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 THE RESPONDENT

QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Fourteenth Circuit correctly decided that there is a sufficiently close nexus between Governor Norton's actions and the State of Calvada, when she ordered a state employee to delete a comment and ban its author, because the comment was critical of her performance as governor, and fitness for public office.

II. Whether the United States Court of Appeals for the Fourteenth Circuit correctly decided that a comment left by a private citizen on a Facebook post by the governor of Calvada was not government speech, when the comment came from the citizen's personal Facebook page, and was in response to a post requesting citizen feedback.

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STATEMENT OF THE BASIS FOR JURISDICTION

The United States District Court for the District of Calvada heard this civil rights action pursuant to 42 U.S.C. § 1983 on January 17, 2017. The civil rights action was brought under 42 U.S.C. § 1983, which is a federal statute that gave the district court, the United States Court of Appeals for the Fourteenth Circuit, and this Court federal question jurisdiction under 28 U.S.C. § 1331. Further, on appeal, the respondent asserts a violation of his rights under the First Amendment to the United States Constitution, which also falls under the federal question jurisdiction of this Court pursuant to 28 U.S.C. § 1331. The petitioner filed a timely petition for writ of certiorari and this Court granted the petition. This Court has jurisdiction over this appeal from a final order pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

In 2011, now-Governor of Calvada Elizabeth Norton ("Governor Norton") started a Facebook page titled "Elizabeth Norton" ("the Norton page"). R. at 14. Governor Norton limited access to the page to her "friends:" other Facebook users with whom Governor Norton had a mutual agreement to be able to access each other's Facebook pages. R. at 14. At the time, Governor Norton held no political office; she owned her own business and posted information about it on the Norton page. R. at 14, 24. She also posted personal announcements to her "friends" on the Norton page. R. at 14.

This was the norm from 2011 until January 12, 2016, the day after Governor Norton became the Governor of Calvada; on that date, she made numerous changes to her Facebook page: she opened it up to the general public, R. at 14; she began posting information about the Calvada government, including requests for citizens to comment about matters of concern to the

Calvada government, R. at 14; and, marking the tonal shift in the page, she changed its name to "Governor Elizabeth Norton" ("the GEN page"). R. at 14. While she still sometimes posted about personal matters on the GEN page, there is no indication that she posted any more business information, having divested herself of business holdings according to Calvada law. R. at 14, 24.

From January 12, 2016 onward, Governor Norton used the GEN page to communicate with the public about state business; for instance, she asked members of the public to help locate roads in need of repair by posting pictures of potholes, along with their location, to the GEN page. R. at 15. Governor Norton directed the Calvada Department of Transportation to monitor the GEN page and respond to the potholes. R. at 15. Even though Calvada has another "governor" Facebook page, R. at 14, Governor Norton's attention is decidedly focused on the GEN page. R. at 25-26. It is not only Governor Norton, and at least one department of the Calvada government, that administers to the GEN page, various Calvada employees do as well, including the following: Governor Norton's Director of Social Media, Sanjay Mukherjee ("Director Mukherjee"), R. at 20; Calvada's Director of Public Security, Nelson Escalante ("Director Escalante"), R. at 19; and Governor Norton's Chief of Staff, Mary Mulholland ("Chief Mulholland"), R. at 23. Director Mukherjee regularly assists Governor Norton with content on the GEN page, and he "generally" does this work before and after official working hours. R. at 20. He uses Calvada property--computers and a smartphone--to do this. R. at 20.

Director Escalante's work relating to the GEN page focuses on identifying threats to Governor Norton's safety. R. at 19. Chief Mulholland has a more general role in the GEN page: she authors posts, discusses strategy with Governor Norton, and communicates with citizens

through the GEN page. R. at 23. Various other members of Governor Norton's staff help run the GEN page. R. at 23.

