In the Supreme Court of the United States

No. 17-874

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

Petitioner,

v.

BRIAN WONG,

Respondent.

ON WRIT OF CERTIORATI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

TEAM 20

QUESTIONS PRESENTED

1. Whether a Governor's actions in deleting an individual's comment that the Governor deemed an attack and then banning that individual from posting further comments on the Governor's personal Facebook page constitutes state action?
2. If so, under the First Amendment, did the Governor's actions qualify as government speech rather than impermissible viewpoint discrimination?

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OPINIONS BELOW

The decision of the Fourteenth Circuit Court of Appeals affirming and denying in part the district court's decision in *Wong v. Norton* is unreported and is set out in the record at R. 29. The decision of the District Court for the District of Calvada granting Governor Norton's Motion for Summary Judgment is unreported and is set out in the record at R. 1.

JURISDICTION

The judgment of the Fourteenth Circuit Court of Appeals was entered on November 1, 2017. Petitioners filed the Petition for the Writ of Certiorari on November 3, 2017. This Court granted the Petition on November 12, 2017. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (2012).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides "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." U.S. Const. amend. I.

STATEMENT OF THE CASE

This Court is being asked to reverse a decision of the Fourteenth Circuit Court of Appeals that found that a Governor engaged in state action and viewpoint discrimination by deleting an individual's comment that the Governor deemed an attack and then banning the individual from posting further comments on the Governor's personal Facebook page. Brian Wong ("Mr. Wong") filed a claim against Elizabeth Norton ("Governor Norton") because he claims she violated his First Amendment rights by deleting his comment and banning him from posting further comments on her personal Facebook page ("GEN page"). Mr. Wong claims the First Amendment requires Governor Norton to restore his post and permit him to make comments on the GEN page in the future. R. 01.

I. Factual Background

Governor Norton was elected Governor of the State of Calvada on November 3, 2015, and inaugurated into office on January 11, 2016. R. 02. In January 2008, before becoming

Governor, Governor Norton created a Facebook account. R. 02. Facebook is a social media platform where users can communicate with other users over the internet by posting messages, photographs, and videos. Users can respond to posts on Facebook by commenting, "liking," or re-posting. R. 02. Governor Norton used her Facebook for many years to connect with family and friends and to post her opinion on social and political issues. For several years, from 2011 to January 2016, Governor Norton allowed only "friends" to view and interact with her Facebook. R. 02. A "friend" on Facebook is a user who connects with another user by sending a friend request or accepting a friend request the other has sent. R. 02.

In 2011, Governor Norton created a Facebook page titled "Elizabeth Norton." Record. 02. Governor Norton used that page between 2011 and 2016 to make personal and business announcements. R. 02. After her inauguration on January 12, 2016, Governor Norton changed the name of her page to "Governor Elizabeth Norton" and changed her privacy settings to make her page available to the public. R. 02. Individuals, businesses and organizations can use public pages to connect with the public. R. 14. On her GEN page, Governor Norton posts her thoughts on news and national events and updates on her administration's actions to make Calvada a better place. R. 25. Also, Governor Norton posted and still posts on her GEN page photographs of her husband and daughters R. 25. For example, on April 2, 2016, Governor Norton posted a photo of her daughter's soccer team stating "Congrats to my amazing daughter Ariana and her soccer team for winning the Laguna City Cup Championship." R. 15.

Governor Norton frequently asked for constituent input about the business and policy matters of the State of Calvada to make constituents feel like they could interact with her as an individual through Facebook. R. 25. Under the State of Calvada's Constitution, the governor is not required to maintain social media accounts or interact with constituents through social media.

R. 26. Governor Norton intends on keeping her Facebook page after she completes public service because it is her personal account and she has photos and conversation with friends and family that date back to 2008. R. 26. Governor Norton regularly uses Facebook to interact with family and friends both privately and publicly. R. 26.

