IN THE
SUPREME COURT OF THE UNITED STATES
NO. 17-874

ELIZABETH NORTON,
IN HER OFFICIAL CAPACITY AS GOVERNOR, STATE OF CALVADA
PETITIONER

v.

BRIAN WONG
RESPONDENT

BRIEF OF RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the 14th Circuit erred in concluding that a State official engaged in state action by deleting an individual's post on her personal Facebook page and banning him from posting further comments on that page.
2. If so, whether the 14th Circuit erred in holding that the State official violated the individual's First Amendment rights by engaging in viewpoint discrimination in a state-sponsored forum rather than government speech.

STATEMENT OF THE CASE

II. BACKGROUND:

On January 12, 2016, the day after her inauguration as governor of the State of Calvada, Governor Elizabeth Norton updated her Facebook social media page. (R. at 14).[1] It had been "Elizabeth Norton" and featured a limited privacy setting for sharing with friends and connections. (*Id.*). It became the "Governor Elizabeth Norton" (the GEN page) with public settings, allowing for sharing with anyone who visited the page. (*Id.*). Since the election, the "vast majority" of posts to the GEN page have pertained to official duties of the governor. (*Id.*). On January 14, 2016, the GEN page informed constituents that the page was their source for "exciting announcements and policies from YOUR government" and that constituents could post comments on the page and the governor would respond to as many as possible. (R. at 14). In the coming months, the GEN page continued to announce crucial government policies and call for constituent input. (R. at 14-15).

The GEN page announced a drastic change in immigration policy on March 5, 2016. (R. at 15). Governor Norton or her staff posted that the state of Calvada would fully cooperate and aid federal immigration enforcement officers and policies. (*Id.*). The policy was announced on the GEN page before any other government source and the governor called for constituent comment and insight. (*Id.*). Numerous constituents posted on the policy announcement, both in favor and against the policy. (R. at 17). Brian Wong was one of the constituents who posted in opposition to the policy. (R. at 16). Mr. Wong felt strongly that the policy would hurt residents of Calvada and that he should have the ability to comment on the GEN page. (R. at 27-28).

[1] Record or R refers to the Record on Appeal.

After the inauguration of Governor Norton, state employees began to post, monitor, and control the GEN page at the behest of and on behalf of the governor. (R. at 15). Sanjay Mukherjee, Governor Norton's Social Media Director, received an email from the governor at 9:45 p.m. instructing him to delete Mr. Wong's "nastygram" and ban him as the governor thought the comment was "not appropriate for [the] page." (R. at 16). Mukherjee then deleted and banned Mr. Wong from the public GEN page at 10:10 p.m., but he also updated the page with other official policy and news statements. (R. at 16-17). One of the statements posted to the page at that same time was a statement submitted by Governor Norton's chief of staff and approved by the governor "a few hours ago." (R. at 16). Despite the governor's desire to delete the comment, Nelson Escalante, the Director of Public Safety for the State of Calvada who monitors social media and the GEN page for threats, did not flag the comment as a threat to be deleted. (R. at 19).

The State of Calvada has a number of social media and internet resources that the constituents can use to interact with the executive; however, they are not all utilized in the same way. A Facebook was created for the executive in 2010 and was passed on to Governor Norton. (R. at 15). The immigration post was first released on the GEN page, not the executive Facebook page from 2010. (R. at 15). There is also a website managed by Governor Norton's staff; however, Mr. Wong utilized this resource and never received a response. (R. at 28). Mr. Wong believes that he has a first amendment right to comment on the post. (*Id.*). Others who also posted comments in opposition to the policy did not have their comments deleted. (R. at 17).

Several members of Governor Norton's staff access the GEN page and some do so during working hours, including the Director of Social Media. (R. at 20). The governor and her staff access this page from state owned devices and are paid by the State of Calvada. (*Id.*). Both the

Director of Social Media and the governor's senior advisor are administrators of the GEN page and they have access to the page at all times. (R. at 20 and 23). The governor posts her public policy and government initiatives on the GEN page that are then reposted on the executive Facebook page afterwards. (R. at 26).

