

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DOCKET NO. 17-874

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

Petitioner,

v.

BRIAN WONG,

Respondent.

ON WRIT OF CERTIORARI TO THE
FOURTEENTH CIRCUIT

Brief for Respondent

TEAM NUMBER 6

QUESTIONS PRESENTED

- 1) Are the actions of a state official attributable to the state itself where the official deletes a comment and bans the commenter from making any future comments on her personal Facebook page?
- 2) If so, did the state official engage in viewpoint discrimination in a state-sponsored forum by deleting a comment opposing the policy that was the subject of the state official's post and banning the individual who posted the comment from posting further?

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JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter. *Wong v. Norton*, No. 17-874, slip op. at 1 (14th Cir. Nov. 1, 2017). Petitioner filed for a writ of certiorari, which this Court granted with respect to the questions presented. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review cases from the United States Court of Appeals for which this Court has granted certiorari.

STATEMENT OF THE CASE

Respondent Brian Wong brought this 42 U.S.C § 1983 claim against Petitioner Elizabeth Norton, in her official capacity as Governor of the State of Calvada, after Governor Norton deleted a comment that Brian Wong posted on the “Governor Elizabeth Norton” Facebook page and banned him from posting additional comments on that page. *Wong v. Norton*, No. 16-CV-6834, slip op. at 1 (D. Calvada Jan. 17, 2017). The parties submitted cross-motions for summary judgment, and the district court granted Governor Norton’s motion. *Id.* at 12. The court concluded that while Governor Norton’s actions were attributable to the State, the Governor Elizabeth Norton Facebook page and the specific post at issue were government speech. *Id.*

The United States Court of Appeals for the Fourteenth Circuit reviewed de novo the district court’s decision of summary judgment in favor of Governor Norton. *Wong v. Norton*, No. 17-874, slip op. at 4 (14th Cir. Nov. 1, 2017). The Fourteenth Circuit held that while the district court was correct in finding that Governor Norton acted as a state official in an official state capacity when she deleted Wong’s comment and banned him from the Governor Elizabeth Norton Facebook page, the district court erred in determining that the Facebook page and the post were government speech. *Id.* at 11–12. Because of the nature of the Facebook page, the Fourteenth Circuit determined that Brian Wong had commented in a state-sponsored forum and

thus, deleting his comment and banning him from making any future comments was a form of viewpoint discrimination that infringed on his First Amendment rights. *Id.* The Court of Appeals reversed the district court’s decision and the case was remanded to proceed consistent with the Fourteenth Circuit’s ruling. *Id.* Petition for a writ of certiorari was timely filed and granted by this Court.

STATEMENT OF FACTS

I. Creation and Maintenance of the Governor Elizabeth Norton Facebook Page

One day after her inauguration as Governor of the State of Calvada, Governor Elizabeth Norton made changes to an already existing personal Facebook account so that her “constituents could follow [her] and have a personal connection to [her].” *R.* at 14, 25. The Governor renamed her Facebook page “*Governor Elizabeth Norton*” (GEN) (emphasis added) and changed the privacy settings on her account, making it available to all members of the public in its entirety. *R.* at 14. Following these changes, Governor Norton posted multiple requests for input from constituents about matters pertaining to the business and policy of the State of Calvada and interacted directly with those who responded. *R.* at 14. There is no statutory requirement that the governor maintain a Facebook page, though the State does maintain an account entitled “Office of the Governor of Calvada” page. *R.* at 25, 26. The Office of the Governor of Calvada page was inherited from the previous administration and posts made on the GEN page are reposted to it. *R.* at 14, 26.

The Governor’s Director of Social Media, Sanjay Mukherjee’s primary job duties entail managing the Governor’s various social media accounts, including the GEN page, and helping to develop her social media strategy. *R.* at 20. As an administrator on the GEN account, Mukherjee assists the Governor in drafting GEN page content and responses to posts from

constituents or other members of the public and has the capacity to manage page roles and settings, edit the page, create and delete posts and comments, remove and ban individuals, among other capabilities. R. at 15. Mukherjee is employed by the State of Calvada and occasionally accesses the GEN account during work hours, but generally does so outside of his designated work hours. R. at 20.

The Governor's Chief of Staff, Mary Mulholland, is also an administrator on the GEN account and regularly monitors the page to determine whether anything on the page requires action on the part of the Governor's staff or other State officials or employees. R. at 23.

