TEAM 15
Counsel for the Appellant

No. 17-874

In The Supreme Court of the United States

Elizabeth Norton,
In her official capacity as Governor, State of Calvada
Appellant

v.

Brian Wong,
Appellee

On Writ of Certiorari
to the United States Court of Appeals
for the Fourteenth Circuit

BRIEF FOR THE APPELLANT

TEAM 15
Counsel for the Appellant

QUESTIONS PRESENTED

1. Does a state official engage in state action, either by deleting a user comment from her Facebook post relating to new governmental policy or by banning the user from posting further comments on her personal Facebook page, for the purposes of Section 1983 of the Civil Rights Act of 1964?
2. Does a state official, by posting a statement of governmental policy on her personal Facebook page, either engage in 'government speech' or create a public forum; and, does the First Amendment protect an individual from being excluded from 'government speech' or a public forum?

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STATEMENT OF JURISIDCTION

The District Court entered final judgment on this case on January 17, 2017, pursuant to federal question jurisdiction under 28 U.S.C. § 1331. *Wong v. Norton (Wong I)*, No. 16-CV-6834, slip op. at 1, (D. Cal. Jan. 17, 2017). The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on November 1, 2017, pursuant to appellate jurisdiction under 28 U.S.C. § 1291. *Wong v. Norton (Wong II)*, No. 17-874, slip op. at 1 (14th Cir. Nov. 1, 2017). Both courts note there is no dispute over jurisdiction over this matter. See *Wong II* at 2 n. 1; *Wong I* at 5 n. 1. Appellant, however, reserves the right to raise any jurisdictional issues on appeal, following to the Court's longstanding jurisprudence. *See Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 739 (1976) (citing *Mansfield, Coldwater & Lake Michigan R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). Appellant timely filed a petition for writ of certiorari, which this Court granted. This Court has jurisdiction on writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Plaintiff, Brian Wong ("Wong") filed suit under 42 U.S.C. § 1983 against Governor Elizabeth Norton in her official capacity, alleging Governor Norton's actions violated his Freedom of Speech, on March 30, 2016. *Wong I*, at 1. Wong sought the lower court to enjoin Governor Norton to restore his access to her Facebook page. *Id.* The parties submitted cross-motions for summary judgment, and the court granted Governor Norton's motion on January 17, 2017. *Id.* at 12. The court held that Wong's comment fell within the government speech exception and was not protected under the First Amendment. *Id.*

Wong submitted a timely appeal to the Fourteenth Circuit, seeking reversal of the District Court's grant of summary judgment. *Wong II*, at 1. The appellate court reversed on the grounds that Governor Norton could not constitutionally exclude Wong from a public forum. *Id.* at 10. The

court reversed remanded the matter to the District Court for entry of summary judgment in favor of Wong. *Id.* at 12. Governor Norton filed a petition for writ of certiorari, which this Court granted.

STATEMENT OF THE FACTS

Elizabeth Norton is the current Governor of the State of Calvada. *Wong I*, at 2. She currently operates a Facebook page in her own name, which she created in January 2008. *Id.* Following her election to office Governor Elizabeth Norton changed her Facebook page's title to "Governor Elizabeth Norton." *Id.* At the same time, the Governor also changed her privacy settings to allow for her page to be public. *Id.* The Governor uses the page to post personal as well as professional content. *Id*.

On March 5, 2016, Governor Norton posted an announcement regarding a new immigration policy being put into place, which she and fellow leaders of the state had voted on. *Id.* at 3. In her post, the Governor explained why the state's leadership decided to implement the new policy and addressed possible reactions to this decision. *Id.* at 3-4. A variety of comments were posted, including one by Wong. Wong responded to the post saying:

> 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.

Id. at 4. Two other negative comments were voiced:

1. "I disagree with the new Calvada immigration enforcement policy. It will harm our state's economy;" and
2. "This is not a good policy. It will punish many hard-working people and their families."

Id. at 5. Of the many comments posted on the Governor's immigration policy post, Wong's was the only comment unrelated to the immigration policy. *Id.* at 4-5. Upon seeing the comment, Governor Norton advised Sanjay Mukherjee, the Director of Social Media for the Governor, to

"delete/ban" the comment. Joint Stipulated Facts at 4-5. At 10:10 p.m., Mr. Mukherjee deleted Wong's post and banned him from posting any further comments on the GEN page. *Wong I*, at 4. Wong subsequently emailed Governor Norton asking for his post to be restored. *Id.* at 5. Wong never received a response from the Governor's Office, and he remains banned from posting comments on the GEN page. *Id.* Following, Wong filed this suit pursuant to 42 U.S.C. § 1983 on March 30, 2016 asking for injunctive relief to "restore his post and permit him to make comments on the GEN page in the future." *Id.* at 1.

SUMMARY OF THE ARGUMENT

This Court should reverse and remand the United States Court of Appeals for the Fourteenth Circuit and find that Brian Wong has suffered no constitutional deprivation to his First Amendment Freedom of Speech that is attributable to actions by Governor Elizabeth Norton in her capacity as state official. Governor Norton acted within her private person by banning Wong from posting content to her personal Facebook page. As such, she cannot be held liable under Section 1983 for any injury that Wong suffered as a result. Furthermore, the First Amendment does not grant a protection to individual's speech where such content is government speech. Thus, Governor Norton cannot have deprived Brian Wong from any constitutional right as the result of her deletion of his comment in relation to a newly announced immigration policy.

