinion, but it just seems to me like a
11 weird way to describe it.

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

17 MR. MOOPPAN: I don't think you're
18 losing a lot. I think you could frame it either
19 way. As I said, I think they are flip sides of
20 the same coin.

21 JUSTICE BARRETT: Okay. You were
22 talking a lot about property, which is the
23 government's focus. So you've articulated the
24 test. As Justice Gorsuch said, we have lots of
25 articulations on offer on your side of the v.

1 What is the difference, what's the
2 daylight between the government's position and
3 your position, you know, their focus on is this
4 private property that the public official is
5 inviting you onto, you know, the test that they
6 propose, versus the authority, duty, control
7 test that you do?

8 MR. MOOPPAN: So I don't actually
9 think there's any daylight between our
10 positions, though you can ask my friend. I --
11 they've obviously emphasized property as sort of
12 this initial gating mechanism --

13 JUSTICE BARRETT: Uh-huh.

14 MR. MOOPPAN: -- whereas we view the
15 fact that it's private property as quite
16 relevant to determining are you exercising
17 duties or authorities of your office.

18 But, at the end of the day, I think
19 the cases all sort of cash out the same way.
20 Whether you apply our framework or theirs, you
21 essentially end up in a spot where, if you're
22 using a private account and you're not
23 exercising an exclusive governmental function
24 and you're not using government resource and the
25 government can't control it, then you're -- you

1 should understand that to be exercise -- acting
2 in your personal capacity because personal --
3 people have the right as government officials to
4 talk about their jobs in their personal
5 capacity, and you should assume that when they
6 do that on their own personal property, they're
7 acting in their personal capacity.

8 JUSTICE BARRETT: Okay, last question.
9 At the beginning of your argument, you referred
10 to unless someone is choosing to use their
11 Facebook account, Twitter account, whatever, in
12 their official capacity. And Justice Kagan's
13 questions were getting to some of this.

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

23 (Laughter.)

24 JUSTICE BARRETT: And -- and that
25 wouldn't be okay. But if, you know, the -- that

1 wouldn't be okay.

2 (Laughter.)

3 JUSTICE BARRETT: If, you know,
4 Governor Newsom decides to do it, he has the
5 authority to define the scope of his authority.
6 I would have thought in your clients' context
7 they don't actually have full-ranging authority
8 just as board members, right, unless the board
9 said, we've taken a vote and you are the one
10 who's our communications person, you are the
11 point person on communications. Then you would
12 look at a source of authority, but if in that
13 context -- I mean, I guess it just kind of
14 depends official by official.

15 I -- I guess I'm not understanding in
16 your specific, for your client, why there would
17 be an argument even. It seemed like you were
18 conceding a little bit in talking to Justice
19 Kavanaugh about official announcements and that
20 sort of thing. Would that be true for your
21 clients?

22 MR. MOOPPAN: Look, I -- yes, I think,
23 if my clients -- you know, if -- if, for
24 example, there was a slush fund at the board to,
25 you know, use money for doing your job and my

1 clients used that money to, like, buy a Facebook
2 account or use advertising on Facebook, I -- I
3 -- I don't think my clients would be acting in
4 an ultra vires fashion, and I think that that
5 would be exercising state action.

6 Now I do agree with you, Your Honor,
7 that on the control piece of using control as
8 evidence of whether it's governmental or not, it
9 becomes harder the higher up you go in the chain
10 because it's harder to identify a superior who
11 can tell you what to do.

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

21 And they certainly could not do that
22 for this sort of page, for a page that he owned
23 before he was the Governor, that he will own
24 after he's the Governor, and that he uses only
25 to say things that, under Lane, he has a First

1 Amendment right to say in his individual
2 capacity.

3 JUSTICE BARRETT: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: So I guess I'm still
7 not clear why the onus isn't on the government
8 official to be clear about the capacity in which
9 they're operating. I mean, I take your point
10 that you can have an individual who's a public
11 official and they can operate in both worlds,
12 official and also personal.

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

22 So it doesn't seem responsive to me at
23 least for you to say: Well, they have a First
24 Amendment right, so they have -- they bear no
25 responsibility in making clear as to when they

1 are operating personally versus officially. So
2 can you just say more about that?

3 MR. MOOPPAN: Sure. I'll -- I'll try.
4 I'll -- I'll say three things.

5 So the first is, again, the conduct
6 that they're objecting to is the blocking.

7 JUSTICE JACKSON: Right.

8 MR. MOOPPAN: They are -- this is not
9 a case where they're complaining because they
10 were confused, that they thought it was
11 official, and if they had known it was official,
12 something else would have happened. Everything
13 in this case would have been exactly the same if
14 that page was plastered with disclaimers.

15 JUSTICE JACKSON: Yeah, but -- but --

16 MR. MOOPPAN: So --

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

24 So what's happening is they're being
25 blocked from either commenting or seeing the

1 information that's being posted on this
2 particular page. And when the official says,
3 but that particular page is my private page and
4 I'm operating in a private capacity, then I
5 suppose we have one set of answers. But, if we
6 believe that that page is actually operating as
7 the official government page and the person is
8 being blocked, we might have a different set of
9 answers.

10 So the question is, with respect to
11 the blocking, is it happening in a personal or
12 an official capacity, and why wouldn't it be the
13 -- the public official's responsibility to say,
14 if you're on this page and you're either seeing
15 or not seeing things, understand this is a
16 personal repository of information?

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

24 JUSTICE JACKSON: If they want us to
25 believe that they're doing it in their personal

1 -- I mean --

2 MR. MOOPPAN: Well --

3 JUSTICE JACKSON: -- how else are we
4 supposed to know?

5 MR. MOOPPAN: Well --

6 JUSTICE JACKSON: I mean, that's just
7 one set of questions.

8 MR. MOOPPAN: -- to be fair, they've
9 got the burden of proof. They are the
10 plaintiffs in this case. They are the ones who
11 are arguing it's state action. So the burden
12 should be on them to show the opposite, not on
13 my clients to disprove it.

14 The second point I would make --

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

23 MR. MOOPPAN: Yeah, in a case like
24 this, where there's no objective indicia that
25 they were doing it in their governmental role,

1 there's no staffing, there's no resources,
2 there's no control.

3 JUSTICE JACKSON: What about the page,
4 the way it looks, the way -- this is the other
5 argument, right?

6 MR. MOOPPAN: Everything about this
7 page's appearance is equally consistent with a
8 campaign page. That's exactly what happened in
9 the Eighth Circuit. A page that looked no
10 different than our page, the justices -- judges
11 just split, saying, well --

12 JUSTICE JACKSON: Okay. Can I just
13 ask one more question? I'm sorry. Justice
14 Sotomayor came up with a private hotline example
15 to seek emergency help that I thought was really
16 interesting. I hadn't thought of it before.

17 And I understood you to say that the
18 response, the government rushes to your house as
19 a result of getting the communication, would be
20 official action. But I guess I'm not clear as
21 to the blocking that would occur by the -- by
22 the official from people that they didn't like
23 with respect to a page that was designated as
24 this is the opportunity to call for government
25 help. I'm creating this Facebook page so that

1 people can have a straight-through hotline to
2 government resources.

3 The person, I guess, is saying, this
4 is a private page, so I can block, you know,
5 Latinos. I don't want any Latinos on this page,
6 says the person. Is that a problem? I mean, is
7 that state action or not state action?

8 MR. MOOPPAN: I would think -- if
9 that's all there is, I would say it's not
10 because a private citizen could set up that
11 exact same page. Here -- this is a page to get
12 you access to government officials.

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

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

23 JUSTICE JACKSON: The one about joint
24 action between the private party and the state,
25 the Brentwood Academy line, where you're looking

1 at is this facilitating the -- the -- the -- a
2 state service, you think would not apply?

