No. 17-874

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

ELIZABETH NORTON, in her official capacity as Governor, State of Calvada

Petitioner,

v.

BRIAN WONG,

Respondent.

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

BRIEF FOR RESPONDENT

Team 11
Counsel for Respondent
January 30, 2018

QUESTIONS PRESENTED

1. Whether a State official engaged in state action when she deleted an individual's Facebook comment, posted in response to an important policy update, and banned the individual from the page so that he was prevented from posting further comments; and
2. If so, whether a public official who explicitly welcomed comments via social media on a certain subject is forbidden from discriminating against a citizen because of his viewpoint, or if an individual's comment on a public official's Facebook post is attributable to the government.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Secondary Authorities

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgement on this matter on November 1, 2017. *Wong v. Norton*, No. 17-874, slip op. at 1 (14th Cir. Nov. 1, 2017). Petitioner timely filed a petition for writ of certiorari, which this Court granted. This Court has jurisdiction over the matter pursuant to 42 U.S.C. § 1983.

STATEMENT OF THE CASE

Respondent Brian Wong brought suit against Petitioner Elizabeth Norton, in her official capacity as Governor of the State of Calvada, in a civil rights action pursuant to 42 U.S.C § 1983 on March 30, 2016. *Wong v. Norton*, C.A. No. 16-CV-6834, slip op. at 1, 12 (D. Calvada Jan. 17 2017). Governor Norton deleted a comment Mr. Wong posted on the Governor's "Governor Elizabeth Norton" ("GEN") Facebook page and banned Mr. Wong from further participation. *Id* at 1. Mr. Wong prayed the court find the acts in violation of the First Amendment and asked for relief that Governor Norton restore his post and rescind his ban. *Id.* Both parties filed cross-motions for summary judgment and on January 17, 2017 the District Court for the District of Calvada granted Governor Norton's motion and denied Mr. Wong's motion. *Id.* at 12. The District Court found that Governor Norton's deletion and ban were attributable to the State but not actionable because neither violated the First Amendment. *Id.*

Mr. Wong timely filed an appeal with the United States Court of Appeals for the Fourteenth Circuit on March 5, 2016. *Wong v. Norton*, No. 16-6834, slip op. at 1 (14th Cir. Nov. 1, 2017). Mr. Wong asked the Fourteenth Circuit to overturn the holding that Governor Norton's actions did not violate the First Amendment. *Id*. at 1, 2. The Fourteenth Circuit affirmed the District Court's finding that Governor Norton violated the First Amendment but reversed the holding that the Governor's actions qualified as government speech. The Court of Appeals therefore found in favor of Mr. Wong's Motion for Summary Judgment. Governor Norton timely filed a Petition for a Writ of Certiorari, which this court granted.

STATEMENT OF THE FACTS

I. GOVEROR NORTON'S BACKGROUND AND FACEBOOK ACTIVITY

In her first attempt at running for political office, Petitioner Governor Elizabeth Norton was elected Governor of the State of Calvada on November 3, 2015. (R. at 25). Governor Norton has lived in Calvada since she was three years old, attended the University of Calvada, and owned a small coffee roasting business before taking office. To communicate her personal and business announcements, Governor Norton created a Facebook page titled "Elizabeth Norton" in 2011. Her announcements included progress on a new roasting and distribution facility and pictures of her fourteen-year-old daughter's accomplishments. At this point, her Facebook page was limited so that only those whom she connected with could view and comment on her page.

The day after her inauguration, Governor Norton renamed her Facebook page to "*Governor* Elizabeth Norton" (GEN Facebook Page) (emphasis added). (R. at 25). In addition to renaming her page, Governor Norton adjusted the privacy settings to make the page available to all members of the public. (R. at 25). Her intention in doing so was to allow her constituents to follow her and have a "personal connection "with her. (R. at 25). After her inauguration, she also inherited a Facebook page titled "Office of the Governor of Calvada," a Page that the previous administration maintained. (R. at 25). Posts on her GEN Facebook Page were sometimes reposted on the official office page, which is also linked to the state's official website. (R. at 25). While members of her staff post on both accounts on her behalf, Governor Norton herself posts on her GEN account "far more frequently" than her official office account. (R. at 3).

The GEN Facebook page played a significant role in Governor Norton's administration. She posted her own thoughts on news and national events and asked constituents for their own advice on how she could make the state a better place for them. (R. at 25). Constituents were asked

to share ideas for improvements, including suggestions on a new state flag, which Governor Norton described as a "major success." (R. at 25). In a large-scale effort to fix potholes around the state, she asked constituents to post photos of potholes they encountered and directed the Department of Transportation to monitor the page so that they could locate and fix the potholes accordingly. (R. at 2).

Governor Norton made it a priority while in office to respond to constituents on her page so that they would know she was "there for them." (R. at 25). She directed several members of her staff (including her Chief of Staff, Mary Mulholland and her Director of Social Media, Sanjay Mukherjee) to respond to constituent requests on the GEN Facebook page. (R. at 23). Ms. Mulholland and Mr. Mukherjee are administrators on the page and often access the account using computers and smartphones provided by the State of Calvada. (R. at 20, 23). Mr. Mukherjee accesses the GEN page account during work hours and while at home before or after work. (R. at 3 and 20). Nelson Escalante, the Director of Public Security for the State of Calvada, monitors Governor Norton's social media accounts for potential threats to the Governor's safety. (R. at 19.)

