Team 18
Counsel for Petitioner

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 PETITIONER

QUESTIONS PRESENTED

I. Whether the Fourteenth Circuit erred in holding that Governor Norton engaged in state action when she deleted Brian Wong's post to the Facebook page and blocked him from posting further when the post was a personal attack on Governor Norton, she did not delete any comments that were critical of the actual immigration policy, and the State of Calvada does not require its public officials to maintain a Facebook?

II. Whether the Fourteenth Circuit erred in holding that Governor Norton deleting Brian Wong's Facebook post violated the First Amendment through a traditional forum, when the GEN page instead conveyed a government message about a new immigration policy, the page had the word "Governor" in the title, and the Governor's staff controlled the page?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

United States Supreme Court Cases:

Federal Appellate Court Cases:

Federal District Court Cases:

Constitutional Provisions:

Statutory Provisions:

Secondary Sources:

OPINIONS BELOW

The opinion of the United States District Court for the District of Calvada appears in the record at pages 1–12. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 29–40. Both opinions are unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered a final judgment on November 1, 2017. R. at 29. Subsequently, Petitioner filed a timely petition for a writ of certiorari, which this Court granted. R. at 41. The Court has jurisdiction under 28 U.S.C. § 1291 (2012).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

STATEMENT OF THE CASE

Petitioner Elizabeth Norton ("Governor Norton"), a resident of the State of Calvada ("the State" or "Calvada"), established a personal Facebook account on January 2008. R. at 2. Governor Norton used her Facebook to connect with family and friends and to post comments expressing her views on various issues. R. at 2. In 2011, she created a Facebook page titled "Elizabeth Norton," which she used to make personal and business announcements. R. at 2. She also posted pictures of her daughter's birthdays, soccer games, and other family events. R. at 25.

Anyone with a Facebook account can create a Facebook page and edit the privacy settings. R. at 2. Only Governor Norton's connections could view or comment on her page. R. at 25.

In 2015, Governor Norton decided to run for Governor of the State of Calvada because she believed that the State lacked leadership and direction. R. at 25. She won the election on November 3, 2015 and was inaugurated on January 11, 2016. R. at 25. Following the election, Governor Norton inherited the official Facebook page for the governorship —"Office of the Governor of Calvada." R. at 25. However, wanting her constituents to connect with her personally, Governor Norton changed the privacy settings of her personal Facebook page to make it available to all members of the public and renamed her the page to "Governor Elizabeth Norton" ("GEN page"). R. at 25. She continued posting personal photographs of her family to the GEN page, as well as updates on the actions her administration was taking. R. at 25. One of her main goals in continuing to use the GEN page was to let her constituents know that she was personally available. was there for them on a personal level. R. at 25. Furthermore, Governor Norton plans on keeping the Facebook page after completing her public service. R. at 26.

On March 5, 2016, Governor Norton posted an announcement regarding a controversial state policy on immigration law enforcement (the "immigration policy") on the GEN page. R. at 3. Governor Norton and other high-ranking government officials had already finalized the immigration policy when Governor Norton posted the announcement on the GEN page. R. at 3. Respondent Brian Wong ("Mr. Wong"), a resident of the State, posted to the GEN page in response to the immigration policy. R. at 4. This post was an ad hominem attack—Mr. Wong called Governor Norton a "scoundrel," "a disgrace," without a conscience, and said she has the "ethics and morality of a toad . . . although . . . I should not demean toads by comparing them to

you . . . ." R. at 4. There were more than thirty other comments in response to the immigration policy posted to the GEN page. R. at 17.

Later that day, Governor Norton emailed her Director of Social Media, Sanjay Mukherjee, and her Chief of Staff, Mary Mulholland. R. at 16. As the Administrator of Governor Norton's social media accounts, one of Mr. Mukherjee's primary responsibilities is managing her Facebook account. R. at 20. As she does routinely, Governor Norton asked Mr. Mukherjee to make certain updates to the GEN page, including removing Mr. Wong's post and banning him from the GEN page. R. at 17. Governor Norton did not ask Mr. Mukherjee to delete other critical posts; unlike Mr. Wong's post, the other posts were critical of the immigration policy rather than of Governor Norton personally. R. at 17. For example, one post said, "I disagree with the new [State] immigration policy" and another said, "[t]his is not a good policy." R. at 17. After realizing his post had been deleted, Mr. Wong sent an email to Governor Norton's official Governor's email address, requesting that his post be restored. R. at 32. Governor Norton and her staff did not oblige, and Mr. Wong remains banned from posting to the GEN page. R. at 32.