3 MR. MOOPPAN: I don't think -- again,
4 if a purely private citizen, just think, you
5 know, a wealthy person in the city, said, I want
6 to make it more easy for people to call and get
7 access to government things and sets up a page
8 like that, that's not joint action. He's acting
9 wholly independent of the government.

10 JUSTICE JACKSON: All right. Thank
11 you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Joshi.

15 ORAL ARGUMENT OF SOPAN JOSHI
16 FOR THE UNITED STATES, AS AMICUS CURIAE,
17 SUPPORTING THE PETITIONERS

18 MR. JOSHI: Mr. Chief Justice, and may
19 it please the Court:

20 We agree with Petitioners that duty
21 and authority is the right way to figure out in
22 what capacity a -- a public employee defendant
23 is acting, but we think the Court should focus
24 on the subset of cases involving a denial of
25 access to property.

1 In those cases, if the defendant is
2 exercising an official duty to provide access,
3 like hosting an official school board meeting,
4 of course, that's state action. It doesn't
5 matter where it happens.

6 But, for other kinds of duties, and
7 most important, where it's ambiguous, where it's
8 the kind of thing a private citizen could do but
9 also within a broad description of the
10 official's responsibilities, there, we think the
11 nature of the property should be all but
12 dispositive. So, if the defendant denies access
13 to government property, probably state action.

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

1 I welcome the Court's questions but
2 happy to talk about --

3 JUSTICE THOMAS: What exactly is the
4 property? The contract talks about terms of
5 services, I guess, with -- I'm not a Facebook
6 person, but I -- I assume it -- they would not
7 consider this service a property.

8 So what exactly is a property?

9 MR. JOSHI: Well, I think the
10 property, it's a form of virtual property. But
11 it is the account. You can post speech on
12 there. You can have conversations on there.
13 You can open it up to -- to everyone or just to
14 friends. It is a form of -- of virtual
15 property.

16 It's like a virtual -- I -- I hate to
17 use the word "forum" because that term is sort
18 of overloaded in this context, but it's a --
19 it's a virtual forum of sorts.

20 It's no different from, say, a hotel
21 that offers its ballrooms for rent to people and
22 you might sign a contract and have terms of
23 service. But, when you take that hotel, you
24 have a certain degree of control. You have one
25 of the sticks in the bundle of property sticks

1 and you can choose who gets invited, what you do
2 there. This is just a virtual space of the same
3 sort.

4 JUSTICE THOMAS: So did -- would you
5 -- just to follow up, do you think that you have
6 to take into consideration the role of the -- of
7 the provider, Facebook, too, since they can also
8 evict you from this room that you're in or this
9 account?

10 MR. JOSHI: Yeah, so not in these
11 cases. And I -- I agree that there are some
12 really difficult questions as to the extent of
13 ownership and control over this virtual property
14 as between Facebook and Twitter and Petitioners
15 in this case.

16 But what should be undisputed and is
17 undisputed is that the Poway Unified School
18 District has absolutely no ownership or control
19 over these pages, and that's the relevant
20 question for the state action question in these
21 cases.

22 JUSTICE ALITO: What if -- excuse me.
23 What if something that looks an awful lot like
24 an official event but is not labeled as such is
25 held on private property?

1 MR. JOSHI: I think the question in
2 these cases is the constitutional one of state
3 action. This Court has often said the
4 Constitution deals with substance, not shadows.
5 And I think these sorts of appearances are the
6 kind of shadows that shouldn't matter to the
7 substantive question of whether, to use
8 Petitioners' test, you know, it is an actual
9 official duty and authority being exercised on
10 that property.

11 And I think this Court has rejected,
12 to the extent Your Honor is invoking reasonable
13 observer kind of tests, this Court has rejected
14 in a variety of contexts, most recently in the
15 Coach Kennedy case.

16 I mean, I think maybe to a reasonable
17 observer, a lot of people would have thought
18 that that coach was acting in his official
19 capacity. But the Court didn't rely on
20 reasonable observers. At least as it saw the
21 facts, it said --

22 JUSTICE ALITO: Well --

23 MR. JOSHI: -- we're going to delve
24 into the facts and figure out exactly --

25 JUSTICE ALITO: -- let's say in a --

1 in a small town the population is bitterly
2 divided over an issue, let's say it's whether
3 they're going to close down their elementary
4 school and send the children to another school
5 25 miles away to save money, and the mayor is in
6 favor of closing down the school.

7 So the mayor holds a meeting on -- on
8 public property and everybody can go and express
9 their views. And after that meeting, the mayor
10 says: Well, that didn't go well. The -- there
11 was an awful lot of opposition expressed to
12 this. Let's have another meeting, and this time
13 we're going to have it on my farm, and I'm going
14 to post people at the entrance, and we're going
15 to exclude the people who were -- who spoke
16 vociferously and articulately against my
17 proposal.

18 Is that allowed?

19 MR. JOSHI: So, with -- if I
20 understand --

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

24 MR. JOSHI: So, if -- if I understand
25 it and if I can assume that when he does it on

1 his farm, he's not using any government
2 resources.

3 JUSTICE ALITO: Right, right.

4 MR. JOSHI: The security guards are
5 paid out of his own pocket.

6 JUSTICE ALITO: Right, right.

7 MR. JOSHI: Totally fine, I think.

8 Again, and then let me further assume that the
9 vote of the people on this farm meeting is not
10 somehow, like, conclusive, they don't actually
11 have the authority, he's just taking their views
12 into account.

13 It's no different than elected
14 officials anywhere or government officials
15 anywhere who choose to speak only to Republicans
16 or only to Democrats in order to get views on
17 what they ought to do when they exercise their
18 official duties. No one thinks that that's
19 state action.

20 And I understand you can think of a
21 lot of odious behavior by government officials
22 being discriminatory in whom they speak to and
23 whom they listen to, but, at the end of the day,
24 the Constitution does not prohibit even odious
25 behavior by private citizens.

1 And I want to return here now to a
2 point that Mr. Mooppan said, which I really do
3 think is maybe one of the most important points
4 in this case, which is that a lot of the scare
5 hypotheticals that the other side gives about
6 public officials behaving badly if you narrow
7 the state action doctrine can be taken care of
8 by their government employers or by the state
9 through statutes.

10 The government has employer -- as
11 employer has much greater leeway to regulate
12 than government as sovereign. And so this Court
13 has decided a number of cases in which
14 government employees acting in their private
15 capacities can nevertheless be regulated by
16 their employers.

17 And so, if you're worried that there's
18 not a code of conduct for government officials
19 on how they comport themselves in their
20 personal/private capacities, such a code of
21 conduct is better if it comes from the
22 government employer as the state.

23 JUSTICE KAGAN: Mr. Joshi --

24 JUSTICE BARRETT: Counsel --

25 JUSTICE KAGAN: -- did -- did -- did

1 -- the questions that Justice Kavanaugh was
2 asking Mr. Mooppan, do you agree with Mr.
3 Mooppan's answers to all those questions,
4 announcements of rules, policies, what have you?

5 MR. JOSHI: Yeah, I think that's
6 basically right. If the duty is to provide
7 access, so if there is a duty to say you must
8 promulgate this information or
9 notice-and-comment, for example, which means you
10 must --

11 JUSTICE KAGAN: No, no, no, no, no,
12 no, no. I mean, it's -- it's not like --
13 there's -- there's a duty that says you -- you
14 have to announce the road closures. They're
15 just you -- you know, you're in charge of road
16 closures, and you think it would be a good idea
17 if citizens knew about them, so you're
18 announcing the road closures on your site.

