No. 19-1020

IN THE

Supreme Court of the United States

ELÉONORE GRIGGS,

Petitioner,

v.

MEGHAN ASHLYN,
CHAIR OF THE CITY OF DOOLEY
SCHOOL BOARD,

Respondent.

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

BRIEF FOR RESPONDENT

Team R
Counsel for Respondent

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STATEMENT OF THE ISSUES

1. Does a school board violate the Establishment Clause insofar as it opens meetings with meditations led by various and diverse community members to promote amity and productivity?

2. Does a municipal employee violate free speech rights when she removes another user's comments and restricts that user's access to a preexisting and personally managed social media profile?

STATEMENT OF THE FACTS

I. Factual Background

The City of Dooley has ten public schools that are governed by the Dooley School Board ("the Board"). R. 1. The Board consists of five elected members, one of whom is elected as the Chair. R. 1. Meghan Ashlyn is the current Chair. R. 1. The Board holds and livestreams monthly meetings at one of the high school's auditoriums. R. 1. Community members and students regularly attend Board meetings for various reasons. R. 1-2. Students may receive extra credit or recognition during meetings; students also may receive consequences if they do not attend meetings which include disciplinary matters. R. 1, 13-14.

Under Dooley School Board Policy 210 ("Policy 210"), the Board is required to open meetings with an invocation. R. 2, 12. Policy 210 requires the invocation to be given in the form of meditation by a leader within the City of Dooley who is certified to lead meditation. R. 12. If a scheduled leader is absent, the Chair will read a meditation. R. 2. The Board must maintain a list of leaders available within city limits, and any leader on the list is automatically eligible to lead a meditation before one of the Board's meetings. R. 12. The Chair is required to introduce the meditation leader and to invite everyone to participate. R. 12. The Board adopted Policy 210 as a mechanism to promote productivity and civility in meetings and peace, emotional, and mental health within the community. R. 2.

Since Policy 210 was adopted, several monks from the Dooley Monastery have led meditations at Board meetings. R. 2. Richard Hammond, the leader of the Dooley Monastery, was invited to give the invocation at the Board meeting on May 14, 2018. R. 1. At the meeting, Ashlyn introduced Hammond as required by Policy 210. R. 2, 12. Ashlyn invited the Board attendees to "pay close attention to the words and direction of Hammond." R. 2.

As they regularly do, Eléonore Griggs and her daughter, Jennifer, attended the meeting on May 14, 2018. R. 2. Griggs, a devout Christian, sent Jennifer out of the meeting as soon as the meditation began. R. 2. Griggs remained in the auditorium. R. 2. Later, during the public comment portion of the meeting, Griggs voiced her opposition to meditation. R. 2. She argued that the Board used Policy 210 to promote Buddhism, a "minor religion" in Dooley, and to "drag [students] away from the faiths of their families." R. 2.

Griggs continued to voice her disagreement after the meeting. R. 2. She turned to LinkedIn to share her thoughts. R. 2. LinkedIn is a social media platform used to facilitate digital professional and social networking. R. 2. Generally, LinkedIn profiles include information about the user's education, career, and professional qualifications. R. 2. Ashlyn created and actively used her own LinkedIn profile before she was elected. R. 3. She has listed her education and employment, not only as the Chair of the Board but also as a co-owner of her family-run business, the Amicus Auto Shop. R. 15. But Ashlyn's profile does not contain any City of Dooley contact information related to her employment as the Chair. R. 3. Instead, Ashlyn only lists her personal contact information. R. 3.

LinkedIn users can "connect" with other users by sending a request, which may then be accepted by the receiving party. R. 2. Only users who are connected with each other can comment on the other's profile. R. 2. LinkedIn's privacy settings allow users to control who has access to their profiles and content. R. 2. Ashlyn personally controls her privacy settings and has accepted around 1,000 connections individually. R. 2. Ashlyn regularly invites people to connect with her on LinkedIn and hands out business cards with a link to her profile. R. 3. Generally, Ashlyn will accept connection requests from the City residents. R. 3.

Occasionally, Ashlyn also posts Board meeting agendas and minutes on her LinkedIn profile. R. 17, 21. But if someone expresses concerns about Board business on her profile, Ashlyn typically directs the individual to raise the issue at the next meeting. R. 15. On May 13, 2018, she posted the Board meeting agenda for the May 14 meeting. R. 3. Griggs, who was one of Ashlyn's connections, commented: "Rejection of the only real God is ruining our schools. Anyone who supports this mess is doomed to suffer forever. Shame!" R. 3. Ashlyn deleted the comment. R. 3. Nevertheless, Griggs continued to comment multiple times on the post. R. 3. One such comment stated: "Meditation belongs in monasteries, not in our schools!" R. 3. Ashlyn removed the comments and then restricted Griggs' access to the personal LinkedIn profile. R. 3.