Mulholland has authored posts, taken pictures and videos, and replied to constituents on the GEN page and regularly discusses the Governor's social media strategy with her. R. at 23.

Mulholland's job requires that she be available to the Governor at all times. R. at 23. It is standard practice for Mukherjee, Chief of Staff Mulholland, and other senior aides who work directly for the governor to respond quickly to requests, even on weekends and holidays. R. at 17. Generally, when accessing the GEN account, the governor and her senior staff do so through devices provided by the State of Calvada, as this is recommended for administrative and safety reasons. R. at 20.

II. Content Posted to the GEN Page

Since her inauguration, the vast majority of the Governor's posts to the GEN page have pertained in some way to her official duties as governor. R. at 14. To "keep Calvadans apprised of the actions [her] administration was taking to make Calvada a better place to live," Governor Norton regularly posted updates to the page and requested input from her constituents. R. at 25. Some examples of these posts include:

“January 14, 2016, at 12:47 p.m.

I’m moving Calvada into the 21st Century by introducing new and exciting ways to interact directly with me and my senior staff. Check my “Governor Elizabeth Norton” Facebook page often for exciting announcements and policies from YOUR government, and let me know what you think by posting your comments there. I will get back to as many of you as I can!” R. at 14.

“February 8, 2016 at 3:26 p.m.

The state budge is a mess! I’m fighting to make the state better, to make government work for YOU. Tell me what your priorities are, and I’ll try to make sure they get included in the budget.” R. at 15.

“March 7, 2016 at 8:13 a.m.

For my birthday, I’m starting an exciting new initiative to make the road ahead smoother for everybody. Post a picture and the location of any post-winter potholes you see on the road here, and the State Department of Transportation is going to fix them as fast as they can. We make Calvada betta by workin’ togetha!” R. at 15.

“March 15, 2016 at 7:35 p.m.

Calvada is open for business, but our state flag and logo are outdated. Have an idea for a new state flag? Everything submitted here will be considered. Are you good with words? Comment below with a logo, and you could help future generations live in a better, more prosperous state!” R. at 15.

On March 5, 2016, Governor Norton posted a new immigration policy to the GEN page. R. at 15. In it, the governor announced that she had “decided to commit the law enforcement resources of [the] state to [the] effort... [of cooperating] with federal law enforcement agencies

in enforcing the immigration laws of the United States.” R. at 15. In the announcement, the governor also noted that there would be a press conference to announce the policy and that her office would issue an Executive Order later in the afternoon. R. at 16. She explained that the policy was announced first on the GEN page because she knew that those who visited the page were “among the most active, influential, caring, and patriotic citizens” and she “wanted [them] to be the first to know.” R. at 16. She included a link to the government website where constituents would be able to access more information about the policy and concluded by stating, “as always, I welcome your comments and insights on this important step.” R. at 15, 16.

III. Brian Wong’s Comment and Governor Norton’s Challenged Actions

Approximately an hour after Governor Norton posted about the new immigration policy, Brian Wong saw the post and felt “angry enough to reply directly on [the GEN] Facebook page.” R. at 15, 27. Wong is a high school teacher whose own parents were immigrants. R. at 27. He personally “believes...that the cultural diversity immigrants bring make this country a stronger and better place to live” and that “the Governor’s change in policy will negatively impact recent immigrants, first-generation Americans like [him]self, and many of [his] students and their families.” R. at 28. By posting, Wong “[hoped] that both the Governor and [his] fellow constituents in Calvada would be able to see [his] reply and agree with [his] position” on what he felt was a “horrible new policy.” R. at 27. Additionally, he “wanted to alert the public to [what he believes is a] waste of state resources because [from his view, the Governor’s new policy] serves principally as a basis to harass law-abiding minority citizens.” R. at 27.

Wong’s comment was as follows:

“Governor, you are a scoundrel. Only someone with no conscience could act as you have. You have the ethics and morality of a toad (although, perhaps I should not demean

toads by comparing them to you when it comes to public policy). You are a disgrace to our statehouse.” R. at 16.

Nelson Escalante, Director of Public Security for the State of Calvada, saw Wong’s post. R. at 19. Escalante’s job duties include regularly monitoring all of the Governor’s social media accounts for any potential safety threats to the governor. R. at 19. If any posts include overt or implicit threats, Escalante will flag them for the Governor’s Chief of Staff and Director of Social Media. R. at 19. Escalante did not flag Wong’s comment as a safety concern to either senior staff member. R. at 19.