The state-action analysis for civil rights claims requires a narrow inquiry into each specifically contested action because of Moose Lodge No. 107 v. Irvis and Brentwood Academy v. Tennessee Secondary School Athletic Association. These cases establish that the inquiry into state action is 'necessarily fact-bound' and is not determinative upon other contested actions of the defendant. Thus, the fact that Governor Norton deleting Wong's comment is government speech is not determinative on whether subsequently banning him is properly attributable to state action.

For the same reason that the Court has found certain conduct private in other cases, banning Wong from her personal Facebook page precipitated from Governor Norton's own personal pursuits. Like Tarkanian, attributing Wong's ban to state action would lead to an inequitable result because Calvada has no constitutional basis to govern how Governor Norton disposes of her personal property. Unlike in the case of the government speech, the State has no interest in determining who is and is not permitted the privilege of contributing to one of its employee's social media accounts. For that reason, among others, Wong's ban is not fairly attributable to state action for the purposes of his claim.

"When the government speaks, it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf." In the Facebook post at issue, Governor Norton promoted the new state policy on immigration law enforcement, addressed the public's concern as to this decision, and invited input from the public as to their opinion regarding the new policy. J. Stip. at 3-4. However, because Governor Norton was speaking in regards to her position as Governor, she "is not barred by the Free Speech Clause from determining the content of what [the government speech] says."

The Governor's post was government speech for three reasons. First, since the post was through Facebook, which since its inception has been used to communicate to the general public and has become one of the most important places for speeches of all kinds Secondly, since the Governor's page was closely identified with the state in the public's mind through its title of "Governor Elizabeth Norton" and the content of the post. Third, since the state was able to control the messages conveyed.

Even assuming the Governor's post was not government speech, the deletion of the comment is still appropriate under content discrimination. Id. The Governor's post was merely a limited

public forum. See Wong II, at 10 ("[T]he GEN page was at most a limited public forum."). A limited government forum is created when the government "opens [an otherwise] nonpublic forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects." Content discrimination is "permissible if it preserves the purposes of that limited forum." Thus, because Wong's comment was regarding the Governor's "ethics and morality as [a] leader," the Governor was entitled to delete his post under content discrimination to maintain the original topic of the post.

ARGUMENT

The First Amendment instructs that "Congress shall make no law . . . abridging the freedom of the press." Appendix I; *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 n. 1 (1995) ("The term liberty in the Fourteenth Amendment to the Constitution makes the First Amendment applicable to the states."). As a measure against intruding upon this constitutional liberty, Congress created a federal cause of action under the Civil Rights Act of 1964 that holds "Every person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws . . . liable to the party injured in an action at law. . . ." Appendix II.

As a threshold matter, a claim upon which relief may be granted under 42 U.S.C. § 1983 must carry two elements:

1. The complainant must show that accused acted "under color of state law"; and,
2. They must further show that conduct caused the deprivation of a right "'secured by the Constitution and the laws' of the United States."

Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155-56 (1978). In *Flagg Bros.*, the Supreme Court imparted that "rights established by the Constitution" may be "protected from both governmental and private deprivation." *Id.* Even so, where "a private person [causes] a deprivation of such a

right, he may only be subjected to liability under § 1983 only when he does so under color of law." *Id.* ("It is clear that these two elements denote two separate areas of inquiry.").

Here, the two questions presented co-align with the lines of inquiry that *Flagg Bros.* defined. If met, Brian Wong's complaint dovetails the state-action and constitution deprivation elements to form a single cognizable claim under Section 1983. The first question—can Wong's alleged deprivation of his First Amendment protections properly be attributed to actions by the state of Calvada—turns on whether Governor Elizabeth Norton acted in the ambit of her private or public capacity, at the moment she acted to delete Wong's comment on her Facebook or when she subsequently banned him from posting future comments on that page. The second question is whether the Facebook post was government speech and privileged under traditional First Amendment protections; if not, was Wong deprived of some constitutional right by being excluded from a public forum? Because Appellee has not suffered a constitutional deprivation as the result of the deletion of his comment, and because his subsequent ban from posting further comments was not state action, Appellee has failed to state a claim in which he is entitled to relief. Therefore, Appellant asks the Court to reverse and remand the lower court's ruling.

I. DELETING WONG'S COMMENT IS STATE ACTION, BUT BANNING HIM FROM GOVERNOR NORTON'S PERSONAL FACEBOOK PAGE IS NOT.

The state action requirement of Section 1983 corresponds with that of the Fourteenth Amendment and ensures that only those acting "under color of any statute, ordinance, regulation, custom or usage, of any State" are held liable for infringements of the personal liberties of another. Appendix II; *See Lugar v. Edmundson Oil. Co.*, 457 U.S. 922, 934-35 (1982) (finding the statutory requirement of action "under color of state law" and the "state action" requirement of the Fourteenth Amendment are identical). Arising from congressional overreach, the *Civil Rights Cases* stand for the federal government's inability to regulate private conduct, even where such actions cause the

deprivation of constitutionally secured rights. 109 U.S. 3, 5 (1883). To initiate a cognizable claim under Section 1983, a plaintiff carries the burden of demonstrating that his defendant's actions are correctly attributed to the state's authority, rather than to the defendant's private interests. *Flag Bros., Inc.*, 436 U.S. at 155; *Screws v. United States*, 325 U.S. 91, 111 (1945) ("It is clear that under 'color' of law means under 'pretense' of law. Thus acts of [officials] in the ambit of their personal pursuits are plainly excluded."). Where the presence of state action is questionable, a court's state-action analysis must be narrowly drawn to determine the specific sort of activity contested. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 167-71 (1972).