This litigation concerns Governor Norton's actions on the evening of March 5, 2016; on that date, Governor Norton sent an email to Director Mukherjee with three directives: to post information to the GEN page about her attendance at a recent school sporting event, her concern about violence in Iraq, and a Calvada agricultural program aimed at young farmers; to delete a comment ("the deletion") left by Brian Wong ("Mr. Wong") on a GEN page post about a new Calvada immigration policy ("the immigration post"); and to permanently ban ("the ban") Mr. Wong from posting to the GEN page and from leaving comments on posts on the GEN page. R. at 16-17. Earlier that day, Governor Norton made the immigration post, which announced a new Calvada policy of cooperation with federal immigration authorities. R. at 15. The immigration post was the first announcement of the new policy; it preceded the issuance of an executive order putting the policy into effect, as well as a press conference held minutes after Governor Norton made the immigration post. R. at 16. Importantly, the immigration post included a statement welcoming "comments and insights." R. at 16.

Accepting this welcome, Mr. Wong left a comment on the immigration post; the comment came from his own Facebook page, titled "Brian Wong." R. at 16. This comment was quite critical of Governor Norton: in Mr. Wong's comment, he called her a "scoundrel" and a "disgrace to our statehouse;" he stated his belief that only one "with no conscience could act" as Governor Norton had; and he compared Governor Norton's "ethics and morality" to those of a toad, before musing that to compare toads to Governor Norton would demean toads "when it comes to public policy." R. at 16. Governor Norton asked Director Mukherjee to delete the

"nastygram" Mr. Wong left, and to ban him from further participation on the GEN page. R. at 17. To justify her order, she later described Mr. Wong's comment as an unresponsive *ad hominem*. R. at 26. Per "standard practice," Director Mukherjee responded quickly, deleting Mr. Wong's comment and banning him in twenty-five minutes. R. at 16-17. All other posts to the GEN page that day--more than thirty in total--were left undeleted, and their authors unbanned, including two posts critical of the immigration post that did not mention Governor Norton herself. R. at 17.

Mr. Wong's comment remains deleted to this day. R. at 17. He is still banned from any interaction with the GEN page, R. at 17, except for sharing posts from it, R. at 14. His account can be unbanned at any time. R. at 14.

Mr. Wong brought this action pursuant to 42 U.S.C. § 1983, claiming that the deletion and ban were in violation of his rights under the Free Speech Clause of the First Amendment, U.S. Const. Amend. I. R. at 01. Both Mr. Wong and Governor Norton filed motions for summary judgment, and the district court held that Governor Norton's actions in ordering the deletion and ban constituted state action. R. at 10, 12. In doing so, it focused on the fact that Governor Norton is the chief executive for the State of Calvada, and uses the page to communicate with and to citizens about state business. R. at 10. It also found it relevant that Director Mukherjee, a state employee, administered the page, including posting content, and that other state employees, including senior members of Governor Norton's staff, did as well. R. at 10. The district court was also concerned with the fact that those who administered the page did so with state-issued equipment. R. at 10.

Further, the district court held that this case involves government speech, and therefore that the deletion and ban were constitutional, even disregarding any viewpoint discrimination. R. at 12. Relying on its reading of this Court's precedents, it found particularly relevant that the GEN page is closely identified in the public mind with the State of Calvada, and that Governor Norton, as well as other Calvada employees, control the content of the GEN page. R. at 11. Although it acknowledged that other people comment on the GEN page, it did not find that determinative. R. at 11. It also rejected Mr. Wong's position that his comment was not government speech, stating that his contribution to the GEN page did not transform it into a government-sponsored forum for speech. R. at 11. On that basis, the Court denied Mr. Wong's motion for summary judgment, and granted Governor Norton's motion for summary judgment. R. at 12.

On appeal the United States Court of Appeals for the Fourteenth Circuit affirmed the district court's holding that Governor Norton's actions constituted state action, but reversed the holding of the district court that the Governor's immigration post constituted government speech. R. at 39, 40. The Court of Appeals found it relevant that Governor Norton had changed the Norton page to the GEN page; it was particularly interested in the addition of the title "Governor." R. at 34. Further, it noted that she communicated with Calvada citizens and solicited their input and assistance. R. at 34. Like the district court, it found relevant that state equipment and employees contributed to the GEN page, and that Governor Norton ordered Director Mukherjee to perform the deletion and ban. R. at 34.