II. PROCEEDINGS BELOW

Governor Norton portrayed her Facebook page as "personal" versus "official." (R. at 10). The District Court was not persuaded by this notion. The Court states that Governor Norton, made all final decisions regarding the content of the Facebook page and she used the page to post content pertaining to state matters. (*Id.*). The Court relied on the Social Media director, who was paid by the state, implementing the governor's instructions regarding the page's content. (*Id.*). In addition, other state employees performed functions on the page and the employees and the governor used state-issued electronic devices to post materials. (*Id.*). The Court found that Governor Norton's actions were attributable to the State of Calvada. (R. at 05).

The Court found the governor's immigration policy post constituted government speech that is not subject to First Amendment limitations on viewpoint discrimination by relying on the three-prong test in *Summum*. (R. at 11). The Court found the Facebook page was "closely identified in the public mind" with Calvada and the governor and her staff control the messages on the Facebook page. (*Id.*). The Court did not look to the history of the medium, as Facebook as a new medium of speech. (*Id.*). Based on the facts above, the Court granted summary judgment in favor of Governor Norton on the ground that the governor's announcement of a new state immigration law enforcement policy on her Governor Elizabeth Norton Facebook page was government speech. (R. at 12). The Court emphasized that when the government is speaking it is not compelled to include opposing views. (*Id.*).

The Court of Appeals for the Fourteenth Circuit, similar to the District Court, found the governor's conduct constituted state action. (R. at 29). Unlike the District Court, the Court of Appeals determined the governor's post was not government speech but in fact government-sponsored forum for speech on her Facebook page. (*Id.*). The Court focuses on whether Mr. Wong's comment would be understood as government speech, which the Court finds would not be construed as government speech because the post was created by "Brian Wong" and the post was critical of the governor. (R. at 35). The Court goes on to say that Governor Norton created a government-sponsored forum of speech because she used the Facebook page to communicate with constituents, solicit public opinion, and make policy announcements. (R. at 36). Thereafter, Governor Norton filed a petition for a writ of certiorari in the Supreme Court of the United States which was granted. (R. at 41).

SUMMARY OF THE ARGUMENT

This Court should uphold the decision of the United States Court of Appeals, Fourteenth Circuit as to both issues presented. Governor Norton was a state official engaged in a state action by deleting Mr. Wong's post on her Facebook page and banning Mr. Wong from posting further comments on that page. The Fourteenth Circuit properly found that Governor Norton, a state official, violated Mr. Wong's First Amendment rights when she engaged in viewpoint discrimination in a state-sponsored forum of speech.

I. Governor Norton was acting under color of state law when she deleted Mr. Wong's comment and prohibited his further participation because she was fairly called a state actor and there is a close nexus between the state and the action. Governor Norton and her staff met both criteria to qualify as state actors. First, the state of Calvada is responsible for their actions, and they deprived Mr. Wong of his First Amendment right. *Florer v. Congregation Pidyon*

Shevuyim, N.A., 639 F.3d 916, 922 (9th Cir. 2011). Mr. Wong has a right to freely state his opinion on the governor's immigration post. When the governor and her staff deleted Mr. Wong's post and blocked him from commenting further, they effectively deprived Mr. Wong of this right. Second, the party causing the deprivation must fairly be a state actor. *Id.* The governor and her staff are state employees and thus can all fairly be called state actors. The staff responsible for deleting Mr. Wong's Facebook comment were acting at the discretion of the governor; Mr. Mukherjee deleted the comment when the governor told him to do so.

II. The GEN page is an established government sponsored forum for speech. Government speech is not regulated by the Free Speech Clause. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). The government is free to say it's thoughts and to choose the views that it wishes to express. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). The Supreme Court constructed three factors that must be considered when determining if speech is subject to the government speech doctrine. *Matal v. Tam,* 137 S.Ct. 1744 (2017). The factors are whether the medium of expression had "long been used by the States to convey state messages," whether the speech was "often closely identified in the public mind" with the State, and "whether the State "maintain[ed] direct control over the messages conveyed" on the medium of expression. *Tam*, 137 S.Ct. at 1760 (quoting *Walker v. Texas Decision, Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2248-49 (2015)). Governor Norton's Facebook page was available to the public and all of her constituents and she is able to choose the views that she expresses on the platform. Constituents were offering feedback on matters relating to the state. Mr. Wong's Facebook comment and page were not closely identified with the state and those following Governor Norton had no reason to believe that the governor and her staff were controlling the messages.