19 MR. JOSHI: Yeah, and if there's not a
20 specific duty to announce the road closure,
21 which I gather is what you're saying, then, if
22 you choose to do it on your own site, that's
23 exactly the sort of thing where we think the
24 nature of the property --

25 JUSTICE KAGAN: Okay. That's not Mr.

1 Mooppan's answer. Mr. Mooppan said that as long
2 as there wasn't a government site where the road
3 closures were being announced, that that would
4 be state action.

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

7 JUSTICE KAGAN: There's not a duty to
8 announce. You're in charge of road closures and
9 you think it would be a very good idea if people
10 understood where the road closures were.

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

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

17 JUSTICE KAGAN: Well, why -- why don't
18 we do my example, because how are you going to
19 know --

20 (Laughter.)

21 JUSTICE KAGAN: -- where the road
22 closures are? I mean, now you're -- you're
23 being -- I -- I thought that we were starting
24 off from a point of, if -- if the only place
25 that somebody can know where the road closures

1 are is on your private site, Mr. Mooppan said
2 that was state action. I was going to go on
3 from there, but you seem to be contesting that.

4 MR. JOSHI: I -- I -- I guess our view
5 is that if there's a specific duty to make that
6 information available and I --

7 JUSTICE KAGAN: There's not a specific
8 duty, Mr. Joshi.

9 MR. JOSHI: Then --

10 JUSTICE KAGAN: Duties don't work like
11 that. You're in charge of road closures.
12 That's your duty, to be in charge of road
13 closures.

14 MR. JOSHI: And if you are not
15 obligated to -- to talk about road closures and
16 tell the public about road closures, if you do
17 it on your private site, then I think that
18 you're -- you are probably acting in your
19 personal capacity.

20 Now I agree there may be duties to
21 inform, and, in those cases, if the only place
22 you do it is on your personal site, that may
23 well be state action, whereas, if you do it on
24 both sites, it wouldn't be.

25 JUSTICE SOTOMAYOR: Six of the --

1 JUSTICE KAVANAUGH: If you --

2 JUSTICE SOTOMAYOR: The Sixth Circuit
3 seems to think that the duties have to be
4 written. But many duties are customary,
5 meaning, no, you're right, I think, if you're in
6 charge of road closures, I have very little
7 doubt that there's a written law that says you
8 must inform the public. But that is what
9 everybody does. It's what tradition and -- and
10 process has always provided for.

11 You're suggesting that that would not
12 be taken into account?

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

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

19 MR. JOSHI: We do not agree with the
20 Sixth Circuit's view that it has to be written
21 down. We agree that customs can inform what the
22 duties are of an office. It's just, if there is
23 a duty to inform, then the discharge of that
24 duty will be state action no matter where it
25 takes place. But where there's doubt about it,

1 if what you're doing is denying access to
2 personal property, we ought to think you're
3 acting in your capacity as a private property
4 owner, not as an agent of the state.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 Justice Alito?

9 JUSTICE ALITO: Would it be practical
10 to require or adopt a rule that puts a lot of
11 pressure on public officials to separate their
12 Facebook pages, just to take that example? So
13 the official can have a -- a personal profile.
14 The official can have a -- a -- a campaign page.
15 The official can have an official page.

16 MR. JOSHI: Those all sound like
17 wonderful things that a state government can
18 impose in its capacity as an employer. I don't
19 think this Court should impose it as a matter of
20 federal constitutional law. And it certainly
21 shouldn't be the case that the Constitution
22 imposes that kind of precondition in order to
23 exercise your personal constitutional rights.

24 JUSTICE ALITO: Mr. Mooppan said that
25 would be unrealistic for -- that would be asking

1 too much of a lot of public officials.

2 MR. JOSHI: I -- I do think it would.
3 I mean, take the example that Justice Jackson
4 brought up with disclaimers. You know, you
5 might think, well, all you need to do is put up
6 a disclaimer and that's it. Well, how good a
7 disclaimer do you need?

8 JUSTICE ALITO: All right. Thank you.

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

11 JUSTICE ALITO: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor?

14 JUSTICE SOTOMAYOR: That's all.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?
16 Justice Gorsuch?

17 Justice Kavanaugh?

18 JUSTICE KAVANAUGH: To pick up on what
19 Justice Kagan was asking, which -- about the
20 road closures and announcements of rules,
21 announcements of information and what have you,
22 when I was discussing it with your friend, we
23 were assuming that it wasn't also posted on the
24 government's site, it was only posted on the
25 personal site, and then asking, okay, when --

1 where does it cross the line into governmental.

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

4 MR. JOSHI: I -- I guess the -- it
5 would matter because that would inform, just as
6 you look at the facts of the case, whether
7 you're acting in your personal capacity or in
8 your official capacity, which metaphorical hat
9 you're wearing. And if you discharge your duty,
10 again, assuming there's a duty to inform the
11 public about these things, if you've discharged
12 a duty on the official site and then you're
13 amplifying it on your personal site, odds are,
14 when you do it on your personal site, you're
15 doing it in your personal capacity.

16 But, if your boss tells you go, you
17 know, inform the public about this road closure
18 and the only place you do it is on your personal
19 site, you're probably discharging your official
20 duties.

21 JUSTICE KAVANAUGH: Okay. So it
22 sounds like both of you would have in essence a
23 safe harbor that if you're reposting information
24 on your personal site, that that's probably not
25 going to be considered governmental.

1 MR. JOSHI: Yeah. And -- that's
2 exactly right. And I think -- you know, I -- I
3 take the point that the other side makes that
4 that might be underinclusive in some cases, but
5 I think that's better because that is the
6 purpose of the state action doctrine, is to
7 preserve an area of individual freedom and not
8 hold the state responsible for conduct it really
9 can't control.

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett?

13 JUSTICE BARRETT: So going to Justice
14 Kagan's questions about announcements, et
15 cetera, if individual posts on a personal site
16 can ever be state action because you have a duty
17 to make announcements, is that a situation in
18 which your property framework or the presumption
19 is just defeated because it's a personal account
20 and which you sometimes use for official
21 purposes?

22 MR. JOSHI: That's right. As I
23 mentioned at the outset, if the official duty or
24 authority you're exercising is one that requires
25 access, like notice-and-comment or an official

1 --

2 JUSTICE BARRETT: Yeah.

3 MR. JOSHI: -- school board meeting
4 where the public can speak, then, yes, that's
5 state action no matter where you do it. And
6 your blocking of someone from accessing that
7 particular action is going to be state action no
8 matter where it occurs.

9 JUSTICE BARRETT: But the word "duty"
10 is important to you. So I asked Mr. Mooppan
11 about duty and authority. You -- you're really
12 leaning on duty, and it seemed in your
13 interchange with Justice Kagan that you saw a
14 difference between duty and authority.

15 MR. JOSHI: Well, I think a duty --
16 it's less obvious in these cases and more
17 obvious in -- in the next case, where he's a
18 subordinate with a supervisor.

19 So duty is important because you need
20 to know is he actually discharging the thing
21 he's supposed to do. An elected official like
22 these school board members don't really have
23 much in the way of those duties, but they do
24 have authority. They can invoke the state's
25 power to do something that someone who doesn't

1 have the state power can't do.

2 And so, in that sense, duty and
3 authority might be different. In Griffin, for
4 example, that was a private security guard at
5 the -- at the Glen Echo Park, but the reason he
6 got his deputy sheriff certification was so that
7 he could make his arrests and his kicking out of
8 the trespassers more effective. People listen
9 to deputy sheriffs in a way they don't listen to
10 a --

11 JUSTICE BARRETT: But that was
12 authority, not duty, right? Because he --

13 MR. JOSHI: That was authority.

14 JUSTICE BARRETT: -- didn't have a
15 duty --

16 MR. JOSHI: That's right.

17 JUSTICE BARRETT: -- to arrest anyone?

18 MR. JOSHI: That's right.

19 JUSTICE BARRETT: Okay.

20 CHIEF JUSTICE ROBERTS: Justice
21 Jackson?

22 JUSTICE JACKSON: So can I just go
23 back to Justice Alito's hypothetical, which I
24 thought was really good, and ask this question?
25 Suppose the public meeting doesn't occur, so we

1 have the mayor of the town and there's this
2 controversial policy, and there is no public
3 meeting to start because the mayor fears that
4 there's going to be quite a bit of acrimony with
5 people who want to come out differently than the
6 mayor does.

