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Docket 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 Appeal from the Court of Appeals
For the Fourteenth Circuit
Case No. 17-874
The Honorable Leif Skillrud
Oral Argument Requested

BRIEF OF THE RESPONDENT BRIAN WONG

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STATEMENT OF THE ISSUES

I. Whether the Court of Appeals erred in concluding there was state action when senior members of the state government deleted an individual post and banned the user on a state run Facebook page.

II. Whether the Court of Appeals erred in holding a designated public forum was created and viewpoint discrimination, not government speech, occurred when a state official changed the privacy settings and name on their Facebook page, encouraged participation from the public, only to delete comments critical of the governor while leaving other positive comments and criticism of a state policy untouched.

STATEMENT OF THE CASE

The Government of Calvada appeals the decision of the Court of Appeals in favor of Brian Wong. Wong filed a civil rights action on March 30, 2016, seeking to restore his post and permit him to make comments on the "GEN" page. (R. 01.) On August 25th, Mr. Wong and Governor Norton filed cross motions for summary judgment. (R. 01.) By order dated January 17, 2017, the District Court granted the motion in favor of Governor Norton, holding that the neither the deletion nor the ban violate the First Amendment because they constitute "government speech." (R. 01-12.) Mr. Wong filed an appeal to the 14th Circuit. On November 1, 2017, the Court of Appeals ruled in favor of Mr. Wong, holding that the deletion and ban imposed viewpoint discrimination against Mr. Wong in violation of the First Amendment. (R. 29-30.)

STATEMENT OF FACTS

On January 12th, 2016, a day after she was sworn in as Governor of Calvada, she renamed her Facebook page to "Governor Elizabeth Norton" ("GEN" page) and changed her privacy settings to allow the public to access and communicate on her page. (R. 02.) Since then, a

continued and substantial effort to engage with the public and modernize the image of the Governor's Office has been made through social media, both through the official Office of the Governor Account and the "GEN" account, which the governor focuses her personal attention on far more regularly. (R. 02-03.) Keeping up with these accounts, particularly the "GEN" account, requires the daily assistance of Sanjay Mukherjee,[1] the Governor's Director of Social Media, who "regularly" helps the Governor keep up with the posts on the "GEN" page. (R. 03.) Most, if not all, of the social media activities done by the Governor, her staff, and other members of the executive branch of the Calvada government occur on state issued devices as part of a security policy to protect the integrity and security of information and persons associated with the government. (R. 03.) The Governor and her staff routinely monitor, post and engage with the Calvadan public as the policy of her office. As a matter of state policy they do so on registered state devices with enhanced security protocols. (R. 18-20.) It is both the expectation and policy of the governor and her staff to engage with the public through social media, particularly the "GEN" Facebook account. (R. 02-03.)[2]

On March 5, 2016, Governor Elizabeth Norton posted a new announcement on immigration law enforcement policy for the state of Calvada on her "GEN" page.[3] (R. 03.) In

[1] The GEN page is also overseen by, among other members of the Governor's staff, Mary Mulholland, the Governor's Chief of Staff. (R. 23.) She is an administrator for the Governor's social media and regularly posts, monitors, and responds to public comments on the GEN page on behalf of Governor Norton. (R. 23.) As the Chief of Staff, she regularly discusses the use of the Governor's social media accounts and helps set strategies with Governor Norton for the use of her social media platforms. (R. 23.) Alongside the Governor, the Governor's Chief of Staff, and the Director of Social Media, Nelson Escalante, the Director of Public Security, monitors the Governor's social media for potential threats, and flags posts he has identified as potential threats to the governor. (R.19.)

[2] Governor Norton used the GEN page to post "multiple requests for input from constituents about matters pertaining to the business and policy of the State." (R. 02.)

[3] The policy was to allow State law enforcement to cooperate with Federal law enforcement on immigration. (R. 02-03.)

Her post, the Governor ended the announcement by stating, "I welcome your comments and insights on this important step." (R. 04.) Later that same day, Mr. Brian Wong wrote in the comment section of his dissatisfaction with the newly appointed Governor Norton, believing it to be immoral. (R. 04.)[4] Upon seeing Mr. Wong's comment, the Governor instructed Mr. Mukherjee, via email, to delete it and ban Mr. Wong from commenting, calling Wong's comment a "nastygram" and inappropriate. (R. 04.) While Mr. Wong's post was deleted, other comments expressing opinions were not.[5] (R. 04-05.) Mr. Wong emailed the Governor requesting that his post be restored but never heard a response. (R. 05). Mr. Wong remains banned and his comment deleted. (R. 05.) He subsequently filed suit on March 30, 2016. (R. 01.)