That evening, Governor Norton reviewed the comments under her immigration policy post. R. at 26. Aside from Wong’s comment, “a few of [the other] posts were critical of the new policy.” R. at 26. Examples include:

“I disagree with the new Calvada immigration enforcement policy. It will harm our state’s economy.” R. at 17.

“This is not a good policy. It will punish many hard-working people and their families.” R. at 17.

After seeing Wong’s comment, Governor Norton emailed Mukherjee’s government email address, from her own government provided email address, that she “saw nastygram by Wong in response to immigration announcement. Pls delete/ban. Not appropriate for page.” R. at 16, 17. Wong’s comment was deleted and he was subsequently banned from making any future comments. R. at 17. As of this date, he remains banned from the GEN page. R. at 26.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the United States Court of Appeals for the Fourteenth Circuit and find that (1) Governor Norton’s actions were attributable to the State of

Calvada; and, (2) the deletion of Brian Wong's comment in a state-sponsored forum and his ban from that forum was an improper form of viewpoint discrimination.

Governor Norton's actions in deleting Brian Wong's Facebook comment and banning him from the GEN page were attributable to the State of Calvada because the actions constituted a traditional and exclusive state function within her role as governor. As governor, Elizabeth Norton's duties include interacting with constituents, and keeping them abreast of her own activities as well as any important government events. Facebook provides one of the most optimal tools to facilitate these tasks. The platform provides broad reach to the public at large and allows for timely, direct contact. Governor Norton made use of these benefits to carry out her role as governor. She used the platform to interact directly with constituents, to respond to their suggestions where necessary—even using their suggestions to provide actionable items to other state officials, and to keep her constituents informed of her own activities and important government updates, including the implementation of new policies.

Alternatively, if this Court finds that the use of Facebook in this way was not a traditional and exclusive state function within the role of governor, because there was a sufficiently close nexus between Governor Norton's official role and the challenged actions, such actions may still be fairly attributed to the State. Governor Norton's impetus for making key changes to the title, privacy settings, and administrators on her account was her election to public office. Since making such changes, the page has been used overwhelmingly as a tool of governance. The governor has used many state resources to maintain the page and facilitate its use, and the motivation behind the governor's challenged actions was Wong's criticism of both her new policy and her overall effectiveness as a state official. These factors argue favorably for a

conclusion that the circumstances surrounding the governor's actions arose out of public— not private—circumstances and as such, those actions are fairly attributable to the State.

Governor Norton was a state official participating in state action, as such, Brian Wong's First Amendment rights were infringed upon because the forum where he posted his comment was a state-sponsored forum and not one protected by government speech. Thus, the deletion of his post and banning him from making any future posts to the Governor Norton Facebook page resulted in a form of viewpoint discrimination.

Governor Norton's Facebook page was a state-sponsored forum because of how it was utilized. Governor Norton gave access to the public in its entirety to view the page. Moreover, she personally posted on the page to solicit feedback from citizens, interact with her constituents, and foster a public dialogue. Using a Facebook page in such a way, created a forum similar to more traditional examples of public fora, such as town halls. Within these public fora, this Court has held that citizens are entitled to certain speech protections.

The Governor Elizabeth Norton Facebook page and the specific post about her new immigration policy were not government speech. In order for this Court to determine that they were government speech, the public would have to easily be able to misconstrue Brian Wong's comment as an endorsed government viewpoint. The nature of Facebook itself, with its identifiable user-generated content, as well as the way in which Governor Norton used Facebook, to deliberately solicit differing opinions, eliminated any confusion that the public could conceivably have. Because Brian Wong's comment strongly opposed Governor Norton's new policy it would be unreasonable for the public to conclude that the government had a hand in crafting his comment.

Finally, the deletion of Brian Wong’s comment was a form of viewpoint discrimination. His post not only questioned the wisdom of Governor Norton’s immigration policy but also called into question her fitness as governor. Brian Wong’s comment was the only one out of over thirty comments that was deleted. The majority of these comments voiced approval of the new policy and while a few others did voice mild opposition to the policy, they did not comment on Governor Norton’s overall fitness as governor.

Such political viewpoints deserve the highest First Amendment protections because they go to the core of both the ideals and the mechanisms of our democracy. Expanding the government speech doctrine to cover Governor Norton’s Facebook page or allowing viewpoints as strong as Brian Wong’s to be censored on that page has the potential to curb future debates on important public issues.