7 And so, instead of the public meeting,
8 the mayor says privately, I'm going to hold --
9 have a meeting on my farm, or maybe he even
10 announces the meeting, but we're only letting in
11 people who are likely to agree with my view.
12 Same result? No state action in that situation?

13 MR. JOSHI: I think probably no state
14 action in that situation. I think it's
15 something that government officials actually do
16 all the time. They might not want to meet with
17 even their own constituents who disagree with
18 them. They might speak only to Democratic Party
19 meetings and only take feedback from Democratic
20 Party donors. And, you know, the solution for
21 that, as I said, for elected officials might be
22 the voters.

23 JUSTICE JACKSON: Yeah.

24 MR. JOSHI: And for appointed
25 officials and employees, the state as employer

1 can regulate that kind of behavior, even if it's
2 in its personal capacity the way --

3 JUSTICE JACKSON: But it doesn't have
4 to do so specifically? I mean, can we believe
5 that, say, the mayor's duties include receiving
6 feedback from the public? If -- if there was a
7 duty to get feedback from the public, I
8 understand you to be saying that he would have
9 to.

10 MR. JOSHI: Yeah, I --

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

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

1 denied really --

2 JUSTICE JACKSON: All right. One
3 final question just as a sort of theoretical
4 matter. Does the government have any concern
5 about the potential privatization of government
6 functions that could occur? I mean, I suppose
7 I'm a little worried about city mayors deciding
8 to sort of shape the debate of the people in
9 their community by having their meetings in --
10 in private places so that others in the
11 community can't comment.

12 Do -- that -- that seems to me
13 problematic as sort of a theoretical matter, but
14 the government, I'm taking, says as long as the
15 mayor chooses to do this on private property,
16 then he can exclude whoever he wants because
17 he's doing it in his personal capacity?

18 MR. JOSHI: Yeah, I mean, in the
19 brick-and-mortar world, I'm not aware of this
20 being a problem. And if it is a problem, I
21 think it's best handled by the state, which can
22 regulate its employees in ways that a state as
23 sovereign cannot. And I think that's the best
24 place to handle those concerns, not a rule of
25 conduct from this Court as a matter of federal

1 constitutional law.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Ms. Karlan.

6 ORAL ARGUMENT OF PAMELA S. KARLAN

7 ON BEHALF OF THE RESPONDENTS

8 MS. KARLAN: Mr. Chief Justice, and
9 may it please the Court:

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

1 generally sufficient to render the defendant a
2 state actor.

3 Second, the record in the district
4 court contains O'Connor-Ratcliff's entire
5 Facebook feed from the time she joined the --
6 the board through summary judgment. Of the
7 hundreds of posts, I found only three that were
8 truly non-job-related. Not only were the posts
9 all related to her job as PUSD trustee, but the
10 district court found that the content of many of
11 the posts was possible only because, as a
12 trustee, she was, in the district court's words,
13 "clothed with the authority of state law."

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

24 And I'd like to direct the Court to
25 page 48 -- 46, Note 12 of the red brief, where

1 we cite the requirement by the board that you
2 have a disclaimer if you're speaking in your
3 personal capacity. She never put that
4 disclaimer anywhere. Instead, she asked people
5 to contact her using her official government
6 email account.

7 And, third, the pages at issue here
8 are in no sense campaign pages. The district
9 court rejected that argument on pages 114 to 115
10 of the petition appendix. She did have a
11 campaign website. That website had a personal
12 email address, unlike her official email address
13 here.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: Ms. Karlan, the
16 Petition -- Petitioners here and Respondents in
17 the next case make much of the fact that if your
18 broad definition of a state action is accepted,
19 that it would actually reduce speech by public
20 officials.

21 I would -- I'd like your reaction to
22 that.

23 MS. KARLAN: No, it would not. No one
24 has challenged the speech that was on these
25 pages at all. If they're speaking as government

1 officials, they have both the government's own
2 protection, so, for example, there are a number
3 of protections that go to government officials
4 when they speak in their official capacity, plus
5 they still have all of the First Amendment
6 rights as a backup.

7 And I think it's really important to
8 note here that all we're talking about is the
9 state action issue. And the idea that
10 government officials are not going to want to
11 talk about their jobs at all if you tell them
12 it's state action just seems to me to be
13 illusory.

14 CHIEF JUSTICE ROBERTS: But -- but I'm
15 not sure about that. I mean, if it's a -- if
16 it's characterized as a state action
17 governmental site, then -- I -- wouldn't
18 anything they say be categorized as governmental
19 speech on which the government could take a
20 particular political, social, whatever, view?

21 MS. KARLAN: Well, I think that it's
22 actually perhaps a little more complicated than
23 that, Mr. Chief Justice, because these are
24 elected officials, and part of their duty is to
25 talk about certain issues.

1 And I think, if the government told
2 them they're simply not allowed to talk about
3 their position on what the board is taking or
4 the like, that itself would violate at least the
5 California constitution and arguably the federal
6 Constitution as well.

7 CHIEF JUSTICE ROBERTS: Well, but just
8 -- just to make sure I understand, you're --
9 we're characterizing a particular site as
10 whether it's governmental, a source of
11 governmental authority or, you know, operated as
12 a governmental duty, or private.

13 Now, if it's private, the people
14 talking on it can say what they want. Their
15 speech won't be limited. If it's governmental
16 speech, you know, they have to do what the
17 government tells them to do on that site.

18 MS. KARLAN: Well, I think the one
19 thing that they do have to do, and I think this
20 is fair, and there were a number of questions of
21 the folks representing the Petitioners here,
22 they do have to have a disclaimer here to say
23 this is a personal site.

24 They did not have this disclaimer.
25 Ms. O'Connor-Ratcliff instead says, if you want

1 to contact me, contact me on my official
2 government email account, which she's not
3 allowed to use for personal or political
4 purposes.

5 JUSTICE ALITO: Your test is --

6 JUSTICE KAGAN: What about the claim
7 -- sorry.

8 JUSTICE ALITO: Your test is whether
9 government officials are doing their jobs,
10 right?

11 MS. KARLAN: That's the starting
12 point, and it -- it -- it creates what I would
13 say is a kind of rebuttable assumption that when
14 a government official is doing her job, she is a
15 state actor.

16 JUSTICE ALITO: All right. So the
17 mayor is in the grocery store and is repeatedly
18 approached by constituents. And the mayor
19 listens to -- really doesn't want to be bothered
20 but listens to supporters and people who are
21 sympathetic to the mayor's program, but with
22 somebody who is a known opponent approaches the
23 mayor, the mayor says, look, please call my
24 office.

25 Is the mayor doing his job when he's

1 doing that?

2 MS. KARLAN: I -- I think the answer
3 to that question, which is, I think, different
4 than the answer I would give in our case, is
5 that when they're clearly off duty, that is, you
6 know, pushing the shopping cart down the aisle,
7 arguably, they're not doing their job.

8 But, when they create an ongoing site
9 like the site here, they maintain a forum, if
10 you will on -- in which people can comment and
11 people can talk to each other, they're not just
12 talking to the mayor, then, yes, that would be
13 state action.

14 JUSTICE ALITO: I mean, elected
15 officials have told me they're always on call.
16 They're always doing their job. They're always
17 being approached by constituents.