Furthermore, the State of Calvada maintains a separate official Facebook page for the Governor under the name "Office of the Governor of Calvada" which is linked to the Governor's official website. R. 03. A page on Facebook can be verified, meaning Facebook has confirmed it is an authentic page by including a blue badge on the page. R. 14. Governor Norton's staff add content to this page and respond to posts on the page on the Governor's behalf. R. 03. All of the government initiatives Governor Norton announced on her GEN page were also reposted by the "Office of the Governor of Calvada" page. R. 26.

Governor Norton's Social Media Director, Sanjay Mukherjee ("Mr. Mukherjee") manages the Governor's various social media accounts including the GEN page. R. 20. Mr. Mukherjee usually manages the GEN page after official working hours have concluded or before they begin every day. R. 20. Nelson Escalante, the State's Director of Public Security and Mary Mulholland, Governor Norton's Chief of Staff monitor the GEN page for addressing potential threats to the Governor's safety and responding to constituent requests as appropriate. R. 03.

This lawsuit commenced because of a comment from Mr. Wong on Governor Norton's GEN page. Mr. Wong is a citizen of the State of Calvada and the United States. R. 27. Mr. Wong was born in the city of Laguna and is a high school teacher there. R. 27. On March 5, 2016 Governor Norton posted an announcement about the new state policy on immigration law enforcement ("immigration policy post") at 3:15 pm. R. 15. The immigration policy post read as follows:

> 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 Constitution of our State.
>
> I do not make decisions 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 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 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.immigrationenforcementintiative.calvada.gov. As always, I welcome your comments and insights on this important step.

R. 15–16.

Mr. Wong became angry after reading the immigration policy post. R. 04. That same day on March 5, 2016 at 4:23 p.m. Mr. Wong posted the following to the GEN page from his own account titled "Brian Wong":

> 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. 16. (hereinafter "Mr. Wong's post").

Governor Norton saw Mr. Wong's reply later that night and understood it to be an *ad hominem* attack unrelated to her immigration policy post and unresponsive to her invitation for input on the policy. R. 26. At 9:45 p.m. Governor Norton emailed Mr. Mukherjee and asked him to add to the GEN page photos from a basketball tournament, a statement about Iraq tragedies, the reboot of a Young Famers program and to delete Mr. Wong's post and ban him from posting again. R. 16–17. Governor Norton felt like anyone capable of an *ad hominem* attack like Mr. Wong's should not be able to attack her on her own Facebook page. R. 26. Mr. Mukherjee deleted Mr. Wong's post at 10:10 p.m. as it is standard practice for him and other senior aides to respond to requests outside of working hours on weekends and holidays. R. 17. There were more than thirty comments posted to the GEN page on March 5, 2016 including the following: "I disagree with the new Calvada immigration enforcement policy. It will harm our state's economy (4:55 p.m.)" and "This is not a good policy. It will punish many hard-working people and their families (6:12 p.m.)." R. 17. Governor Norton did not delete any other posts on her GEN page including those that criticized the immigration policy. R. 17. Once Mr. Wong noticed his reply was no longer on the GEN page, he sent a message to htttp://www.governor.calvada.gov/mail/. asking Governor Norton to restore his post. R. 05.

II. Procedural Background

Mr. Wong filed a civil rights action pursuant to 42 U.S.C. § 1983 against Governor Norton on March 30, 2016 in the United States District Court for the District of Calvada. R. 01. Mr. Wong claimed Governor Norton violated his right to freedom of speech pursuant to the First Amendment to the United States Constitution and argued the First Amendment requires Governor Norton to restore his post and permit him to make future comments on the GEN page. R. 01. Later on August 25, 2016, Mr. Wong and Governor Norton filed cross-motions for

summary judgement. R. 01. On January 17, 2017, the District Court for the District of Calvada granted Governor Norton's motion for summary judgement because the court found that Governor's Norton's actions were attributable to the State of Calvada but that the Governor engaged in government speech and therefore did not violate the First Amendment. R. 02. Mr. Wong then appealed this decision to the United States Court of Appeals for the Fourteenth Circuit. R. 29. On November 1, 2017 the Fourteenth Circuit Court reversed the judgement of the district court finding that Governor Norton's action's constituted state action but not government speech. Therefore, the Fourteenth Circuit held that Governor Norton's deletion of Mr. Wong's post and subsequent ban constituted impermissible viewpoint discrimination in violation of the First Amendment. R. 30. Governor Norton then filed a petition for a writ of certiorari to this Court. R. 41.

