No. 17-874

IN THE

Supreme Court of the United States

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

BRIAN WONG.
Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Fourteenth Circuit

BRIEF FOR PETITIONER

Team 10
Counsel of Record for Petitioner

QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Fourteenth Circuit erred in concluding that a state official engaged in state action by deleting an individual's post on her personal Facebook page and banning him from posting further comments on that page.

II. If so, whether the Fourteenth Circuit erred in holding that the state official violated the individual's First Amendment rights by engaging in viewpoint discrimination in a state-sponsored forum rather than government speech.

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STATEMENT OF JURISDICTION

The United States District Court for the District of Calvada had jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. The United States Court of Appeals for the Fourteenth Circuit had jurisdiction under 28 U.S.C. § 1291. The Supreme Court of the United States has jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

In 2011, Governor Elizabeth Norton ("Norton") established a Facebook page for her personal and business announcements. R. at 14 ¶ 8. On November 3, 2015, Norton was elected Governor of the State of Calvada, having never before held political office. R. at 25 ¶ 8. She was inaugurated on January 11, 2016; the next day, she renamed her Facebook page to reflect her ascension as governor. R. at 14 ¶ 9, 25 ¶ 9. On January 12, 2016, she also inherited the official Governor's Facebook page, titled "Office of the Governor of Calvada" and officially advertised on the state government website. R. at 14 ¶ 7, 25 ¶ 9. On the afternoon of March 5, 2016, Norton posted a statement on her original Facebook page concerning the new Calvada immigration policy and inviting the insights of her constituents "on this important step." R. at 15–16 ¶ 12. Shortly thereafter, Brian Wong ("Wong") commented on Norton's post, calling her a "scoundrel," "someone with no conscience," a person with "the ethics and morality of a toad," and "a disgrace to the statehouse." R. at 16 ¶ 13. His comment contained no other substantive commentary. R. at 16 ¶ 13. Later that evening, Norton had Wong's comment removed. R. at 16–17 ¶ 14. More than 30 other comments, including several critical of Norton's position, were not removed. R. at 17 ¶ 16. At that time, Norton had Wong banned from commenting on her original Facebook page again. R. at 16–17 ¶¶ 14–15.

On March 30, 2016, Wong filed an action pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of Calvada. R. at 1. On August 25, 2016, Norton and Wong filed cross motions for summary judgement. R. at 1. On January 17, 2017, the district court granted Norton's motion for summary judgement. R. at 12. Wong appealed, and the case was argued before the United States Court of Appeals for the Fourteenth Circuit on September 22, 2017. R. at 29. On November 1, 2017, the circuit court affirmed in part and reversed in part, remanding the case to the district court for entry of summary judgement in favor of Wong. R. at 39–40. This Court then granted Norton's Petition for a Writ of Certiorari. R. at 41.

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit created a no-win, nonsensical scenario for Governor Norton. It somehow found that Norton's actions were those of the State of Calvada, but also that Norton could not freely communicate with her constituents. It cannot be both, and therefore the Court must reverse the lower court's order against Norton.

Norton's deletion of Wong's comment and subsequent ban from posting on the "Governor Elizabeth Norton" Facebook page did not constitute state action. First, her management of her Facebook page did not constitute a traditional and exclusive state function. Second, Norton's actions were motivated by personal rather than public circumstances; she wished to remove an *ad hominem* attack on her from her personal page. Further, the lower courts' reliance on an Eastern District of Virginia case both do not mandate the conclusion and do not appropriately balance the personal circumstances at play in the instant case.

Even if this Court believes that Norton's actions constituted state action, Wong still should not prevail because Norton's actions did not violate his right to free speech. First, Norton's Facebook post about immigration policy—along with its associated comments

section—constituted government speech. Norton was speaking as an officer of Calvada, seeking to inform her constituents about her work and solicit relevant feedback. When a government speaks for itself, it is not restricted by the Free Speech Clause of the First Amendment.

Second, Norton did not create a speech forum by making the immigration post. A government can only create a speech forum if it intends to do so. Norton's contemporaneous statements within the immigration post belie any intent to create a forum for private speech. She wished to solicit relevant information from her constituents to further her own professional goals, not to create a venue for private individuals to exercise their First Amendment rights.

Finally, even if this Court finds that Norton created a speech forum, she at most created a limited or nonpublic forum, and her actions did not constitute viewpoint discrimination, so they were permissible. When a government opens up government property as a speech forum, it is free to limit that forum to certain speakers or topics simply by intending such a limit. Norton's statements within the immigration post asking only for feedback relevant to the immigration policy is as clear an intended limitation as imaginable. And if this Court does find that Norton's actions constituted state action, she must have taken those actions due to the comment's lack of relation to the topic at hand, not his remarks about Norton's qualifications—in other words, based on its subject matter, not its viewpoint. This limitation is completely acceptable in a limited or nonpublic forum.

ARGUMENT

I. NO STATE ACTION OCCURRED BECAUSE THERE WAS NO TRADITIONAL AND EXCLUSIVE STATE ACTION AND BECAUSE NORTON ACTED FROM PERSONAL, NOT PUBLIC, CIRCUMSTANCES.