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

21 Now can they say, I don't want to talk
22 to you right now, you know, the ice cream is
23 melting? Of course, they can, because that's
24 not violating somebody's First Amendment rights.

25 JUSTICE ALITO: Well, yeah, but if

1 they're discriminating on the basis of viewpoint
2 and they're doing their job, then there's a
3 problem, right?

4 MS. KARLAN: Arguably, yes.

5 JUSTICE ALITO: So --

6 MS. KARLAN: But that's why I was
7 saying that I think, when you are clearly off
8 duty, you're not doing your job. Even if you
9 say you're doing your job, you're not -- you're
10 not acting in your official capacity.

11 But, here, there was a website. There
12 was a Facebook page. The Facebook page says, if
13 you want to talk to me, call -- you know,
14 contact me at my official office.

15 JUSTICE ALITO: Well, what if she put
16 all --

17 MS. KARLAN: And then --

18 JUSTICE ALITO: -- what if all of her
19 posts were done in the evening? They were all
20 done between midnight and 1 a.m. Is she on duty
21 then? Is she doing her job then?

22 MS. KARLAN: Yes, in the same way that
23 if you stay up until midnight and you're reading
24 briefs at home, you're doing your job. You're
25 under color of law. Nobody has a First

1 Amendment right to come into your house, but, of
2 course, you're a state actor.

3 JUSTICE KAGAN: Could we go back to
4 what you said about disclaimers? Would a
5 disclaimer turn this immediately into private
6 action?

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

9 JUSTICE KAGAN: Why no?

10 MS. KARLAN: Well, because you could
11 say on the top of your website, this is my
12 personal website, but then be operating it as a
13 tool of governance.

14 JUSTICE KAGAN: Yes. So that's my --
15 if -- if -- if it's the same content and if you,
16 in fact, are operating it as a tool of
17 governance, but you have a disclaimer saying
18 that you're not, that this is just you as a
19 person.

20 MS. KARLAN: Well, I'm not sure that
21 the Court wants to have a magic words test for
22 state action. And so you would still, I think,
23 have to look, but at least there, the public
24 would know and -- and be able to take into
25 account that you are not using this as a public

1 website.

2 Here, I think putting the disclaimer
3 there but then saying things like "we" want you
4 to respond to our surveys on whether "we" should
5 change the election system, "we" want you to
6 respond to "our" survey, we are working hard,
7 she's not using "I."

8 And if you compare this to her
9 campaign website, which is a website, not a
10 Facebook page, there, she uses "I." Here, she
11 uses "we." And, honestly, as Mark Twain said,
12 the only people who should use "we" in the
13 singular are royalty and people with tapeworms.
14 And, you know, I don't think she's either of
15 those.

16 (Laughter.)

17 JUSTICE BARRETT: Ms. Karlan, do you
18 think you could win under the test proposed by
19 the government and Mr. Mooppan? Because, I
20 mean, I -- I feel like you're talking about
21 doing your job and it seems like you're saying
22 that she's exercising the authority of her
23 office, whereas the Ninth Circuit focused on
24 this appearance and function test of the
25 website, but it seems to me that you're saying

1 she was doing something more.

2 MS. KARLAN: I think we obviously win
3 under the Ninth Circuit test.

4 JUSTICE BARRETT: Sure.

5 MS. KARLAN: But I think we win even
6 under the Sixth Circuit test because of the
7 duty. And I can -- if you want me to tick
8 through the different places where in state law
9 and board rules and the like are --

10 JUSTICE BARRETT: That's okay, because
11 that was in your brief. So I -- I --

12 MS. KARLAN: Yeah.

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

16 MS. KARLAN: Sure.

17 JUSTICE BARRETT: -- because she had
18 the authority.

19 MS. KARLAN: Yeah. I think we win
20 under every test except a strong version of the
21 Solicitor General's test because, under that,
22 because Facebook itself -- the Facebook account
23 itself was not owned by the government, that's a
24 hard test for us to win under.

25 Now we still do have our --

1 JUSTICE SOTOMAYOR: Well, but they've
2 given -- they've given that up because they're
3 talking about function really.

4 MS. KARLAN: Yeah.

5 JUSTICE SOTOMAYOR: Yeah.

6 MS. KARLAN: I kind of like to think
7 so.

8 JUSTICE SOTOMAYOR: Yeah. I mean,
9 they said, if you do notice-and -- and-comment,
10 whether you have other postings is irrelevant,
11 you're looking at the function of what's
12 happening, correct?

13 MS. KARLAN: Yeah.

14 JUSTICE SOTOMAYOR: So tell me how
15 your test doing your job differs from the
16 authority or duty test of the Sixth Circuit.

17 MS. KARLAN: Well --

18 JUSTICE SOTOMAYOR: What -- what --
19 what -- do you --

20 MS. KARLAN: Yes.

21 JUSTICE SOTOMAYOR: Okay.

22 MS. KARLAN: Yes. I think the Sixth
23 Circuit has a much narrower sense of what "duty"
24 means and what "authority" means than we would
25 say is encompassed in doing your job. As this

1 Court --

2 JUSTICE SOTOMAYOR: I -- I agree with
3 you on duty.

4 MS. KARLAN: Yes.

5 JUSTICE SOTOMAYOR: They require a
6 written law on duty.

7 MS. KARLAN: Yes.

8 JUSTICE SOTOMAYOR: And the government
9 has already conceded that you can't look just to
10 written law. So let's take Justice Barrett's
11 point that authority is doing most of the work
12 and authority has a meaning. So go ahead.

13 MS. KARLAN: So, as I read authority
14 in both the government's brief and the Sixth
15 Circuit, they're treating authority as you're
16 exercising some coercive control over a member
17 of the public.

18 I take authority to be something quite
19 different than that.

20 JUSTICE SOTOMAYOR: Give me a --

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

22 JUSTICE SOTOMAYOR: You're going to
23 have to explain that better.

24 MS. KARLAN: Okay. So, if -- if I
25 understand the government's brief correctly,

1 what the government says is, well, of course,
2 even if you're using private property, if you're
3 using it to coerce somebody, so on your private
4 website, you said to somebody: You're fired,
5 and that -- and -- and that has the force of
6 law, that would be state action because you're
7 using an authority that only you have.

8 JUSTICE SOTOMAYOR: All right. But --

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

10 JUSTICE SOTOMAYOR: -- but they --
11 they --

12 MS. KARLAN: -- private citizen do
13 not.

14 JUSTICE SOTOMAYOR: -- admit that
15 notice-and-comment would not be coercing
16 someone, so --

17 MS. KARLAN: No, but I -- I mean, I --
18 I -- I take it what they're talking about there
19 is a particular kind of authority. Now some of
20 the posts here are because of her authority as a
21 state actor. The modal post on the site, I
22 would say, the thing that is most common on the
23 site, is that she goes and visits a classroom
24 with the superintendent or with a -- a -- a
25 principal during instructional time.

1 The only reason she can ask to do
2 that, the only reason she has the power to do
3 that, is because of her official capacity. No
4 person could do that. No -- no member of the
5 public could do that.

6 JUSTICE SOTOMAYOR: And, presumably,
7 that's not put on the official site, whatever
8 that might --

9 MS. KARLAN: The -- the -- the -- no,
10 as far as we --

11 JUSTICE SOTOMAYOR: It -- it exists
12 only on this site.

13 MS. KARLAN: As far as we know, the
14 only place that you could go to find out about
15 her class --

16 JUSTICE SOTOMAYOR: So, basically,
17 your argument is that it facilitates.

18 MS. KARLAN: Yes.

19 JUSTICE SOTOMAYOR: Her government
20 authority facilitates her doing a government
21 function and permits her to video it and put --
22 put it on the site?