ARGUMENT

I. Governor Norton’s Actions Are Attributable to the State Because She Was Serving in Her Official Capacity at the Time She Acted or Alternatively, Her Actions Exhibited a Sufficiently Close Nexus to the State.

The Fourteenth Amendment¹ protects against the deprivation of an individual’s constitutional rights when such a deprivation may be fairly attributable to the State. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). In order for a plaintiff to be successful in his claim, he must show that the the defendant was acting by, through, or on behalf of the State. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). While this is a highly fact-intensive analysis, in most

¹ “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. amend. XIV.

instances, the first question asked is whether the defendant, in acting, was exercising a traditional and exclusive state function. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974).

Alternatively, even where seemingly private conduct is at issue, this Court has held that state action may still be found if “there is such a close nexus between the State and the challenged action.” *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001). In determining whether the requisite nexus exists, courts have considered a variety of factors. Some of the considerations that courts have weighed in favor of a finding that an individual’s actions are attributable to the state are: whether the motivation behind a seemingly private activity is a public one, whether such activity serves primarily as a tool of governance, whether public resources are used to facilitate the activity, and whether the purpose behind the state official’s challenged actions is one related to his or her role as an official. *See Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 713 (E.D. Va. 2017); *Rossignol v. Voorhaar*, 316 F.3d 516, 526 (4th Cir. 2003).

A. Because Governor Norton’s Actions Exhibited a Traditional and Exclusive State Function, Her Actions Were Fairly Attributable to the State.

Interacting with and responding to her constituents through the ‘Governor Elizabeth Norton’ (GEN) Facebook page constituted a traditional function of Governor Norton’s official role and as such, her actions were attributable to the State of Calvada. This Court has held that “generally, a public employee acts under color of state law . . . while exercising his responsibilities pursuant to state law.” *See West v. Atkins*, 487 U.S. 42, 49-50 (U.S. 1988) (“State employment is generally sufficient to render the defendant a state actor . . .”).

Governor Norton uses the ‘Governor Elizabeth Norton’ Facebook page as a means of connecting with her constituents. R. at 25. As an elected official, part of Governor Norton’s role involves interacting with her constituents and keeping them abreast of her official activities. R.

at 25. The GEN page serves as an important platform to facilitate each of these tasks. Through the page, the governor is able to share with her constituents the actions she has taken in her official capacity, such as the creation of new policies, and to solicit their feedback or suggestions. R. at 14–15. The post announcing the governor’s new policy on immigration was no different. R. at 15. The announcement discussed the new policy that would be affecting the entire state and informed the public about the upcoming press conference and official executive order that would be issued from the governor’s office. R. at 15–16. The announcement included a direct link to a government website, which the public could access for more information on the new statewide policy. R. at 16. Finally, the Governor also “welcomed comments and insights” from her constituents regarding the policy. R. at 16.

Though maintaining a Facebook page is not listed as an official statutory or constitutional duty of the governor, R. at 25, because of the significant role that social media plays in today’s world, this is one of the easiest, most time-sensitive ways to reach a large group of people. That the governor’s chief of staff, a senior official employed by the State, regularly discusses the Governor Norton’s social media accounts and strategy with her and that there was already an ‘Office of the Governor of Calvada’ (OGC) Facebook page prior to her inauguration, further demonstrates how important the use of social media is to the role of Governor. R. at 23, 25. The OGC page was used by the previous administration and likely will continue to be in use after Governor Norton is no longer in office. R. at 14. Moreover, while both pages help facilitate the governor’s official roles, the GEN page plays a more important role. The GEN page provides direct access to the governor herself in a timely manner, the GEN page is often first to post content while the OGC page reposts the GEN page content. R. at 14, 26. Because the GEN page is used so regularly to communicate important information from the governor’s office and at

times even provides direct links and information to the State’s official website, it has become an indispensable tool to execute the traditional and exclusive duties of the governor. R. at 16.

B. Even if this Court Finds that Governor Norton’s Actions Were Not a Traditional and Exclusive Function of the State, there Was a Sufficiently Close Nexus to the State so as to Be Fairly Attributable to the State.