II. GOVERNOR NORTON'S IMMIGRATION POLICY POST

In addition to daily communication with her constituents, Governor Norton also used the GEN Facebook page to post government initiatives and important policy updates. (R. at 26). The challenged action in this lawsuit occurred when one such post became available to the public on March 5, 2016. (R. at 3). In her announcement (the "immigration policy post"), reproduced in Appendix A, Governor Norton addressed a new approach to immigration law enforcement asked for her constituents' "comments and insights." (R. at 4). She explained to her constituents that her reasoning for posting it on the GEN Facebook Page was so that her most "active, influential, and

caring" constituents could be the first to know about the policy before she announced it at a press conference several minutes later. (R. at 4).

Respondent Brian Wong, a citizen of Calvada whose parents immigrated to the United States from Hong Kong, read the new policy shortly after Governor Norton posted it. (R. at 27). He viewed the post as overtly anti-immigrant, prompting him to respond directly to the post on her GEN Facebook page (R. at 27). Mr. Wong hoped that other constituents would see his reply and "agree with [his] position on the Governor's horrible new policy." (R. at 27). He believed that the policy served principally as "a basis to harass law-abiding minority citizens" and would have a negative impact on cultural diversity and immigration in the United States. (R. at 27). As a first-generation American, Mr. Wong believed that immigration and cultural diversity make the United States a "stronger and better place to live," and he hoped that his post would alert other constituents to the potential for Governor Norton's policy to stifle such developments. (R. at 28). Mr. Wong's post to Governor Norton's page contained the following comments:

> Governor, you are a scoundrel. Only someone with no conscience could act as you have. You have the ethics and morality of a toad (although, perhaps I should not demean toads by comparing them to you when it comes to public policy). You are a disgrace to our statehouse.

(R. at 16). Later that evening, after seeing Mr. Wong's post, Governor Norton sent an email to Mr. Mukherjee asking him to delete Mr. Wong's comment and ban him from the GEN page. (R. at 4). Mr. Wong followed Governor Norton's directions and deleted Mr. Wong's post and banned him so that he was incapable of posting anything else on the GEN page. (R. at 4). The page remained public, so Mr. Wong could continue to view it but was unable to post anything. (R. at 4). Over thirty other comments were posted in response to the immigration policy post but none besides Mr. Wong's were deleted. (R. at 4). Most comments were favorable, but two comments, reproduced in Appendix B, were critical of the policy. (R. at 4).

That same day, Mr. Wong realized that his post was deleted and he was banned from the GEN Facebook page. (R. at 28). He promptly sent an email to Governor Norton's official email address requesting that his post be reinstated and that they remove the ban from his account so that he could continue to be an active participant on Governor Norton's GEN Facebook page. (R. at 28). To this day, Mr. Wong has not received a response and is still banned from posting his comments. (R. at 28).

SUMMARY OF THE ARGUMENT

The Circuit Court correctly found that Governor Norton's deletion of Mr. Wong's post from the GEN page constituted state action, and that decision must be affirmed. Governor Norton's actions satisfy several of this Court's test for finding state action. First, contrary to the District Court's finding, Governor Norton was exercising an exclusive government function by maintaining the GEN Facebook page. Second, the facts in the case overwhelmingly support the District Court's finding that a sufficiently close nexus exists between Governor Norton's actions and the State to constitute state action. Third, Governor Norton and her GEN Facebook page, even if considered private, are so entwined with the State to make them indistinguishable. Finally, Governor Norton's GEN Facebook page has a symbiotic relationship with the State so that her activity on the page are attributable to the State. Governor Norton is self-evidently a state actor who, in maintaining her GEN Facebook page, deleting Mr. Wong's posts, and precluding him from posting again, acted on behalf of the State; her actions as such must be subject to the protections of the Fourteenth Amendment.

This Court should also find that by using a social media platform designed to access the general public and with the express intent of opening discourse on a specific subject, Governor Norton created a state-designated public forum. To its core, Facebook is designed for expressive

activity. Governor Norton purposefully sought out Facebook's platform for this exact characteristic. When she announced her administration's new policy and welcomed feedback, she opened a forum limited in scope but nonetheless available for any and all comments related to her post. The Free Speech Clause of the First Amendment is chiefly interpreted to protect speech in such a forum. Regardless if a comment is praise or criticism, the Free Speech Clause mandates that a public official's control over a public forum to be both reasonable and viewpoint neutral. Governor Norton's actions plainly violated viewpoint neutrality, and were thus unconstitutional.

Finally, this Court should uphold the Court of Appeals' ruling that the government speech doctrine does not apply to Governor Norton's actions. The government speech doctrine is tailored to give public officials the requisite freedom to fulfill their duties. The doctrine exempts from viewpoint neutrality only speech associated with government due to the traditional use of the medium, government control over the medium, and if the message would be associated with the government. The government speech doctrine is not construed to grant a public official flexibility to chill speech that is solely attributable to a citizen participating in a public forum.

Because of established precedent and the importance of diverse, open discourse in the digital age, this Court must and should affirm the Court of Appeals' decision and find for Respondent.

ARGUMENT

I. GOVERNOR NORTON'S DELETION OF MR. WONG'S FACEBOOK POST AND THE IMPOSITION OF A BAN PRECLUDING HIM FROM POSTING FURTHER CONSTITUTE STATE ACTION.