SUMMARY OF THE ARGUMENT

Governor Norton's actions—the deletion of Mr. Wong's post and subsequent ban—is not an infringement of Mr. Wong's freedom of speech as protected under the Constitution, because her actions (1) did not constitute state action, (2) even if her actions did constitute state action, then her actions are protected government speech, and (3) even if her actions are not government speech, then her actions were not impermissible viewpoint discrimination.

The deletion of Mr. Wong's post and subsequent ban did not constitute state action, because Governor Norton's Facebook page is a private, personal page that merely provides a functional equivalency of a government Facebook page, but does not involve the government. However, even if this Court finds that Governor Norton's actions constituted state action, then her actions are necessarily protected government speech because: there is a long-standing history of the government using mass media to communicate with the people, which includes social

media, Governor Norton's Facebook page is governmental in nature and is maintained by the government; and the government has effectively controlled what messages are conveyed by deleting Mr. Wong's post.

Even if this Court finds Governor Norton's actions are not protected government speech, then her actions did not constitute impermissible viewpoint discrimination, because Governor Norton's Facebook page is a limited public forum and Mr. Wong's comment fell outside the purpose of the forum. For the foregoing reasons, this Court should reverse the Fourteenth Circuit Court's decision.

ARGUMENT

I. This Court should reverse the Fourteenth Circuit's decision granting summary judgment in favor of Mr. Wong, because Governor Norton did not violate Mr. Wong's First Amendment rights.

Governor Norton did not violate Mr. Wong's First Amendment rights, because the deletion of Mr. Wong's post and the subsequent ban on Governor Norton's personal Facebook page did not constitute state action. Further, even if this Court finds state action, then Governor Norton's actions constitute protected government speech. Lastly, even if this Court finds no government speech, Governor Norton's actions did not constitute impermissible viewpoint discrimination, because the GEN page is a limited public forum.

A. Governor Norton's deletion of Mr. Wong's post and subsequent ban from her personal Facebook page constitute private action—not state action.

The United States Constitution's First Amendment guarantees the People's freedom of speech. U.S. Const. amend. I. Freedom of speech is a fundamental right protected under the Fourteenth Amendment from infringement by state action. *Lovell v. City of Griffin*, *Ga.*, 303 U.S. 444, 450 (1938). Therefore, only the government—federal or state—can infringe upon the freedom of speech. *Hudgens v. N.L.R.B.*, 424 U.S. 507, 513 (1976). First Amendment protections

do not extend to those whose freedom of speech is infringed upon by an individual acting for private purposes, regardless of whether the infringing individual is a private citizen or public official and the extent to which the infringement is discriminatory or wrongful. *See Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 568 (1972); *See also Screws v. U.S.*, 325 U.S. 91, 111 (1945); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). Thus, the threshold question in the case of a First Amendment violation is whether the infringement upon the freedom of speech was the result of private or state action.

State action will be found only where there is a sufficiently close nexus between the state and the actions of the infringer, so that the actions of the infringer may be fairly treated as the actions of the state itself. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176 (1972)). Furthermore, this Court has stated that determining whether private actions may constitute state action is a difficult task that can be determined "[o]nly by sifting facts and weighing circumstances." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

For example, a utility company's termination of a customer's electrical service does not inherently constitute state action if the utility company is privately owned and operated. *Jackson*, 419 U.S. at 358–59 (1974). Even though the privately-owned utility company performed an essential public function, the public function did not create a sufficiently close nexus between the state and the utility company, because the utility company provided the public function—not the state. *Id*. at 347–48, 358. Therefore, because the utility company's termination of the customer's service did not constitute state action, the customer was not entitled to due process of law under the Fourteenth Amendment with respect to the utility company's action. *Id*. at 358–59.