Instead, the GEN page is a public forum opened to host the exchange of ideas and Mr. Wong's comment fell within its scope. The removal of the comment and the ban of Mr. Wong were both governmental actions that violated the First Amendment. Speech is entitled to strict constitutional protections in public forums and its regulation is reviewed by the strict scrutiny standard. As the government cannot prove that its actions served a compelling interest and were the least restrictive means of accomplishing that interest, Governor Norton's action violated the Constitution.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY FOUND THAT THERE WAS A VIOLATION OF MR. WONG'S CONSTITUTIONAL RIGHTS BY GOVERNOR NORTON WHEN SHE WAS ACTING UNDER COLOR OF STATE LAW.

A person is acting under color of state law if an individual is fairly called a state actor given the facts and there is a close nexus between the state and the action. The plaintiff must show that the defendant deprived the plaintiff of a fundamental constitutional right or right secured by United States law in order to establish the defendant was acting under color of state law. The court must make a nominal judgment under the facts to determine whether the defendant was a state actor. If the defendant was a government employee, acting with power given to them by virtue of the law or their position, or their behavior can be fairly attributed to the state due to a close nexus between the state and the challenged action, then the court may find that the defendant was acting under color of state law. Actions under color of state law that deprive a plaintiff of a constitutional right are attributable to a defendant as a state actor.

A. A person is acting under color of state law if an individual is fairly called a state actor given the facts and there is a close nexus between the state and the action.

"To prevail on a § 1983 claim, a plaintiff must establish that a person acting under color of state law deprived the plaintiff of a right secured by the Constitution or laws of the United

States." *Dean v. Byerley*, 354 F.3d 540, 546 (6th Cir. 2004) (quoting *Waters v. City of Morristown*, 242 F.3d 353, 358 (6th Cir.2001)). *See also West v. Atkins*, 108 S. Ct. 2250, 2255 (U.S. 1988). Acting under color of state law necessitates that the defendant "have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West*, 108 S. Ct. at 2255 (citing *United States v. Classic,* 313 U.S. 299 (1941)). The defendant must be someone who can "fairly" be called a "state actor" and state employment is "generally sufficient to render the defendant a state actor." *Id*. at 2255 (quoting *Lugar v. Edmondson Oil Co.,* 457 U.S. 922 (1982)). Generally, an elected official acting in an official capacity or when exercising state law responsibilities is acting under color of law. *Id.* An abuse of a state position constitutes action under color of state law as well. *Id.*

Actions under color of state law that deprive an individual of a fundamental constitutional right can make an individual a state actor. *Florer*, 639 F.3d at 922. There is a two-part analysis for action that may make an individual, even a private actor, a state actor. "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible" and "[s]econd, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* (quoting *Lugar,* 457 U.S. at 937). Until this test is met, there is a presumption that private actors are not state actors. *Id.*

A review of the facts can determine what is state action. State action may also be present if there is a "close nexus between the state and the challenged action" so that the action is "fairly attributed" to the state. *Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002) (quoting *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n.*, 531 U.S. 288, 295 (2001)). The "fairly attributed" analysis is fact intensive and a normative judgment. *Id.* There are a series of tests that can be

applied in the state actor examination. The entwinement of public and private characteristics requires the court to make a nominal judgment. *Brentwood Acad*, 531 U.S. at 297; *See, e.g., Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230 (1957) (finding that a privately endowed high school was a state actor) and *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 130 L. Ed. 2d 902, 115 S. Ct. 961 (1995) (finding that "Amtrak was the government for constitutional purposes" even though it was designated as private by Congress).

Governor Norton was acting under color of law when she and her staff deleted Mr. Wong's comment on her immigration policy announcement and banned him from commenting further. Governor Norton and her staff were comporting themselves on behalf of the state when they deleted Mr. Wong's Facebook comment on the GEN page and blocked him from commenting. In so doing, Governor Norton and her staff deprived Mr. Wong of his First Amendment right to freedom of speech. In challenging Governor Norton's immigration policy through a comment on the GEN page, Mr. Wong was exercising his right to free speech. The nature of the Facebook profile as well as the circumstances surrounding the profiles updates, management, and oversight make the action involved government action.