II. Procedural Background

Griggs filed a complaint in the United States District Court for the District of Emory alleging a violation of her constitutional rights under 42 U.S.C. § 1983 (2019). R. 3, 9. Griggs alleged that Ashlyn violated the Establishment Clause by allowing meditation before Board meetings. R. 3. She further alleged that Ashlyn violated the First Amendment's guarantee to free speech by restricting Griggs' access on LinkedIn. R. 3. Ashlyn moved for summary judgment, which the court granted. R. 3, 9. Griggs appealed to the United States Court of Appeals for the Thirteenth Circuit. R. 1. The Thirteenth Circuit affirmed the summary judgment decision. R. 1. Griggs filed a petition for certiorari, which this Court granted. R. 22.

SUMMARY OF THE ARGUMENT

The First Amendment permits both a policy of opening governmental meetings with meditations and municipal employees maintaining private social media profiles. First, 210 does not impermissibly affect an establishment of religion. **(Part I.)** Second, Ashlyn's use of her personal LinkedIn profile did not violate other users' free speech. **(Part II.)**

I. Modern practice of historically faith-based acts tends to become so widespread and isolated from religious doctrine so as to secularize the practice. As such, the Board's meditations are not religious prayers and therefore do not trigger the protections of the Establishment Clause. **(Part I.A.)** Even where meditations contain religious sentiments, the Board is a legislative, governing body whose invocation policy permissibly serves to offer solemnity to each occasion. **(Part I.B.)**

Some circuits suggest that school boards are inherently school-related, which removes board meetings from the Establishment Clause's legislative-meeting exception. But student attendance at any meeting of a legislative body does not realign a meditation from constitutionally permissible to a coercive endorsement of religion. Therefore, the Board's meditations did not violate the protections of the Establishment Clause. **(Part I.C.)**

II. The Record does not support the conclusion that Ashlyn infringed on Grigg's free speech rights because the LinkedIn profile is not a government forum and Ashlyn's monitoring of her own profile is not a state action. **(Part II.)** Ashlyn's LinkedIn profile does not fit into any of the three categories of government forum. The profile is not a public forum because it has not been opened to the public for assembly, debate, and discourse over policy. Nor is Ashlyn's LinkedIn profile a designated public forum. The profile is not governed by any government policy and practice, and the profile was created for personal, rather than public use. Finally, Ashlyn's profile is not a nonpublic forum because it is not owned by the government. Therefore, her personal profile is not a government forum. **(Part II.A.)**

Additionally, not all activity by a municipal employee is state action. **(Part II.B.)** At no point was Ashlyn acting under the color of law when she conducted activity on her own personal social media profile. Ashlyn's LinkedIn profile is not and has never been designated as an official government page. **(Part II.B.1.)** Nor does the profile appear overwhelmingly official in nature or

bear the "trappings" of an official page so as to render activity on that page under the color of law. On the contrary, the profile was created and continues to be her personal profile. **(Part II.B.2.)** Accordingly, nothing in the record suggests that Ashlyn was ever acting under the color of law in managing her own profile.

ARGUMENT

I. THE SCHOOL BOARD'S MEDITATIONS, WHICH VARIOUS COMMUNITY MEMBERS GIVE AT THE START OF MEETINGS, DO NOT VIOLATE THE ESTABLISHMENT CLAUSE.

For centuries, governing bodies and courts have practiced invocations and recited religious appeals to promote amity and effectiveness within proceedings. *See Marsh v. Chambers*, 463 U.S. 783, 787-89 (1983). But the Establishment Clause of the First Amendment states, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. To balance these seemingly competing ideals, this Court has crafted exceptions and tests to protect governing bodies who would strive for centered wisdom through invocations. *See Town of Greece v. Galloway*, 572 U.S. 565, 591 (2014); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

Unlike invocations, however, contemporary meditations are common and secular, and often do not trigger the protections of the Establishment Clause. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2082-84 (2019). Where meditations do slip over into the kinds of religious prayer that concern the Establishment Clause, those offered at the start of legislative meetings are often constitutionally permissible. *See Town of Greece*, 572 U.S. at 591. Legislative prayer is an accepted historical practice, and school boards comprised of elected officials are protected under this exception. *See Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 527 (5th Cir. 2017). But other invocations, offered in settings that are not so legislative, may still be constitutionally permissible. Invocations intended for a secular purpose that do not endorse a faith or coerce attendees into

adhering to a religion are constitutional. *See Lemon*, 403 U.S. at 612-13. Each of these constitutionally permissible circumstances is present here.

A. The Meditations Do Not Trigger The Establishment Clause.

Over time, historically religious practices may become familiar to the public separate from a particular faith so as to secularize the act. *See Am. Legion*, 139 S. Ct. at 2082-84. Thus, despite religious roots, the modern practice of historical acts does not carry an inherently faith-based meaning or message. *Id.* at 2084; *see also Van Orden v. Perry*, 545 U.S. 677, 686-87 (2005) (explaining that George Washington proclaimed the now secular Thanksgiving holiday: "a day of public thanksgiving and prayer, to be observed, by acknowledging . . . the many and signal favors of Almighty God.").

