Team 5

No. 17-874

IN THE
SUPREME COURT OF THE UNITED STATES

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

Petitioner,

v.

BRIAN WONG,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fourteenth Circuit

BRIEF FOR PETITIONER

Team 5

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a State official engaged in state action by deleting an individual's comment on her personal Facebook page and banning him from posting further comments on that page?
2. Whether a State official engaged in unconstitutional viewpoint discrimination in a state-sponsored forum under the First Amendment by deleting an individual's comment on their personal Facebook page and banning him from posting further comments on that page?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

Supreme Court Cases

Federal Circuit Cases

Federal District Cases

Other Authorities

STATEMENT OF THE BASIS FOR JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on November 1, 2017. *Wong v. Norton*, No. 17-874, slip op. at 1 (14th Cir. Nov. 1, 2017). Petitioner timely filed a petition for writ of certiorari, which this Court granted. R. at 41. This Court now has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondent Brian Wong ("Brian Wong") filed a complaint pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of Calvada, seeking a declaration that the Petitioner Elizabeth Norton ("Elizabeth Norton") violated his right to freedom of speech under the First Amendment. R. at 1. Petitioner Elizabeth Norton and Respondent Brian Wong filed cross motions for summary judgment on August 25, 2016. R. at 1. The District Court granted Elizabeth Norton's motion for summary judgment and denied Brian Wong's motion for summary judgment on January 17, 2017. R. at 12. The District Court held that Elizabeth Norton's actions were attributable to the state, and that because the Facebook page constituted "government speech," her actions did not violate the First Amendment. R. at 12.

Brian Wong timely submitted an appeal to the United States Court of Appeals for the Fourteenth Circuit, seeking that the Fourteenth Circuit remand the case back to the District Court with instructions to enter summary judgment in favor of Brian Wong. R. at 29. This case was argued on September 22, 2017. R. at 29. On November 1, 2017, the Fourteenth Circuit remanded the case back to the District Court with instructions to enter summary judgment in favor of Brian Wong. R. at 29, 39–40. The Fourteenth Circuit held that Elizabeth Norton's actions constituted state action, and that by establishing a government-sponsored forum for speech, Elizabeth Norton engaged in viewpoint discrimination in violation of the First Amendment. R. at 39–40. Petitioner

Elizabeth Norton timely filed a petition for writ of certiorari to the Fourteenth Circuit, which this Court granted. R. at 41.

STATEMENT OF THE FACTS

I. Factual Background.

This case arose out of Elizabeth Norton's deletion of an individual's Facebook comment on her personal Facebook page which contained personal attacks on Elizabeth Norton's character. R. at 1; Jt. Stip. ¶ 15. Elizabeth Norton first established a private Facebook account in January 2008, and in 2011 she created an additional Facebook page titled "Elizabeth Norton." Jt. Stip. ¶ 8. Throughout that time and up until she became governor, Elizabeth Norton used this Facebook page to make personal and work-related announcements to her family and friends. R. at 2. The day after her inauguration, she modified the Facebook page to be titled "Governor Elizabeth Norton" (hereinafter the "GEN Page"), and made it viewable to the public. R. at 2.

Elizabeth Norton has continued to use the GEN Page to post personal information about herself as well as public matters. Jt. Stip. ¶ 10. The State of Calvada also maintains an official Facebook page for the Office of the Governor of Calvada (the "Official Calvada Page"), which reposts government-related posts published on the GEN Page. R. at 3; Jt. Stip. ¶ 7. Various members of her staff assist her with managing the GEN Page—almost always during non-business hours—by drafting content and responding to posts from the public. R. at 3. Elizabeth Norton's Director of Public Security monitors the page as well to address potential security threats. R. at 3. State of Calvada policy strongly encourages its elected officials to utilize state-owned technology due to these privacy and security concerns—even with private matters, such as email or social media—and Elizabeth Norton abides by that policy. Escalante Aff. ¶ 4.

II. The Purpose of Elizabeth Norton's GEN Page.

Since the inauguration, Elizabeth Norton has continued to use the GEN Page to communicate with her friends and family, as well as to keep individuals updated on various private and public matters. Jt. Stip. ¶ 9. By making the GEN Page open to the public, Elizabeth Norton intended to provide a way for her Facebook followers to have a personal connection with her. Norton Aff. ¶ 10. While she invites the public's input on some matters, she does not believe that she should be required to allow unrelated personal attacks on the GEN Page. Norton Aff. ¶ 13. Additionally, she plans to use the GEN Page after she leaves office, as she regularly uses it to interact with friends and family. Norton Aff. ¶ 17. The Official Calvada Page will be transferred to the newly elected governor once her time in office expires. R. at 3; Jt. Stip. ¶ 7.

III. Elizabeth Norton's Immigration Post.

On a Saturday afternoon in March 2016, Elizabeth Norton published a Facebook post relating to her official duties as Governor of Calvada (hereinafter the "immigration post"). Jt. Stip. ¶ 12. The post was made available to alert her Facebook followers that she intended to cooperate with the federal government on immigration policies. Jt. Stip. ¶ 12. The immigration post included the following language: "As always, I welcome your comments and insights on this important step." Jt. Stip. ¶ 12.

Later that day, Brian Wong read the immigration post, and responded to the GEN Page:

> 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.

Jt. Stip. ¶ 13. In total, there were over 30 comments in response to her immigration post, a few of which were critical of her new policy initiative. Jt. Stip. ¶ 16. These comments included the

following language: "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." Jt. Stip. ¶ 16.