Governor Norton and her staff exercised power "possessed by virtue of state law" and were "clothed with the authority of state law" when they deleted Mr. Wong's Facebook comment and blocked him from commenting further. (R. at 16-17). The GEN page was opened to the public under the governor's name the day after the election for the purpose of discussing policy and government affairs with the constituents of Calvada. (R. at 14). Governor Norton, due to the nature of her role as governor, made her page public and decided that was the forum in

which she would share news with the public. (*Id.*). She is the one who chose the method of communication.

Just as a constituent protestor at a public speech has the right to criticize the government, Mr. Wong has the right to comment on the governor's public Facebook profile. The public setting in which the interaction occurred does not change the nature of the interaction itself. The governor announced her immigration policy on the public GEN page, she had executive communications staff monitor the page, she encouraged the public to comment and interact with her via the page, and she directed constituents to official government resources through the post. (*Id.*). These are privileges and actions she possesses and carries out by the very nature of her role as executive. Governor Norton is utilizing government salaried communications staff to monitor, post, and edit her official policy announcements in a public setting and believes that after 5 p.m. this action is no longer attributable to the government. this defies logic.

The governor of Calvada is a state employee, Sanjay Mukherjee and Mary Mulholland, the governor's communication staffer and senior advisor are also state employees, and so they can all fairly be called state actors. (R. at 12 and 16). The communications staff who deleted Mr. Wong's Facebook comment and blocked him from the profile were acting in an official capacity at the pleasure of and direction of the governor. The time at which the governor sent an email to her staff and at which they acted upon that email, all from government issued electronic devices, does not magically make the action that of private citizens rather than government officials. The communications staff were working on the behalf of the state executive. Even if this were private action, the misappropriation of government staff to edit and monitor a so-called "private" profile does not shield the governor from First Amendment scrutiny. An abuse of a state position constitutes action under color of state law.

Action that can make an individual, even a private actor, a state actor, are those where the deprivation is caused by the exercise of a right or privilege created by a person for whom the state is responsible and where the actor is fairly said to be a state actor. Governor Norton and her staff unveiled an important immigration policy on the GEN page using government devices and monitored the post in a coordinated effort, subsequently deleting Mr. Wong's comment on the post. (R. at 15). Other posts made when Mr. Wong's post was deleted were created and reviewed earlier in the day and staff member access the GEN page during the work day. (R. at 17). This is state action.

There was a close nexus between the state and the challenged action so that the governor and her staff's actions can fairly be attributed to the state. Even when a so-called "private" actor is at work the behavior can still be attributed to the state. In *Lebron v. National Railroad Passenger Corporation*, the court decided that even though Congress labeled Amtrak as a private actor, it was also the government for constitutional purposes. Even a privately endowed high school was found to be a state actor in *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*. Private actors in private scenarios may be acting under color of state law.

After the inauguration of Governor Norton, state employees began to post, monitor, and control the GEN page at the behest of and on behalf of the governor. (R. at 15). Sanjay Mukherjee, Governor Norton's Social Media Director, received an email from the governor at 9:45 p.m. instructing him to delete Mr. Wong's "nastygram" and ban him as the governor thought the comment was "not appropriate for [the] page." (R. at 16). Mukherjee then deleted and banned Mr. Wong from the public GEN page at 10:10 p.m., but he also updated the page with other official policy and news statements. (R. at 16-17). One of the statements posted to the page at that same time was a statement submitted by Governor Norton's chief of staff and

approved by the governor "a few hours ago." (R. at 16). This was clearly government staff working under color of state law in their official capacity throughout the day, and exercising the responsibilities of their respective offices.

B. The First Amendment Is A Fundamental Constitutional Right.

The First Amendment to the Constitution states, "Congress shall make no law … abridging the freedom of speech." U.S. Const. Amend. I. The Supreme Court has found that, "A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (U.S. 2017). Free Speech is a core tenet of democracy and protected in political encounters against the state, "… the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies. It is for this reason that this Court has recognized the inherent value of free discourse." *Dennis v. U.S.*, 341 U.S. 494, 503 (1951). Government obstruction of free discourse is a violation of a fundamental constitutional right. A private individual acting on their own cannot violate the first amendment, there must be some form of state action. *Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000).