SUMMARY OF THE ARGUMENT

I. To find state action among private parties there must be a close nexus between the State and challenged action, such a nexus makes a nominal private action fairly attributable to the State. When Governor Norton changed her private Facebook page to "Governor Norton," opened viewing to the public, directed her staff to post content and commanded them to delete Mr. Wong's comment and ban him from commenting, she established a close nexus between her nominally private Facebook page and her role as the Governor of Calvada. Her decision to delete Mr. Wong's comment and to ban him became State action due to the close nexus.

II. The decision to change the privacy settings and name on the governor's private Facebook, combined with active requests for public participation on that page, created a designated forum.

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[4] Mr. Wong specifically said "Governor, you are a scoundrel. Only someone with no conscience could act as 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. 04)

[5] The comments remaining on the announcement were over thirty favorable and another two unfavorable. (R. 04-05.)

The decision does not qualify as "Government speech" because it does not meet the "Tam" factors. Further, the decision infringed upon Mr. Wong's freedom of speech protected by the First Amendment since it was content-based viewpoint discrimination.

ARGUMENT

I. STATE ACTION EXISTS UNDER TWO DIFFERENT TESTS ADOPTED BY THIS COURT

The First Amendment protects the rights of citizens from the abuse of the State, not private parties. In other words, only actions on the part of the State can be constitutionally challenged.[6] This Court in West v. Atkins held that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." [7] The actor must be "under color of state law."[8] This Court in West said, "generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law."[9] The Court added that "state employment is generally sufficient to render the defendant a state actor."[10] While nominally private, the Facebook page, titled "Governor Elizabeth Norton," belonged to and was operated by government employees. (R. 02-03.)

In our modern society, concerns about an overbearing government limiting individual freedoms are valid and mandate the upholding of "constitutional standards" when "the State is responsible"[11] especially when those standards are protecting our individual freedoms. To ensure

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[6] This Court in West v. Atkins said, "[t]o state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." West v. Atkins, 487 U.S. 42, 48 (U.S. 1988)
[7] Id. at 49.
[8] United States v. Classic, 313 U.S. 299, 326 (1941).
[9] West, 487 U.S. at 50.
[10] Id. at 49.
[11] Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

the protection of theses freedoms, we must trace State action through nominally private behavior. In Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n this Court said "state action may be found if, though only if, there is such a "close nexus between the State and the challenged action" that seemingly private behavior 'may be fairly treated as that of the State itself.'"[12] Among the different tests of State action, two are relevant here. First, due to the totality of circumstances, the nominally private actions of the Governor is fairly attributable to the State. Second, the private character of the "GEN" page was "overborne by the pervasive entwinement" with the State, thus making the private actions fairly attributable to the State.

A. THE TOTALITY OF CIRCUMSTANCES SURROUNDING THE "GEN" PAGE CREATE STATE ACTION

Seemingly private actions can be fairly attributable to the State when considering the "totality of the circumstances" from which the actions arose. In Brentwood, the Court held:

> [w]hat is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.[13]

This approach, known as the "totality of circumstances," was used in Rossignol v. Voorhaar. In that case, Kenneth Rossignol owned a local newspaper, St. Mary's Weekly.[14] The newspaper was often critical of the local government, particularly the County Sheriff, Richard Voorhaar.[15] The County deputies planned and executed a buyout of all St. Mary's Weekly newspapers the night before local elections.[16] Even though the deputies were off duty, the 4th Circuit held that "[t]he actions here arose out of public, not personal, circumstances" because the "sole intention

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[12] Id.
[13] Id. at 295–96.
[14] Rossignol v. Voorhaar, 316 F.3d 516, 519-521 (4th Cir. 2003).
[15] Id.
[16] Id.

[was] to suppress speech critical of [the sheriffs] conduct of official duties or fitness for public office, [the deputies] actions are more fairly attributable to the state."[17]

Similar to Rossignol, the resulting actions of Governor Norton "arose out of public, not personal, circumstances." The Governor had renamed her personal Facebook Page to "Governor Elizabeth Norton." (R. 02.) She changed the privacy settings of that page to "public" and her and her staff routinely posted and responded to constituents on that page. (R. 02.) She posted a State policy and asked constituents for feedback. (R. 04-05.) Like Mr. Rossignol, Mr. Wong's feedback was highly critical of a government official. (R. 04.) The circumstances surrounding the deletion of Mr. Wong's comment and subsequent ban arose strictly out of public circumstances. The Government argues that Governor Norton's actions were private because they took place on Governor Norton's personal Facebook page and Mr. Mukherjee only posted content before or after hours. (R. 20.) However, like the off-duty deputies in Rossignol, the circumstances of the actions dictate whether they were public or private. Here, the governor and her staff routinely posted and responded to constituents comments on that page. (R. 02.)