IV. Elizabeth Norton's Response to the Individual's Comment.

After discovering Brian Wong's comment later that evening, Elizabeth Norton sent an email to her colleague, Mr. Mukherjee, in which she instructed him to add content to the GEN Page. Jt. Stip. ¶ 14. In that same email, she asked Mr. Mukherjee to delete Brian Wong's comment. Jt. Stip. ¶ 14. The email included the following language: ". . . saw nastygram by Wong in response to immigration announcement. Pls delete/ban. Not appropriate for page." Jt. Stip. ¶ 14. Shortly after receiving this email, at about 10:00PM that Saturday night, Mr. Mukherjee deleted Brian Wong's comment and banned him from posting further comments on the GEN Page. Jt. Stip. 15.

While the Director of Public Security did not flag the comment as a threat, Elizabeth Norton classified Brian Wong's comment as an *ad hominem* personal attack on her character that was unrelated to the subject matter of her immigration post. Escalante Aff. ¶ 7; Norton Aff. ¶ 13. Brian Wong's comment was the only one Elizabeth Norton instructed Mr. Mukherjee to delete that night, and she did not instruct Mr. Mukherjee to ban any other Facebook accounts. Norton Aff. ¶ 13. Upon realizing that his comment had been deleted the following day, Brian Wong contacted Elizabeth Norton's official email address via the Official State of Calvada website, requesting that the comment be reinstated. Wong Aff. ¶ 11. Brian Wong has not received a response from the State of Calvada, and he remains banned from posting content on the GEN Page. Wong Aff. ¶ 12.

SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit's decision that Elizabeth Norton's deletion of Brian Wong's comment and subsequent ban constituted state action, and even if it does,

that her conduct did not constitute impermissible viewpoint discrimination, and this case should be remanded back to the District Court with instructions to enter summary judgment in favor of Elizabeth Norton.

The Fourteenth Amendment protects the Constitutional rights of an individual from actions by the states, but not from another private individual. Under the Fourteenth Amendment, the Court must apply the state action doctrine to determine whether the action is attributable to the government. Even though Elizabeth Norton holds the position of governor, this does not tie her personal actions to the state. To determine state action, the Court first looks at whether it is a traditional and exclusive state function. Maintaining a social media site is not a requirement of Elizabeth Norton's job nor is it a traditional and exclusive function reserved to the state.

The Court then examines the totality of the circumstances. This determines if the private individual's actions are so intertwined with the government that they can fairly be considered the actions of the state. Elizabeth Norton maintained a personal GEN page for five years prior to her inauguration and she will keep that page after her term has concluded, while the Official Calvada Page will remain with the state. The comment was deleted after working hours, and was motivated by personal reasons. Elizabeth Norton's personal GEN page can be differentiated from the Official Calvada Page and therefore they are not so entwined as to constitute state action.

However, if this Court finds that state action has been met, Elizabeth Norton did not create a government-sponsored forum because the GEN Page falls within this Court's own definition of "government speech" as set forth in *Walker v. Sons of Confederate Veterans*. Elizabeth Norton's GEN Page should be defined as "government speech" because it has long been used as a medium for her office to speak to the public, the public would reasonably interpret the permanent display of Brian Wong's comment as Calvada's endorsement of the use of *ad hominem* attacks, and

throughout Elizabeth Norton's use of the GEN Page, the State of Calvada has exercised full control, including final approval authority.

Even if Elizabeth Norton's actions do not fall within the definition of "government speech," this Court should find that her actions constituted a permissible time, place, and manner restriction designed to preserve the GEN Page for its intended purposes. Elizabeth Norton intended to open a discussion limited specifically to her new immigration policy initiative, and therefore reserves the right to exercise reasonable and viewpoint-neutral discretion to prevent irrelevant personal attacks. Furthermore, public policy supports this type of reasonable control, and to do otherwise would effectively chill the state's use of social media for civic outreach.

ARGUMENT

I. Elizabeth Norton's Conduct on Her Personal Facebook Page Did Not Constitute State Action.

The state action doctrine is designed to preserve private individuals' liberties and rights by separating the obligations of private individuals from the obligations of the government, when interacting with other private individuals. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936–37 (1982); 42 U.S.C. § 1983. State action occurs when the contacts between government action and the action of a private individual becomes so extensive that the action in question may be fairly attributable to the government. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995). However, the Fourteenth Amendment only extends to wrongs committed by the state and does not erect a shield against merely private conduct, no matter how discriminatory or wrongful. *Civil Rights Cases*, 109 U.S. 3, 17 (1883). To apply the Fourteenth Amendment to a case in question, it is imperative to separate a government action from a private action. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721 (1961).

a. The Court Should Adopt a Limited State Action Analysis For Private Individuals' Actions.

Courts draw differing conclusions for when state action occurs, even when based on similar fact patterns. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 262–65 (1964) (finding state action because of the judicial proceedings and state enforcement); *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007) (obligations from the state and court enforcement resulted in state action); *Flagg Bros. v. Brooks*, 436 U.S. 149, 153–55, 163 (1978) (state action is not found for state created authorization); *Harley v. Oliver*, 539 F.2d 1143, 144–46 (8th Cir. 1976) (a court order and court action does not have a "scintilla of state action"). Despite establishing factors and a two-prong test, confusion remains among private companies, state employees, and governments about the reliability of its application. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Lugar*, 457 U.S. at 936. Therefore, this is a distinct opportunity for this Court to better define the standard and definition of when state action applies for a private individual in a public position.