The appellate court stated that the Board's meditations do not trigger the Establishment Clause because many modern meditation practices carry no religious meaning. R. 4. This conclusion is appropriate considering the widespread, modern meditation practices as separate from traditional Buddhist doctrine.[1] In fact, meditation has historical roots in not just Buddhism, but in Christianity, Hinduism, and other faiths and secular doctrines. *See* Lola Williamson, *Transcendent in America: Hindu-Inspired Meditation Movements as New Religion* 4 (2010).

Policy 210 recognizes no religious requirement or background for meditations or leaders. R. 12. While Dooley Monastery monks are automatically placed on a list of potential leaders, the policy does not exclude any community members certified to lead meditations. R. 12. Similarly, the Supreme Court upheld a community's use of a Latin Cross, not as a religious symbol, but to memorialize soldiers of a past war. *Am. Legion*, 139 S. Ct. at 2090. Even though crosses are

[1] *Compare* Taiya C. Clarke et al., *Use of Yoga, Meditation, and Chiropractors Among U.S. Adults Aged 18 and Over*, NCHS Data Brief No. 325 (Nov. 2018) (stating that meditation practice has increased from 4.1% of adults in the United States in 2012 to 14.2% in 2017), *with Religions*, Pew Research Center, https://www.pewforum.org/religious-landscape-study/ (last visited Sep. 18, 2019) (finding that only 0.7% of Americans identify as Buddhist).

employed universally throughout Christian faiths, the memorial represents more than one meaning to the point of secularization. *Id.* Here, where the purpose of meditation, regardless of the faith-affiliation of its leader, is to promote productivity and civility, the meditation conveys even less religious meaning than the Latin Cross. *See* R. 2. Therefore, the Board's meditation policies do not trigger the protections of the Establishment Clause.

B. Even Where Faith-Based, The Board's Meditations Would Be Legislative Prayer Under *Marsh* and *Town of Greece*.

Where meditations do trigger the Establishment Clause, the Board's invocation policy satisfies this Court's legislative prayer exception. School boards are elected, deliberative bodies, which represent communities and carry out legislative tasks, like levying taxes, issuing bonds, regulating district lines, and setting budgets. *See Am. Humanist Ass'n*, 851 F.3d at 526. As such, invocations before school board meetings, even overtly sectarian prayers divergent to Dooley's meditations, do not per se violate the Establishment Clause. *See Town of Greece*, 572 U.S. at 591 (2014); *Marsh*, 563 U.S. at 793 (1983).

Under fact-intensive inquiries, legislative prayers before meetings of a deliberative body are often accepted historical practices. *Marsh*, 463 U.S. at 794-95; *see also Am. Humanist Ass'n*, 851 F.3d at 527 (stating that the tradition of opening school board meetings with prayer dates to the early nineteenth century). When a body offers an invocation before a legislative meeting, courts are not overly concerned about the content of the prayer so long as the prayer is not offered to "advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95. But the legislative prayer exception does not provide freedom to proselytize simply because a body is legislative. *See Town of Greece*, 572 U.S. at 583. Permissible invocations are constrained to the introductory portions of legislative meetings to lend solemnity, gravity, and respect "before [members] embark on the fractious business of governing." *Id.* Additionally, elected

representatives cannot be the sole leaders of the invocations. *See Lund v. Rowan Cty.*, 863 F.3d 268, 281 (4th Cir. 2017). The constraints end there: an invocation that indicates a religious doctrine does not violate the exception. *Id.*

The Board is a deliberative, legislative body, elected by community members and tasked with governing. *See* R. 2-3. To promote professionalism and civility in their proceedings, the Board asks community members to lead meditation at the start of meetings. R. 2. Only when a community leader is unavailable will a Board representative lead the meditation. R. 2. These facts mirror *Marsh*, *Town of Greece*, and *American Humanist Association*. *See Town of Greece*, 572 U.S. at 583; *Marsh*, 463 U.S. at 794-95; *Am. Humanist Ass'n*, 851 F.3d at 527. In each, a town council or school board offered an invocation at the start of legislative meetings. *See Town of Greece*, 572 U.S. at 583; *Marsh*, 463 U.S. at 794-95; *Am. Humanist Ass'n*, 851 F.3d at 527. Unlike here, however, the relevant bodies did not offer meditation, but sectarian prayers with overt Christian themes. *See Town of Greece*, 572 U.S. at 583; *Marsh*, 463 U.S. at 794-95; *Am. Humanist Ass'n*, 851 F.3d at 527. But because those invocations solemnized legislative meetings, they did not violate the Establishment Clause. *See Town of Greece*, 572 U.S. at 583; *Marsh*, 463 U.S. at 794-95; *Am. Humanist Ass'n*, 851 F.3d at 527. Policy 210 functions in the same way.