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

25 JUSTICE SOTOMAYOR: If you could

1 answer --

2 MS. KARLAN: -- she has reports of
3 them.

4 JUSTICE SOTOMAYOR: Okay.

5 JUSTICE KAGAN: But just if I could
6 get you to say that in one bit, if you said, you
7 know, the right way to think about duty and
8 authority if you want to use those words is
9 what?

10 MS. KARLAN: The right way to think
11 about duty is to look at the various -- various
12 sources of state law that tell you what
13 somebody's duty is. And, here, we've got the
14 California constitution, the board bylaws --

15 JUSTICE KAGAN: Right, but stepping
16 back from your case, which --

17 MS. KARLAN: Okay.

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

20 MS. KARLAN: I do. I do.

21 (Laughter.)

22 JUSTICE KAGAN: But just stepping back
23 and saying what's -- is -- does the Sixth
24 Circuit have too narrow a view, I thought you
25 were saying yes.

1 MS. KARLAN: Yes.

2 JUSTICE KAGAN: How is that true? Why
3 is that true?

4 MS. KARLAN: Because the Sixth Circuit
5 says, unless there's an affirmative command that
6 obligates you to do the specific thing you are
7 doing in the specific form you are doing it,
8 you're not doing your duty.

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

11 JUSTICE KAGAN: Which is what?

12 MS. KARLAN: Which is you look to what
13 does state law tell you what to do, what does
14 history and tradition tell you what to do, what
15 do the bylaws of your organization tell you to
16 do? If there's a handbook, what does the
17 handbook tell you to do?

18 And those things can be optional.
19 They can be acting in your discretion. This
20 Court has repeatedly said in a number of
21 different contexts, going back to the MacDaniel
22 case in 1833, if you're talking about really
23 people with -- with important government jobs,
24 it's not all going to be written down.

25 JUSTICE GORSUCH: Counsel, I -- I

1 guess --

2 MS. KARLAN: Yeah.

3 JUSTICE GORSUCH: -- I'm -- I'm -- I'm
4 a little confused as to what's at stake here
5 because I hear you saying now it isn't a matter
6 of appearances and whether a reasonable person
7 might make a mistake, which was kind of the
8 Ninth Circuit's reasoning. It really does boil
9 down to duties and authorities.

10 And you -- you -- you -- you're
11 positing that those duties and authorities
12 include beyond what's in a handbook and must
13 take account of custom. But I had understood
14 the Solicitor General to say exactly the same
15 thing. So are we coalescing around a test that
16 everybody more or less agrees on?

17 MS. KARLAN: Well, I want to be very
18 clear. I was talking about duties and
19 authorities in the context of Justice Barrett's
20 question. We think that the appearance and
21 function are also relevant to whether someone is
22 engaged in state action.

23 I took her question to be, if you take
24 the Sixth Circuit's verbiage --

25 JUSTICE GORSUCH: Yeah. Well, my --

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

2 JUSTICE GORSUCH: I'm asking, yeah,
3 what's wrong with something like that? Is there
4 a problem with it? I mean, it seems like --

5 MS. KARLAN: Well, I think --

6 JUSTICE GORSUCH: -- this discussion
7 --

8 MS. KARLAN: Yes.

9 JUSTICE GORSUCH: -- does seem like
10 it's coalesced around an understanding of duties
11 and authorities, and there's some discussion
12 about how capacious that has to be. But,
13 really, the discussion seems to me like you and
14 the Solicitor General are on --

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

16 JUSTICE GORSUCH: -- all fours.

17 MS. KARLAN: -- here's the one thing
18 that worries --

19 JUSTICE GORSUCH: What am I missing?

20 MS. KARLAN: Here's the one thing that
21 worries me there, and it goes back to this
22 Court's decision in Home Telephone & Telegraph
23 in 1912 but also involves Monroe against Pape,
24 which is lots of times people do things that
25 they're forbidden to do in the course of their

1 job and they are nonetheless acting under color
2 of law.

3 JUSTICE GORSUCH: Sure.

4 MS. KARLAN: Yeah. So --

5 JUSTICE GORSUCH: We're all sensitive
6 to --

7 MS. KARLAN: Yeah.

8 JUSTICE GORSUCH: -- Monroe versus
9 Pape and the Griffin case --

10 MS. KARLAN: Yeah.

11 JUSTICE GORSUCH: -- and all of that,
12 everybody is.

13 MS. KARLAN: Yeah.

14 JUSTICE GORSUCH: But, given that,
15 would -- do you see any problem with what you've
16 -- we've been articulating here and you have
17 with Justice Kagan as -- as to any of that?

18 MS. KARLAN: I -- I have no problems
19 with the things I've said so far. I just think
20 it's more capacious than just -- that -- that in
21 trying to figure out whether someone is acting
22 as a state actor, when you start with someone
23 who's a government official -- and I think it's
24 really important to remember that this Court has
25 had in its entire history as far as I can tell

1 about three or four cases where the question was
2 whether a government official was a state actor,
3 and in all of those cases except Polk County
4 against Dodson, which was a case about public
5 defenders, the Court said, of course, you're a
6 -- you're a state actor if you're a government
7 official.

8 So I think the presumptions and the
9 rules of thumb and the like operate a little bit
10 differently here than they would operate in a
11 case that involved someone who was clearly just
12 a private actor and you're asking, are you --
13 can you push them over the line into being a
14 state actor?

15 Here, we start with somebody who looks
16 like a state actor, says email me on my
17 government official account if you've got any
18 questions, says I -- this is the official page
19 of me, uses the photo and the like. And I do
20 think all of that helps.

21 JUSTICE ALITO: Well --

22 JUSTICE BARRETT: But she had the --

23 JUSTICE ALITO: -- I understand you --
24 I understand you want to win your case, as you
25 said to Justice Kagan, but we have to be

1 concerned about -- about the test. And I
2 understand you to have said that you would
3 define "duty" to include custom, a
4 well-established custom.

5 And is it not a well-established
6 custom for any elected public official to inform
7 constituents about what he or she is doing? So,
8 if that's how you understand "duty," then are
9 you not saying that anything that a -- an
10 elected public official, let's leave it at that,
11 tells constituents about what that person is
12 doing falls -- constitutes state action?

13 MS. KARLAN: I think the starting
14 point is, yes, they could rebut that. For
15 example, talking -- you know, at Thanksgiving
16 dinner, somebody says, pass the gravy, and you
17 say, and I also passed a -- a bill last month.
18 Yes, that would be --

19 (Laughter.)

20 MS. KARLAN: -- that would be private,
21 whereas -- whereas, when you set up -- and this
22 is what the -- this is what the Ninth Circuit
23 says on page 28a of the Pet. App., is the state
24 action here is maintaining an ongoing site for
25 the -- for the exchange of information.

1 JUSTICE ALITO: Well, I understand
2 that, but what I'm -- my -- my -- what I'm
3 getting from this is that you have taken the --
4 the Sixth Circuit's test and the Petitioners'
5 test and you have broadened it by defining
6 custom -- by defining "duty" so broadly. And
7 maybe this is right. But you have made it into
8 a very broad test, a very inclusive test.

9 MS. KARLAN: I think, if you want to
10 use the words that the Sixth Circuit used as
11 your guidance, you have to broaden, and our case
12 would clearly fall on the side of --

13 JUSTICE ALITO: All right. Well --

14 MS. KARLAN: -- a viable state action.

15 JUSTICE ALITO: -- let me go back to
16 -- to your wording --

17 MS. KARLAN: Yeah.

18 JUSTICE ALITO: -- and ask you to
19 finish this sentence for me.

20 MS. KARLAN: Yeah.

21 JUSTICE ALITO: A public official is
22 doing his or her job when?

23 MS. KARLAN: When, if you look at
24 state law and you look at the bylaws, they
25 presuppose that they will engage in precisely

1 the kind of action that you're challenging.