The lower courts concluded that Governor Elizabeth Norton's actions sufficiently satisfied the state-action requirement of Section 1983 of the Civil Rights Act. Governor Norton contends, however, that the Court of Appeals for the Fourteenth Circuit overreached in finding that Governor Norton's actions *en masse* are properly attributed state action. Rather, Governor Norton draws a distinction between her action precipitating from her personal endeavors and those resulting from her elected office. In agreement with Supreme Court precedent, her two actions, the deletion of Wong's comment and subsequently his ban from the GEN page, should each be analyzed independently for state action, in agreement with Supreme Court precedent.

Governor Norton concedes that deleting Wong's comment constitutes actions attributable to the state of Calvada; even so, this initial concession is without consequence. As Section III illustrates, because Wong has no protections associated with his speech that is properly government speech, he fails on Section 1983's second threshold requirement to establish such state action infringes upon an established constitutional right.

Nonetheless, the ban alone is not state action. Moreover, because the ban imposed against Wong's ability to post additional future comments on Governor Norton's Facebook page was

private conduct, no further inquiry into whether Wong meets the burden of establishing injury to his constitutional rights is necessary. As such, Appellant asks this Court to reverse and remand the present case back to the Fourteenth Circuit on the grounds that Wong has not formed a cognizable claim in accordance with this reasoning.

A. The state-action analysis under Section 1983 claims requires a narrow inquiry into each specifically contested action.

The Supreme Court has occasioned, in its Section 1983 jurisprudence, to distinguish between acts that are attributable to the state and those which are private. *Compare Polk County v. Dodson*, 454 U.S. 351 (1981) (finding a public defender acting in the regular course of his employment is not sufficient to create state action) *with Georgia v. McCollum*, 505 U.S. 42 (1992) (finding the exercise of peremptory challenges by a public defender is sufficient to create state action). For example, a private school performs a public function when educating students, thus are state actors, but does not engage in state action when discharging its teachers. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 841-42 (1982); *see also Milonas v. Williams*, 691 F.2d 931, 939 (10th Cir. 1982). Not only has it distinguished between types of conduct with different defendants, the Court has instructed that Section 1983 requires the Court to make independent determinations of state action for different activities with the same defendant. *Moose Lodge No. 107*, 407 U.S. at 17. A plaintiff will often times argue multiple theories of liability, in an attempt to vindicate his claim for relief. *See* F.R.C.P. 8(d) (2); *see also Cleveland v. Policy Mgmt. Sys. Corps.*, 526 U.S. 795, 805 (1999). However, the Court must make independent analyses for each action liberally contested by a plaintiff, to determine whether any or none arise to a state action that could cause the deprivation of a constitutional right. *Moose Lodge No. 107*, 407 U.S. at 171; *see Davison v. Loudoun County Board of Supervisors*, 267 F.Supp.3d 702, 715 (E.D. Va. July 25, 2017) (reviewing an official's

ban of a constituent as an independent inquiry for state action from its inquiry into deletion of his comments).

Similar to the facts at hand, the Court found that Moose Lodge No. 107's discriminatory membership policies did not constitute state action, but that its refusal to serve an African American guest did. *Moose Lodge No. 107*, 407 U.S. at 168-71. In the plaintiff's complaint, he alleged that the defendant's refusal to serve him based on his race, in addition to its discriminatory membership policies, violated on his Fourteenth Amendment protections. *Id.* at 165. In its reasoning, the Court labored to differentiate the injury felt by the plaintiff, who had been denied service based on the color of his skin, from an injury he had not yet realized—because he had failed to apply for membership to the club, and it had not yet denied him based on discriminatory motivations. *Id.* at 166-67. In doing so, the Court articulated that the Moose Lodge could be held liable under Section 1983 for denying the plaintiff service, but it could not be held liable where there was not government purpose or an acute injury felt. *Id.* at 166-67. The Court accordingly reversed the District Court's decision as exceeding the "vindication of any claim that appellee had standing to litigate." *Id.* at 168.

The present case is factually comparable in that the Court must determine whether either of the two independent actions (the deletion or the ban) vindicate Wong's claim of injury to his First Amendment liberties. Like *Moose Lodge No. 107,* however, the actions contested by Wong are motivated by two unrelated complaints, one being an alleged injury presently felt and another that has not yet accrued. By the same token, Governor Norton's two acts each stem from their own explanation, the first being her authority to regulate government speech and the second going back to the personal quality of Wong's comment and limiting such content in the future. *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 298 (2001) (holding the

state action inquiry is 'necessarily fact-bound'). As such, Appellant maintains that the appropriate inquiry into Governor Norton's contested conduct requires two independent state-action analyses.