The Fourteenth Circuit erred in concluding that a state official engaged in state action when he deleted an individual's Facebook comment on Norton's personal Facebook page and banned that individual from posting further comments.

To recover under 42 U.S.C. § 1983 for violation of a constitutional right by a state official, a plaintiff must show that the violation was caused by state action. *See Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). To constitute state action, an official must have acted under the color of law "while exercising his responsibilities pursuant to state law." *West v. Atkins*, 487 U.S. 42, 49–50 (1988). Essentially, the actor must have the "purpose[] to act in an official capacity or to exercise official responsibilities pursuant to state law." *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995). Courts often look first to whether the actor in question is performing a public function traditionally reserved to the State. *See, e.g.*, *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974). However, if this is inconclusive, determining whether state action has occurred is a highly fact-specific inquiry based on the totality of the circumstances surrounding the action and its motivations. *See, e.g.*, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

A. It Has Been Decided that Monitoring a Personal Facebook Page Is Not a Traditional and Exclusive State Function.

The first line of inquiry—whether the actor in question is performing a public function traditionally reserved to the State—may be easily dispatched. If an actor performs a public function traditionally reserved to the State, state action is usually unavoidable. *See Jackson*, 419 U.S. at 352. There are some clear instances of action "traditionally associated with sovereignty, such as eminent domain." *Id.* at 352–53. Outside of similar historically sovereign territory,

however, not even all statutory obligations are considered functions reserved to the State. *See, e.g.*, *id.* at 353 (holding that statutory obligation to furnish regulated utilities was not a traditionally and exclusively state function).

Here, the District Court for the District of Calvada correctly held that, on balance, maintaining a Facebook page, even to communicate with constituents, is simply not a traditional and exclusive state function. *Wong v. Norton* (*Wong I*), C.A. No. 16-CV-6834, slip op. at 7 (D. Calv. Jan. 17, 2017); R. at 7. This holding was not discussed by the Fourteenth Circuit, which instead affirmed by consideration of only the "totality of circumstances." *Wong v. Norton* (*Wong II*), No. 17-874, slip op. at 4–5 (14th Cir. Nov. 1, 2017); R. at 32–33. While this is an easy conclusion to reach, it is important to underline that the most important factor in this determination speaks definitively against a finding of state action. The maintenance of a Facebook page is simply not the sort of vital government function with the weight to warrant a finding of state action unless the totality of circumstances are overwhelmingly in that direction.

B. Removing Wong's Post Did Not Constitute State Action Because It Was Motivated by Personal, Not Public, Circumstances.

To evaluate the "totality of circumstances" potentially creating state action, many courts employ the "sufficiently close nexus" test. *See, e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (quoting *Jackson*, 419 U.S. at 351). This test does not create a "specific formula for defining state action." *Rossignol*, 316 F.3d at 523 (quoting *Hicks v. S. Md. Health Sys. Agency*, 737 F.2d 399, 402 n.3 (4th Cir. 1984)). Rather, a sufficiently close nexus is "a matter of normative judgement." *Id.* at 523 (quoting *Brentwood Acad.*, 531 U.S. at 295).

An important factor in making this judgement is determining whether the action arose out of either public or "purely personal" circumstances. *See id.* at 524. An action which utilizes solely state resources is not necessarily state action if it arises from appropriately personal circumstances. *See Martinez*, 54 F.3d at 987 (holding that on-duty officer firing service weapon during "personal frolic" on police property was not state action).

The contrast between two cases involving police officers provides useful clarification of the line between public and personal circumstances. In *Martinez v. Colon*, an on-duty police officer harassed and ultimately shot his coworker with his service revolver on police property. *Id.* at 982–83. The First Circuit found these actions—though performed while on active duty and using police property—were nonetheless a "singularly personal frolic: tormenting an acquaintance." *Id.* at 987. This finding was based on "the totality of surrounding circumstances," which indicated that the defendant was hazing his coworker, not engaging in an assertion of real or presented police power. *Id.* at 987. Although this was certainly an unauthorized use of department property, the court held that the defendant-officer's actions were too attenuated to constitute state action. *See id.* at 988.

Conversely, in *Rossignol v. Voorhaar*, several off-duty deputies coordinated to remove all copies of a newspaper from their county, a feat accomplished out of uniform and without official department resources. 316 F.3d at 519–21. That day's newspaper was removed because it contained several stories reporting specific unethical conduct of the deputies' sheriff. *Id.* at 519–21. The Fourth Circuit found these actions—on the defendants' own time and without use of state resources—to have been motivated by a desire to "suppress speech critical of [the sheriff's] conduct of official duties or fitness for public office." *Id.* at 524. This motivation created a "sufficiently close nexus" between the defendants' role as police officers and the removal of the

day's newspapers, converting the officers' ostensibly personal actions into state action. *Id.* at 526. The court in *Rossignol* recognized that cases like *Martinez* present the other side of the equation, where status as a public officer "'simply did not enter into' [one's] decision." *Id.* at 524 (quoting *Martinez*, 54 F.3d at 987).