B. The Entwinement Of the Governor and Her Staff With The Private Platform of Facebook Create State Action

Even if Governor Norton's actions were private, there was significant entwinement between her actions and the state. This Court in Brentwood identified a basis for entwinement exists when,

> The nominally private character of the [private party] is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it.[18]

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[17] Id. at 524.

[18] Brentwood, 531 U.S. 288, 298 (2001); This Court in Lugar v. Edmondson Oil Co. said, "[s]econd, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has

In Brentwood, the Tennessee Secondary School Athletic Association regulated private and public schools in academic competition. In finding the Athletic Association entwined with the State, this court noted that it "act[ed] through their representatives, [drew] its officers from them, [was] largely funded by their dues and income received in their stead, and [was] historically . . . seen to regulate in lieu of the State Board of Education's exercise of its own authority."[19]

Like Brentwood, Governor Norton's "GEN" page often communicates "in lieu of" the official page Governor Facebook page. The "GEN" acts mainly through "officers" of the Governor's cabinet, such as Mr. Sanjay Mukherjee, Director of Social Media, Mr. Nelson Escalante, Director of Public Security, and Ms. Mary Mulholland, Chief of Staff. (R. 03.) Moreover, the "GEN" page is directly managed by a State employee, Mr. Mukherjee, who is a primary administrator of it. For example, Governor Norton asked, via email, for Mr. Mukherjee to add news of a recent trip as well her comments on ongoing global and local situations. Then, in the same email, the Governor instructed Mr. Mukherjee to delete Mr. Wong's post and ban him from commenting further. In exercising this mandate, Mr. Mukherjee was "clothed with the authority of state law" and the management of the "GEN" page was done "under color of' state law."[20]

II. THE POST BY RESPONDENT IS NOT GOVENRMENT SPEECH BUT A COMMENT ON A DESIGNATED FORM WHOSE REMOVAL CONSTITUTED VIEWPOINT DISCRIMINATION

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obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

[19] Brentwood, 531 U.S. at 290–91.

[20] Classic, 313 U.S. at 326.

A. THE CIRCUIT COURT WAS CORRECT IN APPLYING THE TAM FACTORS TO RESPONDENTS COMMENT AND NOT THE "GEN" PAGE ITSELF

The government contends that regardless of the existence of a designated public forum, the "GEN" page, and Mr. Wong's comment on it, are protected communication under the government speech doctrine and cannot be subject to a viewpoint discrimination claim. This contention must be analyzed under the Tam factors this Court has laid out to determine the applicability of government speech doctrine. As the Court of Appeals correctly determined, the "GEN" page fails to pass scrutiny under any of the Tam factors. (R. 36.). The 14th Circuit also noted that the district court, in erroneously holding the "GEN" page was government speech, applied the right test to the wrong speech. The government asks this Court to commit the same legal error.

In Matal v. Tam, this Court determined whether the Patent and Trademark Office could deny a mark that was considered "disparaging". (R. 35.). The factors used by the Tam court to decide the extend of government speech doctrine were the same used by this Court in Walker v. Texas Div., Sons of Confederate Veterans, Inc, (involving the registration of special state license plates) and Pleasant Grover City v. Summum (involving a denied request to add a private monument to a public city park).[21] In order to determine whether the government was speaking, the Court looks to whether, in the words of the 14th Circuit, the "medium" used to convey that message. (R. 35). In analyzing whether government speech exists, this Court looks to first the whether the medium has been "traditionally . . . used to convey a government message".[22] Second, to whether the medium is "often closely identified in the public mind with the state".

[21] Matal v. Tam, 137 S. Ct. 1744, 1760 (2017).
[22] Id.

Third, to whether the state has "direct control over the messages conveyed [with or on the medium]".[23] Tam, not yet decided when the District Court underwent its analysis of Walker and Summum, did not guide the District Courts decision. The District Court erred in identifying the "GEN" page itself, not the respondents comment that was regulated, as proper medium for an analogy to the specialty license plates in Walker and the monument in Summum. (R. 35). It was this error that led to the conclusion that the speech fell under government speech doctrine. The medium at issue is not the "GEN" page, which when it posts speaks on behalf of the Governor and her senior staff. Instead, the medium at issue is the medium which carried the message that the government objected to and permanently removed, Mr. Wong's message.