The Court of Appeals also held that Governor Norton's actions of opening the GEN page to the public established a government-sponsored forum for speech, therefore making her

deletion and ban impermissible viewpoint discrimination in violation of his First Amendment right to free speech. R. at 40. It specifically held that the district court erred in its finding of government speech, because it focused on the GEN page as a whole, as opposed to Mr. Wong's comment. R. at 36. It found that Governor Norton had created a public forum by inviting constituent input, both on the immigration post and on the GEN page generally. R. at 38. It then held that the deletion and ban constituted viewpoint discrimination. R. at 39. The Court of Appeals remanded the case to the district court for entry of summary judgment in favor of Mr. Wong. R. at 40. This Court granted Governor Norton's Petition for a Writ of Certiorari. R. at 41.

SUMMARY OF THE ARGUMENT

This court should affirm the decision of the Court of Appeals holding that the deletion and ban constituted state action and that Mr. Wong's comment to the immigration post does not constitute government speech. Governor Norton directed a state employee to delete Mr. Wong's comment and ban him from the GEN page. The employee complied, and used state-provided equipment to do so. This demonstrates a sufficiently close nexus between Governor Norton's actions and the state, such that her order is fairly attributable to the state.

The fact that Governor Norton had a Facebook page for personal use before becoming governor is not important in this case. The GEN page only exists because Governor Norton was elected, the content of the GEN page is primarily related to her public and official role as governor, and it is publicly viewable. This came about because of a transformation in the page that only occurred because of Governor Norton's election. The fact that this transformation arose out of public, and not personal, circumstances also demonstrates the sufficiently close nexus

required for state action. The GEN page has a largely overlapping identity with the office of the governor.

Governor Norton created a limited public forum when she posted the immigration policy on the GEN page. The deletion and ban constituted impermissible viewpoint discrimination in a limited public forum. Like many other posts on the GEN page, Governor Norton used to the immigration post to solicit feedback from the public; by deleting his comment and banning him from further participation on the GEN page, the state discriminated against Mr. Wong's viewpoint.

Facebook does not physically exists, but it is a metaphysical limited public forum. Because the GEN page and specifically Governor Norton's immigration post created a limited public forum Mr. Wong's comment was not government speech, rather it was his own speech and is therefore protected under the First Amendment right to free speech. Mr. Wong's comment was political speech and is protected by the First Amendment. The structure of Facebook itself is so that the comments section on a post is to discuss the original post rather than be included in the content of the original post. Despite the relatively short history of Facebook, the comments are identified in the public consciousness as the content of the commenter, not the original poster. Neither Governor Norton, nor any state employee, maintained any kind of control over Mr. Wong's comment, except to censor it. This cannot show government speech.

ARGUMENT

I. The deletion and ban constituted state action.

State action exists 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.'" *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). Governor Norton created the GEN page before becoming governor, but at the time of the deletion and ban the page had undergone a substantial transformation such that it was essentially an extension of the State of Calvada. In addition, common sense dictates that when, with a censorial motive, a governor of a state directs a public employee to remove a statement--and prevent further like statements--on an announcement of a state policy by the Governor herself, the state has acted.

a. The fact that Governor Norton created the GEN page before she became governor is not determinative.

Governor Norton created the page at issue twice: once as "Elizabeth Norton," next as "Governor Elizabeth Norton." It is the second iteration that matters for this case. When Governor Norton changed the page she not only changed the name, she also changed its character. What was once a page for personal and business announcements is now devoted primarily to state business. What would otherwise be private action takes on a governmental character once the state becomes involved in the action to a significant degree. *Shelley v. Kraemer*, 334 U.S. 1, 14, 20-1 (1948). It would be a stunted inquiry if an initially private entity always remained private, no matter how intertwined with the government it becomes, simply because it was private in the beginning.

b. The GEN page and the immigration post are subject to First Amendment restrictions.

The First Amendment does not restrict purely private action; only where the challenged action is fairly attributable to the government does the First Amendment apply. *Id.* at 14. In determining the state action question, a relevant inquiry is whether the challenged actions arose out of public or personal circumstances. In this case, the GEN page only exists because of a gubernatorial election. Further, the content on the GEN page is overwhelmingly attributable to the government; between state employees drafting content and managing the page, Governor Norton announcing policies, and state agency involvement, the GEN page has become a hub of government activity, and is devoted almost exclusively to the government's business.

i. The transformation of Governor Norton's personal Facebook page to the GEN page arose out of public, not personal, circumstances.