The Second Circuit Court of Appeals articulated this principle well when it wrote that "the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury." *Powe v. Miles*, 407 F.2d 73, 81 (2d Cir. 1968). Seemingly, a specifically contested action must be sufficiently governmental *and* fairly traceable to the constitutional deprivation to vindicate an alleged injury. Moreover, the question as to whether either action is attributable to the state, thus, rests with the particular circumstances pertaining to each contested act. The impression left is that to conclude that one undertaking is state action does not compel to conclude that another is as well. Rather, the judge may make independent judgments on the nature of specific conducts without a state-action conclusion bleeding from one determination to another. The real issue arises as to whether Wong's ban can be properly attributed to state action that caused an injury to Wong.

B. The deletion of Brian Wong's Facebook comment is conduct attributable to the state.

Appellant agrees with the conclusion that Governor Norton's deletion of Wong's comment on constitutes state action for the purposes of Wong's claim under Section 1983. The deletion precipitated from Governor Norton's pursuing her role as an elected official, even if such conduct did not fall traditionally within the scope of her office.

The District Court likewise found that there was a sufficiently close nexus between the State and deleting Wong's comment, such it could fairly attribute Governor Norton's conduct to the state. *Wong I*, at 9 (citing *Rossignol v. Voorhaar*, 316 F.3d 516, 525 (4th Cir. 2003)). This Court, in *Brentwood*, held that "state action may be found if . . . there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as of the State itself.'" 531 U.S. at 295 (2001) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345,

349 (1974)). This 'close nexus' with the state has been the proxy for a catch-all anthological test involving the level of state encouragement, empowerment, and entwinement in the actions of ordinarily private actors. The District Court found that the question turns on the totality-of-the-circumstances of "whether the conduct of the private actor is sufficiently interwoven with government." *Brentwood*, 531 U.S. at 7 (despite offering no legal authority for this assertion). Although it did find government action, it disposed of Wong's complaint on the grounds of government speech. *Id.* at 10-12.

The Fourteenth Circuit held noted that public employees act "generally . . . under color of state law . . . while exercising his responsibilities pursuant to state law." *Wong II*, at 5 (quoting *West v. Atkins*, 487 U.S. 42, 50 (1988)). Thus, Governor Norton could conceivably be held liable under Section 1983 for the deprivation of constitutional rights pursuant to her elected position. Governor Norton disagrees with the Court of Appeals only in as far as its opinion, like that of appellate court in *Moose Lodge No. 107*, goes "beyond the vindication of any claim the appellee had standing to litigate." *Moose Lodge No. 107*, 407 U.S. at 168. The appellate court's reasoning regarding state action should be limited to the Court's inquiry into whether the deletion of Wong's comment is state action, on the grounds that private activity by public officials is not state action. *See supra Screws*, 325 U.S. at 111. Nonetheless, the circuit court reversed the lower court's dismissal, finding Governor Norton had deprived Wong of his right to speak in a public forum.

Under several of the tests cited in the record, the Court could reasonably conclude that deleting Wong's comment is attributable to government conduct. This Court imparted that state action may be found "in the exercise by a private entity of powers traditionally exclusively reserved to the states." *Jackson v. Metro. Edison. Co.*, 419 U.S. 345, 352 (1991). And although the District Court concluded that maintaining a Facebook page is not a traditional function of the state, it also noted

that this Court, itself, wrote that "[t]he test is not which state power has been applied but, whatever the form, whether such power has in fact been exercised." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). Espousing a governmental policy is certainly a necessary and important role of the state. *See Walker v. Texas Div., Sons of Confederate Veterans*, Inc., 135 S.Ct. 2239, 2246 (2015). And, the Court has acknowledged the importance of social media, as recently as last year. *See Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017). Deleting Wong's comment, thus, was not only in close nexus to the state, it was the state acting. Notwithstanding, Wong's ban on the Facebook page is certainly not attributable to state action.

C. The imposition of the ban on Brian Wong against posting further additional content on Governor Norton's Facebook page falls within the ambit of personal pursuits.

This Court in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, underscored the argument—that the factual circumstances necessary to establish state action for a particular contested action differ on a case-by-case basis—noting,

> What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.

531 U.S. 288, 295-96 (2001) (citations omitted). In *Brentwood*, the Court addressed whether an interscholastic athletic association that regulates sports among public and private high schools in Tennessee is a state actor for the purposes of Section 1983. In the paragraph following the above excerpt, the Court specifies a number of examples "that can bear on the fairness of such an attribution." *Id.* at 296. Finding that "examples may be the best teachers," regarding such questions as ours, the Court expanded on the principles of finding state action where the private party "is controlled by an 'agency of the State[,]" "has been delegated a public function of the state," or is

"entwined with governmental policies." *Id.* at 930-31 (quoting *Pennsylvania v. Bd. of Dir.*, 353 U.S. 230, 231 (1957); *West v. Atkins*, 487 U.S. 42, 56 (1988); *Evans v. Newton*, 382 U.S. 296, 299 (1966)).