Here, Norton's actions had personal, rather than public, motivations. First, the context of their actions was a private, rather than public, forum. Second, the actions themselves were motivated by personal consideration rather than public motivation. Taken together, the totality of circumstances indicates individual action, not state action.

First, the conduct in question must be analyzed in light of the totality of the circumstances. As in *Martinez*, where purely personal conduct occurred on government property and with government resources, 54 F.3d at 987, here, Norton's use of government property does not definitively prevent a finding of private action. The deletion of Wong's comment occurred on Norton's personal Facebook page, not the official gubernatorial page. R. at 15–16 ¶¶ 12–13. Norton's personal page ("GEN page"), was created by Norton for her personal and business announcements in 2011, four years before she first ran for office. R. at 25 ¶ 7–8. This page remains wholly distinct from the "Office of the Governor of Calvada" Facebook page, the official gubernatorial page linked to on the State's official website. R. at 25 ¶ 9. Norton continues to use the GEN page to post personal photographs and thoughts. R. at 25 ¶ 10. While, like the off-duty officers in *Rossignol*, taking action outside of a government forum does not fully insulate an action from being state action, *see* 316 F.3d at 519–21, the general context of the action must be considered. Norton was operating in the context of her private Facebook page, not the official gubernatorial page.

Second, unlike the defendants in *Rossignol*, Norton was motivated by a personal attack, not an overarching desire to censor speech. *See* 316 F.3d at 524. In reviewing Wong's comment, Norton noted that it was "an *ad hominem* attack that was unrelated to [her] immigration policy announcement." R. at 26 ¶ 13. Every one of the comment's four sentences contained a personal attack against Norton's character, all in the form of bald accusations. R. at 16 ¶ 13. The basis of her decision to remove the comment, as documented in her contemporaneous email to Director of Social Media Sanjay Mukherjee, was that the comment was an inappropriate "nastygram." R. at 17 ¶ 14. Unlike the defendants in *Rossignol*, who were motivated specifically to defend their sheriff from specific factual allegations of misconduct, 316 F.3d at 519–21, Norton was motivated by a desire to remove personally offensive comments, e.g., comparing her to a toad. R. at 16 ¶ 13. This distinction is further highlighted by the fact that Norton allowed all other critical comments (of which there were several) to remain on the post, completely accessible to the public. R. at 17 ¶ 16. This speaks not to a censoring reaction, but rather to the normal response of a private individual who feels they have been personally attacked on social media.

In removing an *ad hominem* attack from her private page, Norton did not create a "sufficiently close nexus" to warrant labeling their conduct as state action. Rather, they were behaving in a "singularly personal" manner, which may not be attributed to the state.

C. When Properly Interpreted, *Davison* Neither Binds The Court Nor Prevents A Finding Of No State Action.

In making its decision, the Fourteenth Circuit relied heavily on a recent case from the Eastern District of Virginia. While that case provides an interesting comparison, more attention must be given to the personal and public factors identified in that case.

In *Davison v. Loudoun County Board of Supervisors*, the plaintiff had been banned from posting on the Facebook page of the Chair of the Loudoun County Board of Supervisors. No. 16-

cv-932, 2017 WL 3158389, at *5 (E.D. Va. July 25, 2017). The *Davison* court found that, in light of the totality of the circumstances, the defendant had acted under color of state law. *Id.* at *5–8. Several public factors were identified, including that the defendant had created the page in question the day before taking public office. *Id.* at *7. The fact that the page was included in the "official newsletters released by [the d]efendant's office," which were then hosted on the County's official website, was also a public factor. *Id.* at *7. Several personal factors were also identified, including that the defendant was not required to maintain a social media website, as well as that the page in question would not revert to the County when the defendant's term ended. *Id.* at *6.

Here, the Fourteenth Circuit selectively focused on the facts of *Davison* that supported finding state action, ignoring important distinctions between *Davison* and Norton's case. First, while the page in *Davison* was created the day before the defendant took office, *id.* at *7, here, Norton merely changed the name of her pre-existing page in a reflection of her new official title, R. at 25 ¶¶ 7, 9. A step as innocuous as renaming a page should not link that page inexorably to one's official position as if it were created on the eve of one's inauguration. Similarly, while the page in *Davison* was included in official County newsletters published on the County website, 2017 WL 3158389, at *7, here, the "Officer of the Governor of Calvada" Facebook page is the only one mentioned on the governor's state website, without any mention of the GEN page, R. at 14 ¶ 7. The Fourteenth Circuit failed to analyze how these important distinctions should be factored into the totality of circumstances. *See Wong II*, slip op. at 6; R. at 34.