B. THE CIRCUIT COURT CORRECTLY HELD THAT WHILE FACEBOOK HAS NOT TRADITIONALLY CONVEYED GOVERNMENT MESSAGES THIS FACTOR IS NOT DETERMINATIVE OF GOVERNMENT SPEECH DOCTRINE

The Circuit Court noted that "the States do not have a long tradition of using Facebook to convey government messages" but did acknowledge the growing trend of states to do so, as social media has become "for many . . . the principal sources for knowing current events . . . speaking and listening in the modern public square" and "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[24] It is not the respondents contention that government, particularly the Calvada Governor's Office, did not or should not utilize social media as a method to convey government messages. The power of this medium is clear, and the petitioner sought to utilize it to connect with Calvadan citizens. (R. 14). However, opening up social media as an avenue for government expression, given its strong history and growth as a tool for the general public, comes with it certain obligations and

[23] Id.

[24] Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

responsibilities on the part of the State. While Governor Norton did in this case utilize the "GEN" Facebook page, the government cannot mount an availing argument that enough time has passed for a tradition of social media posting to be established as a means of satisfying the first Tam factor.

C. The Circuit Court Correctly Held That Respondents Post and By Extension Posts By the Public At Large Could Not Be Identified As The States

While a medium for expressive activity, Mr. Wong's comment on the "GEN" page it is unlike either specialty state license plates on vehicles or monuments in a public park, rather it should be analyzed under the facts of Tam. The Walker Court, in analyzing whether or not the specialty license plates met the government speech factors, noted that,

> Texas license plate designs are often closely identified in the public mind with the [State] . . . Each plate is a government article serving the governmental purposes of vehicle registration and identification. The governmental nature of the plates is clear from their faces: the State places the name "TEXAS" in large letters across the top of every plate. Texas also requires Texas vehicle owners to display license plates, issues every Texas plate, and owns all of the designs on its plates. The plates are, essentially, government IDs, and ID issuers "typically do not permit" their IDs to contain "message[s] with which they do not wish to be associated.[25]

While the District Court correctly noted that the posts by the Governor or her staff on the "GEN" page could correctly be identified as the states speech, such an identification comes not from the nature of Facebook as platform for expression, but from the individual identity of the online speaker, "Governor Elizabeth Norton". (R. 02). The ability of the public to identify that this particular Facebook account, the "GEN" account, belongs to Governor Norton is what gives that account, and by inference all social media, its influence. Likewise, it was Mr. Wong, using his profile as an individual citizen, who added his voice in the comment section of the Governor's

[25] Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2242 (2015).

public post on the new immigration policy. Mr. Wong's comment identifies him as an individual citizen.

His comment, posted on a platform built on the notion of individual identify and influence, would never be attributed by the public to the State of Calvada or the Governor. Unlike a license plate, bearing the states name" in large letters across the top of every plate"[26] Mr. Wong's comment on "GEN" page, alongside over thirty other individuals, is better understood like the application for a trademark. It is an individual expression, one that the Governor and her staff neither not "dream[ed] up" nor "edit[ed]".[27] If individual posts by Calvadan citizens on the "GEN" page are the speech of the Calvadan government, that government "is babbling prodigiously and incoherently. It is saying many unseemly things."[28] If this was so, the Calvadan government would find itself in the same position as the Federal Government as hypothesized in Tam, a result this Court has found untenable.[29]

Unlike the monuments at issue in Summum, which were messages "built to commemorate" and "designed as a means of expression"[30] Mr. Wong's comment, nor his fellow citizens comments, can be interpreted under any reasonable analysis as a government attempt to communicate. The government neither "wishe[d] to convey some thought" nor did it hope to "instill some feeling" in the public comments on the "GEN" page.[31] Neither Summum or Walker can support the extension of government speech that would be required to hold that a comment,

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[26] Id.
[27] Matal,137 S. Ct. at 1758.
[28] Id.
[29] Id. at 1759.
[30] Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 470 (2009).
[31] Id.

posted on a platform built on individual expression, could be identified as the belonging to the State. As such, the government speech argument fails to satisfy the second prong.

D. THE CIRCUIT COURT CORRECTLY HELD THAT RESPONDENTS COMMENT IS NOT CONTROLLED BY THE STATE

The third of the Tam factors asks whether the state has "direct control over the messages conveyed [with or on the medium]".[32] The Circuit Court noted that "Facebook users would not think the Governor controlled the responsive messages posted on her "GEN" page. There is little danger of misperception as to the source of Mr. Wong's posts." (R. 36). This analysis is cogent. As highlighted above, there is little to no chance the public could misinterpret Mr. Wong's comment as that of the States. Facebook, as a platform for private or public expression, is built on individual profiles and the interactions of those profiles. (R. 13). Like this Court acknowledged of trademarks, not only is there "no evidence that the public associates the contents of [Facebook comments] with the Federal Government"[33] but the public affirmatively understands an individual's activity on Facebook to belongs to that user alone. There is no real possibility of confusion with a State message. The third Tam factor is not satisfied.