The "necessarily fact-bound inquiry," guided by similarly fact based cases, prompted this Court to find that the association's regulations constituted state action. There is no such historical precedent guiding the Court today. Rather, Wong asks the Court to find a new basis for holding private parties liable under Section 1983. That is, if the Court were to decide that banning Wong constitutes state action, the result suggests that private parties forfeit their due process rights to personal property upon entering into public office; or, that Calvada is vicariously liable through its employees for the use of their personal property. This runs contrary to the Supreme Court's attitude toward the state action element. "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and avoids careful imposition of responsibility on a State for conduct it could not control." *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 461 (1988). Per *Tarkanian*, if the Calvada state legislature could not constitutionally prescribe how is to use Governor Norton her personal property, then certainly here it is unreasonable to attribute the excluding of another from her personal property to state action. *Id.*

Carrying the burden of proving Wong's ban is attributable to state action, Appellee offers little more than conclusory accusations for the purpose of meeting the requirements under Section 1983. For example, Wong argues, as the District Court noted, that because Governor Norton and her staff work sporadically beyond the Eight-to-Five work day, then somehow her the deletion of his comment becomes state action. *Wong I*, at 8. But, no legal standard is given toward that assertion.

And once the Court narrows its inquiry to whether banning Wong is specifically state action, the record evidences that Wong has not made a sufficient showing in his pleading.

Per the District Court opinion, Wong argues that used of state resources can conceivably convert private conduct to governmental in nature. *Wong I*, at 8 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 742 (7th Cir. 2015)). Neither of the cases relied on by Wong are similar to the one at bar. In *N.Y. Times Co.*, the Court was faced with whether a civil libel action against the newspaper and African American preachers for criticizing a public official violated the plaintiffs' First and Fourteenth Amendment rights. Disposing of the state-action defense, the Court found that the Alabama courts worked under color of state law toward the deprivation of their rights to freedom of press. This case simply stands for the same proposition as *Shelley v. Kraemer*, that "state action . . . is equally repugnant to . . . constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute," which is not contested today. 334 U.S. 1, 16 (1948). In *Listecki*, the Seventh Circuit was faced with whether a "committee of unsecured creditors" of a bankrupt archdiocese were sufficiently government actors for the purposes of the archdiocese's suit injunctive relief under the Religious Freedom Restoration Act. *Listecki*, 780 F.3d at 737-38. Although the court cited *N.Y. Times Co.* in its opinion, it did not even arrive at the question of whether court action created state action, finding that establishing the committee of unsecured creditors was a result of private action by the plaintiff himself. *Id.* at 738, 741-42.

Neither of these cases pass muster for the "necessarily fact-bound inquiry" required with these complex questions surrounding the state-action doctrine. The sole factually relevant case in the record is *Davison v. Loudoun County Board of Supervisors*, arising from the Federal District Court for the Eastern District of Virginia. 267 F.Supp.3d 703 (E.D. Va. July 25, 2017). In *Davison*, a

county official banned a constituent that was posting similarly inflammatory comments to Twitter and Facebook. *Id.* at 709-11. While they both were present at a town hall, the official read the comments posted, banned the individual, and the following morning unbanned him after further thought. *Id.* The court found that the official's actions "arose out of public, not personal, circumstances" for three reasons. First, because the comments directed toward the defendant followed in response to her comments at the town hall; second, because the defendant banned the plaintiff in response to comments directed toward her colleagues; and, because the defendant acted out of censorial motivation to suppress criticism relating to the pursuing her office. *Id.* at 713-15 (quoting *Rossignol v. Voorhaar*, 316 F.3d 516, 524 (4th Cir. 2003)).

Those facts distinguish *Davison* from this case. First, the contested actions in this case did not precipitate in the same manner as *Davison*. While Davison engaged in back-and-forth interactions with state officials prior to being banned, Wong interacted with no state officials, but merely posting his comment underneath Governor Norton's statement. *Davison*, 267 F.Supp.3d at 710-11; J. Stip. At 4. The level of government entwinement, then, is far lower than the threshold set by the Court in the past. Second, Wong's comment was directed at Governor Norton personally, implying that his ban precipitated from personal motivations. J. Stip. at 4. Davison, on the other hand, directed some, if not most, of his critical comments at the integrity of the institution and the defendant's colleagues. *Davison*, 267 F.Supp.3d at 711. The difference suggests that the content of the user's post are instructional as to what is state action and what is personal conduct. And finally, Wong was one critic among many, unlike Davison, suggesting that Governor Norton was not interested in censoring criticism against her, but rather interested maintaining a specific tone on her personal page. *Davison*, 267 F.Supp.3d at 711; J. Stip. at 5. As such, finding that the ban

arises out of censorial motivations by Governor Norton is incongruent with the truth that she did not censor posts criticizing the content of her policy statement.

As in *Brentwood*, these factual considerations lay a starting line from which this Court can decide what does and does not fall on the side of state action for state officials using social media. For the foregoing arguments, banning Wong from Governor Norton's personal Facebook did not cross the line from private conduct to state action. Ergo, Wong has failed to state a cognizable claim from which he is entitled to relief.