When tasked with eradicating racism, the Court has taken an expansive view on state action. *See Burton*, 365 U.S. at 723–26 (state action found when restaurant in state owned building refused to serve patron based on race); *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (state action found when the state enforced race-based restrictive covenants); Terri Peretti, *Constructing the State Action Doctrine, 1940-1990*, 35 LAW & SOC. INQUIRY 273, 287 (2010). Justice White noted "the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations." *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967). Whenever state action was opened further, it was in the pursuit of preventing racial injustices from being committed with government complacency. *Burton*, 365 U.S. at 723–26. However, the Courts adopted more limited applications when a private party has expressed

other views, even when political in nature. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 461–63 (1952) (this Court did not rely on the mere fact that by reason of such federal authorization, capital transit now enjoys a substantial monopoly of street railway and bus transportation in DC). Similarly, when a private actor is also a public official, this does not alone resolve the question of whether the particular challenged conduct constitutes state action. *Patterson v. City of Oneida*, 375 F.3d 206, 230 (2d Cir. 2004). Further, government officials do act in different capacities while speaking. *Van Orden v. Perry*, 545 U.S. 677, 723 (2005) (Stevens, J., dissenting).

In determining state action, this Court asks (1) whether the claimed Constitutional deprivation resulted from the exercise of a right or privilege sourced in state authority; and (2) whether the private party charged with the deprivation could be described in all fairness as a state actor. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620–21 (1991); *Marsh v. Alabama*, 326 U.S. 501 (1946). To determine the level of government participation, the Court looks to the totality of the circumstances. *Tulsa Prof'l Collection Serv., Inc. v. Pope*, 485 U.S. 478, 484 (1988). The greater the combined force of relevant contact factors is, the more readily the court will conclude that the challenged private action was state action. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 290 (2001); *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982).

i. A Personal Facebook Page is Not a Traditional and Exclusive State Function.

Historically, the state action doctrine, when considering actions of private individuals, first asks whether the private actor is exercising a traditional and exclusive state function. *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); *Nixon v. Condon*, 286 U.S. 73 (1932); *Terry v. Adams*, 345 U.S. 461 (1953). Simply because Elizabeth Norton holds the position of governor does not equate her personal actions into state action. *Patterson*, 375 F.3d at 230; *Van Orden*, 545 U.S. at 723 (Stevens, J., dissenting); *Pollak*, 343 U.S. at 461–63.

The District Court of Calvada correctly concluded that Elizabeth Norton does not exercise a traditional and exclusive state function in using her personal GEN page. R. at 7. While Facebook does provide a platform to communicate with other individuals around the world, including constituents, it is relatively new. Lily Rothman, *Happy Birthday, Facebook*, TIME (Feb. 4, 2015), http://time.com/3686124/happy-birthday-facebook/ (The social media website started as a private dating platform in 2004). The "traditional and exclusive" analysis examines whether the states reserved a power to themselves. *Condon*, 286 U.S. at 87. In keeping with that principle this Court held in *Jackson* that a privately owned utility was not exercising a power "traditionally exclusively reserved to the State." *Jackson*, 419 U.S. at 353–54 (traditional and exclusive is associated with state sovereignty, such as eminent domain).

Elizabeth Norton's position as Governor does not require her to maintain a social media presence and the use of her personal GEN page is not a traditional and exclusive state function. Norton Aff. ¶ 14. While communicating with constituents is an important aspect of her position as Governor, this is not a platform that is traditional or exclusive to her position or to the state. Jt. Stip. ¶ 5 (any user with a Facebook account can create a page). It would be beyond the stretch of this traditional and exclusive analysis to include a new platform, such as social media, that is not reserved to the states. *Jackson*, 419 U.S. at 352 (new technology and privately owned utilities are not exercising traditional and exclusive state functions).

ii. Under the Totality of the Circumstances There is a Requirement for the Significant Participation of the Government.

No single factor can function as a necessary condition for finding state action, nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing the activity to the government. *Brentwood Acad.*, 531 U.S. at 296. This Court has looked at the totality of the circumstances and factors in determining whether there is significant

participation of the government to be considered state action. *Evans v. Newton*, 382 U.S. 296, 299 (1966). After the Court has examined whether there is a "traditional and exclusive" state function, the Court then determines whether it would be fair to attribute the actions of a private individual to the state. *Edmonson*, 500 U.S. at 620–21.

1. There is Not a Sufficient Nexus Between the State and Elizabeth Norton's Actions.

A sufficiently close nexus allows private action to be equated to state action when it would be fair to treat the actions as if the state itself performed them. *United States v. Morrison*, 529 U.S. 598, 621 (2000). It is largely a matter of normative judgment with no specific formula. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). The nexus must arise out of public, not personal, circumstances. *Rossignol v. Voorhaar*, 316 F.3d 516, 524 (4th Cir. 2003). Further, the private individual's actions must be so intertwined with the government that they can fairly be considered the actions of the state. *Id.* at 525; *Jackson*, 419 U.S. at 351. This Court should follow the limited state action standards set out in *Lebron* for private individuals acting in public positions. *Lebron*, 513 U.S. at 399. This analysis requires a showing that the ultimate purpose for the action be attributable to the state. *Id.* at 391. To complete this analysis, the Court must then examine the nature and history of the action through the totality of the circumstances. *Id.* at 383.