Similarly, there was no state action when a shopping center prohibited the distribution of handbills protesting the Vietnam War. *Tanner*, 407 U.S. at 570 (1972). Even though the shopping center served the same purposes and contained the same infrastructure (i.e. streets, sidewalks, and parking lots) as a municipal business district, the mere functional equivalency did not create a sufficiently close nexus between the shopping center and the state. *Id*. at 568–70. This Court stated, "[t]he Constitution by no means requires such an attenuated dedication of private property to public use." *Id*. at 569.

Conversely, there was state action when a private restaurant refused to serve an individual based on race. *Burton*, 365 U.S. at 724–25 (1961). There, the Court found state action because the restaurant, at the time of the discriminatory act, was operating in a space leased from a public parking authority. *Id*. at 717. Because the space leased by the restaurant was publicly owned, maintained, and operated strictly from public funds, the actions of the restaurant created a sufficiently close nexus between the restaurant and the state. *Id*. at 723–24.

The deletion of Mr. Wong's post and subsequent ban on the Governor's personal Facebook page did not constitute state action. Like the utility company in *Jackson* and the shopping center in *Tanner*, Governor Norton's personal Facebook page is providing an essential public service that is not controlled by the government—a functional equivalency—because she posts information that is relevant to her constituents, but also posts private pictures of her life that would be found on a private, personal Facebook page. Governor Norton is providing the essential public function—not the state.

Similar to the shopping center in *Tanner*, it is not enough that Governor Norton opened her page to the public for comment on state policies. As the Court in *Tanner* declined to find state action where a privately-owned shopping center resembled a business district provided by a

municipality, this Court should decline to find state action where Governor Norton's Facebook page resembles a state-sponsored website serving the purpose of communicating with constituents.

Further, unlike in *Burton*, here, Governor Norton's personal Facebook page is neither publicly owned, nor maintained and operated wholly from public funds. In fact, Governor Norton created her Facebook page several years before becoming Governor of Calvada and, even after taking office and renaming her page, continued to use her Facebook page to post news and photos of friends and family. For example, on April 2, 2016, Governor Norton posted a photo of her daughter's soccer team to her Facebook page stating "Congrats to my amazing daughter Ariana and her soccer team for winning the Laguna City Cup Championship." Moreover, Governor Norton intends to continue posting to her personal Facebook after her service as Governor concludes. While Governor Norton uses her personal Facebook page to interact with constituents, the use of her Facebook page remains a personal endeavor that does not constitute state action.

Ultimately, Governor Norton's Facebook page is not state action, because while she is performing a service that the government can also provide, the functional equivalency is not a sufficient nexus between the state and Governor Norton. Rather, this was a purely private action by Governor Norton, over which the state itself had no control; thus, Governor Norton did not violate Mr. Wong's freedom of speech, and this Court should reverse the Fourteenth Circuit's decision.

B. Even if this Court finds the deletion of Mr. Wong's post and subsequent ban constitute state action, Governor Norton's GEN page qualifies as "government speech."

This Court generally disallows a First Amendment challenge to government speech. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239 (2015); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). When the government speaks, it is entitled to take a position or promote a policy or program, even to the exclusion of other viewpoints. *See Rust v. Sullivan*, 500 U.S. 173 (1991). Therefore, government speech preempts the Free Speech Clause from determining the content of the speech itself. *Walker v. Texas Sons of Confederate Veterans*, 135 S.Ct. 2239, 2245 (2015). Government speech is inherently regulated by the democratic electoral process—thus, First Amendment regulation is unnecessary. *Id.*

To determine if particular speech qualifies as government speech, this Court looks to: (1) the history of the medium, (2) whether the medium is "often closely identified in the public mind with the [State]; and (3) the extent to which the state has "effectively controlled the messages [conveyed]." *Id.* at 2248–49.

1. Although the history of Facebook usage in regard to government speech is limited, the government's usage of mass media to convey messages is long-standing.