Similarly, important distinctions in personal factors between *Davison* and the instant case were not addressed. In *Davison*, the defendant was not required to maintain a social media page, which was found to weigh against state action. 2017 WL 3158389, at *6. Here, not only is

Norton not required to maintain a social media account, R at 26 ¶ 14, but she also had specifically inherited an official governor's Facebook page from her predecessor, which she and her staff maintained as part of their execution of the office. R. at 14 ¶ 7. While there was no mandate in *Davison*, here there appears to be a specific mandate to use the "Officer of the Governor of Calvada" Facebook page. Similarly, in *Davison*, the fact that the page would not revert to government custodianship after the defendant left office was considered to be a strong privacy factor. *See* 2017 WL 3158389, at *6. Here, the GEN page is similarly Norton's personal page, which she will continue to use after her "public service is complete." R at 26 ¶ 17. The decision of the Fourteenth Circuit omits discussion of how such important personal factors should affect the totality-of-circumstances analysis. *Wong II*, slip op. at 6; R. at 34.

In essence, the Fourteenth Circuit decision appears to have misread *Davison*, treating several distinguishing factors as analogous and giving little apparent weight to the highly similar personal factors. Furthermore, even if this Court finds that *Davison* is not fully distinguishable from the instant case, the Eastern District of Virginia's weighing of these factors is not binding, and the more appropriate balancing of factors discussed above may be used in this case.

For the foregoing reasons, the Court should reverse the Fourteenth Circuit's erroneous finding of state action.

II. IF THIS COURT FINDS THAT NORTON'S ACTIONS CONSTITUTE STATE ACTION, THESE ACTIONS WERE NONETHELESS LAWFUL BECAUSE THEY CONSTITUTED GOVERNMENT SPEECH, DID NOT CREATE A STATE-SPONSORED FORUM, AND DID NOT CONSTITUTE IMPERMISSIBLE VIEWPOINT DISCRIMINATION.

A. Norton's Actions Did Not Violate Wong's First Amendment Rights Because Her Actions Constituted Government Speech, Not Censorship of Wong's Speech.

The Free Speech Clause of the First Amendment, as incorporated against the States by the Fourteenth Amendment, "restricts government regulation of private speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009); *see* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech."). It does not apply, however, when a government is itself speaking. *See Summum*, 555 U.S. at 467 ("The Free Speech Clause . . . does not regulate government speech."). Governments must obviously be free to take positions on issues. *See Matal v. Tam*, 137 S. Ct. 1744, 1757–58 (2017) (explaining that federal government is free to promote purchase of war bonds without also discouraging such purchases). Therefore, to determine whether the First Amendment is applicable in a given case, the key question is "whether a government entity is speaking on its own behalf." *Summum*, 555 U.S. at 470. Even if a government "receives assistance from private sources for the purpose of delivering a government-controlled message," this does not strip the government of its freedom to choose its own message. *Id.* at 468.

There is no single, concise test for determining whether speech in a given medium is made by a government or private individual, but this Court has relied primarily on three factors: (1) the medium's history of conveying State messages, (2) whether the public identifies the medium with the State, and (3) the degree of control the State maintains over the medium. *Tam*, 137 S. Ct. at 1760. Additionally, this Court recently looked to whether the particular speech that

has been communicated through the given medium could rationally be understood as representing a government's message. *See id.* at 1758–59.

1. Norton Used Facebook Essentially to Disseminate a Press Release, Which Is a Medium Long Used to Communicate State Messages.

If a State has "long used [a medium] to speak to the public," communication via that medium is more likely to constitute government speech. *Summum*, 555 U.S. at 470. This factor is more relevant when evaluating a medium that serves a primary purpose other than conveying a state message. *See, e.g.*, *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248 (2015) (concluding that States have historically used license plates to convey state messages because since 1917, States have included messages they wanted to promote beyond the utilitarian information of "state names and vehicle identification"); *Summum*, 555 U.S. at 470 (stating that "[g]overnments have long used monuments to speak to the public," but also have accounted for "esthetics, history, and local culture" when selecting monuments). Conversely, when a medium's entire purpose is to convey a clear message—often the case when it consists of text or verbal speech—it is less important to rely on this factor. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 555, 560, 562 (2005) (holding that promotional campaigns in favor of beef products whose messages were "effectively controlled by the Federal Government" constituted government speech without addressing whether beef advertisements via "print and television" had historically been used by the government); *see also Wong v. Norton* (*Wong I*), C.A. No. 16-CV-6834, slip op. at 11 (D. Calv. Jan. 17, 2017) ("While . . . Facebook is a relatively new medium for speech, announcing state policy through the channels a governor has at her disposal is a venerable practice."); *cf. Summun*, 555 U.S. at 474 (describing the beef promotion message in *Johanns* as "a simple one").