While Elizabeth Norton is governor of the State of Calvada, this alleged injury to Brian Wong occurred on her personal GEN page. Jt. Stip. ¶ 2. This is a page that existed 5 years prior to her inauguration, and it will remain with her after her time as governor has concluded. Jt. Stip. ¶ 8; Norton Aff. ¶ 17. While Elizabeth Norton does state that she and Mr. Mukherjee use mobile smart phones and computers provided by the state, they are encouraged to use the devices for all communications that concern the state or personal safety due to serious security concerns. R. at 7.

Further, all relevant actions occurred on a Saturday night after working hours. Jt. Stip. ¶ 15; *West v. Atkins*, 297 U.S. 42, 49 (1988) (the alleged injury occurred during normal working hours).

When Brian Wong's comment was deleted from the GEN page, it was out of a personal circumstance. Jt. Stip. ¶ 14. Brian Wong claims that his comment was a response to an immigration policy, however the comment contains no mention of that policy, or any policy. Wong Aff. ¶ 8. The comment itself called Elizabeth Norton a scoundrel, toad, and a disgrace. Jt. Stip. ¶ 13. Elizabeth Norton felt it was an attack on her person and had it removed since it was not appropriate for her personal GEN page. Norton Aff. ¶ 13. She did not remove any criticism from the GEN Page that discussed policy, including comments that claimed the immigration policy would harm the state's economy and would punish families. Jt. Stip. ¶ 16.

The Official Calvada Page that is representative of the state and the position of the Governor, was inherited from the previous administration and will be transferred after Elizabeth Norton's term ends. Jt. Stip. ¶ 7; R. at 3. This is an entirely political page that the state itself is responsible for and is linked to the official government website. Jt. Stip. ¶ 7. The average Facebook user can tell the difference between an official page, the personal GEN page, and a fan page. Jt. Stip. ¶ 5 (users know a page is verified if it has a badge on the page). While Elizabeth Norton does have connections to the state due to her position, the personal GEN page and the Official Calvada Page are not so intertwined that Facebook users can differentiate between the state and the person.

2. All Relevant Factors Considered Do Not Amount to State Action.

The state action doctrine requires a heavily fact reliant analysis. *Morrison*, 529 U.S. at 621. Generally, state action is found when the party is acting in an official capacity or while exercising their responsibility pursuant to state law. *Harris v. City of Roseburg*, 664 F.2d 1121, 1127 (9th Cir. 1981); *Soldal v. Cook Cnty.*, 506 U.S. 56, 72 (1992). In the totality of the circumstances, the Courts

look to the entire history and all of the relevant facts to be able to see the entirety and purpose of the action itself. *Hudgens v. NLRB*, 424 U.S. 507 (1967). The Courts have looked to see if there is an overlapping identity, what the job of the individual requires, if the injured party could not seek other venues, and the purpose of the action. *West v. Atkins*, 297 U.S. at 49; *Marsh*, 326 U.S. at 508*; Morrison*, 529 U.S. at 621.

Elizabeth Norton created a Facebook account in 2008 and the GEN page in 2011. Jt. Stip. ¶ 8. She created the page for the purpose of expanding her business and keeping in touch with her community. Norton Aff. ¶ 7. After being elected, she changed the name of the GEN page to reflect her new title and opened the page to the public. Norton Aff. ¶ 9.When Elizabeth Norton became Governor she inherited the Official Calvada Page for government business. Jt. Stip. ¶ 7. It is this page that is connected to the government website and will remain with the office of the governor. Jt. Stip. ¶ 7. When Elizabeth Norton has completed her time as governor, the GEN page will remain with her. Jt. Stip. ¶ 7. Further, Elizabeth Norton is not required by law to have or maintain any social media presence. Norton Aff. ¶ 14.

Unlike in *West v. Atkins* where the injured party could not seek other venues to remedy the harm, Brian Wong had multiple other venues to express his opinion and still be heard by the state. *West*, 297 U.S. at 49. Facebook is a social media platform that allows users to create their own profiles and pages, meaning the venues to post would be almost limitless. Jt. Stip. ¶ 5. Even when blocked from posting to a page, a user can share information from that page to the user's own page or profile. Jt. Stip. ¶ 6. However, this Court has stated that it is not just the opportunity to use freedom of speech – it is also the right to have the speech reach the intended speaker. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982). Brian Wong had the

option of reaching Elizabeth Norton through posting to the Official Calvada Page, the official government website, e-mailing the Governor directly, etc. R. at 3.

In the most factually similar case, *Davison v. Loudoun*, the court found that an elected official's actions on her Chair's Facebook page constituted state action. *Davison v. Loudoun County Bd. of Supervisors*, No. 16-cv-932, 2017 WL 3158389 (E.D. Va. July 25, 2017). However, in looking to what the Court considered to be the determining facts, this outcome should not apply to Elizabeth Norton. In *Davison*, the elected official created a Facebook page for the sole purpose of representing her elected position and frequently referred to it as the "County Facebook Page". *Id.* at *10. In the "about" section of the page, it was categorized as a government official page, it provided her county office e-mail and telephone number, and it linked to the county website. *Id.* at *2 Further, the official county newsletter linked to that Facebook page. *Id.* at *4. What the Court found most persuasive though was the fact that the comment she deleted from this page, which held itself as the official county Facebook page, had originated from a town hall question. *Id.* The Court found that the deletion of the comment occurred from the motivation to suppress criticism of county officials related to the conduct of their official duties. *Id.* at *8.