The threshold question in this case is whether Governor Norton engaged in state action by deleting Mr. Wong's post and banning him from the GEN page. To be successful in demonstrating that the defendant violated the plaintiff's constitutional rights, the plaintiff must show that the defendant was acting on behalf of the State. *The Civil Rights Cases*, 109 U.S. 3, 17 (1883). The

Fourteenth Amendment is a "restraint upon the states and not upon private parties unconnected with the state." *Nixon v. Condon*, 286 U.S. 73, 83 (1932). This Court has developed a variety of approaches to deciding whether challenged behavior is state action. Four distinct tests may be used to find state action; the "exclusive government function" test, the "nexus" test, the "symbiotic relationship" test, or the "entwinement" test. Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 Va. L. Rev. 1767, 1797-98 (2010). While any one of these tests can lead to a good finding of state action, there is evidence in this case to support all four tests, and this Court should affirm the Circuit Court's finding that Governor Norton's behavior constitutes state action.

A. Governor Norton exercised a government function by posting important policy updates and inviting constituent feedback.

This Court has often first used the "exclusive government function" test to ask whether the defendant was exercising a function that has been "traditionally the exclusive prerogative of the State." *Jackson v. Metro Edison Co.*, 419 U.S. 345, 353 (1974) (finding that a utility company had not exercised a state function by terminating a customer's electricity for non-payment). A very narrow category of activities has been classified as exclusive State powers. *See Marsh v. Alabama*, 326 U.S. 501 (1946) (finding state action where private property, built primarily to benefit the public, was exercising a government function); *see also Nixon v. Condon*, 286 U.S. 73 (1932) (finding state action where "delegates of the State's powers had discharged their official functions). In *Terry v. Adams*, 345 U.S. 461 (1953), this Court found that a state electoral apparatus had taken on "those attributes of the government which draw the Constitution's safeguards into play." *Id.* at 484. The defendant in *Terry*, a political organization which denied membership based on race, was found to be so integral in the election process that it performed a government function by determining "who shall rule and govern in the county." *Id.* at 469. The fact that the state did

not control the defendant's management of the election process was determined by this Court to be "immaterial." *Id.*

Governor Norton's GEN Facebook page had similarly become an integral part of her work governing the State of Calvada. She and her staff members used the page frequently to communicate with constituents, asking them for ideas on how could improve the state, and thus better serve the community. (R. at 25). Specifically, the GEN Facebook page was used to identify and fix potholes around the state, and to collect ideas for a new state flag, which Governor Norton herself described as a "major success." (R. at 25). Governor Norton and her staff also used the page to post important policy updates and encourage her constituents to be politically active, which is precisely what occurred when Mr. Wong posted his initial feedback. (R. at 25-26). Similar to the political party's importance in the electoral process in *Terry,* the pervasive involvement of the GEN Facebook page in Governor Norton's communication with her constituents demonstrates its designation as a vital government function.

This case can be distinguished from other decisions of this Court where the "exclusive government function" test was not satisfied. In *Jackson*, this Court found that the state's regulation of a private utility company was not enough to find state action. *Jackson*, 419 U.S. at 358 (1974). Governor Norton and her staffers—unlike the private company in *Jackson*—are government employees who used the GEN Facebook page as part of their work responsibilities. As such, they were not simply regulated by the State, but rather acting on behalf of the State itself by performing a government function.

This case can also be distinguished from *Blum v. Yaretsky*, 457 U.S. 991 (1982) (finding that the state's authorization of funds for medical care did not mean a nursing home was performing a government function). The defendant in *Blum*, like *Jackson*, was a private entity that

this Court determined was not performing a government function simply because it was regulated by the State. *Id.* at 1004. In his dissent, Justice Brennan stated that, contrary to the defendant in *Blum*, "where the defendant is a government employee, this inquiry is relatively straightforward." *Id.* at 1013. This case is similarly straightforward; Governor Norton is a government employee who was using her GEN Facebook page to benefit the public, and was performing an "exclusive government function" as such. Her actions in her capacity as Governor are subject to the protections of both the First and Fourteenth Amendments.

B. Given the totality of the circumstances, Governor Norton's actions are sufficiently related to her position as Governor to be considered state action.

Governor Norton's actions also satisfy another test that this Court has used, which asks if there is a "sufficiently close nexus" with her position as Governor to be "fairly treated as that of the State itself." *Jackson* 419 U.S. at 351. This test, which relies heavily on the facts, has been used frequently in this Court to find state action. Julie K. Brown, *Less is More: Decluttering the State Action Doctrine*, 73 Mo. L. Rev. (2003). In order to establish a sufficiently close nexus, this Court should look at the totality of the circumstances surrounding Governor Norton's operation of her Facebook page and her decision to delete Mr. Wong's post and ban him from posting in the future. Hala Ayoub, *The State Action Doctrine in State and Federal Courts,* 11 Fla. St. U L. Rev. 893 (1984).

Governor Norton's argument that her GEN Facebook page was personal is misguided and contrary to the facts in this case. Governor Norton and her staff members were "clothed with the authority of state law" when using the GEN Facebook page and when deleting Mr. Wong's comments. *United States v. Classi*c, 313 U.S. 299, 326 (1941) (noting that misuse of power that is primarily made possible by the authority of the State is action taken "under color of state law"). Three main connections with the State were established through Governor Norton's use of the

GEN Facebook page: (1) Governor Norton changed the name on her GEN Facebook page to reflect her official state title, (2) Governor Norton and her staff used the page as a tool for governance by communicating with her constituents and posting important Government initiatives, and (3) the page itself and the challenge action in question required state resources. These factors solidify the connection between the GEN Facebook page and the State so that Governor Norton's actions are subject to the protections of the Fourteenth Amendment.