Typically, the history of the medium relates to the duration in history that the platform of speech has been utilized. *See Summum*, 555 U.S. 460, 470-71 (2009). In *Walker*, the Court noted that the history of license plates includes more than just state names and vehicle identification numbers. *Walker*, 135 S.Ct. at 2248. For decades Texas has included graphics and slogans on their plates that relate to the state's messages, activities, or slogans. *Id.* This kind of speech has appeared on Texas plates for decades. *Id.* Because Texas had a history of providing government

messages through license plates, this Court found that license plates are a form of government speech. *Id.*

Regarding monuments in *Summum*, this Court stated that "[g]overnments have long used monuments to speak to the public… A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure." *Summum*, 555 U.S. at 470–71. Because governments throughout history have used monuments to convey a message to the public, this Court found monuments are a form of government speech. *Id.*

Here, even though the history of social media is limited, the history of governments speaking to constituents through mass media is nearly unlimited. Communicating messages to the public is an essential function of government. Governments have historically communicated their messages in the most efficient ways possible to reach as many people as possible. With the changes in technology, the natural progression of mass media is through social media. Therefore, there has been a longstanding history of the government trying to communicate its messages to as many people as possible, and social media is now seemingly the most efficient way to do that.

2. Because Governor Norton's GEN page is governmental in nature and is maintained by the government, then the page must be often closely identified in the public mind with the state of Calvada.

The Walker court found that license plate designs "are often closely identified in the public mind with the [State], because the governmental nature of the plates was clear from their faces—the State places the name "TEXAS" in large letters at the top of every plate. *Walker*, 135 S. Ct. at 2242. The Court further stated that a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message. *Id.* at 2248.

If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate. *Id.* The *Summum* court found that monuments are regarded as often closely identified in the public mind with the State when those monuments are maintained by governmental agencies. *Id.*

The *Tam* Court found that the USPTO's denial of the application for the trademark "The Slants" was facially unconstitutional under the First Amendment's Free Speech Clause and therefore, preempted the government speech doctrine. *Matal v. Tam*, 137 U.S. 1744, 1765 (2017). The *Tam* Court found the USPTO "made it clear that registration does not constitute approval," and the Court reasoned that most of the population probably has no idea what federal registration of a trademark means. *Id.* at 1759.

Here, Ms. Norton's Facebook page entitled Governor Norton is a page that is "often closely identified in the public mind with the State," because the governmental nature of the page is clear, and the government obviously maintains Governor Norton's Facebook page. Like the state name "TEXAS" indicated the governmental nature of the license plates, here, the title "Governor" indicates the governmental nature of the Facebook page by prominently displaying her title within the government. Furthermore, this Court stated that a person wanting a particular message on a license plate must seek some sort of government approval, because otherwise he or she could just place a bumper sticker next to the license plate with the same information. Here, Mr. Wong must have sought some sort of government approval, because he also could have made the exact same comment on his own Facebook page for everyone to see—the only difference is the direct government connection to the comment.

Additionally, like the governmental maintenance of the monuments in *Summum*, here, it is even more obvious that the government maintains Governor Norton's page, because the

"verified" tag means that page is maintained by either that person or an agent of that person, which in this case is Governor Norton herself and multiple other government employees. For example, Mr. Mukherjee, Nelson Escalante, and Mary Mulholland all help either manage or monitor the GEN page for addressing potential threats to the Governor's safety and respond to constituent requests as appropriate. Because multiple government employees are helping maintain the GEN page, and the public is aware that the government—via Governor Norton and her associates—are maintaining the Governor Norton Facebook page, then the GEN page must often be closely identified in the public mind with the state of Calvada.

Unlike the trademarks in *Tam*, where the USPTO had explicitly stated that registration of a federal trademark does not indicate approval, here, there is no such evidence that a disparaging comment left on a government-maintained Facebook page does not indicate some approval from the government. Also unlike *Tam* where the Court did not find that the public would generally have knowledge of the government's involvement with a trademark, here, the government's involvement with the Governor of Calvada Facebook page is explicit and obvious, again, as evidenced by the verified tag on the page. While the general population might not understand the government's involvement with trademarks, the general population that looks to Governor Norton's Facebook page will clearly understand the government's involvement with that page.