Elizabeth Norton did not act out of the motivation to suppress criticism that was directly related to official duties. R. at 4; Jt. Stip. ¶ 14. Her purpose in deleting the comment—which was a nasty personal attack on her ethics and not her duties—was simply that it was not suited for her personal page. Norton Aff. ¶ 13. She did not delete criticism of the policies or her duties from her Facebook page. Jt. Stip. ¶ 16. Further, this page did not hold itself out to Facebook users as the official page of Calvada, and the official website linked to the Official Calvada Page. R. at 3.

b. Public Policy Supports Allowing Elizabeth Norton to Express Her Views As a Private Citizen

Social media is an expansive, multi-platform channel in which people have almost limitless opportunities to express themselves. Jt. Stip. ¶ 5. Facebook alone has 2.07 billion monthly active users that all have the ability to create their own personal pages associated with their private account. Jt. Stip. ¶ 3. Any user on Facebook has a name and profile picture linked to any comment or post that they make, allowing for the differentiation between other users and pages. Jt. Stip. ¶ 4. Facebook users, specifically users such as Elizabeth Norton or other state employee or private corporation associated with the government, have accounts and pages separate from their official jobs or the government. When another Facebook user views Elizabeth Norton's GEN page and the Official Calvada Page or an Elizabeth Norton fan page, they can view the difference in who is connected to that page. A Facebook user can see the difference between a private individual and the government, and therefore the government should not be held responsible for a private individual's actions when the average user can tell the difference.

II. Elizabeth Norton's Facebook Page Constitutes "Government Speech," And, Even If It Does Not, Her Actions Constitute Reasonable and Viewpoint Neutral Regulation of a Government Designated Limited Public Forum

If this Court determines that Elizabeth Norton's conduct constitutes state action, it should still find that her actions were constitutional under the First Amendment. As the Court provided in *Forbes*, "the First Amendment does not preclude the government from exercising editorial control over its own medium of expression." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998). As discussed further below, Elizabeth Norton reserved the right to exercise reasonable editorial control over the GEN Page, and the Court should therefore hold that the GEN Page constitutes "government speech."

Even if the GEN Page does not constitute "government speech," this Court has also held that where the government wishes to create a forum that is limited to a particular group or particular scope, it may "legally preserve the property under its control for the use to which it is dedicated." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995). As discussed further below, the Court should hold that Elizabeth Norton's actions constituted a reasonable and viewpoint neutral regulation designed to preserve the GEN Page for its intended purpose.

a. Elizabeth Norton's GEN Page Constitutes "Government Speech" Under this Court's *Walker* Standard.

The First Amendment protects elected officials like Elizabeth Norton in taking reasonable steps to control their administration's own views. *Walker v. Sons of Confederate Veterans*, 135 S.Ct. 2239, 2250 (2015). This principle permits the government, when it is formulating and conveying its own messages, to "take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by its individual messengers." *Rosenberger*, 515 U.S. at 833 (internal quotes omitted). Further, the United States Supreme Court has held that where the state is "speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply." *Walker*, 135 S.Ct. at 2250.

The Supreme Court considers three factors when determining whether government actions constitute "government speech" for First Amendment purposes. *Id.* at 2247. First, the Court will look to whether the medium in which the government speaks has "long been used . . . to speak to the public." *Id.* Second, the Court will determine whether individuals observing such speech would routinely and reasonably interpret the message as being made on the government's behalf. *Id.* The third factor centers on whether the state has "effectively controlled" the messages being communicated. *Id.* (quoting *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 473 (2009)).

The Court noted in *Walker* that simply because private parties "take part in the design and propagation of a message 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.

i. The Calvada Office of the Governor has Long Utilized the GEN Page to Speak to the Public.

While it is generally true that Facebook has not "long been used [by the government] to speak to the public," Elizabeth Norton's own administration has done so for the entire duration of her time in office. *Walker*, 135 S.Ct. at 2247. In fact, she intended to utilize social media to reach the public from the beginning, by renaming her Facebook page to "Governor Elizabeth Norton" the day after her inauguration. Jt. Stip. ¶ 9. In addition to updating the name, she updated her privacy settings so that her page was available to her entire constituency. Jt. Stip. ¶ 9. She subsequently utilized Facebook as a primary method of communicating with the public on "matters of social and political concern." Jt. Stip. ¶ 9. Elizabeth Norton also instructed her staff to reply to constituents through the GEN Page. Mukherjee Aff. ¶ 4. Elizabeth Norton had success in using this medium, and received numerous responses when reaching out to constituents about government regulation, budget negotiations, new state flags and logos, etc. Norton Aff. ¶ 10. Based on this consistency and the public's responsiveness, at the very least the GEN Page had long been used to speak to Calvada. *Walker*, 135 S.Ct. at 2247; Jt. Stip. ¶ 10.

ii. Individuals viewing the GEN Page would Reasonably Interpret the Message as a Whole as Being Made on the Government's Behalf.