1. Governor Norton changed the name of her GEN Facebook page.

Immediately following her inauguration, Governor Norton changed the name of her Facebook page to *Governor* Elizabeth Norton. (emphasis added). Governor Norton insists that she intended to keep her Facebook page private and use it to interact with family members and friends, but her decision to change her name to her official state title says otherwise. (R. at 7). Governor Norton's decision to alter her Facebook page to include her title right after she was inaugurated indicates a change in purpose of her page, from private to public use. The facts in this case are notably similar to those in *Davison v. Loudoun County Board of Supervisors*, No. 16-cv-932, 2017 WL 3158389 (E.D. Va. July 25, 2017), where the defendant maintained a Facebook page with her official state title, "Chair Phyllis J. Randall." The timing of and purpose for the establishment of the page was particularly persuasive for the court; the "impetus" for creating the page was, "self-evidently, [the] Defendant's election to office." *Id.* at *18. She created the Facebook page, which she said would be used to communicate with her new constituents, just one day before taking office.

The timing of Governor Norton's adjustment to her GEN page, and her reasoning for doing so, parallel the defendant's in *Davison*. The day after her inauguration, Governor Norton changed the name on her Facebook page to include her official title, and changed the privacy settings so

that all members of the public could access her page. (R. at 25). Her stated purpose for doing so was so that her constituents could have a personal connection with her, and so that she could show her constituents that "[she] was there for them." (R. at 25). Her interactions with constituents on the page is significant; she asked for their input, requested ideas, and posted important policy updates and initiatives. This suggests that she was "there for them" on her Facebook page as their Governor, not as a private citizen, and that by changing her name on Facebook to Governor Elizabeth Norton, she initiated its use as a tool for governance.

2. Governor Norton used the GEN Facebook page as a tool for governance.

After altering her name on Facebook to include her new official state title, Governor Norton proceeded to use her Facebook page as a tool for governance, solidifying a substantially close nexus with the State. In *Davison*, the court found that the defendant used her page as a "tool for governance" by interacting with constituents and facilitating important policy debate and coordination. *Davison*, WL 3158389 at 18-19. Chair Phyllis Randall, the defendant, used her Facebook page to coordinate with her constituents for "disaster relief efforts after a storm," encourage attendance and participation at "events related to her work as Chair," and keep her constituents informed of "important events in local government." *Id.* at 19. Combining this with several other factors similar to those present in this case, the court found that the defendant "acted under color of state law" in maintaining her Facebook page and banning the plaintiff from that page. *Id.* at 15.

Governor Norton's activity on her Facebook page similarly established it as a tool for governance. She "asked constituents for their input on various state matters and "requested ideas" on how to make the state better. (R. at 25). She, like Chair Randall, "encouraged her constituents to be more actively involved" and announced "government initiatives," which were always

reposted to her official office Facebook page. (R. at 26). Moreover, it was precisely this type of post that Mr. Wong was responding to—a policy update for her constituents that was likely reposted by her official office page, suggesting that this was far from personal, but rather an important public matter. Governor Norton stated that, while she continued to use her Facebook page for personal reasons, she also used it to "keep Calvadans apprised of the actions [her] administration was taking to make Calvada a better place to live." Governor Norton's own words define her page as a tool for governance, as it serves an important purpose for her ability to govern and communicate with her constituents. Her actions are indistinguishable from the State.

Although she claims to use her GEN Facebook page for personal matters, Governor Norton's identity as a state actor and the content of her posts contribute to the perception of her page and her overall authority as a state actor. The Fourth Circuit's reasoning in *Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir. 2003) is instructive on this matter. In *Rossignol*, off-duty police officers removed newspapers that were critical of their police force. The court found that the officers' "identities as state police officers played a role" in their ability to execute their plan and sufficiently established state action. *Id.* at 526. These off-duty police officers were in plain clothes and their personal cars, ostensibly acting on personal matters, yet the court still found that their authority as police officers established a close nexus with state action. *Id.* The totality of the circumstances supported the finding that the officers' actions arose out of "public, not private, circumstances." *Id.* at 524.

Governor Norton's behavior establishes her authority as a state actor to a greater extent than the officers in *Rossignol.* By changing her Facebook account to "Governor Elizabeth Norton," she demonstrated a change in purpose and authority, from a private citizen to a state actor. The activity on her page, particularly communicating with her constituents about state policies,

suggests that she used her authority as a state actor to operate it. Though she did post personal updates, she frequently communicated with her constituents as their Governor and asked them about important state issues. This is of particular importance in her interaction with Mr. Wong, whose comments were directed towards a policy announcement, suggesting that she was acting with her authority as Governor, not as a private citizen.

3. The GEN Facebook page required state resources.

Governor Norton and Mr. Mukherjee, while fulfilling regular work duties, were using state resources to operate the GEN Facebook page and to delete Mr. Wong's post and ban him from posting further. The use of state resources has been important factor for this Court in its analysis of state action. *See Burton v. Wilmington Parking Authority*, 365 U.S. 715 (finding state action where a private restaurant space received state funds). In *Davison*, the Eastern District of Virginia found state action despite the fact that the county officials were not using county-issued electronic devices when they posted to their Facebook page. *Davison*, No. 16-cv-932 at 4. Governor Norton and Mr. Mukherjee, however, were using state devices, suggesting that their conduct in this case further establishes their action on behalf of the State than the defendant in *Davison.* (R. at 7). By completing their normal work duties using smartphones and computers owned by the state, even if acting privately, they established a similar financial relationship to that in *Burton.* The use of state resources qualifies the challenged action as public, not private, and attributable to the State.