Mr. Wong's constitutional rights were violated when Governor Norton's staff deleted his comment and banned him from further participation on the governor's public Facebook profile. Government obstruction of free discourse is a violation of a fundamental constitutional right. Governor Norton and her staff unveiled an important immigration policy on the GEN page and Mr. Wong's response was subsequently deleted by the governor and her staff. The immigration post was first released on the GEN page, not the executive Facebook page from 2010 or the governor's website. (R. at 15). Mr. Wong utilized the governor's website to address the deletion

of his comment and never received a response. (R. at 28). Mr. Wong has a First Amendment right to comment on the post. (*Id.*). Others who also posted comments in opposition to the policy did not have their comments deleted. (R. at 17). Mr. Wong was denied participation in the free discourse of ideas by a state actor and so his fundamental right to freedom of speech was violated.

II. THE COURT OF APPEALS PROPERLY FOUND THAT GOVERNOR NORTON'S IMMIGRATION POST WAS NOT GOVERNMENT SPEECH BUT WAS THE ESTABLISHMENT OF A GOVERNMENT SPONSORED FORUM FOR SPEECH.

Government speech is not subject to the Free Speech Clause as the government is able to select the views that it wants to express. Mr. Wong's comment on the Facebook post cannot be construed as government speech. Regulation of the GEN page is subject to strict scrutiny. Mr. Wong's comment was appropriate for the forum, therefore removing it and banning him is unconstitutional.

A. Governor Norton's Immigration Post Was Not Subject To The Government Speech Doctrine.

The First Amendment's Free Speech Clause restricts government regulation of private speech. However, it creates a caveat for the government. The Free Speech Clause "does not regulate government speech." *Pleasant Grove City*, 555 U.S. at 467. The government is able to "say what it wishes," *Rosenberger*, 515 U.S. at 833, and it is able to "select the views that it wants to express." *Pleasant Grove City*, 555 U.S. at 468.

When determining whether speech is subject to the government speech doctrine, there are three factors that must be considered. *Tam*, 137 S.Ct. at 1744. The factors are whether the medium of expression had "long been used by the States to convey state messages," whether the speech was "often closely identified in the public mind" with the State, and "whether the State

"maintain[ed] direct control over the messages conveyed" on the medium of expression. *Tam*, 137 S.Ct. at 1760 (quoting *Walker*, 135 S.Ct. at 2248-49).

Governor Norton made the GEN page available to the entire public. (R. at 30). Her occasional posts regarding her friends and family do not change the nature of her Facebook page. (R. at 2). The page is still completely available to the public. (*Id.*). The governor asked for input from her constituents and anyone who has a Facebook page because the governor's Facebook page was public, regarding the business and policies of the state of Calvada. (R. at 2-3). In addition, the governor engaged with her constituents who were providing feedback regarding various matters relating to the state of Calvada. (*Id.*).

Governor Norton is able to say and post "what [she] wishes." The First Amendment does not prohibit Governor Norton from posting her ideas and thoughts. There is nothing that prevents her from using her Facebook page to convey state matters to her constituents and the general public. However, there are also posts on her Facebook page that are not related to government matters.

The first issue is whether Mr. Wong's comment on Governor Norton's Facebook page can be misunderstood as government speech. It cannot. It is obvious that Mr. Wong, and not the government, generated the deleted comment.

The first factor from *Tam*, though an apparent win for the government at present, cuts more in Mr. Wong's favor with every passing day. Given the recent technological developments, Facebook is becoming a forum to create and distribute government ideas. Cyberspace creates a forum where people from different parts of the world are able to create and exchange ideas. *Packingham*, 137 S.Ct. at 1730.

"Seven in ten American adults use at least one Internet social networking service" and one of the "most popular of these sites is Facebook." *Id.* at 1735. Perhaps, currently Facebook does not have a long history of being used to convey government messages, that is changing. "Social media websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Id.* at 1737. Regardless of whether the Court believes that Facebook has a history of conveying government messages, the second and third *Tam* factors unarguably favor Mr. Wong.