Because Governor Norton's page is governmental in nature and is maintained by the government, then the page must be often closely identified in the public mind with the state of Calvada.

3. Because Governor Norton instructed her associate to delete Mr. Wong's post, the government effectively controlled the messages conveyed on Governor Norton's GEN page.

Because Governor Norton has effectively controlled the messages conveyed by utilizing the delete and block features of Facebook, then the Governor Norton Facebook page must constitute government speech. When the government speaks, it is entitled to take a position or promote a policy or program, even to the exclusion of other viewpoints. *See Walker*, 135 S. Ct. 2239; *Summum*, 555 U.S. 460; *Rust v. Sullivan*, 500 U.S. 173 (1991). The *Walker* court found that Texas maintained direct control over the messages conveyed on its specialty plates by having a Board approve every specialty plate, and this exclusion constituted government speech. *Walker*, 135 S. Ct. at 2249. The Court reasoned that just because Texas offers plates celebrating the many educational institutions attended by its citizens does not mean that Texas must issue plates deriding schooling. *Id.*

Because government speech can shape the public's perception of the government, then the government must be able exercise discretion through selectivity. *Summum*. 555 U.S. at 472. The *Summum* court found that monuments play an important role in shaping the public view of a city, and therefore the government must exercise discretion through selectivity when accepting donated monuments—even to the exclusion of privately donated monuments. *Id.* The Court reasoned that government decisionmakers must select the monuments that portray what they view as appropriate for the place in question. *Id.* The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech. *Id.* The *Summum* court referenced and followed an example where New York City rejected the proposed placement of a donated monument to honor Daniel

Webster, because city required the gift of art be viewed in its finished condition before acceptance. *Id.*

Conversely, the *Tam* Court declined to extend the government speech doctrine to trademarks, because if government speech extended to the federal registration of trademarks, then the government would be "unashamedly endorsing a vast array of commercial products and services," which would include "expressing contradictory views." *Id.* at 1758. The Court also was concerned about extending the government speech doctrine to apply to trademarks, because then the government speech doctrine could be applied to copyrights, and then books, for example, would have no First Amendment protection. *Id.* at 1760.

The government effectively controlled the messages conveyed on the GEN page through the power to delete comments and block users. Similar to the information found on a government entity's own website, the government creates social media posts to convey a particular message. A government's posts on its own social media page easily constitute the government speaking for itself, arguably even more apparent than the license plates in *Walker* or the monuments in *Summum*. Like the Court in *Walker* reasoned that Texas did not need to include intentionally disparaging viewpoints on license plates, here, Governor Norton does not need to include intentionally disparaging remarks on the Governor Facebook page. Governor Norton has obviously maintained control over posts on her Facebook page by deleting Mr. Wong's disparaging post and subsequently banning him from posting further comments. The Governor must not reject the posts for the posts to remain on the page, and here, Governor Norton rejected Mr. Wong's post, and therefore, has established control over the messages.

Moreover, like the monuments in *Summum* that played an important role in shaping the public view of a city, Governor Norton's Facebook page shapes the public view of the governor

of Calvada—therefore, discretion through selectivity of comments and posts is required. Again, the government of Calvada has exercised this selectivity by deleting Mr. Wong's post. Having disparaging comments that added nothing to the discussion on a government-related post would create an unwanted image for any government, thus the government's exercise of control by excluding Mr. Wong's comment is government speech.

Further, this case would not harm the Free Speech Doctrine but would instead encourage government transparency. This Court should not share the same concerns as this Court did in *Tam*, because here there is no slippery slope effect to attach to this case that could ultimately harm the Free Speech Doctrine in other unexpected areas. If this Court decides Governor Norton's Facebook page is government speech, then the only precedent that would be set would be that the government can exclude disparaging remarks on its own government-ran, government-titled Facebook page. This is a narrow situation that falls well within the precedent for the government speech doctrine. The government and government officials will be more likely to share information and increase transparency with constituents if they do not fear the possibility of First Amendment suits.