Governor Norton emphasizes that the order to delete Mr. Wong's post and ban him from the page was initiated and completed outside of Governor Norton and Mr. Mukherjee's regular office hours while they were both in their homes, not their offices. (R. at 07). But previous cases suggest that the time and space of state action is not confined to state offices. *See Givens v. O'Quinn*, 121 Fed. Appx. 984 (W.D. Va., Aug. 29, 2003) (reversing the district court's finding

that police officers were not acting on behalf of the State because they were off-duty); *See also Layne v. Sampley*, 627 F. 2d 12 (6th Cir. 1980) (finding an off-duty police officer was acting under the color of the law). As previously suggested in *Rossignol*, where police officers were definitively off-duty when they committed the offending act, the fact that a state actor is not working during normal working hours is not dispositive. *Rossignol*, 316 F.3d 516, 526. These cases demonstrate that state actors can act under the color of the law regardless of the fact that they weren't technically on duty or acting within the scope of their employment. In *Layne*, the court stated that "it is clear that whether or not a police officer is off-duty does not resolve the question of whether he or she acted under color of state law." *Layne,* 627 F. 2d 12 at 13. The simple fact that a government employee was off-duty does not necessarily lead to the conclusion that they were not acting on behalf of the State.

For the same reason, the fact that Governor Norton and Mr. Mukherjee were not in their offices during regular business hours does not mean that their actions are not attributable to the State. Moreover, in this case, Governor Norton and Mr. Mukherjee, while working outside of their "normal" office hours, were not doing anything out of the ordinary—the Governor and her staff often complete important work tasks later in the day away from their offices. (R. at 8). Ms. Mulholland went so far as to state that "[her] job is to be available to the Governor at all times." (R. at 23), suggesting that the staff does not operate during regular business hours. Additionally, Mr. Mukherjee also stated that, though he does often access the page at home, he sometimes accesses the GEN account during work hours, bringing it within the scope of his official duties as the Director of Social Media. Because he is an administrator of the page and monitors it as part of his position with the state, he was simply completing a task for work outside of the office.

C. Governor Norton and Mr. Mukherjee actions constitute state action because they are significantly entwined with public officials, institutions, and business.

A third test this Court has applied when analyzing state action asks whether a private actor is significantly entwined with public officials, institutions, or business. In *Brentwood,* this Court found that the private character of an athletic association was "overborne by the pervasive entwinement" of public entities. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assn.*, 531 U.S. 288, 298 (2001). The Court stated that a private entity may be considered a state actor when it is "entwined with government policies or when government is entwined in [its] management or control." *Id.* at 296 (quoting *Evans v. Newton*, 382 U.S. 296, 299, 301(1966)). Various factors contributed to the athletic association's public character, including the overwhelming membership of public schools and that state board members were members of the association's legislative council. *Id.* at 299-300. The defendant, though ostensibly a private actor, was so connected with the State that it was considered part of it for the purposes of the Fourteenth Amendment.

Governor Norton insists that her GEN Facebook page was personal and private, similar to the association in *Brentwood*. Even if this Court agrees that the GEN Facebook page is private, this Court should find that the facts overwhelmingly demonstrate her page's entwinement with the State. Her Facebook page was monitored by her chief of staff, Mary Mulholland, and Mr. Mukherjee, along with several other members of the Governor's staff. (R. at 23). Ms. Mullholland also approves all public announcements and likely approved the Immigration Policy post that Mr. Wong responded to. (R. at 23). The decisions involved in creating the initial post and deleting Mr. Wong's post were all made by Government officials, not private actors, who were performing their typical work duties. Even if Governor Norton's decision to delete Mr. Wong's post and ban him was made privately, it was so entwined with state officials and resources that it should be viewed as public action.

D. The GEN Facebook Page, even if used for Governor Norton's personal reasons, developed a symbiotic relationship with the state so that Governor Norton's use of the page constitutes state action.

Finally, a fourth test that this Court has used to find state action asks if a private entity has developed a symbiotic relationship with the State. In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), this Court found that a private restaurant, in a building where public funds paid for the upkeep and repairs, was in violation of the Fourteenth Amendment when it refused to serve the plaintiff. Finding state action, this Court ruled that "the State has so far insinuated itself into a position of interdependence" with the restaurant that the State "must be recognized as a joint participant in the challenged activity." *Id.* at 725. The restaurant space, though leased by a private party, was sufficiently funded by the State to make its actions attributable to it. The two entities relied on each other, establishing a symbiotic relationship between the private restaurant and the State.

As the facts in this case have already demonstrated, a similar relationship exists between the State and Governor Norton's GEN Facebook Page. In maintaining the page, Governor Norton used state resources by directing her staff members to monitor the Facebook page and to do so using government laptops and phones. Staff members used valuable time at work and at home to post on the page and evaluate its content. Additionally, the Governor's Office came to rely on the page for feedback from constituents and to effectively govern the State of Calvada; some of the administration's successful initiatives required substantial feedback from constituents on the GEN page. Policies were posted for constituents to see and respond to, making it a substantial tool to communicate with the citizens of Calvada. This symbiotic relationship makes the GEN Facebook page, and Governor Norton's actions in relation to it, sufficiently tied with the State to qualify as part of the State itself. Governor Norton's activity on the GEN Facebook page are indistinguishable

from the State, and her actions against Mr. Wong must be subject to the protections of the Fourteenth Amendment.

II. GOVERNOR NORTON VIOLATED THE FIRST AMENDMENT BY DISCRIMINATING AGAINST MR. WONG'S VIEWPOINT IN A PUBLIC FORUM.

The First Amendment's Free Speech Clause has long protected expression in a public forum against viewpoint discrimination. *Rosenberger v Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828-829 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys"). This case involves a straightforward application of the public forum doctrine, only in the digital age.