The first Tam factor, dealing with a relatively new forum for expression, has not yet established the necessary foundation to arguably create a "tradition" of government speech.[34] The argument that Mr. Wong's comments could be attributed by any reasonable standard to the State, and that the State would have direct control over his message, cannot withstand serious

[32] Matal, 137 S. Ct. at 1760. (Internal citations removed)
[33] Id.
[34] Id.

scrutiny. The Tam factors have not been met, and Mr. Wong's comments cannot constitute government speech.

E. The Extension of Government Speech to Comments on the "GEN" Page Will Create Dangerous Precedent

Government speech doctrine exists to protect the ability of government to communicate messages and sustain its necessary role in society. As the Court stated in Matal v. Tam, "it is not easy to imagine how government could function if it were subject to the restrictions that the First Amendment imposes on private speech" and "the First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely."[35] While this doctrine is "essential" this Court has acknowledged that,

> it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.[36]

The power of government speech doctrine to remove state actions, including the discrimination of private voices, from First Amendment scrutiny is tremendous. This Court has, even before Tam, acknowledged the need for judicial restraint.[37] It is a case like the one presented before the Court today that require the need for "great caution".[38] The government asks this Court to abandon caution by declaring essentially any expressive activity that occurs on a digital forum run by the State government speech. The Governor did not need to make her Facebook page into

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[35] Matal, 137 S. Ct. at 1757. (Internal citations removed).
[36] Id. at 1758.
[37] Justice Souter in his concurrence noted that "Because the government speech doctrine, as Justice STEVENS notes . . . is "recently minted," it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored . . ." Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 485–86 (2009)(Souter concurrence).
[38] Matal, 137 S. Ct. at 1758.

a digital forum. An official page for her office already existed when she assumed that role. (R. 03.) By opening up her page as a public forum for expression, she implicitly and explicitly invited the conversation, and scrutiny, that resulted. Removing and subsequently banning Mr. Wong from future posts, and seeking this Court to affirmatively remove that decision from a further judicial scrutiny leads to "a huge and dangerous extension of the government-speech doctrine."[39] If an individual would lose their First Amendment freedom of expression by engaging with a digital forum owned, identified, or managed by the State, that precedent will swallow whole a vast new means of expression that "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[40]

Extending government speech here allows "private speech [to] be passed off as government speech" and would permit "[the] government" to silence or muffle the expression of disfavored viewpoints."[41] However offensive or disfavored Mr. Wong's speech was, it occurred on a forum that the State of Calvada opened to the public. A forum may well be more "metaphysical than . . . spatial or geographic . . . but the same principles are applicable" and the same precedent set here will come to govern both digital and physical forums, creating an unprecedented vanishing of First Amendment protections that future governments might use with a vengeance against dissident voices.[42]

[39] Id. at 1760.
[40] Packingham, 137 S. Ct. at 1735.
[41] Matal, 137 S. Ct. at 1758.
[42] Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 830 (1995).

F. THE "GEN" PAGE IS A DESIGNATED PUBLIC FORUM AND NOT A PRIVATE PAGE

The test to determine whether or not a designated public forum has been created asks whether the government intentionally opened a nontraditional forum for public discussion.[43]

This Court in Cornelius noted that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." [44] To determine whether or not the government intended to open up that forum, the Court has looked to two different sets of factors. First, to "the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum".[45] Second, to "the nature of the property and its compatibility with expressive activity [in order to] discern the government's intent." [46] The forum presented in this case, the "GEN" Facebook page that was initially private, but repurposed when the petitioner took office as Governor, satisfies both sets of factors under the designated public forum test laid out in Cornelius. (R. 02.)

G. THE POLICY AND PRACTICE OF THE CALVADA GOVERNOR'S OFFICE DEMONSTRATE AN INTENT TO OPEN THE "GEN" FACEBOOK PAGE AS A FORUM FOR PUBLIC DISCOURSE

Facebook is unquestionably a place designed for purpose of discussion and debate. It is a 21st century political forum that captures the attention of over 167 million users in both the United States and Canada. (R. 02.) The Fourth Circuit, highlighting the public forum side of Facebook, noted that "Facebook is a dynamic medium" where "users . . . can interact with members of their community".[47] Posting on Facebook is "[s]imilar to writing a letter to a local

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[43] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).
[44] Id.
[45] Id.
[46] Id.
[47] Liverman v. City of Petersburg, 844 F.3d 400, 409–10 (4th Cir. 2016).

newspaper" and that "publicly posting on social media suggests an intent to communicate to the public or to advance a political or social point of view . . ." [48] In the 21st century, Facebook has become a predominant digital platform for a wide array of "political [and] social viewpoints."[49] Unlike a meeting room or sidewalk, with Facebook the individual maintains a sense of ownership over their own account, allowing only those they become "friends" with to see and comment on posts. (R. 02.) Facebook does provide the ability for its users to alter their privacy settings to various degrees, from allowing the any member of the public with a Facebook account to see posts from that user to permitting the public at large to comment and engage with that user's page. (R. 02.) This flexibility allows it to be a tool for both private expression, akin to an intimate dinner party where the company is selectively chosen, and public communication, similar to traditional public forums like parks and sidewalks.