The second factor looks to whether the speech was "often closely identified in the public mind" with the state. *Tam*, 137 S.Ct. at 1760 (quoting *Walker*, 135 S.Ct. at 2248-49). Mr. Wong's comments on the immigration post were created from his account and are attributable to him. There is no chance for confusion because the post was created by Mr. Wong, under his personal profile which is titled "Brian Wong." Mr. Wong's Facebook page is not "identified" with the state. It is only the GEN page that the public thinks represents of the state. Governor Norton's followers on Facebook know immediately upon seeing the name and profile attached to the comment that Mr. Wong posted that the governor did not post the comment on the immigration policy; they know that it was someone's response to the immigration policy. The followers also see that the comment was critical of the governor, so it is not possible that the comment is based on the governor's ideas.

The final factor is whether the state "maintain[ed] direct control over the messages conveyed" on the medium of expression. *Tam*, 137 S.Ct. at 1760 (quoting *Walker*, 135 S.Ct. at 2248-49). The constituents who follow Governor Norton on Facebook have no reason to believe that Calvada has "direct control" over postings. The users assume that the governor allows all

people to convey their thoughts because the governor asks for feedback, as that is what was done previously.

For example, previously Governor Norton asked for her constituents to take pictures of the potholes that they encountered. (R. at 2). The constituents were directed to post photos and locations to Governor Norton's Facebook page. (*Id.*). This proves that Governor Norton was able to post "what [she] wishes" and in addition her constituents were able to convey their thoughts on the governor's Facebook page. In posts related to the potholes in the state, the Calvada Department of Transportation was able to respond to constituents directly on the GEN page. (*Id.*). That was not government speech. Asking constituents for feedback on the immigration policy was not government speech either. Both of these are establishing a government sponsored forum of speech.

B. The 14th Circuit correctly identified Governor Norton's official Facebook page as a public forum for speech.

There are three categories of forums in free speech jurisprudence; two with broad constitutional protections and one without. First, governmentally controlled zones that have historically been available for public expression are traditional public forums. *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678-79 (1992). Second, the government creates a public forum by intentionally opening a space for the express purpose of the free exchange of ideas. *Id*. Finally, all other zones of governmental control fall into the third category and are not public forums for speech. *Id*.

Traditional public forums are those that have, "time out of mind," been used for communication and discussion of public issues between citizens. *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939). The classic examples are streets and parks. *Id*. However, the

controlling factor is that they are areas with the principal purpose of the free exchange of ideas. *Krishna*, 505 U.S. at 682.

The second category of public forums encompasses all zones that the government creates for the express purpose of public speech. *Id*. at 680. These are areas that may have not existed for the purpose of speech "time out of mind" or that government is required to create. *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981). The critical issue is whether the government has opened the forum for direct citizen involvement. *Id*. The *Widmar* court ruled that a state university created a public forum by accommodating a wide variety of student organizations to exchange ideas. *Id*. Once the government designates a forum in such a way, it "assume[s] an obligation to justify its discriminations and exclusions under applicable constitutional norms" equal to that of traditional public forums. *Id*.

Though the government is free to open a limited public forum designed for particularized speech within, once it does so it must obey its own rules. *Rosenberger*, 515 U.S. at 829. Additionally, regardless of the policy, viewpoint discrimination is still strictly prohibited. *Id*. This means that the government's actions cannot conflict with its own stated policy. Therefore, it cannot prohibit speech that conforms with the purpose of the limited forum. Though the government may preserve the limited forum by banning speech that is outside its scope, any distinctions drawn must be "reasonable in light of the purpose served by the forum." *Id*.

The public spaces that fall into the third category are those designed for a function other than the exchange of ideas. *Krishna,* 505 U.S. at 679. An airport, for instance, is a space the government created to facilitate transportation, not speech. *Id*. at 682-83. Religious solicitations in such a zone are outside its intended scope and are detrimental to its function. *Krisna*, 505 U.S.

at 688-90 (O'Connor, J. concurring). These types of zones, designated for their entirely different function, do not enjoy strict 1st amendment protections. *Id.*

The GEN page is a public forum as it falls into either of the first two categories or both. While Facebook has not itself existed "time out of mind," it has only ever existed as a medium to freely exchange ideas. (R. at 13). This is its principal purpose, regardless of how long it has been used by the public.