2 Well, I have two last points.

3 JUSTICE KAVANAUGH: If you're -- if
4 you're the White House press secretary and you
5 have a dinner at your house and you invite over
6 certain members of the press and not other
7 members of the press because part of what you
8 think makes you a good press secretary is to get
9 feedback and develop good relations with members
10 of the media, is that state action?

11 MS. KARLAN: Can I take that question
12 and -- and kind of flip it around and go
13 backwards into it? There would be no
14 constitutional claim by anybody, no meritorious
15 constitutional claim that they have a right to
16 come to your dinner.

17 JUSTICE KAVANAUGH: Well, someone
18 who's excluded on the basis of viewpoint, so
19 you're inviting friendly reporters or who you
20 perceive to be friendly reporters.

21 MS. KARLAN: I think --

22 JUSTICE KAVANAUGH: Or comment --
23 commentators?

24 MS. KARLAN: I -- I think that anybody
25 who looked at just a dinner, as opposed to you

1 don't allow people to show up at press briefings
2 altogether, I would be prepared to say that
3 there, you are enough off duty and you are
4 clearly enough off duty because people --

5 JUSTICE KAVANAUGH: How about a
6 regular meeting, no -- no food is served, but a
7 regular meeting offsite, so not at the White
8 House, with certain members of the press and not
9 others?

10 MS. KARLAN: I think the members of
11 the press put us in a somewhat different
12 position because already you're entitled to
13 limit that in a variety of ways. But, if you
14 had a public meeting -- for example, in
15 California, a lot of our elected representatives
16 have what they call sidewalk office hours, and
17 they'll sit in the bank parking lot next to the
18 farmers' market and they'll talk to anybody and
19 they'll hand out stuff.

20 If they decided simply because they
21 were sitting on the bank's parking -- bank's
22 parking lot instead of in their office, I'm not
23 talking to black people, I'm not talking to
24 Muslims, I'm not talking to evangelicals, yes,
25 they'd be engaged in state action, and, yes,

1 they would be violating the Constitution.

2 JUSTICE KAVANAUGH: And different tack
3 now. On the reposting question I was asking
4 your friends on the other side about, if you're
5 -- a government agency issues a notice and you
6 then repost it?

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

9 JUSTICE KAVANAUGH: Just your thoughts
10 on that issue if you have any. If you don't
11 want to answer it --

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

13 JUSTICE KAVANAUGH: -- that's fine.

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

17 JUSTICE KAVANAUGH: It's going to be
18 very relevant to the opinion -- well --

19 MS. KARLAN: Yes. And --

20 JUSTICE KAVANAUGH: -- how this is
21 interpreted and applied.

22 MS. KARLAN: -- and so what I would
23 say is there, if what you're talking about is
24 whether a particular post is state action or
25 not, it may well be that simply reposting

1 something isn't itself state action such that
2 you could challenge your being -- your being --
3 your having your comments to that post deleted.

4 But, if you were blocked altogether
5 from a website on which they have invited the
6 entire public to share across the public as well
7 as with you what they think, then, yes, that
8 would be state action and it would be actionable
9 under the First Amendment.

10 JUSTICE BARRETT: Ms. Karlan, do I --
11 I just want to be sure that I'm clear about your
12 position. In your test, your doing your job
13 test, so you agree it seems like that the Ninth
14 Circuit test of appearance and function is
15 enough, you wouldn't go with that?

16 MS. KARLAN: I think that the function
17 part of the Ninth Circuit's test, because they
18 quote this language that the district court's
19 findings made about this being a tool of
20 government is the appearance and function. When
21 they're talking about function, they're talking
22 about are these people doing their job as the
23 function of this is for them to do their job of
24 getting --

25 JUSTICE GORSUCH: How about the

1 appearance part?

2 MS. KARLAN: Well, the appearance is
3 really helpful in figuring out what is the
4 function.

5 JUSTICE GORSUCH: So the -- it boils
6 down to the function in your mind?

7 MS. KARLAN: Yes.

8 JUSTICE GORSUCH: Okay.

9 MS. KARLAN: Yes.

10 JUSTICE KAGAN: But the function is
11 sort of another word for duty in your sense,
12 like a duty is a responsibility, is a function?
13 They're all kind of tied up together?

14 MS. KARLAN: Yeah. Yes.

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

17 MS. KARLAN: And when you do your job,
18 you're doing the function of -- of -- of being a
19 trustee of the Poway School District.

20 JUSTICE BARRETT: Which brings us back
21 to this is all a question of how broadly do we
22 define "authority" or "duty"?

23 MS. KARLAN: I think you have to
24 define it more broadly than Petitioners are
25 suggesting.

1 JUSTICE BARRETT: Oh, no, I understand
2 that. But I'm just saying that --

3 MS. KARLAN: Yes.

4 JUSTICE BARRETT: -- then is the nub
5 of the case as you see it?

6 MS. KARLAN: Yes.

7 JUSTICE BARRETT: The case totally
8 boils down to how you define it?

9 And I asked the other side a bunch of
10 questions about what work does duty do. It's
11 all an authority. I think you would say, if I
12 understand your position correctly, it's just
13 about authority, we're not really looking at
14 duties?

15 MS. KARLAN: No, we are looking at
16 duty. That's exactly what I'm trying to say, is
17 duty -- are you performing the duty of your job
18 as a trustee? If you are, then you are
19 presumptively a state actor. That's what the
20 Court's statements in West and Lugar turn --
21 turn to. So --

22 JUSTICE KAVANAUGH: You would say duty
23 is -- having conversations with citizens is
24 always part of your duties --

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

1 JUSTICE KAVANAUGH: -- or almost
2 always part of your duties, which converts every
3 conversation you have or --

4 MS. KARLAN: No, I would say having
5 some mechanism by which you can interact with
6 your constituents is part of your duty -- is
7 part of your duty.

8 And the board bylaws say this. They
9 say in Bylaw 9010(a) the responsibility of board
10 members in their role as community leaders is to
11 participate in public discourse, and then they
12 say board members have a responsibility to
13 identify personal viewpoints as such and not as
14 the viewpoint of the board.

15 And, here, what you have is -- the --
16 both of the Petitioners using "we" and "our"
17 when they talk about what the board is doing,
18 and anybody who looks at that is going to think:
19 This is an official website. It looks like an
20 official website. It performs all the functions
21 of an official website. There's no disclaimer
22 anywhere. She has a separate campaign website.
23 She uses her government email. All --

24 JUSTICE KAGAN: Now suppose there's an
25 official website too and this, you know, partly,

1 largely, entirely duplicates it. So this goes
2 back to the question that Justice Kavanaugh was
3 asking. How does that matter or does it matter?

4 MS. KARLAN: I -- I don't think it
5 would matter if it was the website at issue
6 here. And I really do urge you to take a look
7 at ECF 3511, which has the entire feed from the
8 day she took office until the day of the summary
9 judgment motion.

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

14 JUSTICE KAGAN: And I take it that
15 this is the crucial difference between you and
16 the government, right, that they just say
17 Facebook says it's her private property?

18 MS. KARLAN: Yeah.

19 JUSTICE KAGAN: And so it's not an
20 official website by definition.

21 MS. KARLAN: Right.

22 JUSTICE KAGAN: And you're saying no.

23 MS. KARLAN: That's correct.

24 JUSTICE BARRETT: And I'm sorry to be
25 hung up on this duty question, but what if the

1 bylaws or the state law doesn't say it's your
2 duty to communicate with constituents, give
3 announcements, et cetera, but she decides, hey,
4 constituent communication would be a good idea.
5 This is the kind of like, well, the governor
6 decides to do this, or the president decides to
7 do this.