The Free Speech Clause applies for three reasons. First, Petitioner intentionally opened a channel of communication for the explicit purpose of public discourse on a certain subject, thereby establishing a limited public forum. Second, a public official's restrictions on expressive activity in any public forum must be both reasonable and viewpoint neutral. Offense is a viewpoint. When Petitioner deleted Mr. Wong's comment and forbid him from participating in similar fora in the future, she unlawfully discriminated against him. Third, Petitioner's censorship was unjustified and inexcusable because Mr. Wong's comment in the designated forum does not constitute government speech. In fact, the Free Speech Clause is designed to protect exactly such a comment.

A. Once Governor Norton designated her Facebook page for public discourse on her immigration policy, she established a limited public forum.

A public official creates a designated public forum when she intentionally opens a nontraditional channel of communication to discourse on a particular subject. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.,* 473 U.S. 788, 802 (1985). Whether or not a channel qualifies as a particular forum depends on the access sought by the speaker. *Id.* at 801. In particular, this Court looks to the "policy and practice" of the government in using the channel of

communication and the "nature of the property and its compatibility with expressive activity" to decide if it qualifies as a public forum. *Id* at 800-802; *see also Perry Ed. Assn. v. Perry Local Educators' Assn*, 460 U.S. 37, 47 (1983).

To help classify the various types of public fora, this Court distinguished three categories: traditional public fora, designated (or limited) public fora, and nonpublic fora. *Perry,* 460 U.S. at 45; *Cornelius* 473 U.S. at 802. While some fora of expressive activity, such as parks and public streets, qualify "by long tradition or government fiat," this Court extended free speech protection to nontraditional channels that have been designated as open for certain speakers or certain topics. *Cornelius*, 473 U.S. at 802 (citing *Perry,* 460 U.S. at 45-46). Furthermore, this Court has long held that across fora devoted to assembly and debate, the First Amendment sharply circumscribes the rights for government officials to restrict expression. *Perry*, 460 U.S. at 45; *see also Hague v. CIO*, 307 U.S. 496, 515 (1939) (describing a spectrum of public fora subject to free speech protection).

Courts have widely adopted that once intent is made clear to open a channel of communication, the Free Speech Clause extends to speech within the scope of the designated forum. For example, in *Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989) the Eleventh Circuit held that a city commission designated their meeting to be a limited public forum once opening the meeting to the public for discussion on agenda items. *See also Christian Legal Society Chapter of the Univ. of Cal. v. Martinez*, 130 S.Ct. 2971, 2979 (2010) (holding a school activities fund could be a limited public forum upon opening eligibility to all students); *Musso v. Hourigan*, 836 F.2d 736, 742 (2d Cir. 1988) (applying the limited public forum to a school board meeting); *Suita v. Hyde*, 665 F.3d 860, 869 (7th Cir. 2011) (holding that audience time during city council meetings qualifies as a limited public forum).

There is also clear precedent that a privately-owned, online medium can be used as a limited public forum. With respects to ownership, this Court held in *Southeastern Promotions Ltd. V. Conrad*, 420 U.S. 546, 555 (1975) that a theatre, unowned by the government, constituted a public forum under the requisite circumstances. Later, albeit in a concurring opinion, Justice Kennedy plainly stated that public forum analysis is not limited to "physical gathering places" or "property owned by the government." *Denver Area Ed. Telecomms. Consortium, Inc. v FCC,* 518 U.S. 727, 792 (1996) (Kennedy, J., concurring in part). Lower courts have readily found private property to qualify as a public forum when a public official designated it as such. *See e.g. Am. Broad. Cos. v.* Cuomo, 570 F.2d. 1080, 1083 (2d Cir. 1977) (ruling private campaign headquarters can be a public forum); *Davison,* 2017 WL 3158389 at *10 (finding a public official's Facebook page to be a public forum).

With respects to a forum's online nature, this Court held that a forum need not consist of tangible property when it applied the public forum doctrine broadly to the "means of communication." *Cornelius,* 473 U.S. at 801 (holding that a charity drive constitutes a public forum) (*citing Perry,* U.S. 460 at 44 (defining a mail system as a forum)). This Court took the opportunity to reiterate that point in *Rosenberger*¸ holding that a "metaphysical" space should be protected the same as if it were a physical one. *Rosenberger,* 515 U.S. at 830 (finding a student fund to be a public forum).

As communication has transitioned online, the importance of preserving free speech has become all the more evident. This Court deemed social media platforms, and Facebook in particular, to be "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard". *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017). In fact, this Court went so far as to compare social media as a traditional public square because online

platforms allow "a person with an Internet connection to 'become a town crier with a voice that resonates father than it could from any soapbox.'" *Id.* (quoting *Reno v. ACLU,* 521 U.S. 844, 870 (1997)). Lower courts have been keen to grant these new virtual public squares the same forum analysis as any other novel medium. In *Davison*, the Eastern District Court of Virginia found that Facebook pages were designed as "public spaces", where private citizens could go to express "unfettered virtual discussion". *Davison,* WL 3158389, at *26 and *27. As such, a public official expressly soliciting comments on a Facebook page was "more than sufficient to create a forum for speech." *Id.* Similarly, in *Twitter, Inc. v. Sessions*, No. 14-cv-04480-YGR, 2017 WL 2876183, at *8 (N.D. Cal. July 6, 2017) the Northern District Court of California likened Twitter to the "modern, electronic equivalent of a public square."