II. THE POST AS A WHOLE WAS GOVERNMENT SPEECH

"When the government speaks, it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2246 (2015). In the Facebook post at issue, Governor Norton promoted the new state policy on immigration law enforcement, addressed the public's concern as to this decision, and invited input from the public as to their opinion regarding the new policy. J. Stip. at 3-4. However, because Governor Norton was speaking in regards to her position as Governor, she "[was] not barred by the Free Speech Clause from determining the content of what [the government speech] says." *Walker*, 135 S.Ct. at 2241. It would be difficult "to imagine how government could function if it lacked the freedom to select the messages it wishes to convey." *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009).

A. The three step test applied in *Summum*, *Walker*, and *Matal* suggests the Governor's post is government speech.

The Court of Appeals incorrectly analogizes the case at hand to *Matal v. Tam* and discredits the District Court's application of *Walker*; nonetheless, both *Matal* and *Walker* apply the *Summum*'s government speech test. *See Wong I*, at 11; *Wong II*, at 7. In *Summum*, this Court

addressed whether the government was required to erect a proposed monument in a public park. *Summum*, 555 U.S. at 466. This Court found that park monuments challenged had a history of communicating messages to the public; parks and their monuments are thought of as state property, and, because the state had the sole right to erect statutes, the state exercised control over the messages conveyed. *Id.* at 465**.** Thus, the monuments in *Summum* were found to be government speech. *Id.* at 481**.**

In *Walker*, this Court held that the Texas Department of Motor Vehicles Board's rejection of a proposed specialist license plate design featuring a Confederate battle flag did not violate First Amendment protections because specialty license plates, issued pursuant to Texas's statutory scheme, conveyed government speech. *Walker*, 135 S.Ct. at 2253**.** Furthermore, Texas did not intend for its specialty license plates to serve as either a designated public forum or a limited public forum. *Id.* at 2251.

In reaching their decision, the Court applied the three factor test adopted in *Summum*, which looked to: (1) the history of the medium, as to whether they had been used to communicate to the public; (2) whether the medium is "often closely identified in the public mind with the [State];" (3) the extent to which the state has effectively controlled the messages conveyed." *Id.* at 2248-49.

In analyzing the use of the medium to communicate, the court looked to the history of license plates, noting "license plates have . . . long communicated messages from the States." *Id.* at 2248. Similarly, while the history of Facebook does not have an extensive history, it's impact on the community is undeniable and the way it has revolutionized communication is quite clear. *See Packingham v. North Carolina*, 137 S.Ct. 1730 (2017) This Court's decision in *Packingham v. North Carolina* recognized the profound impact of social media on modern society, stating that

"[social media] allow[s] a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" *Packingham*, 137 S.Ct. at 1737 (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)).

In regards to whether the public's perception of the medium, the court found the "Texas license plate designs 'are often closely identified in the public mind with the State." *Walker*, 135 S.Ct. at 2248. Similarly, the evidence shows that the public, including Wong, engaged with Governor Norton in her official capacity on her Facebook page. J. Stip. at 2-5. The Facebook page in question was titled "Governor Elizabeth Norton." J. Stip. at 1. Furthermore, this specific post was in regards to the government's decision to implement a new immigration policy. J. Stip. at 1. Thus, a reasonable person looking at this Facebook page would likely assume that it was connected to the state.

Finally, for the control exerted by the state prong, this Court found "Texas maintains direct control over the messages conveyed on its specialist plates." *Walker*, 135 S.Ct. at 2249**.** This Court looked to the state's "sole control over the design, typeface, color and alphanumeric patter for all license plates . . . [and] rejected at least a dozen proposed designs." *Id.* Thus, the Court emphasized the ability for the State to regulate what is promoted as government speech as key factor. *See Id.* In this instance, Governor Norton has exclusive control over any content she posts to her Facebook. J. Stip. at 1-5. She continues to maintain control over editing even after posting. *Id.* Governor Norton is also able to see all comments responding to her original post. *Id.* Additionally, Governor Norton maintained the ability to delete comments which she believed did not conform with the topic. *Id.* Finally, she was able to block users from further posts on her page. *Id.* at 2. The very same capabilities which support the third prong necessary for government speech, are the basis of Wong's suit today.

Because the Governor's post satisfied the three prong test utilized in *Summum* and *Walker*, her Facebook page is considered government speech. Thus, it is not subject to scrutiny under the First Amendment's Free Speech Clause.

B. *Matal* does not control.

The Court of Appeals disagrees with the District Court as to the application of *Walker*. Rather, the Court of Appeals asserts that the application of *Matal v. Tam* is more appropriate. In *Tam* this Court found that trademarks are private, not government speech, and 15 U.S.C.S. ¶ 1052(a), which allowed the denial of a patent on the basis of being disparaging or brought into contempt or disrepute any person, violated the Free Speech Clause of the First Amendment. Rather, the Patent Trademark Office "has made it clear that registration does not constitute approval of a mark." *Matal*, 137 S.Ct. 1744, 1759 (2017). After applying the three factors from *Summum* and *Walker*, this Court found that a patent was not government speech. *Id.* at 1760. Furthermore, this Court found that the approval of patents was unlike any other government speech case previously ruled on. *Id.* Thus, *Matal*'s application is limited to instances of patents and other original ideas which are merely approved by the government.