Were it not for Governor Norton's election, a visitor to her Facebook page would not be able to access it unless the visitor were a "friend," in Facebook terms. That person would see a page titled "Elizabeth Norton," and little else. What such a visitor would certainly not see is any message from the government, nor the title of "Governor." That person would be unable to interact with the page, except for asking for permission to interact with it (becoming a "friend"), unless he or she already had permission. In short, had Governor Norton not become the chief executive of Calvada, the GEN page would not exist. This fundamental change "'arose out of public, not personal, circumstances.'" *Davidson v. Loudoun Cty. Bd. of Supervisors*, 2017 WL 3158389, *6 (E.D. Vir. 2017) (quoting *Rossignol v. Voorhaar*, 316 F.3d 516, 524 (4th Cir. 2003)) (set for publication). The Norton page thus became the GEN page, an information clearinghouse between the Calvada government and the public.

In *Rossignol*, the Fourth Circuit distilled its own precedents, as well as cases from the First, Second, Fifth, and Sixth Circuits and found that it is relevant to the state action inquiry that a public official took action as a result of public, rather than personal, circumstances. 316 F.3d at 523-24. *Rossignol* involved police officers who were upset at prior criticisms of their sheriff and department from a newspaper, and anticipated criticism on the day of an election. *Id.* at 519. On election day, they set out in plain clothes and in personal vehicles on their own time to buy up all the issues of the paper they could. *Id.* at 520. The Fourth Circuit, in deciding that there was a sufficiently close nexus between the mass purchase and the government, focused largely on the fact that the actions arose "out of public, not personal, circumstances." *Id.* at 524. The same is true here: if not for the election, there would be no GEN page.

ii. The GEN page is functionally public property devoted to public use.

The GEN page is a source of information from the Calvada government to many of its citizens, and vice versa. For at least some important state announcements, including the one in the immigration post, the GEN page is the first place that information becomes available to the public. R. at 26 (all government initiatives announced on the GEN page are reposted on another Calvada governor Facebook page). That Governor Norton occasionally posts personal information on the GEN page no more destroys the governmental character of that page than a personal anecdote in a President's State of the Union Address turns the address into a private occasion.

If Governor Norton kept her Facebook page set to private, and managed it by herself, this would be another situation. However, she decided to involve state employees in its operation, and she further decided to use the GEN page to communicate with the public about government

business. She turned this into a "two-way street:" she communicates to citizens and they communicate back. The subject of their discussions is the government, how it is run, and how it should be run. Any realistic assessment of this by an objective observer would include the conclusion that state action dominates the GEN page, and Governor Norton's posts on it. Governor Norton cannot escape this conclusion just because her Facebook page existed before she was governor, any more than she can escape the conclusion that her actions as governor constitute state action, even though she existed before she was governor.

c. The deletion and ban both constituted state action, because the action was taken by a state employee at the direction of the Governor on a post announcing a new Calvada state policy.

A sufficiently close nexus between private action and the State shows state action. In *Brentwood Acad.* this Court found relevant that a private association had a "pervasive entwinement to the point of largely overlapping identity" with public entities. 531 U.S. at 303. This was based in part on the fact that eighty-four percent of the members of the association were public schools. *Id.* at 299-300. In this case the vast majority of Governor Norton's posts to the GEN page relate to her duties as governor. It bears repeating that the significant change in the content of the GEN page occurred when Governor Norton changed the name of the page to include her official title as governor. All this goes to show that the GEN page has a "largely overlapping identity," *Id.* at 303, with the office of the governor. This is especially true in this case, because the immigration post itself announced a new Calvada State policy, and the governor ordered the deletion and ban, which a state employee carried out.

i. Because the actions were taken by and at the direction of Calvada officials and employees, there is a close nexus between the state, and the deletion and ban.