At least three circuits hold that school board meetings do not satisfy the requirements necessary for the legislative prayer exception. *See Freedom from Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Ed.*, 896 F.3d 1132, 1145 (9th Cir. 2018); *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 275-76 (3d Cir. 2011); *Coles v. Cleveland Bd. of Ed.*, 171 F.3d 369, 381 (6th Cir. 1999). Additionally, the dissenting opinion below states that Dooley School Board meetings are not legislative, but akin to a high school graduation or faculty meeting. R. 7. These views seemingly turn on the connection between public school boards and the students who may attend

meetings. *See Coles*, 171 F.3d at 381. This suggests that the potentially obligatory nature of school board meetings for students removes school boards from the legislative prayer exception. *Id.* One circuit highlights that school board meetings are sites of extracurricular activities and disciplinary fora for students. *See Freedom from Religion Found.*, 896 F.3d at 1145. Another suggests that the meeting's location, in a school auditorium, might be dispositive. *See Coles*, 171 F.3d at 388 (Ryan, J., dissenting).

Neither the presence of students nor the meeting location, however, preempts the legislative function of school boards. *See id.* ("None of the case law prohibiting prayer in public schools has focused on the titleholder to the real estate."). Indeed, in *Town of Greece*, students were present at the controversial town council meeting. 572 U.S. at 623 (Kagan, J., dissenting). Further, town council meetings may be just as obligatory for students with teachers who demand participation in local government. Students may also attend court hearings, which judges have long opened with religious statements. *Id.* at 587 (majority opinion). There, unlike here, a student would risk being held in contempt for not standing during religious statements.

Additionally, opinions that liken board meetings to in-school, compulsory events ignore the stark differences between the classroom and the legislative nature of a school board. Teachers, unlike school board representatives, are not elected and therefore cannot be removed by a dissatisfied constituency. Students attending a school board meeting, unlike the classroom, cannot run afoul of truancy laws. In fact, Griggs sent her daughter out of the Board meeting as soon as the meditation began, and neither faced any repercussions for Jennifer's absence. R. 2. While students may face consequences for not attending disciplinary meetings, nothing obliges them in any way to remain or participate in the meditation, as Griggs' actions demonstrate. R. 2. Thus,

sitting in the audience of a school board meeting, as here, and obeying the law by attending class, are unambiguously disparate.

The Dooley School Board carries out essential legislative tasks. Prior to formal, potentially contentious meetings, the Board meditates to promote productivity and civility. R. 2. Therefore, these circumstances are no different than other legislative prayer cases, and the Board's meditations are excepted under the Establishment Clause.

C. Even Had The Meditations Not Been Legislative Prayers, The Board's Invocation Policy And Practice Is Constitutionally Permissible Under *Lemon v. Kurtzman*.

Petitioner's argument that the Board violated the Establishment Clause through meditations also fails under the last, and beleaguered, test available.[2] Even if considered within a less permissive school prayer context, meditations are only unconstitutional if they violate *Lemon v. Kurtzman's* three prongs. *See* 403 U.S. 602 at 612-13. First, the meditation must lack a secular purpose. *Id.* at 612. Only if the Board was motivated by entirely religious considerations would they lack the requisite secular purpose necessary to be constitutional. *See id.* at 613. Governmental bodies maintain constitutionality even if the relevant act affects significant advancement of religion. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). Courts offer substantial deference to government bodies' genuine "articulation of a secular purpose." *Id.* Here, the Board has articulated the secular purpose of promoting productive and civil meetings. R. 2. In fact, nothing within the invocation policy articulates a purpose related to religion. R. 12. Thus, the

[2] Two years after *Lemon*, the Court characterized the test as "no more than helpful signposts." *See Hunt v. McNair*, 413 U.S. 734, 741 (1973). Additionally, the Court has avoided employing the test even in school-related Establishment Clause questions. *See Good News Club v. Milford Cent. Sch.* 533 U.S. 98, 121 (2011). Applying the test here provides no more than a helpful illustration that school boards are legislative in nature and thus not prey to the stricter Establishment Clause tests.

Board should be granted significant deference in the policy's stated purpose. Similarly, Policy 210 conforms with the remaining *Lemon* prongs, too.

1. The primary effect of the meditations is not to proselytize or advance religion.

The second prong requires that, to be unconstitutional, the primary effect of the meditation must advance or inhibit a religion. *Lemon*, 403 U.S. at 612-13. This "endorsement" test means that a body violates the Establishment Clause when it appears to "take a position on questions of religious belief," or conveys a message that a certain religion is "favored," "preferred," or "promoted." *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94 (1989). The Establishment Clause does not, however, restrict conduct that "merely happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

Actions are unconstitutional where a governmental body places the "power, prestige, and financial support of government … behind a particular religious belief." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). For example, this Court quashed state laws that required school curricula to include "creation science," and mandated a daily "moment of silence" in the classroom as arrant endorsements of religion. *See Edwards v. Aguillard*, 482 U.S. 578, 593 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985). Similarly, a town's prominent nativity scene on public property violated the Establishment Clause because it contained a "patently Christian message." *Cty. of Allegheny*, 492 U.S. at 601. The scene included the words, "Glory to God in the Highest!" *Id.* at 598.