The facts of the instant case allow for straightforward public forum analysis. Governor Norton used her GEN page for the explicit purpose of reaching the most engaged citizens of Calvada. (R. at 15-16). She plainly welcomed comments and feedback on her policy, demonstrating an express intent to open her Facebook post to discourse among concerned citizens. (R. at 16, 25-26). Mr. Wong is such a citizen, and voiced his opinion in a manner within the bounds of the Free Speech Clause. (R. at 27). Even without her explicit intention to hear comments from the public on her new policy, Governor Norton post stated that she *always* welcomes feedback and uses the GEN page with the purpose of keeping Calvadans informed on her agency's action. (R. at 15-16). This access sought by Governor Norton is entirely in line with the nature of Facebook, a forum designed to give individuals broad access to the public in a cost-efficient, practical manner.

B. The Governor violated the First Amendment when she forbid Mr. Wong's participation in a public forum because of his viewpoint.

"Giving offense is a viewpoint." *Matal v. Tam*, 137 S.Ct. 1744, 1763 (2017).

For the purpose of applying strict scrutiny to government censorship, this Court need not dwell on the specific categorization of a particular forum. Once a court determines there to be a forum of any nature, the First Amendment mandates viewpoint neutrality. *Davison,* 2017 WL 3158389 at *27; *see also Child Evangelism Fellowship of S.C. v. Anderson School Dist. Five,* 470 F.3d. 1062, 1067 (2006) (finding that viewpoint discrimination is "prohibited in all forums").

A prime tenant of the Free Speech Clause and this Court's precedent is that individuals have a right to speak their minds even if that speech offends. In *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964), this Court declared a "profound national commitment to the principle that debate on public issues should be uninhibited" and that such debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." In support of this notion, courts across the nation have time and again emphasized the importance of uninhibited speech. *See e.g. Connick v Myers,* 461 U.S. 433, 444 (2011) (stating "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values'" (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)); *R.A.V. v St. Paul*¸ 505 U.S. 377, 391 (1992) (when the government targets particular views, the violation is all the more blatant), *Davison,* 2017 WL 3158389 at *27 ("the suppression of critical commentary regarding elected officials is the quintessential form of viewpoint discrimination against which the First Amendment guards"); *Rossignol v. Voorhaar*, 316 F.3d 516, 521-522 (4th Cir. 2003) ("It goes without saying that this stigmatization of speech critical of public officials was among the chief evils that the First Amendment sought to combat.").

In the context of the public forum, this Court has fiercely protected the right to uninhibited speech. In *Rosenberger,* this Court held that the denial of access to a pool of funds, deemed a public forum, to a student group based on their religious viewpoint was clear viewpoint

discrimination. *Rosenberger*, 515 U.S. at 829-30 (viewpoint discrimination is "blatant," "egregious", and "presumptively unconstitutional"). This court reaffirmed in *Good News Club v. Milford Central Schools*, 533 U.S. 98, 106-07, 135 (2011) that any restrictions on a designated public forum must be both reasonable and viewpoint neutral with respects to the scope of the designation. *See also, Lamb's Chapel v Center Moriches Union Free School Dist.,*, 508 U.S. 384, 392-393 (1993) (holding that strict scrutiny applies to speech within the scope of a designated public forum and that any restrictions must be reasonable and viewpoint neutral). This doctrine does not mean that public officials may have no control over a public forum, but rather the control is limited to "reasonable time, place, and manner restrictions." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 469 (2009). Once a public forum is established, this Court found that restrictions on speech must satisfy strict scrutiny, and plainly stated that "restrictions based on viewpoint are prohibited." *Id.*

Governor Norton admits she forbid Mr. Wong from participating in the comment thread because it was an *ad hominem* attack. (R. at 26). She further argues that it was unrelated to the content of the immigration policy post, and thus outside the scope of limited public forum protection. (R. at 26). Her argument is misguided. The circumstances make it clear that Mr. Wong, an immigrant himself who is a teacher of immigrants in Calvada, was prompted to voice his opinion because of specific subject of the Governor's post. (R. at 27-28). Mr. Wong's statement did not merely show disagreement with a policy. It was a statement that spoke to the character and underlying ethics of the policy. While the Governor did not delete other posts in opposition of the administration, such non-action does not excuse her deletion of Mr. Wong's post because his post was more critical to the Governor. *N.Y. Times* and its progeny have settled this issue without

equivocation, to forbid speech critical of a public official merely because it is critical, is unconstitutional.

C. The government speech doctrine does not apply because Mr. Wong's Facebook post on the comment thread is not attributable to the Governor.

The Governor claims that her restriction on Mr. Wong's post should be exempt from the Free Speech Clause because she construes Mr. Wong's comment as her own. Such a finding would vastly expand the government control over public fora beyond its current confines and defy common sense.

This Court has created a well-defined exception to the Free Speech Clause through the government speech doctrine. *Summum,* 555 U.S. 460, 472. Put simply, in order for government to fulfill its duty it must be allowed to "speak for itself." *Id.*at 467-468. This principle is designed so that government has the necessary authority to define an agenda and pragmatically pursue its goals. *Id.* As a corollary, an individual has no Constitutional right that the government share her own view. *Id; See also Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 283 (1983) (holding the general public has no right to be heard by public officials making decisions on policy). There is no right to be heard, but once a public forum is established, once a public official has opened the floor to all comers, the government cannot discriminate within that forum based on viewpoint. *Summum*, 555 U.S. at 469.