8 Is that not, even if it's not formally
9 in her job description, and even if she's the
10 first one to do it, so it's not custom, but we
11 would say she has the authority to decide to be
12 a mouthpiece for government.

13 Would you agree that that would be a
14 test?

15 MS. KARLAN: Yeah. I -- I -- I -- if
16 I can just say, it's a little complicated in our
17 case because the board has specifically said she
18 doesn't have the authority to speak for the
19 board and that's why she's supposed to have a
20 disclaimer.

21 But, if you're talking about a
22 hypothetical of someone in another jurisdiction
23 where there's nothing that says anything either
24 way and she decides she has the authority, then
25 it would come down to a question of, as a matter

1 of state law, did she have that authority
2 because, if she had that authority, then, yes,
3 she would be a state actor.

4 Now most government workers, most
5 government employees do not have the authority
6 to speak for the government, and so it wouldn't
7 be part of their duty to run a personal website,
8 and so, for most government officials, you know,
9 if you're -- if you're the janitor or the school
10 bus driver in Poway --

11 JUSTICE KAVANAUGH: Yeah, but that --
12 I mean, that's making it too easy. There are
13 vast number of government officials around the
14 country at the local town, city level, so I
15 don't think you can --

16 MS. KARLAN: Right, but I --

17 JUSTICE KAVANAUGH: -- minimize -- you
18 can minimize this by saying, oh, it's not going
19 to affect certain categories.

20 MS. KARLAN: No, but --

21 JUSTICE KAVANAUGH: It's going to
22 affect a lot of people.

23 MS. KARLAN: But, at the very least,
24 the other -- you know, the other side says here
25 at the very least, you know, if the state wants

1 to tell you not to do this, they can do that.
2 And the answer here is the Poway School District
3 told her not to do this, told her not to have a
4 website that looked as if she was speaking
5 officially, and this website did exactly that.

6 JUSTICE KAVANAUGH: Just on the custom
7 question, to follow up on Justice Barrett, it's
8 usually I think, as you're describing it, going
9 to be part of the custom of most of these jobs
10 that are elected officials or appointed
11 officials who have some authority to communicate
12 with constituents.

13 MS. KARLAN: I don't think that that's
14 necessarily true at all.

15 JUSTICE KAVANAUGH: When wouldn't it
16 be true?

17 MS. KARLAN: It will be true for
18 elected officials. It will be true for some
19 government officials, but let me give you a
20 hypothetical that I think will illustrate this.

21 So, if a public school teacher in
22 Poway had a website that was communicating with
23 the parents of children in her class, that would
24 clearly be state action, and I think that would
25 be true regardless of what she called the

1 website.

2 If she then also wanted to talk about
3 things like whether the board should be elected
4 at large or by districts, which was a big issue
5 here, or she wanted to talk about whether the
6 schools were being mismanaged, which is
7 something that for a while there was a real
8 problem, that would be her speaking in her
9 personal capacity because that wouldn't be
10 coming from her job and her duties as a -- as a
11 school teacher.

12 So just to kind of wrap up, I think --

13 JUSTICE KAGAN: Do you think -- this
14 is -- a little bit anticipates the next case.
15 If there were also some personal things on this
16 site, how far does that take you? Can you
17 dilute the site and turn it into non-state
18 action by putting up your kids' pictures?

19 MS. KARLAN: I don't think one picture
20 of your children turns something into not a
21 state website. Here, I really do think, if you
22 look at this website, you will find one picture
23 of her children on Christmas, one picture of her
24 children at some school-related event, one
25 picture of her grandfather at -- on Veterans

1 Day, and nothing else that is personal, that is
2 clearly personal as opposed to coming out of her
3 job.

4 You know, here's the thing to
5 understand, and this goes back to something that
6 Justice Kagan said earlier, which is there are
7 First Amendment issues on both sides of this
8 case. And, here, the First Amendment provides a
9 tremendous backstop for members of school boards
10 and the like who want to regulate their sites.

11 There are rules about public forums,
12 there are rules about time, place, and manner
13 and the like, and they have a lot of control
14 over what goes on on these websites.

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

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas?

1 Justice Alito?

2 Justice Sotomayor?

3 JUSTICE SOTOMAYOR: In some ways,
4 you've complicated things.

5 MS. KARLAN: I'm sorry.

6 (Laughter.)

7 JUSTICE SOTOMAYOR: No, really,
8 because what we're being asked to find is
9 whether the state was acting when these
10 government officials turned off these sites.

11 So we're being asked to hold the state
12 responsible for ultra vires activities because
13 these officials were told specifically you're
14 telling us now don't do this and they did it
15 anyway.

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

22 But there was nonetheless a
23 constitutional tort there for which individual
24 government actors could be held responsible.

25 JUSTICE SOTOMAYOR: Okay, thank you.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?
2 Justice Gorsuch?
3 JUSTICE GORSUCH: No, thank you.
4 CHIEF JUSTICE ROBERTS: Justice
5 Kavanaugh?
6 Justice Barrett?
7 Justice Jackson?
8 Okay. Thank you, counsel.
9 MS. KARLAN: Great. Thanks.
10 CHIEF JUSTICE ROBERTS: Rebuttal?
11 REBUTTAL ARGUMENT OF HASHIM M. MOOPPAN
12 ON BEHALF OF THE PETITIONERS
13 MR. MOOPPAN: Thank you, Your Honor.
14 So, first, on the appearance question,
15 I -- you know, I think my friend said appearance
16 is relevant in assessing whether there's duty or
17 authority but basically gave up the notion that
18 the Ninth Circuit adopted that you can use
19 appearance as a freestanding trump over duty and
20 authority. I think that concession is basically
21 right because, otherwise -- the power to block
22 doesn't come from the appearance, and I think
23 she would have to concede my hypothetical where
24 the police officer runs down the street in his
25 uniform is not state action.

1 So then I think the action really does
2 come to, how do we define "duty" and
3 "authority"? And I think the fundamental
4 problem with Ms. Karlan's submission is that
5 she's defining it too broadly. She's doing
6 exactly what this Court said in Kennedy, in
7 Lane, you should not do, because you have to
8 recognize that government officials have the
9 right to speak in their personal capacity about
10 their jobs.

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

20 And the flip side of that problem is
21 that if you treat this too broadly, the problem
22 that this Court recognized in both Kennedy and
23 Garcetti, and the Chief Justice adverted to
24 this, if you treat this as duty and authority
25 just because you're talking about your jobs,

1 that means it's controlled by the state. It
2 amounts to government speech, which means the
3 state itself could tell individuals what to say
4 on their pages.

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

22 Finally, a few points about the facts
23 of my case because I too would like to win for
24 my clients.

25 (Laughter.)

1 MR. MOOPPAN: So the -- the -- the
2 first point I'll make is that if -- this is laid
3 out in our reply brief -- if you look through
4 the citations to the record, the only duty that
5 my clients had to interact with the public was
6 at their board meetings, which they complied
7 with, and no one was ever blocked from that.

8 Everything else is the same sort of
9 overbroad, "it's your duty to talk to people,"
10 that would cover campaign rallies, talking to
11 your neighbors at church, the stuff that cannot
12 possibly be viewed as governmental unless you
13 swallow individuals' -- individual First
14 Amendment rights.

15 The last -- she suggested that the
16 page was somehow their duty. One of my clients
17 closed the page, just shut it down. No one
18 thinks he was acting in breach of his office, he
19 was in dereliction of duty.

20 Your Honor, I see my time is up.

21 CHIEF JUSTICE ROBERTS: Yes. Thank
22 you, counsel.

23 The case is submitted.

24 (Whereupon, at 11:45 a.m., the case
25 was submitted.)

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