Ultimately, Governor Norton's immigration post on her Facebook page qualifies as government speech, because (1) there is a history of the government using mass media platforms to convey messages, which now includes social media; (2) Governor Norton's Facebook page is governmental in nature and is maintained by the government; and (3) Governor Norton's deletion of Mr. Wong's post is effectively controlling the messages conveyed by the government. Therefore, this Court should reverse the Fourteenth Circuit's decision, and find that the GEN page is protected government speech.

C. Even if this Court finds no government speech, then Governor Norton's actions did not constitute impermissible viewpoint discrimination, because the GEN page is a limited public forum and Mr. Wong's comment fell outside the purpose of the forum.

Governor Norton did not engage in viewpoint discrimination because her page was a limited public forum and Mr. Wong's comment fell outside the purpose of the forum. Whenever a state creates a limited public forum, the state has the discretion to determine which types of speech persons may use in that forum. *See Good News Club v. Milford Central School*, 533 U.S. 98, 106 (2001). A state has lawful authority to reserve discussion on a limited public forum to certain groups or topics because of the necessity of confining the forum to serve its limited and legitimate purpose. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995). Further, a state has the right to exclude speech as long as the exclusion is reasonable in light of the forum's purpose and not an effort to exclude speech because a public official opposes the speaker's view. *Id.*; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

Exclusion from a limited public forum is permissible whenever the exclusion is reasonable and viewpoint neutral. *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings College of the Law v. Martinez*, 561 U.S. 661, 679 (2010). In *Christian Legal Society*, the Court held that a university did not violate a student organization's First Amendment rights because the university had created a limited public forum and the student organization did not meet the conditions of the limited public forum. *Id.* at 669. The petitioner, Christian Legal Society ("CLS"), claimed that the Hastings College of Law ("Hastings") impaired its First Amendment right to free speech and expressive association by requiring CLS to comply with Hasting's "accept all-comers" policy to qualify for official recognition. *Id.* at 668. Hasting's accept all-comers policy required student organizations to accept any member regardless of their status or

beliefs to qualify for official recognition which included financial benefits. *Id.* at 671. CLS sought exemption from the all-comers policy because it did not want to accept members who did not share CLS's beliefs about religion and sexual orientation. *Id.* at 668. The Court found that Hasting's official recognition program was a limited public forum given its purpose and the accept all-comers condition which limited official recognition to student organizations that complied with the policy. *Id.* at 682.

Although CLS did not have access to methods of communication available to officially recognized organizations the Court noted that CLS still had other methods of communication to use, some of which Hastings provided. *Id.* at 690–91. Moreover, the Court found that the accept all-comers policy was reasonable because of several benefits such as ensuring educational opportunities to all students and bringing together individuals with diverse backgrounds. *Id.* at 688–89. The Court also reasoned that the university's policy was viewpoint neutral because it required *all* student groups to accept all-comers and drew no distinctions between groups based on their perspective. *Id.* at 694.

Furthermore, a speaker should not be excluded from a limited public forum merely because of opposition to the speaker's standpoint. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993). The *Lamb's Chapel* Court held that a school district violated the Free Speech clause of the First Amendment by denying a church access to school premises because the church wanted to show a film for religious purposes. *Id.* at 393. Pursuant to a New York education law, the school district issued rules and regulations about the use of school property when not in use for school purposes. *Id.* at 386. The school district denied the church access to school premises to show the film because the district's Rule 7 prohibited using school facilities for religious purposes and the church's film was to be showed for religious

purposes concerning family and child-rearing issues. *Id.* at 389. However, the district's Rule 10 permitted using school property for "social, civic, and recreational" purposes. *Id.* at 391. The *Lamb's Chapel* Court reasoned that although the purpose of the district's forum was limited by Rule 7 and 10 there was no indication that the church's film did not fall within the permitted uses of Rule 10, and thus, the only reason for the district's denial was that the film would have been shown from a religious standpoint. *Id.* at 394. Accordingly, the Court found that the ban on using district property for religious purposes could not survive the First Amendment challenge because the ban was not reasonable or viewpoint neutral. *Id.* at 393.