In contrast, a governmental act will not affect an endorsement of religion just because byproducts of the act happen to accord with religious tenets. *See Lynch*, 465 U.S. at 682. Where a nativity scene violated the Establishment Clause in *County of Allegheny*, a similar nativity scene was deemed constitutional in *Lynch*. *See Lynch*, 465 U.S. at 682; *Cty. of Allegheny*, 492 U.S. at

601. In *Lynch*, the nativity scene was part of a larger display that included secular holiday symbols, colored lights, and a large banner that said, "Season's Greetings." *Lynch*, 465 U.S. at 671. The scene did not affect an endorsement of religion because the scene served, "the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worth of appreciation in society." *Id.* at 693 (O'Connor, J., concurring).

Each of these cases reflect that, under the second prong of *Lemon*, the primary effect of a particular act is a legal question of "judicial interpretation of social facts." *See id.* at 694. As such, considering the "social facts" surrounding the modern, widespread, and secularized use of meditation, the Board no more endorses a religion through meditation practices than does a town's nativity scene within a larger holiday display. *See id.* And considering the particularized facts, the Board does not in effect endorse a religion. Board meetings are conducted with a high degree of professionalism. *See* R. 13. Additionally, the Board's leadership and invocation policy encourage attention to the meditations and breathing exercises for the express purpose to promote peace and "emotional and mental health of [the] community." R. 2. While "peace" may coincide with tenets in most religions, any association with a particular religion is a byproduct rather than a primary effect. *See Lynch*, 465 U.S. at 682. Finally, even where meditations include some religious features or phrases, like the nativity scene among a holiday display in *Lynch*, the social fact of the secularization of meditation outweighs a particular religious symbol. *Id.* at 693 (O'Connor, J., concurring). Therefore, the meditations remain within this necessary threshold for constitutionality.

2. The meditations do not coerce community members or students into practicing a religion.

To obfuscate the constitutional threshold of the third *Lemon* prong, the Board's meditations must excessively entangle government with religion so as to have a coercive effect on students in

school prayer contexts. *Lemon*, 403 U.S. at 612-13. Coercive effect is applied much more assiduously in a public-school environment than in legislative meetings. *See Lee v. Weisman*, 505 U.S. 577, 588-89 (1992).

In public school settings, the Establishment Clause is concerned about the "subtle coercive pressures," where students have no sufficient alternative to avoid the "fact or appearance of participation." *Lee*, 505 U.S. at 588. Regardless of a school's attempt to neutralize the content of prayer, the Court is concerned about a school's intention to "produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend." *Id.* at 589. The classroom during school hours and high school graduations are regarded as settings where religious coercion may be particularly acute. *Id. See also Engel*, 370 U.S. at 430.

Legislative settings, like school board meetings, however, are distinct from public school settings. *See Lee*, 505 U.S. at 596-97. In school board meetings, participants and spectators are universally free to come and go without explanation or reason. *Id.* at 597. In the classroom and graduations, students are under a "high degree of control" of teachers and principals. *Id.* Classroom attendance is compulsory by law, and a graduation ceremony is "one school event most important for the student to attend." *Id.* As previously stated, prayer at legislative meetings is a historical practice to offer solemnity to governing decisions. *See Town of Greece*, 572 U.S. at 587. This setting and purpose are starkly different than, and thus do not contain the same coercive nature as, a public-school setting with obligatory or compulsory student attendance. Finally, student participation at a legislative meeting changes nothing about the content and purpose of the meeting, nor the permissiveness of an invocation at the start. *See id.*

Nothing in the record demonstrates a coercive effect. In fact, the record demonstrates the opposite: Griggs sent her daughter out of the meeting at the start of the meditation before even

hearing the words. R. 2. Jennifer Griggs, a regular attendee of Board meetings, could leave the room without any repercussions or coercion. *See* R. 2. Unlike during graduations and in the classroom, participants in school board meetings are free to enter and exit without explanation or legal consequence. Even where the Board encourages attention to the meditations, the environment of a legislative meeting and the content of the meditations do not coerce community members and students to practice a religion.

A school board invocation policy could conceivably contravene the Establishment Clause, but this one does not. Because the Board utilizes meditation to offer solemnity to legislative meetings, the overall effect of the meditations is just that. Therefore, the Board's meditations are permissible under the First Amendment.

II. ASHLYN DOES NOT VIOLATE OTHER USERS' FREE SPEECH RIGHTS WHEN SHE MONITORS AND MANAGES ACTIVITY ON HER OWN LINKEDIN PROFILE.