Simply put, Governor Norton gave an order which Director Mukherjee carried out. This would never have happened but for Governor Norton's position within state government, and Director Mukherjee's position below the Governor. "What is fairly attributable [to the state] is a matter of normative judgment," *Id.* at 295, and here there can be no question that this is state action. While the initially private character of the Norton page between 2011 and January 11, 2016, might indicate a private action, every other consideration--such as the largely governmental content of the GEN page since January 12, 2016--militates against that conclusion here. When the focus becomes more specific, that conclusion is all the more obvious. The question becomes, as a matter of normative judgment, did the State of Calvada act through Director Mukherjee? The answer must be that it did. The opposite conclusion, that the State of Calvada was not acting when a state employee followed the governor's directive with regard to a post announcing a new government initiative, blinks reality.

ii. Like the change from the Norton page to the GEN page, the deletion and ban arose out of public, not personal, circumstances.

"Where the sole intention of a public official is to suppress speech critical of his conduct of official duties or fitness for public office, his actions are more fairly attributable to the state." *Rossignol*, 316 F.3d at 524. Mr. Wong's comment called Governor Norton a disgrace to the statehouse; he also criticized her position on "public policy." R. at 16. His motives for criticizing her were clearly related to her role as governor. Governor Norton's desire to suppress his speech was likewise related to her public office: not only was her censorship directed at speech critical

of her public role, but she has admitted in this litigation that she censored it because it was an *ad hominem*.

Assuming her characterization is correct, this is similar to the speech the deputies in *Rossignol* suppressed: a newspaper report that a candidate for state attorney supported by the sheriff's office had pled guilty to rape years before; the obvious implication being that, because the man was a rapist, he was bad and should not be a state attorney. 316 F.3d at 520. That is a classic *ad hominem*: an attack on a person rather than her or his positions. The desire to censor this speech arose from public circumstances, because the motive was to censor speech critical of a public official's fitness for office. *Id.* at 524. Likewise, Norton sought to censor speech critical of her fitness for public office.

It is also relevant that Mr. Wong's comment criticized her performance in public office by talking about her approach to public policy. Mr. Wong did not only say that Governor Norton is a bad person, but that she has enacted bad policies. Regardless of whether his comment was a "nastygram," he directed it at Governor Norton's actions as governor. Governor Norton did not like this criticism, and she censored it. Her motive for doing so arose out of public, not personal, circumstances. This shows state action.

> *iii. Because the comments section on the immigration policy post was a government-sponsored forum for speech, the deletion and ban, as proprietary actions in a government-sponsored forum, necessarily constituted state action.*

That the comments section on the immigration post was a limited public forum is discussed below. For now, it suffices to say that because Director Mukherjee was managing a government forum for speech (and did so at the direction of the chief executive of Calvada), his

actions were necessarily those of the state. A state government, in managing its public forums, may take many actions that have the effect of limiting or altering a speaker's message. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (allowing New York City to require performers in a government auditorium to use a government-provided sound technician); *Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666 (1998) (public broadcaster can exclude candidate for lack of public support in televised debate in a nonpublic forum); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (government can preserve public forum for the use to which it is lawfully dedicated).

What has never been disputed in these "forum" cases is that, in limiting or altering the message of a speaker, the government was acting. Indeed, it would have been strange if, in *Forbes*, a party had disputed that the exclusion of a potential speaker was the action of the government, where a public broadcaster excluded the speaker. Similarly here, the government hosted a limited public forum for the purpose of discussing the new policy of cooperation with federal immigration authorities. Of course, this assumes that the comments section on the immigration post was a limited public forum, as opposed to government speech. It indisputably was, as Respondent will now show.

II. Mr. Wong's comment was protected speech in a limited public forum.

If the comment from Mr. Wong's Facebook page is not Governor Norton's speech but his own, no one can dispute that it is entitled to the most serious protection under the Free Speech Clause of the First Amendment. *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 347 (1995) (core political speech includes advocacy of controversial viewpoints aimed at influencing government policy, and restrictions on such speech are subject to "exacting scrutiny"). Likewise,

no one disputes that if the motivation for suppressing speech is viewpoint discrimination, there is no test the government can meet to make its actions constitutional. *Rosenberger*, 515 U.S. at 829 (when reason for restriction on speech is the speaker's viewpoint, "government must abstain from regulating speech"). The law is crystal clear on these points. It is also easy to see that the deletion and ban took place in a government forum, and the speech censored was Mr. Wong's, not the government's.

a. The deletion and ban constituted impermissible viewpoint discrimination in a limited public forum.