Although Facebook is relatively new compared to license plates or park monuments, the immigration post was essentially a press release—a medium long used by States to communicate with citizens. Facebook is simply a modern analog of physical mail or billboards; it is a new way to bring the State's written message to constituents. *See Wong I*, slip op. at 11. The underlying technology's novelty should not render it a "new" medium. This case is simpler than both *Walker* and *Summum* because it involves the direct communication of a message unrelated to any other purpose. Those cases involved messages on license plates and from park monuments—media primarily used for purposes besides disseminating government messages—so it was necessary to analyze the histories of those media of carrying government messages. *See Walker*, 135 S. Ct. at 2248; *Summum*, 555 U.S. at 470. This case is more analogous to *Johanns*. Like in *Johanns*, where a campaign explicitly promoting beef was held to be government speech because it explicitly conveyed its message through "print and television," 544 U.S. at 555, here, Norton explicitly conveyed her message through a text-based post. Just as a historical analysis was unnecessary in *Johanns* because the message was explicit and unconnected to other purposes, here the immigration post's purpose was clearly to inform Norton's constituents about immigration policy.

2. The Immigration Post Was Likely Identified in the Public Mind with the Government Because It Concerned a Governmental Policy and Was Disseminated by a Government Official's Facebook Account.

If a medium is "often closely identified in the public mind with the government," communication via that medium is more likely to constitute government speech. *Summum*, 555 U.S. at 472. The public is likely to identify a medium with the government when that medium serves "governmental purposes." *Walker*, 135 S. Ct. at 2248; *see id.* (explaining that the public closely identifies license plates with the State because the plates serve the "governmental

purposes of vehicle registration and identification"); *Summum*, 555 U.S. at 472 (explaining that the public identifies public parks with the government because public parks "play an important role in defining the identity that a city projects"). Even if the public could discern that certain parts of government speech were contributed by private individuals, that is not enough to render those parts private speech. *See Summum*, 555 U.S. at 471 (noting that "privately financed and donated monuments" may still speak for the government because their presence on government land would lead the public to "reasonably[] interpret them as conveying some message on the [government]'s behalf," and that the "subsequent addition of other monuments" may change a government's message).

The public is likely to identify Norton's Facebook post with the government because it was used for the governmental purposes of informing constituents about policy and soliciting relevant feedback, as was obvious from the text of the post. Like in *Walker*, where this Court found that the public associated license plates with the government because they served governmental purposes regarding vehicle ownership, *see Walker*, 135 S. Ct. at 2248, here, this Court should also conclude that the public associated Norton's post with the government because it served the governmental purpose of informing constituents about Norton's policy decision. *See* R. at 25–26. Although Wong asserts that the *comments* on the post are not government speech, *Summum* counsels otherwise. Like in *Summum*, where this Court held that because a city's decisions as to which monuments to display in its public park were government speech, the city could not be forced to include additional monuments next to the extant ones because it would change the overall message, *see* 555 U.S. at 471, here, Norton wishes to exclude certain comments attached to her immigration post because allowing them to remain in proximity to her post would similarly alter her government speech. The comments cannot be viewed in isolation

as the Fourteenth Circuit concluded, *see Wong v. Norton* (*Wong II*), No. 17-874, slip op. at 7 (14th Cir. Nov. 1, 2017); R. at 35, because they are part and parcel with the entire message. This is like a movie poster including only favorable reviews: the entire post is the government's message, so the government is free to include or exclude whatever it wishes.

3. Norton Maintained Control over the Immigration Post Because She Retained Legal Authority to Control the Facebook Page and Exercised It When She Deleted Wong's Comment.

If a State maintains control over a medium's content, it suggests that the medium conveys government speech. *See Tam*, 137 S. Ct. at 1759–60. This Court has looked to (1) whether a State retains legal authority to control a medium's content and (2) whether that State has exercised such control. *See Walker*, 135 S. Ct. at 2249 (finding that "Texas maintain[ed] direct control over the messages conveyed on its specialty plates" because a statute gave the State "sole control" over the plates' content and the State "actively exercised" this authority in rejecting "at least" twelve designs); *Summum*, 555 U.S. at 472–73 (finding that the city "'effectively controlled' the messages sent by the monuments in the Park" because it exercised "'final approval authority' over their selection").

Norton maintained control of the Facebook page because she retained legal authority to remove comments and ban users, and exercised this authority at least once. Like in *Walker*, where this Court found that Texas controlled the messages on license plates because it maintained legal authority to control their messages and exercised that authority by rejecting proposed designs, *see* 135 S. Ct. at 2249, here, Norton did nothing to relinquish legal authority to control the Facebook page and exercised that authority by deleting Wong's comment and banning him from making subsequent posts, R. at 17. In *Summum*, this Court said that it was sufficient only to exercise "final approval authority," 555 U.S. at 472–73, which Norton surely

did at least once in reaction to Wong's post, so her actions similarly demonstrate governmental control.[1]

4. The Immigration Post and Its Associated Comment Section as a Whole Are Government Speech Because a Clear Governmental Message Can Be Discerned from It.

A given message should only be considered government speech if it can be rationally understood as a message conveyed by a government. *See Tam*, 137 S. Ct. at 1758–59 (explaining that content of trademarks is not government speech because if federal government spoke all trademarks, it would be "babbling prodigiously and incoherently, . . . expressing contradictory views, . . . [and] endorsing a vast array of commercial products," which federal government is unlikely to do). Such speech can be government speech even when the underlying content stems from private speech. *See Walker*, 135 S. Ct. at 2248–50 (finding that license plate designs were government speech even though many were originally designed by private citizens); *Summum*, 555 U.S. at 472 (holding that collection of monuments, including several donated by private citizens, constitutes government speech).