The distinct nature of Facebook differentiates itself from this Court's previous line of analysis and encourages the application of a new legal framework based on the platform's bilateral structure. Jt. Stip. ¶ 5. While an individual would reasonably assume Elizabeth Norton's immigration post was made on her behalf, as others comment on that post the original message

changes, thereby altering that initial message. *Walker*, 135 S.Ct. at 2247; Jt. Stip. ¶ 3. The Court in *Summum* agreed with that proposition in the context of a sculpture park: that one statue's initial meaning would change when additional alternative statues appear in the same vicinity. *Summum*, 555 U.S. at 477 (holding that the state reserved the right to limit speech on their property where the public may conclude that such speech is on the state's behalf). When analyzing this alteration, the initial meaning of the government's message becomes immaterial; all that matters is whether the public views that alteration as an expression of the government's point of view. *Id.*

Although Elizabeth Norton is not required by law to maintain a social media account of her own, she nonetheless sought to utilize Facebook to keep the public "apprised of the actions [her] administration was taking." Norton Aff. ¶ 10. In doing so, Elizabeth Norton and her staff publish posts and control their message. Norton Aff. ¶ 10. When individuals post comments, however, that initial message changes to the point where it may become "garbled" and "distorted"—the type of situation which the government "may take legitimate and appropriate steps" to prevent. *Rosenberger*, 515 U.S. at 833. Facebook is also unique in that posts and comments do not disappear until an individual with the ability to delete a post or comment does so; in other words, it leaves a permanent record. *See Summum*, 555 U.S. at 472–73 (noting that the permanent aspect of a sculpture park required greater deference to the state); Jt. Stip. ¶ 3. The average citizen could therefore reasonably determine that by allowing personal attacks to go unregulated, that Calvada has approved of this mode of discourse. Similarly, to allow these types of comments to exist permanently on the GEN Page would invite a cacophony of disruptive messaging thereby rendering its very purpose useless.

iii. Elizabeth Norton Exercised Effective Control and Approval Authority Over Every Post and Comment Made on the GEN Page.

Elizabeth Norton's staff have "effectively controlled" the GEN Page by continuously exercising their "final approval authority" over its content. *Walker*, 135 S.Ct. at 2247; Jt. Stip. ¶ 11. Several members of Elizabeth Norton's cabinet routinely monitor the GEN page: (1) her Director of Public Security regularly monitors social media accounts for safety reasons; (2) her Director of Social Media manages emails; (3) her Chief of Staff monitors contacts with constituents, including social media. Escalante Aff. ¶ 5; Mukherjee Aff. ¶ 6. Additionally, Elizabeth Norton has policies in place to actively monitor and control the GEN page: her Social Media Director has the capacity to respond, edit and delete comments and posts, and to remove and ban people from the page. Jt. Stip. ¶ 11. At the very least, Facebook grants Elizabeth Norton the unique ability to control her message by exercising final approval authority far more effectively than the government agencies in *Summum* and *Walker*. *Walker*, 135 S.Ct. at 2247 (quoting *Summum*, 555 U.S. at 473).

b. By Publishing the Immigration Post on the GEN Page, Elizabeth Norton Intended to Create a Limited Public Forum Dedicated to the Discussion of Specific Agenda Topics.

Even if the GEN Page does not constitute "government speech," Elizabeth Norton intended to open a forum limited to the discussion of specific topics, and is thereby protected by the First Amendment in preserving that forum. *United States Postal Service v. Council of Greenburgh*, 453 U.S. 114, 130 (1981). Generally, the Supreme Court applies a categorical analysis to determine whether a government entity may place limitations on speech when regulating property under its control. *Christian Legal Soc. Chapter v. Martinez*, 561 U.S. 661, 679 (2010). In a traditional public forum, which includes sidewalks, parks, and general meeting halls, the government may place reasonable time, place, and manner restrictions on speech *so long as* they are content-neutral and

are narrowly tailored to serve a significant government purpose. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Nonetheless, the government may designate non-traditional public forums for public speech (e.g. public theatres), which require the same scrutiny as traditional fora. *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 800 (1985).

The Supreme Court has defined an additional category known as the limited public forum, which the government may establish by "opening property limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Martinez*, 561 U.S. at 679 n.11 (internal quotations omitted). When the state establishes a limited public forum, it is not required to allow all persons to engage in "every type of speech." *Good News Club v. Milford Central School*, 533 U.S. 98, 106 (2001). Notably, "[t]he government does not create a public forum by . . . [p]ermitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 788. In a limited public forum the government may impose reasonable content-based restrictions on speech so long as they are viewpoint-neutral, in order to "reserve the forum for its intended purposes." *United States Postal Service*, 453 U.S. at 131.

When Elizabeth Norton published her immigration post, she intended to invite limited discourse regarding her recent immigration policy initiative specifically. Jt. Stip. ¶ 12. At the end of the immigration post, she added the following language: "As always, I welcome your comments and insights on *this* important step." Jt. Stip. ¶ 12 (emphasis added). In effect, by posting this policy update on the GEN Page, Elizabeth Norton intended to open a forum limited to discussing that particular immigration policy. Jt. Stip. ¶ 12. Furthermore, Elizabeth Norton routinely limited comments on particular posts to the specific subject matter being addressed. Jt. Stip ¶ 10. For example, in a February 2016 post, Elizabeth Norton invited the public's opinions on the state budget by stating, "Tell me what your priorities are, and I'll try to make sure they get included in

the budget." Jt. Stip. ¶ 10. Similarly, in a March 2016 post, Elizabeth Norton invited the public to post geo-tagged pictures of potholes in a joint effort with the State Dept. of Transportation. Jt. Stip. ¶ 10. In that same month, Elizabeth Norton solicited ideas for a new state flag and logo, calling on citizens to share ideas to be considered. Jt. Stip. ¶ 10. Given Elizabeth Norton's routine practice of limiting posts to particular topics, her immigration post was likewise limited to discussing only that particular policy. Elizabeth Norton intended for comments to be limited to discussions of her immigration post, and was therefore not required to include Brian Wong's comment attacking her person. *Good News Club*, 533 U.S. at 106; Norton Aff. ¶ 13.

c. Elizabeth Norton's Decision to Delete Brian Wong's Comment Constituted a Permissible Regulation in Order to Preserve Decorum within the GEN Page and to Limit Discussion to Specific Substantive Policy Initiatives.