This Court's forum analysis is familiar: quintessential public forums are places held open for "assembly and debate," by tradition or government fiat; designated public forums are places the government has opened for general expressive purposes, although generally for a limited time; nonpublic forums are not held open for general expressive purposes, but for a specific purpose related to expression. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). In the first category, the government can impose reasonable time, place, and manner restrictions, and cannot discriminate based on content without satisfying the traditional strict scrutiny test, and must keep the forum open. *Id.* at 45. In the second category, the government is subject to the same restrictions as in quintessential public forums, except that the government does not have to keep the forum open indefinitely. *Id.* at 46. In nonpublic forums, the government may lawfully reserve the forum for its intended purpose, and can exclude whole categories of speakers and subjects, but may not draw distinctions based on viewpoint. *Id.*

By contrast, when the government itself speaks, there is no requirement that it do so in a viewpoint-neutral manner. *Matal v. Tam*, 137 S.Ct. 1744, 1757 (2017). Generally, there is no

constitutional problem with the government speaking on its own, so long as it does not compel private persons to speak for it, or run afoul of other constitutional provisions, such as the Establishment Clause of the First Amendment. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2246 (2015); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009).

i. The comments section on the immigration post was a limited public forum held open for discussion about the new Calvada immigration policy.

In determining whether something is a public forum, this Court looks to the government's policy and practice; the inquiry is whether it intended to create forum for public discourse. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). The focus is on the government's intent; a public forum does not appear because the government made a mistake, or permitted limited discourse in a particular place. *Id.*; *Walker*, 135 S.Ct. 2250.

1. Governor Norton solicited feedback from the public in the immigration post on the GEN page.

In the immigration post, Governor Norton welcomed the public's "comments and insights." R. at 16. Directly below this welcome was the comments section; by all appearances, this is where Governor Norton expected these comments. This much is obvious, because she did not direct public comments elsewhere. Rather, she held the comments section of her immigration post open to the public, to discuss the immigration post. This is the very definition of a limited public forum: a setting for the discussion of a certain topic, rather than for general expressive activity, or for government speech. *Walker*, 135 S.Ct. at 2250 (quoting *Rosenberger*, 515 U.S. at 829).

2. *Because of the structure of Facebook, the comments section on a post exists to discuss the original post.*

It would be strange indeed if the comments section of a Facebook post were not some kind of forum related to the original post. It is difficult to think of a reason why it would be called a "comments" section at all, if it were meant for unrelated discourse. Even absent Governor Norton's express solicitation of feedback from the public, anyone looking at that part of the immigration post, or any other Facebook post for that matter, would surely consider it the proper venue for discussing the original post. Facebook's general structure creates a limited public forum in every comments section, with the obvious distinction that, because the government is not involved with most Facebook posts, the First Amendment does not usually apply. However, when the government does involve itself by making a post, and it simply uses the default structure of Facebook posts with comments, it creates a limited public forum. Not only does this neatly fit with existing law, it also fits with the intent of the government in cases such as this, where a governmental entity wants feedback from the public.

3. *The comments section of the immigration post constituted a "metaphysical" limited public forum.*

It is of no moment that the comments section of a Facebook post does not physically exist, because this Court has stated that in a "metaphysical" public forum, the same principles apply as in a physical forum. *Rosenberger*, 515 U.S. at 830. Although the Court has expressed hesitancy at making broad pronouncements about the law on the Internet due to its fast changing nature, *see, e.g., Packingham v. N.C.*, 137 S.Ct. 1730, 1736 (2017), this is not a situation where the Court's words today may have unintended effects tomorrow. Instead, by holding that the government is limited in how it may censor speech online, the Court would err on the side of

caution, in favor of the robust national, and even international, debate that is the sole constant of the internet. Just as this Court had no trouble holding in *Rosenberger* that a fund for student publications was a forum for speech, the fact that this case concerns the comments section on a Facebook post should give it no pause either.

ii. By deleting Mr. Wong's post and banning him from further participation on the GEN page, the state discriminated against Mr. Wong's speech based on viewpoint.