Even if this Court finds that the governor’s actions were not a traditional and exclusive function of the State, their nominally private character is eclipsed by the pervasive entwinement of such actions with the State. *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961) (“The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which . . . cannot be considered to have been so ‘purely private’ as to fall without the scope of the Fourteenth Amendment.”). Because the impetus for making changes to the GEN page was a public one, the page was used overwhelmingly as a governing tool, state-provided resources were used to maintain the page, and the motivation behind the governor’s actions was state-related, “there is no substantial unfairness in [attributing the Governor’s action to the State] and applying Constitutional standards to it.” *See Brentwood Acad.*, 531 U.S. at 298.

i. Governor Norton’s Impetus for Changing Her Private Page into a Public One Upon Being Elected Was to Facilitate Her Role as a State Official.

Governor Norton’s motivation for making changes to the title, privacy settings, and administrators of her Facebook page was her role as governor; this is evidenced by the fact that she made these changes only and immediately upon being elected to public office. *See Davison*, 267 F. Supp. 3d at 713-15 (finding that the defendant’s impetus for the creation of her Facebook page, where it was created in collaboration with her chief of staff one day before she took office and was entitled “Chair” Phyllis J. Randall, was her election to public office as it would allow her to address her new constituents).

Though the governor maintained a personal Facebook page prior to taking office, she made several significant changes to the page one day after being elected governor so that her “constituents could follow [her] and have a personal connection to [her].” R. at 14, 25. First, she changed the name of her account from Elizabeth Norton to ‘Governor Elizabeth Norton.’ R. at 14. This is significant because it made her page recognizable to the public as belonging to a state official. This ensured that her constituents knew where to find state-related information and where to interact with the Governor, as demonstrated by Wong’s comment. R. at 27. The governor also changed the privacy settings on her page to further enable direct access with the public, and specifically her constituents. R. at 14. Finally, after being elected to her official role, the governor made her social media director and her chief of staff administrators on the account, allowing each to post to the page and create new content directed at the governor’s constituents. R. at 19-20, 23. After the changes were made, a new public page was “born out of, and is inextricably linked to,” the the governor’s public office. *Id.* at 713.

ii. Governor Norton Uses the GEN Page Overwhelmingly as a Tool of Governance.

Since taking office, Governor Norton has used the GEN page overwhelmingly as a tool of governance by using it to converse directly with constituents, solicit their support in improving living conditions in the state, hear their ideas for new initiatives, and keep them abreast of her own activities and any important government updates. *See Davison*, 267 F. Supp. 3d at 713-15 (holding that the defendant used her Facebook page as a tool of governance where she used it to hold back and forth conversations with constituents, coordinate efforts for disaster relief, solicit participation in a new initiative, and to keep her constituents informed on her own activities and important government events).

From the start, Governor Norton made it clear that she would be using the GEN page as a way for constituents to “interact directly with [her] and [her] senior staff.” R. at 14. The governor also recommended that constituents regularly check the GEN page for “exciting announcements and policies from [their] government” and requested that they leave comments telling her what they think. R. at 14. She pledged to respond to as many of the comments and concerns as she could. R. at 14. The governor also regularly posts on the GEN page requesting input from her constituents about matters pertaining to the business and policy of the State of Calvada and responds to those messages accordingly, at times even directing other state officials to fulfill certain tasks based on what has been posted. R. at 14, 23. For example, the governor has asked constituents to post photos of potholes throughout the state so that the Calvada Department of Transportation could make the necessary repairs, to submit ideas for a new state flag and logo, and to post comments about their priorities so that she could incorporate such concerns in to the state budget. R. at 14-15. The governor and her staff regularly monitor the GEN page in order to determine whether anything posted requires any action on the part of the governor, her staff, or other state officials. R. at 23.

iii. Governor Norton Uses State-Provided Resources to Maintain the GEN Page.

Governor Norton has used many state resources to maintain and facilitate use of the GEN page, such as receiving help from staff employed by the state, using state-provided devices to access the account, and communicating through state-provided email accounts to convey information pertinent to the page. *See Davison*, 267 F. Supp. 3d at 713-15 (finding that the defendant used county resources to support her Facebook page because she received help from her Chief of Staff in creating the page and continuing to assist in its maintenance).