Norton's control of her Facebook page and post does not create any message that is contradictory, incoherent, or otherwise incompatible with a government's speech. Unlike in *Tam*, where trademarks were found not to constitute government speech because it would not have made sense for the federal government to be speaking the content of all trademarks, *see* 137 S. Ct. at 1758–59, here, it makes complete sense for Norton to moderate her post's comments to

[1] It is true that the State in *Walker* exercised its discretion more times than Norton, but there was not much time during which Norton could demonstrate her control: Norton was inaugurated on January 11, 2016, and removed Wong's comment on March 5, 2016. R. at 14–16. Texas had rejected at least twelve license plate designs at the time of *Walker*, but this seems to have been over at least several years. *Walker*, 135 S. Ct. at 2249; *see id.* (noting that "the Board *and its predecessor* have actively exercised [their] authority" as of 2015 (emphasis added)); *About TxDMV*, Tex. Dep't of Motor Vehicles, http://www.txdmv.gov/about-us (last visited Jan. 12, 2018) (stating that the agency was created in 2009).

convey her overall desired message to her constituents, so it should be deemed government speech. The post and its comments created a single government message. Allowing her constituents to contribute to her government speech did not negate its governmental nature. Like in *Summum*, where a collection of monuments was deemed government speech even though individual monuments were donated by private individuals, 555 U.S. at 472, here, Norton similarly curated her own expression utilizing her constituents' speech, so her entire post, including the comments, should also be considered government speech.

Both the three factors and the broad reasonableness test discussed above show that Norton's post and its associated comments constituted government speech, rendering Wong's First Amendment claim meritless.

B. Norton Acted Lawfully in Managing Who Could Post on Her Facebook Page Because Even if Wong's Speech Was Protected, the Page Was Not a Forum for Speech.

1. Speech Receives Different Protection Depending on the Forum in Which It Is Spoken.

"Even protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985). There are several types of speech forums, each created in different ways and affording different levels of protection to private speakers.

A traditional public forum is a venue historically held open by the government for use by the public to assemble and communicate. *Walker*, 135 S. Ct. at 2250. This category is limited to streets, parks, and similar public spaces. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Facebook does not fit this category, as the Fourteenth Circuit agreed. *Wong II*, slip op. at 9; R. at 37.

A designated public forum is created when the government opens up government-controlled property that is not a traditional public forum for the same purposes as a traditional public forum. *Walker*, 135 S. Ct. at 2250. Alternatively, the government could open up property that is not a traditional public forum for only a limited purpose. "A public forum may be created for a limited purpose such as use by certain groups, or for the discussion of certain subjects." *Perry*, 460 U.S. at 46 n.7 (citations omitted). Both designated and limited public forums are created only when the government "intentionally open[s] a nontraditional forum for public discourse." *Walker*, 135 S. Ct. at 2250–51 (quoting *Cornelius*, 473 U.S. at 802). This Court has emphasized in no uncertain terms that it is the government's intent that controls. *See, e.g.*, *Cornelius*, 473 U.S. at 802 ("The 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."). Evidence of government intent can be found in "the policy and practice of the government" and "the nature of the property and its compatibility with expressive activity." *Id.* This Court has stated that it will not "infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity. *Id.* at 803.

A nonpublic forum is a forum operated by the government as an owner or manager of the property, as opposed to operating the property as the sovereign. *Walker*, 135 S. Ct. at 2251; *see id.* (concluding that Texas was not acting merely as manager of government property in controlling which license plate designs were acceptable because it was "engaging in expressive conduct"); *Cornelius*, 473 U.S. at 805–06 (concluding that charity-listing document for soliciting donations from federal employees was a nonpublic forum because it was used in federal workplace where government—as employer—could regulate information being supplied to employees).

If certain government-controlled property does not constitute any of these forum types, there is no First Amendment protection afforded.

2. Norton's Intent to Maintain Control over Her Facebook Page Prevented It from Becoming a Speech Forum.

The evidence for discerning intent to create a speech forum is similar to the factors considered above in determining whether there is government speech: exercising authority over the alleged forum, maintaining ownership over the speech in the alleged forum, and traditional use of the alleged forum for government speech. *See Walker*, 135 S. Ct. at 2251 (finding that Texas did not intend to create speech forum because it turned down license plate designs, took ownership of plate designs, and plates were traditionally used for government messages). Conversely, if a government sought to encourage private speech independent of the government, this shows intent to create a speech forum. *See Widmar v. Vincent*, 454 U.S. 263, 265, 267 (1981) (holding that university created speech forum because it held its facilities "generally open for use by student groups" with purpose of "encourag[ing] the activities of student organizations"); *Davison v. Loudon Cty. Bd. Of Supervisors*, No. 1:16cv932 (JCC/IDD), 2017 WL 3158389, at *26–27 (E.D. Va. July 25, 2017) (finding a speech forum when a public official encouraged "ANY Loudon citizen" to comment on her Facebook page about "ANY issue[]"). If allowing unfettered private expression in an alleged forum interferes with the forum's purpose, it is unlikely the government intended to create a speech forum. *See Cornelius*, 473 U.S. at 805 (finding that charity-solicitation program was not intended to be forum for speech because its purpose was "*lessening* the amount of expressive activity occurring on federal property"). A showing of "selective access" along with a lack of evidence that access was granted ministerially has been sufficient to prevent finding a designated or limited public forum. *See id.* at 804–05.