Elizabeth Norton's decision to delete Brian Wong's comment constitutes a reasonable and viewpoint neutral restriction within a limited public forum. *See Eichenlaub v. Township of Indiana*, 385 F.3d 274, 280 (3d Cir. 2004). Where the Court has found that the state has created a limited public forum, some content-based restrictions are permitted, so long as they are "designed to confine the 'forum to the limited and legitimate purposes for which it was created.'" *Eichenlaub*, 385 F.3d at 280 (quoting *Rosenberger*, 515 U.S. at 829). When applying this analysis to limited public forums, the Court has stated that a restriction "need not be the most reasonable or the only reasonable limitation," but instead must only be (1) "reasonable in light of the purpose served by the forum," and (2) viewpoint neutral. *Cornelius*, 473 U.S. at 806, 808.

i. Elizabeth Norton's Actions were Reasonable Given All the Surrounding Circumstances, as Well as the Fact that Brian Wong Continues to have Substantial Alternative Channels to Communicate.

Elizabeth Norton's decision to delete Brian Wong's comment and ban him from posting in the future was reasonable, given the forum's function and "all the surrounding circumstances."

Martinez, 561 U.S. at 663–64 (quoting *Cornelius*, 473 U.S. at 809). While there is scant case law dealing with social media on the internet for First Amendment purposes, various circuits have held that rules of decorum in settings such as town hall meetings may be constitutional. *See, e.g.*, *Steinburg v. Chesterfield County Planning Comm'n*, 527 F.3d 377, 387 (4th Cir. 2008) (holding that a content-neutral policy against personal attacks in county planning commission public meetings was not facially unconstitutional); *Eichenlaub*, 385 F.3d at 274 (3d Cir. 2004) (holding that the removal of a landowner from township board of supervisors meeting did not violate his free speech rights); *White v. City of Norwalk*, 900 F.2d 1421, 1426 (9th Cir. 1990) (holding that a local ordinance governing decorum at city council meetings was not facially overbroad even though it restricted disruptive speech). These cases are persuasive in regards to their analysis, and they stand for the proposition that speech at a citizen's forum may be limited according to its germaneness to the purposes of that meeting. *See City of Madison v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 175 n.8 (1976) ("Plainly, public bodies may confine their meetings to specified subject matter. . .").

The Fourth Circuit in *Steinburg* held that a town hall meeting policy against personal attacks was permissible in that it sought to prevent the types of evils that "could erode the beneficence of orderly public discussion." *Steinburg*, 527 F.3d at 386. The Court focused specifically on the nature of insults directed at a person (and not to substantive ideas or regulations), concluding they are "surely irrelevant" in the town hall context. *Id.* at 386–87. The Court noted that such an attack almost inevitably leads to argumentation that has a "real potential to disrupt the orderly conduct" of a meeting. *Id.* at 387. Notably, the Fourth Circuit concluded that a government policy against personal attacks was content-neutral so long as it "serves purposes unrelated to the content of expression . . . even if it has an incidental effect on some speakers or

messages but not others." *Steinburg*, 527 F.3d at. 387 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)). By denying a speaker the right to launch personal attacks, the Fourth Circuit concluded that the government "does not interfere with what that speaker could say without employing such attacks," because the message "could [still] be communicated, indeed probably more persuasively" otherwise. *Id.* at 387.

Elizabeth Norton's decision to delete Brian Wong's comment from the GEN Page constituted a permissible use of discretion to preserve the forum for its intended purpose of discussing her recent immigration policy initiative. First, Elizabeth Norton's decision to delete Brian Wong's comment was reasonable given both the purposes of the designated forum, and the reasonable discretion government officials must be given in order to facilitate the purposes of that forum. *Eichenlaub*, 385 F.3d at 281. By publishing her immigration post, Elizabeth Norton sought to collect public opinions regarding that policy. Jt. Stip. ¶ 12. In this context, Elizabeth Norton was well within her rights to circumscribe the purpose of a designated forum, and to limit the agenda accordingly. *City of Madison*, 429 U.S. at 175 n.8. Brian Wong's comment, while ostensibly related to "general policy" clearly demonstrates an intent to attack Elizabeth Norton's person. R. at 16. These types of low-value comments are irrelevant to that discussion, as these types of personal attacks work only to erode of orderly public discussion. *Steinburg*, 527 F.3d at 386. Because Elizabeth Norton has a significant interest in maintaining civility and decorum throughout the discussion of her immigration policy initiative, it was permissible to regulate speech that the average citizen could reasonably characterize as an unrelated *ad hominem* attack against her character. *Id.* at 386–87.