Several members of the governor's staff, who are employed by the state, contribute to and provide support to the site. R. at 19-20, 23. The governor's chief of staff and social media director have both been made administrators of the GEN account, which provides them with many capabilities, including producing content for the page, managing comments and posts, and adjusting privacy settings. R. at 20, 23. Her chief of staff is also responsible for regularly monitoring the page to determine whether anything on the page requires action on the part of the governor's staff or other state officials or employees. R. at 23. Additionally, as part of his job duties, the director of public security for the State of Calvada regularly monitors the GEN page to identify and address any potential threats to the governor's safety and communicates with her chief of staff and social media director if there are any concerning posts. R. at 18-19.

When accessing the GEN page, the governor and her staff all regularly use devices provided by the State of Calvada. R. at 18, 20. Moreover, to communicate GEN page-related tasks to her staff, as in the case when requesting that Wong be banned and his post deleted, Governor Norton has used state provided email accounts. R. at 16. Though the governor's staff members often access the GEN page outside of regular work hours, R. at 20, in prior cases, this fact has been given little weight by the lower courts. *See Rossignol*, 316 F.3d at 524 (holding that the fact that the law enforcement officials acted after hours did not immunize their efforts to retaliate and stifle critical speech). Moreover, both of the staff members' job duties involve being available to the Governor at all times and they often work outside of standard work hours, including holidays and weekends. R. at 17.

iv. The Purpose Behind Governor Norton's Actions Was Directly Linked to Her Role as a State Official.

Governor Norton's motivation behind deleting Wong's post and banning him from posting in the future was directly linked to her role as governor as it was in response to his

criticism of not only the immigration policy but her fitness for office and overall public policy stance. *See Rossignol*, 316 F.3d at 525 (holding that there was a link between the purpose behind defendants' actions and the defendants' official roles because the public officials were driven by a desire to retaliate against the plaintiff's past criticism of their fitness for office and to censor future criticism along the same lines).

Governor Norton is an elected official. As such, in order to continue in her role as governor, she must ensure that she is consistently interacting with her constituents and that the majority of them view her in a positive light. Wong's comment, made soon after the immigration announcement was posted, directly conflicted with the governor's position on immigration and put her success as a state official in to question. R. at 27–28. The post went beyond other critical comments because it not only criticized the new immigration policy, but questioned the Governor's entire public policy stance. R. at 16–17.

Though outspoken, the post was never considered a threat by the director of public security, who had seen the post but did not flag it as a safety concern. R. at 19. Still, upon seeing the critical comment, Governor Norton emailed Social Media Director Sanjay Mukherjee, telling him that she had seen Wong's comment "in response to [the] immigration announcement" and asked that he delete the comment and ban Wong from making any future comments on the page. R. at 16-17. Wong's comment was deleted and he was subsequently banned from making any future comments. R. at 17. To this day, he remains banned from commenting in any way on the GEN page. R. at 26.

v. The Totality of Circumstances Weigh in Favor of a Finding that Governor Norton’s Actions Demonstrated a Sufficiently Close Nexus to the State That They Can Be Fairly Attributed to the State.

The impetus for making significant changes to the GEN page upon Governor Norton entering office was state-related, the GEN page has since been used, overwhelmingly, as a governing tool, the governor has used resources provided by the state to maintain the GEN page, and the governor’s reason for deleting Wong’s comment from the GEN page and banning him from commenting in the future was directly related to her official status. Each of these factors support a finding that the governor’s actions arose out of public—not private—circumstances and thus, may fairly be attributed to the State itself.

II. The 14th Circuit Properly Determined that Wong’s First Amendment Rights Were Violated When the Governor of Calvada Engaged in Viewpoint Discrimination in a State-Sponsored Forum.

Because of the nature of the Facebook page, how it was used by Governor Norton, and the kinds of interactions that the public had with it, the GEN Facebook page was a state-sponsored forum. Moreover, the governor’s post about the new immigration policy was a continuation of that forum. Finally, when Brian Wong’s post in disagreement with the immigration policy was deleted and he was banned from that forum because of his political viewpoint, these actions infringed on his First Amendment rights. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.* 515 U.S. 819, 829 (1995) (“When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”). While the deletion of the post was a state action conducted by a state official, it was improper because it occurred in a state-sponsored forum and did not constitute government speech. *Compare Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (“The Free Speech Clause . . . does not regulate government speech.”) *with Matal v.*

Tam, 137 S.Ct. 1744, 1749 (2017) (noting that in “[c]ases in which government creates a limited public forum for private speech . . . [V]iewpoint discrimination is forbidden”).