Norton did not create a speech forum in the comments section of her immigration post because she had no intent to do so. Like in *Walker*, where this Court found no intent to create a speech forum when Texas turned down certain license plate designs, owned the plate designs, and plates were traditionally used for government messages, *see* 135 S. Ct. at 2251, here, Norton deleted Wong's comment, retained the ability to delete comments from her posts,[2] and as discussed above, the post and associated comments are analogous to a press release traditionally used for government messages. Therefore, Norton's actions similarly do not demonstrate an intent to create a forum.

This case is much less similar to *Widmar*, where a university was found to have created a speech forum when it encouraged student use of facilities specifically held open for them because this showed the university wished to facilitate students' private speech activities for *their* benefit. 454 U.S. at 265, 267. Conversely, Norton gave no indication that she held her Facebook post open for commenting for the benefit of private speakers. She utilized her page to "ask[] constituents for their input," "request[] ideas," and "respond to . . . users who replied with relevant input" so that her constituents would know she "was there for them." R. at 25. Regarding the immigration post specifically, Norton solicited feedback to receive "constituent input on the policy." R. at 26. This shows that her request for comments was ultimately for *her* benefit as an elected official, not her constituents. She took these actions to gain relevant feedback from constituents and let them know she was fighting for them. This belies any intent to create a speech forum. This is more similar to the charity solicitation program in *Cornelius*, which was not a public speech forum because its purpose was to *minimize* private speech, not promote it unfettered, showing a lack of intent to create a forum. *See* 473 U.S. at 805. Here,

[2] *See How Do I Hide or Delete a Comment from a Post on My Page?*, Facebook, https://www.facebook.com/help/297845860255949 (last visited Jan. 13, 2018) (acknowledging that "*you* [can] delete a comment from a post on *your* Page" (emphasis added)).

Norton made this post not to promote private speech, but to inform her constituents of policy and solicit information relevant to it. Both of these aid Norton's professional goals as governor, showing her intent was not to open a forum for private speech. *Davison*—which also dealt with a public official's Facebook page—is distinguishable because the official there explicitly invited comment on "any issue," 2017 WL 3158389, at *26, while Norton confined her request to relevant commentary. R at 15–16 ¶ 12. The court in *Davison* also limited its holding to the case's "specific circumstances." *Davison*, 2017 WL 3158389, at *31.

Because Norton did not intend to create a speech forum, her post did not become one and therefore Wong's First Amendment rights cannot have been violated by any alleged restriction of speech there.

C. Even if Norton's Facebook Page Was a Forum for Speech, Her Actions Were Lawful Because the Page Was at Most a Limited Forum and She Merely Limited Comments Based on the Scope of the Forum, Not Viewpoint.

1. Norton at Most Created a Limited or Nonpublic Forum Because She Had No Intent Beyond Soliciting Relevant Feedback, as Demonstrated by Her Specific Request in the Post.

Although Norton believes that the post was not a forum for speech at all, if the Court finds otherwise, it should also find that the forum was a limited one—restricted to comments about the immigration policy by posters who only participate in good faith. A forum's type is based on the intent of the government that created it. If a government opens government property with the intent that it to be used just like a town square, then it is a full designated public forum; if it intends it to be used "by certain groups, or for the discussion of certain subjects," then it is a limited public forum. *Perry*, 460 U.S. at 46 n.7 (citations omitted).

If this Court finds the immigration post to be a forum, it must conclude that it was at most a limited or nonpublic forum because Norton's intent to limit comments to the subject of the

immigration policy was clear. As described above, Norton made the post to inform her constitutes and receive "constituent input *on the policy*." R. at 26 (emphasis added). This language—included in the post itself—clearly shows a lack of intent to create a forum for discussion beyond the immigration policy. Alternatively, the post might be a nonpublic forum. Like in *Cornelius*, where a charity solicitation program was a nonpublic forum because it was used by the government "to minimize . . . disruption to the workplace," which furthered the government's organizational goal of effective operation, 473 U.S. at 805, here, the immigration post was used to educate Norton's constituents and solicit relevant feedback to help her perform her job effectively, which also would result in effective government operation.

2. Norton's Actions Were Permissible Regulations of Speech Because They Limited Discussion to the Relevant Subject Matter, Not to Specific Viewpoints Norton Supports.