Whether ones Facebook circle is akin to a dinner party or a park rally, whether one comments to a close knit circle or writes a "letter to the local newspaper" is a choice Facebook has left in the hands of the user. The "GEN" page at issue here was, for several years, a private page created by Governor Norton before she was governor. (R. 02.) In that capacity, she used it in a way much akin to the dinner table, allowing her family and friends to engage with her posts on "various social and political issues." (R. 02.) To be a part of then Elizabeth Norton's Facebook community, she had to accept the "friend" request that allowed a friend or family member to view and engage with her posts. When the Governor changed her pages name and privacy settings, encouraging direct access by the Calvadan public, she changed not only the scope, but the nature of the page. (R. 02-03.).

[48] Id.
[49] Id.

H. THE POLICIES AND RESPONSIBILITIES OF THE GOVERNOR'S STAFF CLEARLY SHOW AN INTENT TO OPEN THE "GEN" PAGE AS A PUBLIC FORUM.

This Court noted that social media is "for many . . . the principal sources for knowing current events . . . speaking and listening in the modern public square" and "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[50] It is a community, as well as an individual tool, and one that has become crucial to social and political expression in the United States. (R. 02.) The petitioner implicitly acknowledged this when she changed the settings on her page when she took office. On January 12th, 2016, a day after she was sworn in as Governor of Calvada, she renamed her Facebook page to "Governor Elizabeth Norton" and changed her privacy settings to allow the public to access and communicate on her page. (R. 02.)

Since then, a continued and substantial effort has been made to engage with the public through social media, both through the official Office of the Governor Account and the "GEN" account. (R. 02.) It is the "GEN" account however, which the governor focuses her personal attention on far more regularly. (R. 02-03.) Keeping up with these accounts, particularly the "GEN" account, requires the daily assistance of Sanjay Mukherjee, the Governor's Director of Social Media, who "regularly" helps the Governor keep up with the posts on the "GEN" page. (R. 03.) This is, as the Director of Social Media and a state employee, an integral part of his job.

The "GEN" page is also overseen by, among other members of the Governor's staff, Mary Mulholland, the Governor's Chief of Staff. (R.23.) She is an administrator for the Governor's social media and regularly posts, monitors, and responds to public comments on the "GEN" page on behalf of Governor Norton. (R. 23.) As the Chief of Staff, she regularly

[50] Packingham, 137 S. Ct. at 1735.

discusses the use of the Governor's social media accounts and helps set strategies with Governor Norton for the use of her social media platforms. R. 23. Alongside the Governor, the Governor's Chief of Staff, and the Director of Social Media, Nelson Escalante, the Director of Public Security, monitors the Governor's social media for potential threats, and flags posts he has identified as potential threats to the governor. (R.19.)

Most, if not all, of the social media activities done by the governor, her staff, and other members of the executive branch of the Calvada government occur on state issued devices as part of a security policy to protect the integrity and security of information and persons associated with the government. (R. 18-20.) The Governor and her staff routinely monitor, post and engage with the Calvadan public as the policy of her office. The intent of the government is clear. It is both the expectation and policy of the governor and her staff to engage with the public through social media, particularly the "GEN" Facebook account. (R. 02-03.)

I. THE ROUTINE AND INTENTIONAL POSTING ON THE "GEN" PAGE CLEARLY INDICATE AN INTENT TO OPEN THE "GEN" PAGE AS A PUBLIC FORUM FOR CALVADANS

Two days after changing the name and privacy settings on her "GEN" account, the Governor began and has continued to post on topics and issues predominately relating to her responsibilities as Governor of Calvada. (R.14). On January 14th, the Calvadan public was able to both see and comment on a post that read,

> 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 . . . and let me know what you think by posting your comments there. (R. 14).