The question before this Court is where to draw the line with what speech can be attributed to the government. This Court has already created a clear test to determine what should be considered the government's own speech and what speech is characterized as belonging to an individual. *Walker v. Texas Division, Sons of the Confederate Veterans, Inc.,* 135 S.Ct. 2239 (2015). With *Walker,* this Court found that license plate designs, even though they are created by private parties and placed on private cars, have "the effect of conveying a government message"

and therefore qualify as government speech. *Id.* at 2251 (quoting *Summum* 555 U.S. at 472). There are three steps to government speech analysis. *Id.* at 2248-49. First, courts must examine whether the channel of expression has traditionally been used by the government to convey public messages. *Tam*, 137 S.Ct. at 1760 (citing *Walker* 135 S.Ct. at 2248-49). Second, courts must examine if the speech is "closely identified in the public mind with the State." *Id.* Third, courts must determine if the government has direct control over the messages on the medium. *Id.*

Following the standards set out in *Walker* and *Summum*, this Court has not allowed the government speech doctrine as a loophole to restrict speech that can only be attributed to the public. In *Summum*, this Court found that because of the traditional purpose a monument serves on a public park, the approval of a private monument would clearly represent government speech. *Summum*, 555 U.S. at 472. Likewise, in *Walker,* the traditional association of a license plate with government-sanctioned messages was determinative in classifying license plates as government speech. *Walker,* 135 S.Ct. at 2250. These two instances of private individuals using a medium traditionally operated exclusively through government means does not grant public officials the right to restrict speech whenever they so please. In *Tam,* this Court held that the Patent and Trademark Office could not deny a trademark and its associated benefits on the ground that the speech was disparaging. *Tam*, 137 S.Ct. 1744. The Court found the connection between a trademark approval and government speech too attenuated to warrant chilling free expression. *Id.* at 1758.

Tam establishes clear grounds for why the government speech doctrine is inapplicable to Mr. Wong's post. The monument in *Summum* and the license plate in *Walker* both represent channels of exchange long controlled by and associated with government officials. Applying the first factor in the *Walker* test, both types of mediums have long been used to convey a public

message. Mr. Wong's post has no such association with the government. A comment by a citizen in the thread following a Facebook post, written under the citizen's name, has never been nor could it ever be construed as displaying a public message. The circumstances and common-sense show that when Mr. Wong, himself an immigrant with reason to oppose the Governor's policy, authors a post in opposition to the Governor's post, he is speaking on his own behalf, not the Governor's. As such, the Governor's government speech argument does not even get off the ground.

Should this Court find that Mr. Wong's post does satisfy the first *Walker* requirement, it should still strike down the government speech analysis on the latter two prongs. No reasonable observer would consider Mr. Wong's post, under his own name, in the comment section of the Governor's post to be identified, let alone "closely", with the state. Furthermore, no reasonable individual could consider the Governor has direct control over the message. As in *Tam,* the Government does not "dream up" Mr. Wong's message. Even though Facebook has granted Governor Norton authority to delete posts, she explicitly opened the comment section to any and all viewpoint on the immigration policy. No reasonable person could believe the comments are endorsed or sanctioned by the Governor. To the contrary, the general public enters the comment thread for the purpose of hearing and engaging with diverse opinions of all comers. (R. at 16, 27). The government speech doctrine does not apply to a comment thread under *Summum* and its progeny. As such, the Governor cannot giver herself the right to censor speech in a public forum under such a false pretense.

Conclusion

For the foregoing reasons, Respondent asks this Court to affirm the Court of Appeal's decision, granting Respondent's Motion for Summary Judgment and denying Petitioner's cross Motion for Summary Judgment.

APPENDIX A

New State Policy on Immigration Law Enforcement

Members of my cabinet, other senior advisors, the leadership of the Calvada Senate and House of Delegates, and I have now concluded an extensive discussion of the question whether state law enforcement officials should cooperate with federal law enforcement agencies in enforcing the immigration laws of the United States. I have decided to commit the law enforcement resources of our State to this effort. This new approach in our State will entail cooperation on a number of different levels. For example, law enforcement officers will be instructed to request proof that individuals stopped for alleged traffic infractions or apprehended as suspects in criminal investigations are legally present in the United States wherever such inquiries are determined to be consistent with the United States Constitution and the Constitution of our State.

I do not make this decision lightly. I know that some Calvadans worry that cooperating with the federal government in enforcing federal immigration laws may raise concerns among our citizens about family members and friends, and I am aware that many local law enforcement officials worry that this cooperation will jeopardize their ability to work with immigrant communities in seeking to solve crimes. These are important issues. Nevertheless, it is essential for the good of all Calvadans – and all Americans – to ensure that the laws of our country R.03 4 are vigorously enforced. We need to do our part to enforce United States immigration laws.

I am announcing this new policy here today because I know that those of you who visit this Facebook page are among the most active, influential, caring and patriotic citizens of the State of Calvada. I wanted you to be the first to know of this decision. I will announce the new policy to the news media at a press conference I will hold in just a few minutes, and my office will issue an Executive Order pertaining to this new policy later this afternoon. You may find the Executive Order and more information about our new policy at https://www.immigrationenforcementinitiative.calvada.gov. As always, I welcome your comments and insights on this important step.

APPENDIX B

Other Negative Comments on the Immigration Policy Post

I disagree with the new Calvada immigration enforcement policy. It will harm our state's economy. (posted at 4:55 p.m.)

This is not a good policy. It will punish many hard-working people and their families. (posted at 6:12 p.m.)

BRIEF CERTIFICATION

The members of Team 11 hereby certify that the work product contained in all copies of this brief is in fact the original work product of the members of Team 11. Team 11 further certifies that its members have fully complied with Team 11's school's governing honor code. Finally, Team 11 certifies that its members have complied with all Rules of the Competition.

/s/ Team 11

Date: January 30, 2017