The First Amendment expressly protects the right to free speech and prevents governments from adopting any law or policy that would infringe upon that right. U.S. Const. amend. I. This Court has thus long protected an individual's right to free expression on government property. *See Hague v. CIO*, 307 U.S. 496, 515 (1939). However, First Amendment protection of expression has not extended to a municipal employee's private property. To determine whether speech in such a setting is protected, the court must consider three factors: whether the speech in question was protected, whether it occurred in a government forum, and whether it was excluded on the basis of a disagreement with the speaker's viewpoint. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469-70 (2009); *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678-79 (1992).

Here, the parties dispute whether speech on a municipal employee's personal social media profile is protected under the First Amendment and 42 U.S.C. § 1983 (2019). If the speech were

made on a government forum, then there would be an issue of viewpoint discrimination. But the social media profile is not a government forum, and managing the profile is not a state action. Therefore, there was no violation of the First Amendment right to free speech.

A. Ashlyn's LinkedIn Profile Is Not A Government-Controlled Forum.

Where a property is not a traditional public forum, a designated public forum, or a nonpublic forum, the property is not a forum at all. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998). Here, Ashlyn's privately maintained LinkedIn Profile does not fit into any category of fora, and thus is not government-controlled forum.

The forum analysis in the First Amendment context focuses on the degree of government control. *See Cornelius v. NAACP Legal Def. & Edu. Fund, Inc.*, 473 U.S. 788, 800 (1985); Jeremy T. Berry, Comment, *Licensing a Choice: "Choose Life" Specialty License Plates and Their Constitutional Implications*, 51 Emory L.J 1605, 1624-25 (2002). A public forum is one that "by long tradition or government fiat" has been open to the public for assembly and debate. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Additionally, citizens use public fora to discuss public questions. *Id.* The quintessential examples of public fora are streets and parks. *Id.*; *see also Int'l Soc. for Krishna Consciousness, Inc.*, 505 U.S. at 679.

Ashlyn's LinkedIn profile is patently not a public forum. Unlike streets, parks, and other public places, Ashlyn's LinkedIn does not have a long history of being open to the public for debate and assembly. *See Int'l Soc. for Krishna Consciousness, Inc.*, 505 U.S. at 679; *Perry Educ. Ass'n*, 460 U.S. at 45. Although LinkedIn is a communication tool, "not every instrumentality used for communication . . . is a traditional public forum." *Cornelius*, 473 U.S. at 803. Rather than opening the LinkedIn profile for public discourse, Ashlyn created her profile to share her professional developments. *See* R. 2-3. Further, the general public does not have unlimited access

to Ashlyn's profile—only her 1,000 hand-picked connections can interact with her LinkedIn. R. 3. Because Ashlyn's LinkedIn profile has not traditionally been open to the public for assembly and discourse, it is not a public forum.

Social media pages maintained by political figures have only been considered government-controlled public fora when political figures invite public discourse on their pages. See *Davison v. Randall*, 912 F.3d 666, 682 (4th Cir. 2019); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019). In *Knight*, the court reasoned that because the President opened his Twitter account for announcing public policy and public discussion, and then made it completely available to the public, the account was a public forum. *Knight First Amendment Inst.*, 928 F.3d at 237. Similarly, in *Davison*, a public official used her Facebook page to explicitly invite any member of the public to discuss any issue of public concern. 912 F.3d at 682. Several members of the public engaged in discussion on the page, which was open to all citizens, based on the official's invitation. *Id.* Accordingly, the court held that the page was a public forum. *Id.*

Unlike the President's Twitter account and the state public official's Facebook page, Ashlyn does not indiscriminately open her LinkedIn profile to the public. *See* R. 2. Instead, Ashlyn only interacts with individuals after accepting each individual connection request. R. 2. Moreover, Ashlyn does not invite public discourse on her LinkedIn profile. If someone voices concern about something, instead of engaging with her on LinkedIn, Ashlyn directs the individual to voice her concerns at the next Board meeting. R. 15. Instead of using her LinkedIn page to discuss policy, Ashlyn uses hers to announce upcoming Board meetings and to share Board meeting minutes. R. 17, 21. Thus, Ashlyn's LinkedIn profile is not a government-controlled public forum.

The government can also create a public forum by designation. *Perry Educ. Ass'n*, 460 U.S. at 45. A designated public forum is one the government designates for certain speakers or for

discussing certain subjects. *Int'l Soc. for Krishna Consciousness, Inc.*, 505 U.S. at 678. The government cannot create a designated public forum on accident—intent is required. *Cornelius*, 473 U.S. at 802; *see also* Berry, *supra*, at 1625 ("A specific government action is required to transform the forum…to a designated public forum."). Courts determine whether the government has created a designated public forum by considering (1) the policy and practice of the government, and (2) the nature of the property and its compatibility with expressive activity. *Cornelius*, 473 U.S. at 802.