Following this post, the Governor began to request the engagement and comment of the public on budget priorities, to post pictures of potholes that need repair, and to submit new ideas for the state flag and logo. (R. 15). The post pertaining to the Respondents permanent ban, where the

Governor outlined her state policy on immigration law enforcement, ended with the words "As always, I welcome your comments and insights on this important step." (R. 16). Governor Norton consistently took the opportunity on her "GEN" posts to request the honest feedback, comment, and dialogue of Calvadan citizens, including the respondent, on the social and political issues her administration was dealing with. The consistent practicing of requesting public comment removes any doubt that the government intended to open up the "GEN" page as an authentic forum for expression, meeting the Cornelius test. Moreover, even if the Court finds that it was not the practice and policy of the government, the "GEN" Facebook page passes the second set of factors under the Cornelius test, whether the Forum is compatible with expressive activity.

J. FACEBOOK IS CLEARLY COMPATIBLE WITH EXPRESSIVE ACTIVITY

The Internet, since it early days, has been acknowledged by this Court to be a major tool of communication, collaboration, and discussion. In Reno, a case deciding the application of the Communications Decency Act, the court stated that "[t]he Internet is a unique and wholly new medium of worldwide human communication."[51] Since then, the internet has continued to witness a spectacular growth both in terms of users and its applications for modern political life.

Particularly, the intervening years between the Reno court and today have witnessed the rise of social media, including Facebook, as a new kind of forum for First Amendment expression. This Court in Packingham v. North Carolina noted that "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace . . ."[52] The development of these networks

[51] Reno v. Am. Civil Liberties Union, 521 U.S. 844, 850 (1997) (Internal citations removed).
[52] Packingham, 137 S. Ct. at 1735.

will continue to deepen their political importance. Facebook as a medium is inherently compatible with expressive activity, and as such provides significant clues to "discern the government's intent."[53] The intent here could not be clearer. Social media, particularly Facebook, has become a central form of expressive activity within our political process, something the Calvada Government acknowledge in the hiring of a Director of Social Media specifically for the Governor, and the active encouragement of public discourse on the "GEN" Facebook page. (R. 02-03.) The stated desire of the Governor for the public to "interact directly with me and my senior staff" should remove any doubt regarding what was intended by opening up the "GEN" page for (R. 14).

As a channel for expressive speech, it has already been established that Facebook is different than other expressive forums of the past.[54] It gives the user the decision over whether or not their page will be a private forum for friends and family or a public forum for their community to engage with. When Governor Norton leaves office and once more changes the privacy settings of her page, permitting only those with whom she chooses to be "friends" to engage with her posts, the forum will once again be closed to the public at large. Until then, the "GEN" page remains a designated forum open to the citizens of Calvada, a forum on which the governor has explicitly encouraged the participation and voice of Calvadans.

K. The Removal of Mr. Wong's Comment and Subsequent Ban Constitute Viewpoint Discrimination

The recent Supreme Court decision in Reed v. Town of Gilbert, Ariz. reiterated that: "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on

[53] Cornelius, 473 U.S. at 802.
[54] Packingham, 137 S. Ct. at 1735.

particular viewpoints, but also to prohibition of public discussion of an entire topic."[55] However, when the Government discriminates

> among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'— [it] is a 'more blatant' and 'egregious form of content discrimination.'[56]

Content-based regulation exists when the Government regulation "applies to particular speech because of the topic discussed or the idea or message expressed." [57] Deleting Mr. Wong's post and banning him from future expression on the "GEN" page was unconstitutional viewpoint discrimination, or at the very least impermissible content-based regulation.[58] Mr. Wong's comment was strongly critical of the governor and her policy, but by suppressing his speech the government ignores this Courts reminder in Police Dep't of City of Chicago v. Mosley that "[the] government may not grant the use of a forum to . . . views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.[59]

In Mosley, Earl Mosley constantly protested outside of a local high school over racial disparity. The City of Chicago enacted an ordinance that made picketing illegal in front of schools but exempted "peaceful" picketing in labor disputes.[60] Mr. Mosley subsequently sued.

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[55] Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2230, (2015)(quoting Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y., 447 U.S. 530, 537 (1980)).
[56] Reed, 135 S. Ct. at 2230. (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)); See also Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972)(stating that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").
[57] Reed, 135 S. Ct. at 2227.
[58] This Court in Turner Broad. Sys., Inc. v. F.C.C. said, "[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 643 (1994).
[59] Mosley, 408 U.S. at 96.
[60] Id. at 92–93.

This Court held that because the ordinance distinguished between permissible and impermissible acts solely on subject matter, the ordinance violated the First Amendment.[61]

Like Mosley, Mr. Wong's comment was regulated by the Government because it was deemed as a "nastygram" and "not appropriate." Unlike content-neutral time, place, and manner restrictions which regulate without regard to content, the Government's regulation was solely on the subject matter of Mr. Wong's comment.[62] Therefore, the regulation of Mr. Wong's comment and his banning was content-based regulation.