A. Governor Norton’s Facebook Page is a Medium Where the Government Speech Doctrine Does Not Apply.

The core issue in determining whether the government speech doctrine should apply to speech expressed by private actors is whether such speech could be construed as speech endorsed by or reflective of the government. *See, e.g., Summum*, 555 U.S. at 471 (allowing a municipality to reject the erection of a donated monument in a public park under the government speech doctrine because “persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf”). In determining whether private speech could be construed by the public as belonging to the government this Court has looked to three factors: first, whether the medium involved has historically been used by states to convey state messages; second, whether that medium is “closely identified in the public mind with the State;” and, third, whether the State “maintain[ed] direct control” over the speech conveyed on the particular medium. *See Tam*, 137 S.Ct. at 1760 (internal quotations omitted). Using the three factors that this Court has historically applied, Wong’s comment cannot be interpreted as government speech.

First, Facebook has not been long used by the States to convey messages. Facebook has been used by the State of Calvada since only 2010. R. at 14. By comparison, mediums where this Court has held that the government speech doctrine should apply have had a much longer lifespan. For example, the doctrine has been applied to license plates, where government messaging has existed for a little more than one-hundred years, *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2248 (2015), and monuments, where government messaging has existed “[s]ince ancient times.” *Summum*, 555 U.S. at 470. Even relative to

Facebook's existence, the State of Calvada has not been a historical user of it. Governor Norton, as a private citizen, was a Facebook user for approximately two years longer than the State of Calvada. *Id.*

Second, Facebook, and comments posted on Facebook, are not closely identified by the public with the State of Calvada. In addition to the fact that the State has not used Facebook for a considerable length of time (compared to other mediums where government speech has been applied by this Court), Facebook is a fundamentally different medium that precludes such confusion. The fact that users are identified as individuals allows for posts and comments to be easily distinguishable from one another and the authors of such posts to be readily identifiable. Beyond just its visual display, which allows for easy differentiation between users, the fundamental usage of Facebook implies such a relationship between posts and comments. The premise of social media is based on the interaction among different groups and individuals. When someone leaves a comment on a post it is assumed that they are doing so because they were not part of the process in creating the original post and that the two separate messages have originated from different entities. Wong's comment on Governor Norton's post is easily understood, within the context of Facebook, to be an indicator of his own individual thoughts.

Finally, given that the authors of posts and comments are readily identifiable, unless Wong had shown himself through his profile to be an employee of the State of Calvada, one would not reason that the government had participated in crafting the message that Wong ended up posting. This is beyond the self-evident fact that it would be a hard stretch for the public to conclude that the government would have direct control over a message that exhibited such vitriolic opposition to the governor and her policy.

B. Because of the Nature of the Medium and The Way in Which Governor Norton Used That Medium, Governor Norton’s Facebook Page Was a State-Sponsored Forum.

Governor Norton’s Facebook page was a state-sponsored forum where “viewpoint discrimination is forbidden.” *Tam*, 137 S.Ct. at 1749. A public forum can manifest itself in a variety of different ways. *Rosenberger*, 515 U.S. at 830 (noting that a student newspaper was “a forum in a metaphysical [rather] than in a spatial or geographic sense, but the same principles [of protection against viewpoint discrimination] are applicable”). Crucial to the determination of whether a given medium is a public forum is how that medium is used. *See, e.g., Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989) (holding that property which is not traditionally a public forum can become one when intentionally done so such as when a city commission “intentionally opened it[s meeting] to the public and permitted public discourse on agenda items”).

Governor Norton’s Facebook page was not always a state-sponsored forum. When she first created an account she was not yet governor. R. at 14. The account was only accessible by her friends and family, with whom she wanted to share personal thoughts. R. at 24. When Governor Norton, still a private citizen, created a Facebook page entitled “Elizabeth Norton,” the page was still not a state-sponsored forum. R. at 25. Though she posted both personal and business announcements and allowed visitors to interact with the page, access was still limited, allowing only her personal Facebook connections. *Id.*

Elizabeth Norton was then elected Governor of the State of Calvada. Upon making a series of changes, her page became a state-sponsored forum. First, she changed the name of the page to “*Governor* Elizabeth Norton” (emphasis added). R. at 2. The governor then changed her privacy settings to allow all members of the public to have access to the page. *Id.* As governor,

she used the GEN page to solicit the input of the public in key policy decisions. The governor fostered dialogue so that the page would be a place for constituents to interact with her directly and voice their own politics. *Id.* Governor Norton turned her Facebook page into a public forum in cyberspace. There, individuals could have a direct say in how their government was run by sharing their opinions and interacting directly with their elected officials.