Ashlyn's LinkedIn profile is also not a designated public forum. First, the profile is not governed by any City of Dooley intent, policy, or practice. Instead, Ashlyn herself created and controls her profile for digital networking. R. 2-3. Additionally, Ashlyn's LinkedIn profile has not been open for indiscriminate use by the public. *Cf. Perry Educ. Ass'n*, 460 U.S. at 47. Access to her LinkedIn profile is based on her discretion in accepting connection requests, not on government policy. R. 2. Moreover, Ashlyn uses her profile to share her professional developments, both at Amicus Auto Shop and the Board. R. 16-21. Because Ashlyn uses her LinkedIn profile for her private, professional interests, it is not a designated public forum by government policy or practice. *See Cornelius*, 473 U.S. at 802 ("We will not find that a public forum has been created in the face of clear evidence of a contrary intent.").

Second, Ashlyn's LinkedIn is incompatible with expressive activity by members of the public. Property is compatible with expressive activity only when set aside for the purpose of hosting expressive activities. *See Cornelius*, 473 U.S. at 802 (concluding that opening a school board meeting to citizen involvement and leasing a municipal auditorium for expressive activities were both designated public fora). In contrast, Ashlyn did not set aside her LinkedIn profile for public communication. She primarily uses her profile to share her personal professional

developments, including education, employment history, and professional skills. R. 2, 15-16. Only Ashlyn's connections can comment on her posts, and those comments are the sole form of expressive activity from the public present on her profile. R. 2, 15-23. Accordingly, Ashlyn's profile is incompatible with expressive activity and is not a designated public forum.

If a property does not fit either category of public fora, then it may be considered a nonpublic forum or not a forum at all. *Davison*, 912 F.3d at 682; *Ark. Educ. Television Comm'n*, 523 U.S at 678. A forum is nonpublic when the government owns it and grants the public selective access to it. *Ark. Educ. Television Comm'n*, 523 U.S at 679; *see also Int'l Soc. for Krishna Consciousness, Inc.*, 505 U.S. at 679 (explaining that all other government-controlled property that is not a public forum or a designated public forum is nonpublic fora). Here, the City of Dooley does not own or operate Ashlyn's LinkedIn profile. Instead, Ashlyn personally manages her LinkedIn profile. R. 2. Thus, Ashlyn's LinkedIn is not a nonpublic forum.

Because Ashlyn's LinkedIn profile is neither a public forum, a designated public forum, or a nonpublic forum, it is not a government-controlled forum and is not subject to scrutiny under the First Amendment.

B. Ashlyn Was Not Acting Under The Color Of Law When She Removed Comments And Restricted Another User's Access To Her LinkedIn Profile.

Not every action taken by a municipal employee is state action. "Isolated unconstitutional actions by municipal employees will almost never trigger liability." *Robinson v. Hunt Cty.*, 921 F.3d 440, 499 (5th Cir. 2019). Rather, a violation under 42 U.S.C. § 1983 is only triggered by state action. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978); *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976).

What constitutes a state action is a "matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295

(2001). Instead, this Court must examine the totality of the circumstances to determine whether the action at issue "bore a sufficiently close nexus with the State to be fairly treated as that of the State itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). The "nexus test" asks whether the challenged actions are linked to events which arose out of an individual's official status. *Davison*, 912 F.3d at 680. If the individual's status as a public official enabled him to act in a manner that private citizens never could have, then the action is likely attributable to the state. *Id.*

This Court has not yet addressed the state action issue in the context of activity on a municipal employee's social media profile. A government official's acts may be treated as state action when he removes comments or blocks users from a social media profile only if he acts in an official capacity when he uses the page. *Knight First Amendment Inst.*, 928 F.3d at 236. Some circuits have found such acts are under the color of law when the social media page is designated as an official government account or the profile is "swathed in the trappings" of the individual's office. *See id.*; *Robinson*, 921 F.3d at 448 (5th Cir. 2019); *Davison*, 912 F.3d at 681. But these critical factors are nonexistent here.

1. Ashlyn's LinkedIn profile was not designated as an official government account.

A social media page is designated as an official page when it explicitly says so or is separate from the official's personal page and contains official contact information. *See Robinson*, 921 F.3d at 448-49. For example, the Fifth Circuit has found a state action when a user's comments were removed and she was banned from a Facebook page operated by the Sheriff's office and that displayed an "About" section reading, "Welcome to the official Hunt County Sheriff's Office Facebook page." *Id.* Likewise, the Fourth Circuit concluded a government official acted under the color of law when she removed comments and blocked users from a designated government

official Facebook page that was separate from her personal profile. *Davison*, 912 F.3d at 673, 680. This official page only contained the formal email address and phone number of her government office as opposed to any personal contact information. *Id.*

Neither Ashlyn nor the Board has designated her personal LinkedIn profile as the official page for the Chair of the School Board. Ashlyn created and actively used her LinkedIn profile before she was elected to the Board. R. 3. And at no point after being elected as a municipal employee has the government or Ashlyn designated her personal profile as an official page for her position. Ashlyn merely lists her employment by the Board alongside her status as the co-owner of her family-owned auto shop. R. 15. She also does not list any government contact information, despite doing so for her auto shop. R. 15. Ashlyn alone controls the privacy settings that permit other users to access the profile or interact with her posts, and Ashlyn alone controls the content and activity on her personal profile. R. 2-3. Considering these aspects of her profile, nothing in the record supports that Ashlyn's personal LinkedIn profile has been designated as an official government page.