The Court in Mosley went further. The Court also determined the ordinance to be viewpoint discrimination. The Court in Mosley reiterated Justice Black in Cox v. Louisiana, stating:

> (B)y specifically permitting picketing for the publication of labor union views (but prohibiting other sorts of picketing), Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form . . . [63]

The Chicago ordinance in Mosley engaged in viewpoint discrimination that benefited the expression of speech with certain views, shutting out all others. Like Mosley and Cox, the Government's regulation of Mr. Wong's comments about the governor, but not other comments either praising or criticizing the post, is blatant viewpoint discrimination. (R. 04-05.)

L. The Offensive Nature of Mr. Wong's Comment Does Not Strip It of Constitutional Protection

[61] Id. at 95. Mosley also said, "Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wise-open." Id. at 96.

[62] The Mosley Court said, "In this case, the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. The regulation 'thus slip(s) from the neutrality of time, place, and circumstance into a concern about content.' This is never permitted." Id. at 99.

[63] Cox v. Louisiana, 379 U.S. 536, 581 (1965).

Mr. Wong's comment was highly critical of Governor Norton, unlike other dissent that was critical of the policy itself. The fact that Governor Norton justified the removal of Mr. Wong's comment and his subsequent by calling his speech "not appropriate" and a "nastygram," or an offensive email, does not remove it from Constitutional protection.[64](R. 04.) Speech may not be regulated, or in this case banned because it may cause offense. This Court reiterated that position in Matal v. Tam when it noted that "[g]iving offense is a viewpoint."[65] Mr. Wong's comment falls under constitutionally protected speech because "speech cannot be restricted simply because it is upsetting or arouses contempt."[66] In other words, "[t]he fact that the messages conveyed by those communications may be offensive to their recipients does not deprive them of constitutional protection."[67] Implicit in this protection is that a democratic society cannot stifle a message, an "attempt to persuade others" simply because it upsets contemporary sentiments.[68] By banning Mr. Wong's post due to the critical or offensive nature of his comments, the Government engaged in impermissible viewpoint discrimination.

CONCLUSION

For the above stated reasons, the respondent Brian Wong respectfully requests this Court affirm the ruling of the 14th Circuit.

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[64] https://en.oxforddictionaries.com/definition/us/nastygram

[65] Matal, 137 S. Ct. at 1763. Moreover, although offensive, Mr. Wong's comment was not deemed "dangerous" by Mr. Nelson Escalante, Director of Security. Among Mr. Escalante's responsibilities is to flag dangerous content on the "GEN" page.

[66] Snyder v. Phelps, 562 U.S. 443, 458 (2011); Texas v. Johnson, 491 U.S. 397, 414 (1989)(stating that "there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Street v. New York, 394 U.S. 576, 592 (1969)(noting that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.")

[67] Hill v. Colorado, 530 U.S. 703, 715 (2000).

[68] Id. at 715-16.

APPENDIX A

42 U.S.C.A. § 1983 Civil action for deprivation of rights[69]

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX B

Calvada "New State Policy on Immigration Law Enforcement"

Members of my cabinet, other senior advisors, the leadership of the Calvada Senate and House of Delegates, and I have now concluded an extensive discussion of the question whether state law enforcement officials should cooperate with federal law enforcement agencies in enforcing the immigration laws of the United States. I have decided to commit the law enforcement resources of our State to this effort. This new approach in our State will entail cooperation on a number of different levels. For example, law enforcement officers will be instructed to request proof that individuals stopped for alleged traffic infractions or apprehended as suspects in criminal investigations are legally present in the United States wherever such inquiries are determined to be consistent with the United States Constitution and the Constitution of our State. I do not make this decision lightly. I know that some Calvadans worry that cooperating with the federal government in enforcing federal immigration laws may raise concerns among our citizens about family members and friends, and I am aware that many local law enforcement officials worry that this cooperation will jeopardize their ability to work with immigrant communities in seeking to solve crimes. These are important issues. Nevertheless, it is essential for the good of all Calvadans – and all Americans – to ensure that the laws of our country are vigorously enforced. We need to do our part to enforce United States immigration laws. I am announcing this new policy here today because I know that those of you who visit this Facebook page are among the most active, influential, caring and patriotic citizens of the State of Calvada. I wanted you to be the first to know of this decision. I will announce the new policy to the news media at a press conference I will hold in just a few minutes, and my office will issue an Executive Order pertaining to this new policy later this afternoon. You may find the Executive Order and more information about our new policy at https://www.immigrationenforcementinitiative.calvada.gov. As always, I welcome your comments and insights on this important step.

[69] 42 U.S.C.A. § 1983 (2012).