On the most basic level, *Matal v. Tam* and *Walker v. Texas* were addressing two different public functions. In *Matal*, the government was conferring a property interest in the original idea submitted by the constituent. *Id.* at 1753. In the *Walker v. Texas*, the government was a conveying a message and the State was in fact showing a property right because despite the individualized design, the main features of the license plate still included the state name being in bold writing and an image of the outline of the shape of Texas. *Walker*, 135 S.Ct. at 2250. The *Matal v. Tam* case addressed an instance in which an individual created an idea, and the Patent Trademark Office merely regulated whether or not there had been a similar concept already thought of or whether

the content was disparaging. *Tam*, 137 S.Ct. at 1754. The Patent Trade Office allows concepts from all areas of work and all ideas. *Id.* at 1752. It is not limited to a single subject. *Id.* Furthermore, after being approved by the Patent Trademark Office, there is never any thought by the public that the patent might belong to the government. *See Id.* at 1758 ("[I]f trademarks represent government speech, what does the Government have in mind when it advises Americans to 'make believe' (Sony), 'Think different' (Apple), 'Just do it' (Nike) or 'Have it your way' (Burger King)?"). However, this is unlike Wong's comment. While the Governor was attempting to promote and explain a government policy, Wong posted his comment. Wong posting his comment "does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider." *Walker*, 135 S.Ct. at 2251. "[B]ecause the State is speaking on its own behalf, the First Amendment structures that attend the various types of government-established forums do not apply;" consequently, discrediting the Court of Appeal's suggestion that the speech was a government sponsored speech forum. *Walker*, 135 S.Ct. at 2250.

Thus, since the the Governor's post was government speech for three reasons. First, since the post was through Facebook, which since its inception has been used to communicate to the general public and has become one of the most important places for speeches of all kinds. *See Packingham*, 137 S.Ct. at 1735. Secondly, since the Governor's page was closely identified with the state in the public's mind through its title of "Governor Elizabeth Norton" and the content of the post. Third, since the state was able to control the messages conveyed. "Government must be allowed to speak, and to discriminate freely in that speech, in order to govern at all." Developments in the Law: State Action and the Public/Private Distinction, 123 HARV. L. REV. 1248, 1293 (2010) (citing *C.f. Keller v. State Bar of Cal.*, 496 U.S. 1, 12-13 (1990)). Governor Norton acted within her rights to delete Wong's comment.

C. Wong's comment subsequent to the Governor's post is included within the government speech exception to the First Amendment.

The District Court and Court of Appeals both agree that the Governor's post is not subject to scrutiny under the Freedom of Speech Clause on the grounds of government speech. *See Wong I*, at 10-11; *Wong II*, at 7. Nonetheless, the courts differ on the framing of the issue. The District Court found the comment section below the immigration policy was included in the government speech, and therefore, the restrictions were permitted. *Wong I*, at 11.

However, the Court of Appeals found that the issue was not whether Governor Norton's post in its entirety was government speech but whether Mr. Wong's comment would be understood as government speech. *Wong II*, at 7. By distinguishing between the Governor's post and Mr. Wong's comment, the Court of Appeals destroys the government speech exception to the First Amendment.

If all comments regarding government speech were seen as distinct from the speech itself, then there would be no need for the government speech exception. Rather, comments subsequent to the government speech, such as Mr. Wong's comments, should fall within the government speech not subject scrutiny under the First Amendment. *See Rust v. Sullivan*, 111 S.Ct. 1759, 1775 (1991). While Wong's comment was an original thought, by commenting under the Governor's Facebook post on immigration, it is included in government speech. Thus, the government has total authorization to regulate government speech. *See Rust v. Sullivan*, 500 U.S. 173 (1991); *Summum*, 555 U.S. at 460; *Walker*, 135 S.Ct. at 2239. Likewise, Wong's First Amendment Rights are not applicable in this context. Had Wong posted his idea merely on the Governor's Facebook wall rather than on a specific government speech post, then his comment's deletion might have violated the First Amendment. However, that is not what occurred here.

"[T]he government can speak for itself" and needs not include alternative views. *Bd. Of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000). Not all speech by a

government employee is government speech; "private speech [cannot] be passed off as government speech by simply affixing a government seal of approval." *Matal,* 137 S.Ct. 1744, 1748 (2017). This was not a post regarding personal content, it was a post regarding a governmental decision which impacted citizens and immigrants. J. Stip. at 3-4. The Governor specifically notes that this decision was made by "[m]embers of [her] cabinet, other senior advisors, the leadership of the Calvada Senate and house of Delegates." J. Stip. at 3. Thus, the decision (and the post) represent not only the Governor's opinion but also that of other governing officials. The Governor continued to explain the immigration policy and address concerns of the constituents. J. Stip. at 5. Further, the Governor noted that she "will announce the new policy to the news media at a press conference . . . and [her] office will issue an Executive Order pertaining to this new policy later this afternoon." J. Stip. at 16. Further, the assertion that the Facebook post is government speech is supported by the fact an announcement of the same policy followed shortly thereafter. J. Stip. at 3-4.