Even if it is too young to be called a traditional forum, Governor Norton turned the GEN page into a public forum. By the Governor's own admission, her motivation behind rebranding her Facebook page was to designate a space for the free exchange of ideas. (R. at 25). She intentionally created a space used to "ask constituents for their input about how to make the state better." (*Id*.). She wanted to give those constituents a means to "actually interact with [her] as an individual." (*Id*.).

If the GEN page serves any function beyond hosting the speech of Governor Norton's constituents, it is to express her own voice on the marketplace of ideas directly to the public. (R. at 25). She posted her "thoughts on the news and national events," her administration's policies, and her responses to "many users who replied with relevant input." (*Id*.). The GEN page serves no function beyond a forum for speech and is thus distinct from *Krishna* and cases like it.

Further, Mr. Wong's speech was well within the scope of any limitations on the forum. On March 5, 2016, Mr. Wong responded to a recently announce policy change on the GEN page by expressing his political anger for it. (R. at 27). He was dismayed by the announced changed and was thus critical of the Governor in his response. (*Id*.). He was not the only participant in the discussion, as more than thirty comments were posted to the page that day. (R. at 17). He was, however, the only person banned. (R. at 16). Clearly his comment, as well as many others left on

the GEN page, lies within the scope of a forum created to allow the public to connect with Governor Norton and give policy feedback. (R. at 25). As the 14th Circuit put it, "Governor Norton utilized Facebook to open a digital forum for speech." (R. at 36). Having done so, she assumed an obligation to justify the exclusion of Mr. Wong from it.

As the GEN page is a public forum, banning Mr. Wong from participating in discussion and removing his comments were unconstitutional acts because the government cannot pass strict scrutiny analysis. When evaluating regulation of a public forum, strict constitutional scrutiny applies. *Widmar*, 454 U.S. 263, 270. The government must justify its actions as being the least restrictive means to accomplish a compelling interest. *Id.* Moreover, this court has routinely held that viewpoint discrimination is never tolerated and is unconstitutional in a public forum. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

In this case, the government cannot satisfy the strict scrutiny test. There is no compelling interest in prohibiting a constituent from contributing to the public discourse on the GEN page and removing his comment. Even if there were, the steps that Governor Norton took were not the least restrictive means of achieving that interest. An outright ban after a single disagreeable message, without investigation, clarification, or even response is emphatically not the least restrictive means of accomplishing anything. (R. at 26). Still, even if the government could pass the test, the only comment Governor Norton removed was a voice of criticism and dissent. (R. at 17). This is evidence of viewpoint discrimination, which is never permissible in a public forum.

While this public forum does not exist in the physical world, a virtual forum is entitled to the same constitutional protections as one in brick and mortar. The same principles apply to a metaphysical forum as they do to a spatial or geographic forum. *Rosenberger*, 515 U.S. at 830.

The *Rosenberger* court held that a public school creates a public forum when it authorizes payments for publications created by and distributed to its students. *Id*. This forum was not a place that people could physically attend and engage each other in verbal sparring matches. It was a means of exchanging viewpoints on the marketplace of ideas from the students owns dorms or libraries. *Id*. at 823-26.

This type of remote exchange continues today, though it frequently happens instantaneously and electronically on mediums like a public Facebook page. "Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose." *Packingham*, 137 S. Ct. at 1735 (citing Electronic Frontier Foundation). These accounts allow users to engage with their policymakers in a wide array of protected First Amendment activity on topics "as diverse as human thought." *Id*. at 1735-36.

This is exactly the situation in the matter at hand. Mr. Wong is no different than the students in *Rosenberger* and Governor Norton is no different than the school, except that this happened virtually rather than in print. The governor, then, created a metaphysical public forum entitled to the same constitutional protections as any other.

CONCLUSION

For the foregoing reasons, Mr. Wong respectfully asks this Court to uphold the decisions of the United States Court of Appeals, Fourteenth Circuit in ruling that the governor engaged in state action that violated the First Amendment by deleting Mr. Wong's comment and banning him from posting in the future.