When a governmental entity discriminates on the basis of viewpoint, as opposed to content, it commits the most egregious sin under the First Amendment. *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2223 (2015) (quoting *Rosenberger*, 515 U.S. at 829). Here, Governor Norton's discrimination was against speech that was critical of her, as opposed to simply her immigration policy. That is undoubtedly unconstitutional.

1. Governor Norton ordered the deletion and ban because of the viewpoint expressed in Mr. Wong's comment.

In her original email ordering the deletion and ban, Governor Norton called Mr. Wong's comment a "nastygram," and said that his comment was not "appropriate for [the GEN] page." R. at 17. She later stated that she ordered the deletion and ban because Mr. Wong's comment was an *ad hominem* criticism of her, and was unresponsive to her request for feedback from citizens. Governor Norton's admission that Mr. Wong's criticism of her was an *ad hominem* necessarily means that she considered the viewpoint expressed in his comment, and her decision to delete his comment and ban him based on that constitutes discrimination based on viewpoint. This is perhaps the clearest example of such impermissible discrimination against speech.

Governor Norton's attempt to characterize Mr. Wong's comment as unresponsive is immaterial, and also incorrect, for several reasons. First, Mr. Wong specifically identified her position on public policy as part of his criticism of her in his comment. That he did not include a statement to the effect of "everything I am saying in this comment is based on my reaction to the policy on which I am commenting" does not change anything. Second, while she tried in the District Court to characterize his comment as unresponsive, her order to Director Mukherjee belies that claim. In that order, she specifically identified the comment as the "nastygram by Wong *in response to* [the] immigration announcement." R. at 17 (emphasis added). Even assuming for the sake of argument that it is permissible under the First Amendment to delete a comment on the immigration post for not being responsive to the post when it is obviously directed at its author, that still does not save Governor Norton. Simply put, she did not like his opinion, so she removed it from the public discourse. That is *per se* unconstitutional.

2. *Mr. Wong's comment was political speech protected by the First Amendment.*

There is no allegation in this litigation that Mr. Wong's comment was not protected speech. It certainly was not obscene or threatening, and did not incite anyone to commit any unlawful act. "Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). In the United States, there is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Mr. Wong's comment was certainly

strongly-worded; anyone announcing a policy like the one in the immigration post must be aware that tensions on this issue run deep. But Mr. Wong's harsh words in response to a new government initiative were undeniably political, and his comment therefore "occupies the core of the protection afforded by the First Amendment." *McIntyre*, 514 U.S. at 346.

b. Based on this Court's precedents, Mr. Wong's comment was not government speech.

The government speech doctrine "is susceptible to dangerous misuse." *Matal*, 137 S.Ct. at 1758. This Court has recently expressed concern that "private speech could be passed off as government speech," thereby muffling private speakers with whom the government disagrees; it is for this reason that the Court exercises "great caution" before it extends the government speech doctrine. *Id.* In *Walker*, this Court looked to three factors in determining that state license plates constitute government speech: 1) that the plates have long been used to express government messages, 2) that the plates are closely associated in the public mind with the government, and 3) that Texas, the state at issue in *Walker*, maintained direct control over license plate messages. 135 S.Ct. at 2248-49. In *Matal*, the Court relied on these same factors in determining that trademarks do not constitute government speech. 137 S.Ct. at 1760. While the *Walker* Court did find that Texas specialty license plates constitute government speech, 135 S.Ct. at 2250, the Court in *Matal* noted that *Walker*, "likely marks the outer bounds of the government-speech doctrine," 137 S.Ct. at 1760. Using the *Walker* factors, it is abundantly clear that the government does not speak when private citizens, acting through their personal Facebook pages, leave comments on a government message.

i. The history of Facebook comments, to the extent such history exists, indicates speech by the commenters, not the original poster.

The first factor, if limited to Facebook comments themselves, is not particularly helpful in this analysis. Facebook itself, though popular, has not existed for long. Governmental use of Facebook has an even shorter history. However, the "post/comment" format of Facebook is similar to the format of a long governmental tradition in the United States: the city council meeting. All across this country, local governments hold regular meetings, and allow for citizen comments. It is notable that this basic structure is like a Facebook post with comments on the original post. In the city council example, the government speech is the thing to which the citizens respond; the citizens' comments, on the other hand, are certainly their own. To the extent the two formats are analogous, the history of city council meetings shows that comments are not government speech.

ii. Comments on a Facebook post are closely identified in the public mind with the commenter, not the original poster.