Elizabeth Norton's decision to both delete Brian Wong's comment and ban his Facebook account from posting on the GEN Page in the future also allows for substantial alternative channels

of communication. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 53 (1983). Where the Court finds substantial alternative channels of communication, those other available avenues to exercise First Amendment rights "lessen the burden created by those barriers." *Martinez*, 561 U.S. at 690. In this case, there remains a myriad of alternative methods Brian Wong may use to petition the government, including the traditional methods utilized since the founding of our nation. Jt. Stip. ¶ 7; Wong Aff. ¶ 11. First, the State of Calvada maintains an Official Calvada Page which is similarly maintained by Elizabeth Norton's staff. Jt. Stip. ¶ 7. Moreover, Elizabeth Norton's staff regularly add content to that page, and receive and respond to posts on her behalf. Jt. Stip ¶ 10. Second, the government of Calvada maintains an official website, which features the governor's official email address where individuals may direct their comments on policy. Jt. Stip. ¶7; Wong Aff. ¶ 11. Third, Brian Wong is still able to utilize a variety of other mediums to voice his opinion on matters of policy, e.g. calling the governor's office, writing letters, and meeting with the governor herself. Lastly, Brian Wong is not prevented from viewing the GEN Page and is still able to share its contents elsewhere. Jt. Stip. ¶ 6. Because there are substantial alternatives for Brian Wong to exercise his First Amendment rights, this Court should find that this burden is sufficiently minimized. *Martinez*, 561 U.S. at 690.

ii. Elizabeth Norton's Actions were Not Based on Viewpoint, But were Instead Limited to Preventing Personal Attacks.

Elizabeth Norton deleted Brian Wong's comment because of the *ad hominem* character of the message itself, and not his viewpoint. Jt. Stip. ¶ 14. If the State's regulation of a limited public forum is found to be reasonable, such a policy must still remain viewpoint-neutral. *Martinez*, 561 U.S. at 694. The Court will find a policy to discriminate based on viewpoint if it singles out particular groups based on their perspective. *Id.* Nonetheless, a policy may be deemed viewpoint-neutral "even if it has an incidental effect on some speakers or messages but not others."

Ward, 491 U.S. at 791; *see also Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763 (1994) ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.").

Elizabeth Norton's own email directing her colleague to delete the comment shows that Brian Wong's *viewpoint* was not the issue, as it reads "saw nastygram by Wong in response to immigration announcement . . . Not appropriate for page." Jt. Stip. ¶ 16. Similarly, in her sworn affidavit, Elizabeth Norton characterized Brian Wong's comment as an *ad hominem* attack that was unrelated to the immigration policy announcement and "unresponsive to [her] invitation for constituent input on the policy." Norton Aff. ¶ 13. This argument is supported by the fact that Brian Wong's comment was not the only comment critical of Elizabeth Norton, both generally to her person or specifically to her policy. Jt. Stip. ¶ 13. In fact, the record shows that at least two comments made prior to her decision to delete Brian Wong's comment were also critical: one stating that it "will harm our state's economy," and the other stating that it "will punish many hard-working people and their families. Jt. Stip. ¶ 16. Elizabeth Norton's own affidavit implies that had Brian Wong simply chosen not to engage in such personal attacks, his comment would not have been deleted. Norton Aff. ¶ 13. Despite Elizabeth Norton's actions having an "incidental effect" on Brian Wong specifically, it was permissible for her to limit personal attacks generally. *Ward*, 491 U.S. at 791.

d. Public Policy Supports Allowing Elizabeth Norton to Exercise Reasonable Rules of Decorum on her GEN Page.

This Court should grant elected officials reasonable discretion to preserve proper rules of decorum on the internet due to public policy considerations. As this Court recently noted, "While in the past there may have been difficulty in identifying the most important places . . . for the exchange of views, today the answer is clear. It is . . . social media in particular."

Packingham v. North Carolina, 137 S.Ct. 1730, 1735 (2017). This Court should grant elected officials the right to adopt reasonable policies on their social media pages so that the government may utilize modern means of civic outreach without the fear of violating the First Amendment. Today, city governments and elected officials throughout the country are refraining from utilizing these important tools because of these First Amendment concerns.[1] In an age where social media can be used in "covert ways . . . to manipulate public opinion," elected officials have an important interest in preventing their messages from being hijacked.[2] This Court should rule in favor of Elizabeth Norton so that government outreach may reasonably adapt with this new medium.

CONCLUSION

For the foregoing reasons, Elizabeth Norton respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fourteenth Circuit, and remand the case to the United States District Court for the District of Calvada with instructions to enter summary judgment in favor of Petitioner, Governor Elizabeth Norton.

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[1] *See, e.g.*, Bill Sherman, *Your Mayor, Your "Friend": Public Officials, Social Networking, and the Unmapped New Public Square*, 31 PACE L. REV. 95, 106 (2011) ("(1) the City of Redondo Beach was advised to avoid all use of social networks for any purposes; (2) the City of Seattle was advised to adopt regulations . . . ; (3) Attorneys for a Florida municipal planning board told the board that . . . it should not have a social network profile "under any circumstances"; (4) Attorneys for a collection of Washington cities advised city councilmembers to avoid posting any content regarding policy or city-related issues . . .).

[2] This is true especially when such tactics are employed by other states or other political actors. *See* Samuel Earle, *Trolls, Bots and Fake News: the Mysterious World of Social Media Manipulation*, NEWSWEEK, October 14, 2017, 8:40 AM), http://www.newsweek.com/trolls-bots-and-fake-news-dark-and-mysterious-world-social-media-manipulation-682155.

CERTIFICATE

Team 5 hereby certifies that the following statements are true:

(1) The work product contained in all copies of Team 5's brief is in fact the work product of the members of Team 5 only;

(2) Team 5 has complied fully with its school's governing honor code; and

(3) Team 5 has complied with all Rules of the Competition

Team 5

Counsel for Petitioner

APPENDIX

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment states the following:

> 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. am 1.

The Fourteenth Amendment, in relevant part, states the following:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. am 14.

FEDERAL STATUTES INVOLVED

42 U.S.C. § 1983, in relevant part, states the following:

> 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.

42 U.S.C. § 1983.