Removal of Wong's comment and the ban on his further posting were appropriate regulations of speech to maintain the post as a place for discussion of the immigration policy. Speech in a limited or nonpublic forum may be restricted if the restriction is "reasonable in light of the purpose served by the forum and . . . viewpoint neutral." *Cornelius*, 473 U.S. at 806. Content discrimination is "permissible if it preserves the purposes of [a] limited forum," but viewpoint discrimination remains impermissible. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

Restrictions are reasonable in light of a forum's purpose when some rational basis underlies the restriction's justification. *See Cornelius*, 473 U.S. at 808–11 (finding it reasonable for employer to exclude certain organizations from charity-fundraising nonpublic forum because

it felt they were worse at helping the needy).[3] Norton's case is like *Cornelius*. In that case, it was reasonable to exclude certain organizations simply because the employer disfavored them, because the purpose of the forum was to make the workplace efficient. Similarly, here, this Court should find Norton's restrictions reasonable in light of the immigration post's purpose: educating constituents and soliciting relevant feedback. Just like excluding organizations from a fundraising forum because of an employer's preference was reasonable, excluding a comment and commenter to preserve the post as a place for relevant discussion was reasonable. For a limited or nonpublic forum, the standard is reasonableness—nothing more.

Viewpoint discrimination is the exclusion of one viewpoint about a particular subject matter. *Rosenberger*, 515 U.S. at 830–31; *see Tam*, 137 S. Ct. at 1763 (opinion of Alito, J.) (concluding that Lanham Act's ban on offensive trademarks was viewpoint discrimination because "[g]iving offense is a viewpoint"); *id.* at 1766–67 (Kennedy, J., concurring in part and concurring in the judgment) (reaching same conclusion, but because "an applicant may register a positive or benign mark [about persons, institutions, beliefs, or national symbols,] but not a derogatory one," representing government's censorship of ideas which it disfavors); *Rosenberger*, 515 U.S. at 825, 831 (holding that public university discriminated based on viewpoint when it excluded "a magazine of . . . religious expression" from receiving funds to reimburse student-group printing costs because other, secularly motivated magazines were allowed to discuss same topics as religious magazine). In other words, the government cannot regulate speech based on the "ideology or the opinion or perspective of the speaker." *Rosenberger*, 515 U.S. at 829.

Norton's actions did not discriminate based on viewpoint because they were based on Wong's comment being off-topic, not objectionable to Norton. Unlike in *Tam*, where every

[3] This case was about a nonpublic forum, but the reasonableness inquiry is the same for a limited forum.

Justice agreed that the Lanham Act constituted viewpoint discrimination because it barred disparaging or offensive trademarks but not complimentary ones, here, Norton acted because Wong's post was off-topic, and would have deleted any *ad hominem* comments, either praiseworthy or condemning. This is also unlike *Rosenberger*, where a public university could not disfavor a religiously themed magazine that discussed the same topics as nonreligious magazines. Here, Norton did not act because of the speaker's identity or viewpoint, but because the subject matter discussed (her own "ethics and morality," R. at 16) was not relevant to the immigration policy. Notably, Norton did not delete other comments that were critical of the immigration policy and stayed on-topic. *See* R. at 17.

The Fourteenth Circuit skirted this issue by conflating the *ad hominem* "attack on Governor Norton's fitness to serve" with what it found to be "a viewpoint at odds with that of the Governor with respect to the new immigration policy." *Wong II*, slip op. at 11; R. at 39. Its analysis suffers from at least two flaws. First, it is not at all clear that Wong's post had anything to do with the immigration policy. The Fourteenth Circuit found that the comment "appear[ed] to pertain directly to" the immigration post, and that the comment was "fairly understood as a reply" to the post, *Wong II*, slip op. at 11; R. at 39, but these are factual determinations. Because the circuit court granted summary judgment in favor of Wong, it was obliged to draw all factual inferences in the light most favorable to Norton. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The court obviously failed to do so. *Davison* is again distinguishable because a trial was held to make this factual determination and the defendant there admitted she acted because she felt the comments made were "personal in nature" and "slanderous." *Davison*, 2017 WL 3158389, at *28–29. Second, even if the comment did relate to the post, the circuit court admitted that the post also attacked Norton's fitness to serve, which is a

subject matter unrelated to the post, and therefore removing the post for *that* reason would be permissible content discrimination, not viewpoint discrimination.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court reverse the Fourteenth Circuit's erroneous conclusions that Norton engaged in state action and violated Wong's First Amendment rights by engaging in viewpoint discrimination. In light of these corrections, we respectfully request that this Court grant summary judgement in favor of Norton.

APPENDIX OF STATUTES & CONSTITUTIONAL PROVISIONS

Statutes

42 U.S.C. § 1983

> 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.

Constitutional Provisions

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

BRIEF CERTIFICATE

We hereby certify & acknowledge the following:

- That the work product contained in all copies of this team's brief is in fact the work product of the team members;
- That the team has fully complied with their school's governing honor code; and
- That the tam has complied with all Rules of the Competition.

/s/
January 31, 2018