If Governor Norton is correct, and the public believes that comments on the immigration post convey the government's own message, the public likely believes that the government is schizophrenic. It is hard to see how a reasonable person could otherwise interpret such conflicting messages coming from the same source; an observer who believes the government is speaking would see the immigration post, then a slew of messages both supporting and opposing the policy announced therein, for a variety of reasons. Such a person would notice that the government, for some reason welcoming itself to comment on its own program, responded to its own welcome under numerous pseudonyms.

What is more likely is that a member of the public would see an announcement from the governor and interpret that as government speech. She would note that the government asked for feedback from the public, and that members of the public responded. If she were so inclined, she might scroll through the comments, and see what members of the public thought. She might think to herself, "Brian Wong certainly does not have a high opinion of Governor Norton." What she almost definitely would not think is "the State of Calvada sometimes speaks under the name Brian Wong, and does not seem to like Governor Norton when it does so." This Court has noted that it is "far-fetched" to interpret registered trademarks as government speech. *Matal*, 137 S.Ct. at 1758. This is because to do so would be to say that the federal government is "babbling prodigiously and incoherently," and "expressing contradictory views." *Id. See also Id.* at n. 9 (if trademarks are government speech, government is expressing contradictory opinions on topics including abortion, capitalism, and global warming). As described above, the same is true here.

iii. Neither Governor Norton nor any Calvada official or employee maintained direct control over Mr. Wong's comment, or the comments of any other person.

There is no evidence that Governor Norton maintained control over the comments of any person other than Mr. Wong. Even then, neither she nor any Calvada employee had any part in drafting or posting the comment; the government's involvement in Mr. Wong's comment was only as a censor. That is not the sort of "direct control" this Court found relevant in *Walker*. In that case, the Court looked to Texas law giving the state "'sole control'" over "'all license plates,'" *Walker*, 135 S.Ct. at 2249 (quoting Tex. Transp. Code Ann. § 504.005). It also noted that the proper state authority had to approve specialty plate designs before they could appear on a Texas license plate. *Id.* Finally, the Court in *Walker* noted that Texas effectively controlled the

messages on specialty plates by exercising final approval authority. *Id.* (quoting *Summum*, 555 U.S. at 473).

In this case, the government did not maintain anywhere near the kind of control this Court has required in other cases. Governor Norton never told anyone that she would express control, sole or otherwise, over anyone's comments. Rather, she specifically asked for feedback from the public. She then imposed a retroactive "pleasant feedback only" policy on a single comment. This is not like in *Walker*, where the government received potential messages that it considered giving the imprimatur of the state. This is not like in *Summum*, where by long practice the city selected monuments to erect in a park. 555 U.S. at 473. Governor Norton did not "take[] ownership of most of the" comments on the GEN page. *Id.* She simply censored a "nastygram" that she did not like. If direct control exists simply where the government deletes a single comment and bans its author pursuant to no policy by the whims of the governor, then the dangerous misuse of the government speech doctrine this Court feared in *Matal* is already here. This Court's precedents have limited this factor to situations where a governmental entity sets forth clear rules about the messages it will accept from private parties and display as its own speech. It is wholly inapplicable to a comment that bears the name of a private citizen, and no indication of government control.

CONCLUSION

That the GEN page is an extension of the Calvada government should be apparent on these facts. The executive branch of the State of Calvada was involved in the actual operation of the GEN page in a day-to-day sense; Calvada executive officials took all the relevant actions in this case. It is not even necessary to go beyond this analysis, but it is worth noting that Governor

Norton ordered the deletion and ban because she disliked Mr. Wong's criticism of her fitness for office, and performance as governor. This also is not a government speech case, but a public forum case. It is simply untenable to label speech bearing the name of a private citizen government speech, where, as here, that speech criticized the government in response to the government's request for comment. Simply put, Mr. Wong spoke in a public forum, the government censored him, and this Court should affirm the Court of Appeals to vindicate his right to speak.