In *Rust v. Sullivan*, this Court decided whether an act limiting the federal funding for family-planning services was limited to programs "where abortion [was not] a method of family planning." 500 U.S. 173, 206 (1991). U.S.C. § 300a-6 and subsequently prohibited doctors from "encourage[ing], promot[ing] or advocate[ing] abortion as a method of family planning." *Id.* at 210 (quoting § 59.10(a)). The act and regulations greatly limited the ability for doctors to even recommend abortion as an option to a patient. *Id.* at 212. However, the Court found that the "grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project." *Id.* at 196 (quoting 42 CFR § 59.9 (1989)). Similarly, Wong is permitted to voice his opinion on his own Facebook page. He even retains the ability to

share Governor Norton's status with his own comments. J. Stip. at 2. Nonetheless, he must keep his comments on an unrelated topic to the immigration post separate and independent from the government speech. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995).

III. EVEN IF THE POST WAS NOT GOVERNMENT SPEECH, GOVERNOR NORTON ACTING WITHIN HER RIGHT TO LIMIT CONTENT TO A SPECIFIC TOPIC.

Even assuming the Governor's post was not government speech, the deletion of the comment is still appropriate under content discrimination. *Id.* While it is possible that social media can be analogized to traditional public forum, *Wong II*, at 9, and that a forum can be found in a metaphysical sense, *see e.g., Perry Ed. Assn*., 460 U.S. 37, 46-7 (1983), this specific deletion occurred on a post regarding a specific topic. Furthermore, it's important to note that Governor Norton did not allow "virtually unfettered discussion" on her Facebook page, thus distinguishing the case at hand from *Davison v. Loudoun Cty. Bd. of Supervisors* in which the court held that allowing such a substantial and unregulated amount of discussion created "a forum for speech." 267 F.Supp.3d 702, 716 (E.D. Va. July 25, 2017).

The Governor's post was merely a limited public forum. *See Wong II*, at 10 ("[T]he GEN page was at most a limited public forum."). A limited government forum is created when the government "opens [an otherwise] nonpublic forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects." *Travis v. Owego-Appalachian Sch. Dist.*, 927 F.2d 688, 692 (2d Cir. 1991).

In this instance, a nonpublic forum was opened to the topic of the immigration policy. Governor Norton created a post regarding the government's decision in which she explained the decision and preemptively addressed possible concerns with the decision. J. Stip. at 3. The Governor then asked for input "on this important step." J. Stip. at 4. Content discrimination is "permissible if it preserves the purposes of that limited forum." *Rosenberger*, 515 U.S. at 830.

Thus, because Wong's comment was regarding the Governor's "ethics and morality as [a] leader," *Wong II*, at 11, the Governor was entitled to delete his post under content discrimination to maintain the original topic of the post and the choice to delete Wong's comment was "reasonable in light of the purpose served by the forum." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001).

Because of the specification that the input should relate to the immigration policy, the Governor limited the forum to a specific topic. Wong then posted a comment not regarding the immigration policy but rather his comment described his personal feelings on the Governor. Specifically, Wong posted:

> 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.

Wong I, at 4. Clearly, Wong's post was on a personal attack on the governor rather than related to the immigration policy, and for that reason, the Governor was able to partake in content discrimination. *See Wong II*, at 11.

The Court of Appeals found the Governor's actions constituted viewpoint discrimination, as opposed to content discrimination. *Id.* at 11. Viewpoint discrimination is "an egregious form of content discrimination [which] targets not subject matter, but particular views taken by a speaker on a subject." *Rosenberger*, 515 U.S. at 829. However, the Court of Appeal's assertion of viewpoint discrimination does not explain why the Governor would allow the two other comments in opposition of the immigration policy to remain. The other comments stated: "I disagree with the new Calvada immigration enforcement policy. It will harm our state's economy;" and "This is not a good policy. It will punish many hard-working people and their families." *Wong I*, at 5. These two comments expressed concern and discontent with the Governor's decision; however, neither

of the comments were deleted. J. Stip. at 5. Had these comments been deleted, then the Governor would have clearly been partaking in viewpoint discrimination. But rather, these comments were left for all to see, and thus, the govern was clearly not "prohibit[ing] the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

Wong's comment was deleted not because of viewpoint discrimination but because of content discrimination. Content discrimination is "permissible if it preserves the purposes of that limited forum." *Rosenberger*, 515 U.S. at 830. Thus, because Wong's comment was regarding the Governor's "ethics and morality as [a] leader," *Wong II*, at 11, the Governor was entitled to delete his post under content discrimination to maintain the original topic of the post, and the choice to delete Wong's comment was "reasonable in light of the purpose served by the forum." *Good News Club*, 533 U.S. at 106-07.

CONCLUSION

This Court should reverse and remand the opinion of the Fourteenth Circuit Court of Appeals on the grounds that Wong's comment is not protected by the First Amendment because Governor Norton was exercising her government speech powers and because banning Wong from further posting on Governor Norton's personal Facebook page is not attributable to state action.

APPENDIX I

First Amendment

U.S. Const. amend. I

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.

APPENDIX II

Section 1983
42 USC § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

CERTIFICATE OF COMPLIANCE- BRIEF

1. The work product contained in all copies of this team's brief is in fact the work product of its team members.
2. This team has complied fully with its school's governing honor code.
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Team 15

Attorneys for the Appellant