Governor Norton's GEN page is a limited public forum and the deletion of Mr. Wong's comment and subsequent ban was reasonable and viewpoint neutral. When Governor Norton posted the immigration policy post to her GEN page she explained "As always, I welcome your comments and insights on this important step." With this statement Governor Norton limited the speech on her page to comments and insights pertaining to the immigration policy post. Further, like the university's ability to bar access to a limited public forum for failure of complying with conditions in *Christian Legal Soc.*, here, Governor Norton could bar access to the limited public forum for failing to comply with conditions. Governor Norton could limit access to her GEN page through the block feature and by deleting comments that fell outside the scope of "comments and insights on this important step."

Governor Norton's deletion of Mr. Wong's post and subsequent ban was reasonable because Mr. Wong's comment fell outside the limited scope and purpose of the GEN page given that his post was neither a comment nor insight related to the immigration policy post. Mr. Wong's comment had no reference whatsoever to the immigration policy post but instead purely insulted and attacked Governor Norton calling her a "scoundrel," "with no conscience," "ethics

and morality of a toad," and a "disgrace." Further, like the alternative methods of communication available to the organization in *Christian Legal Soc.*, here, Mr. Wong had alternative methods of communication to express himself. Although Mr. Wong can no longer post ad hominem attacks on the GEN page, he is able to do so on his own Facebook, other Facebook pages and other social media platforms. Also, like the benefits of the limited public forum's conditions in *Christian Legal Soc.*, here, the GEN page's conditions provide benefits to the community. Through the GEN page, Governor Norton can communicate with her constituents directly and keep them informed and up to date about government matters. These benefits are a result of her ability to choose the topics of her posts and content of the comments. Allowing a constituent to claim that a public official violated his First Amendment rights simply because the public official was limiting content on her personal Facebook page to serve its legitimate purpose would discourage transparency with constituents through social media platforms.

Furthermore, Governor Norton's deletion of Mr. Wong's post and subsequent ban was viewpoint neutral because Governor Norton did not delete Mr. Wong's comment because of his standpoint. Unlike the school district in *Lamb's Chapel*, here, Governor Norton did not exclude speech based on standpoint. Governor Norton did not delete Mr. Wong's comment because she disagreed with his standpoint but rather because his post fell outside of the limited purpose of "comments and insights on this important step." Assuming that Mr. Wong's animosity towards Governor Norton was an expression of opposition to the immigration policy, Governor Norton still did not delete his comment because of his opposition. Governor Norton did not delete all other posts critical of her policy because the posts were directly related to the immigration policy post despite their opposition. The critical posts in opposition were as follows:

> "I disagree with the new Calvada immigration enforcement policy. It will harm our state's economy."

> "This is not a good policy. It will punish many hard-working people and their families."

Accordingly, Governor Norton's deletion of Mr. Wong's comment and subsequent ban were not impermissible viewpoint discrimination because the GEN page is a limited public forum.

CONCLUSION

Governor Norton's actions in deleting Mr. Wong's post and subsequently banning him from her personal Facebook page constitute private action—not state action. However, even if this Court finds state action, then Governor Norton's actions qualify as government speech. Lastly, even if this court finds no government speech, then Governor Norton's actions did not constitute impermissible viewpoint discrimination because the GEN page is a limited public forum. Therefore, this Court must reverse the Fourteenth Circuit's decision and find that Governor Norton did not violate Mr. Wong's First Amendment rights.

CERTIFICATE OF COMPLIANCE

Team 20 certifies that the work product contained in all copies of the brief is in fact the work product of the team members. Team 20 further certifies that the authors of this brief have complied with all applicable honor code requirements. Furthermore, this brief complies with all the Rules of the Competition.

Respectfully,

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Team 20