2. Nor is Ashlyn's personal LinkedIn profile used as a tool of governance to further her official duties or "swathed in the trappings" of her office.

"Not every social media account owned and operated by public official is a government account." *Knight First Amendment Inst.*, 928 F.3d at 236. Lower courts look to "how an official describes and uses the account; to whom features of the account are made available; and how others, including government officials and agencies, regard and treat the account." *Id.* These courts have only found that a government official acts under the color of law on their own social media page when they create or use the page to further their duties as a municipal officer or the official

nature of the account is overwhelming. *See Knight First Amendment Inst*, 928 F.3d at 238; *Davison*, 912 F.3d at 681; *Robinson*, 921 F.3d at 449.

A profile used to solicit public comment or to announce official decisions might be considered as used to further official duties. In considering the President's Twitter account, the Second Circuit noted that he uses the account to "announce, describe and defend his policies; to announce official decisions; to engage with foreign political leaders; to publicize state visits; [and] to challenge medial organizations whose coverage of his Administration he believes to be unfair." *Knight First Amendment Inst.*, 928 F.3d at 246. Moreover, the court indicated that the National Archives, the agency responsible for maintaining government records, has classified the Tweets as official records since the President and his aides "characterize the Tweets as official statements of the President." *Id.* at 232.

Likewise, the Fourth Circuit held that a county official "clothed [her page] in the power and prestige of her state office" when she created and administered the page to further her duties. *Davison*, 912 F.3d at 680. The court noted that most posts were directed at the county, the official submitted posts on behalf of Board as a whole, and the content had a tendency toward matters related to office. *Id.* at 673, 680. Based on these factors, the court concluded that the page was primarily used as a tool of governance. *Id.* at 680.

Moreover, if a social media profile appears overwhelmingly official in nature or is "swathed in the trappings" of government office, then activity on the page is more likely a state action. The Second Circuit found that the "public presentation of the [President's] Account and the webpage associated with it bear all the trappings of an official, state-run account." *Knight First Amendment Inst.*, 928 F.3d at 231. Specifically, the court noted that the account is registered to the

"45th President of the United States of America, Washington, D.C." and the header showed the president engaged in performance of specific duties. *Id.*

Similarly, the Fourth Circuit found a city official's page was "swathed…in the trappings of her office" because the page included the official's titled, listed her official email address and office phone number, and included the web address for the County. *Davison*, 912 F.3d at 674. The court pointed out that this, combined with the fact that it was used to further official duties, enabled the government official to use the page in such a way that no private citizen could have. *Id.* at 680.

Ashlyn's account, however, is not overwhelmingly official in nature, and she did not create or use it as a tool of governance. In fact, any private citizen can—and often do—create and use a LinkedIn profile in the same manner as Ashlyn. LinkedIn is a platform designed to allow individuals to post their professional information, including articles and job updates. R. 2. Accordingly, Ashlyn has listed all of her professional information, including not only her position as the School Board Chair but also her position as a co-owner of Amicus Auto Shop, a family-run business. R. 15. While Ashlyn occasionally posts minutes and links to footage from Board meetings, this is by no means the exclusive content on her profile. R. 3. To the contrary, Ashlyn frequently uses her personal profile to post articles related to her co-owned business as well as to share personal information about her family with her friends. R. 21.

This profile also lacks any of the typical "trappings" of an official government page. Ashlyn does not list any contact information related to her municipal employment. R. 3. She does not direct connections to other official government sites, except the occasional footage of a Board meeting. R. 3. She also did not register the profile to "Meghan Ashlyn, Chair of the School Board," but rather continued to use it as her own personal profile just as before she was elected as a

municipal employee. R. 3. Nothing suggests that the personal profile is overwhelmingly, or even nearly, official in nature.

Considering Ashlyn's personal LinkedIn profile was not designated as an official government page, used to further her official duties, or swathed in the trappings of her official office, Ashlyn was not acting under the color of law.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals for the Thirteenth Circuit that Ashlyn did not violate either the Establishment Clause or the guarantee of Free Speech under the First Amendment.

Respectfully Submitted,

Attorneys for Respondent

September 25, 2019

APPENDIX

First Amendment

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."