Finally, Governor Norton's Facebook post about her new immigration policy was a continuation of the state-sponsored forum that she had created. The post carried all the hallmarks of her previous posts that made the character of the GEN page that of a state-sponsored forum. The post solicited feedback; it closed with the words, "As always, I welcome your comments and insight on this important step;" it reached out to readers of the page in a personal tone, calling them "among the most active, influential, caring and patriotic citizens of the State of Calvada;" and finally, it included a link to the official announcement page, implying that the post was not an official government announcement. R. at 16.

C. Brian Wong Was Banned from the Governor Norton Facebook Page and His Comment Was Deleted Because of its Political Viewpoint.

Protection against viewpoint discrimination is a core value of the First Amendment. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.* 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

Of all the comments that were posted in response to Governor Norton's post about the new immigration policy only one was deleted: Brian Wong's. R. at 17. In his comment, Wong disagreed with the new immigration policy and used the policy decision as the impetus to question Governor Norton's fitness as governor. *Id.* ("Only someone with no conscience could act as you have."). Of the comments that were critical of the immigration policy, Wong's was

the one that was most vitriolic to the policy. The other posts that opposed the new immigration policy were much more benign in their criticism. In one, the commenter stated that they “disagree with the new...policy” while another stated that it was “not a good policy”—neither of which, when surrounded by thirty or more positive comments rise to a particular level of political disagreement and engagement that would rally others in opposition. *Id.*

The fact that other comments that opposed the policy were not deleted is irrelevant to the question of whether Wong’s First Amendment rights were infringed. Just because Governor Norton chose not to engage in viewpoint discrimination against other more benign comments that disagreed with her does not mean that the deletion of Wong’s comment was unrelated to its viewpoint. The strength of the viewpoint in Wong’s comment was greater than that displayed by the other comments opposing the policy. *Id.* Likewise, Wong’s was the only negative comment that directly used the opposition to the immigration policy to question the governor’s fitness for office. *Id.* This raises the political stakes of the comment and materially separates it from other negative comments as it goes directly to the effectiveness of Governor Norton in a role to which she was elected by the public.

The argument that the comment was deleted because it was an *ad hominem* attack and not because of its political message, ignores the context in which the post was made. It was made as a direct reply to the immigration policy post and implicitly referenced the policy in order to critique the governor. *Id.* While it is true that the language used may have been outside the bounds of respectable political discourse (although certainly very tame for a political debate on the internet), the language and word choice are not determinative here. What is determinative is that the words used to attack the governor did so in relation to the new immigration policy, and they did not create a safety or security threat. R. at 19.

D. Expanding the Context of What Constitutes Government Speech Would Undermine the Most Important First Amendment Protections That Our Society Values

Political speech is one of the most protected kinds of speech in our democracy. *See, e.g., Connick v. Myers*, 461 U.S. 138, 145 (1983) (“[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection.”) (internal quotations omitted). This is because in order for a democracy to function properly, citizens need to be able to engage in free debate and discussion about elected officials and their policies.

The deletion of Wong’s comment and his ban from the governor’s Facebook page presents a number of concerns about the protection of political speech. The State of Calvada essentially argues that the government can curtail comments because Governor Norton’s Facebook page is government speech, indirectly allowing the government to craft how the policy is viewed throughout the medium of Facebook. This is dangerous. To allow such government discretion this would mean that certain members of the public, like Brian Wong, would not have the same access to Governor Norton that other members have, and their exclusion would have less oversight than if the Facebook page were considered a state-sponsored forum. Moreover, public debate on issues of public importance to the entire State of Caldava would be restricted to certain members of the public, while excluding others. Beyond simply curtailing a policy debate on Facebook, the perception of the debate in the larger public could also be affected. Readers of the Facebook post and comments would have the false impression that a particular policy announced by Governor Norton has lopsided favorability. This affects the public’s perception of the issue and its overall popularity, which, in turn, may affect whether members of the public are willing or eager to engage in a larger debate about the policy.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the Fourteenth Circuit and find that (1) Governor Norton's actions were attributable to the State of Calvada; and, (2) the deletion of Brian Wong's comment in a state-sponsored forum and his ban from that forum was an improper form of viewpoint discrimination.

Respectfully submitted,

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