On March 30, 2016, Mr. Wong filed a civil rights action pursuant to 42 U.S.C. § 1983, asking the court to declare that Governor Norton's action violated his First Amendment right to freedom of speech. R. at 1. On January 17, 2017, the District Court for the District of Calvada granted Governor Norton's Motion for Summary Judgment, holding that deleting Mr. Wong's post and banning him from the GEN page constituted state action, and that neither the deletion nor the ban violated his First Amendment rights. R. at 12. Mr. Wong appealed to the United States Court of Appeals for the Fourteenth Circuit. R. at 29. The Fourteenth Circuit held that the deletion and the ban violated Mr. Wong's First Amendment rights and remanded the matter

to the district court for entry of summary judgment in favor of Mr. Wong. R. at 40. Governor Norton appealed to the Supreme Court of the United States, contending that the GEN page is personal rather than official and her actions with respect to Mr. Wong were neither state action nor a violation of the First Amendment. R. at 1, 41.

SUMMARY OF THE ARGUMENT

Governor Elizabeth Norton respectfully requests this Court reverse the decision of the lower court. First, Governor Norton's conduct does not constitute state action. Second, the immigration policy post on Governor Norton's GEN page is protected government speech.

Governor Norton did not engage in state action when she deleted an individual's post from her Facebook page and blocked him from posting further comments on that page. Courts use a two-part test to determine whether challenged action is state action. First, courts look to see if the individual whose actions are being challenged is a private or public actor. Even if an individual is a public actor, the action may nevertheless not amount to state action because it arises from private, rather than public, conduct. Second, if the individual is a private actor, courts will look to see if there is a sufficiently close nexus between the State and the challenged action. This analysis is highly fact-specific and no one fact is dispositive. Governor Norton's actions are not state action under either part of this test. If this Court characterizes Governor Norton as a public actor, her conduct arose from personal conduct because Mr. Wong's comment was an ad hominem attack on Governor Norton as a person. If this Court determines that Governor Norton acted as a private actor, her actions are nevertheless not state action because there is not a sufficiently close nexus between her actions and the State. There is not a sufficiently close nexus because Governor Norton's actions are not ones that are traditionally performed exclusively by the State and the State did not encourage or support her actions.

If Governor Norton's actions are attributable to the state, then this Court must view her immigration policy posy as a source of government speech for purposes of the First Amendment analysis. Government statements do not usually trigger First Amendment protections because the Constitution affords the government the ability to efficiently respond to constituents. Courts use a three-part test in evaluating whether or not government speech is protected. A government expression becomes protected government speech when: (1) the government traditionally uses the medium to convey government messages; (2) the speech is closely identifiable with the government; and (3) the government maintains direct control over the messages on the medium of expression. Furthermore, the interjection of private parties in the creation of the message does not remove the governmental nature of the message.

Here, Governor Norton's immigration policy post is protected by the government speech doctrine because, traditionally, the State of Calvada uses Facebook to convey government messages, the immigration policy post is closely identifiable with the State, and high-ranking government officials maintain direct control over the GEN page and the immigration policy post. Furthermore, even if the immigration policy post is not protected by the government speech doctrine, the Supreme Court does not recognize Facebook as a traditional forum for speech akin to parks, streets, and public town halls. Because Facebook is not a traditionally recognized forum by the Supreme Court, Governor Norton could reasonably limit the forum to exclude ad hominem attacks. Mr. Wong's ad hominem attack on Government Norton went beyond the limited nature of the forum the post created. Therefore, even if the immigration policy post is not protected by the government speech doctrine, the Governor may remove comments that go beyond the limited nature of the post.

ARGUMENT

I. GOVERNOR ELIZABETH NORTON DID NOT ENGAGE IN STATE ACTION WHEN SHE DELETED BRIAN WONG'S POST FROM THE GEN PAGE AND BLOCKED HIM FROM POSTING FURTHER COMMENTS ON THAT PAGE.

The Fourteenth Amendment only protects individuals from acts committed by the State, not private parties. *See Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) ("[The Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful."). Thus, parties claiming a constitutional violation attributable to the state must show that the conduct constitutes state action. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). State action may be found when a state official exercises power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). A finding of state action is a wholly fact-specific inquiry, in which no one fact or circumstance is dispositive. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Although there is a wide range of factors that courts may look to when determining whether conduct amounts to state action, this brief will focus specifically on the traditionally exclusive state function test and whether the state supported or encouraged Governor Norton's actions.

First, Governor Norton did not engage in state action when she deleted Mr. Wong's Facebook post and blocked him from the GEN page because she was acting as a private, rather than public, individual. Second, this private conduct does not amount to state action because there is not a sufficiently close nexus between the state and her conduct. Third, even if Governor Norton was acting in a public capacity, her actions nevertheless do not amount to state action because her conduct arose from personal and private circumstances. Thus, the Petitioner respectfully requests that this Court reverse the decision of the lower court.

A. Mr. Wong's claimed deprivation is not the result of state action because Governor Norton was acting as a private individual when she deleted his Facebook comment and blocked him from the GEN page.

The Supreme Court has generally held that state employment may be sufficient to "render the defendant a state actor." *West*, 487 U.S. at 49. However, an individual being a state official does not alone dictate whether that individual is acting in a public or private capacity and whether that individual's challenged conduct constitutes state action. *Polk Cty. v. Dodson*, 454 U.S. 312, 325 (1988); *see also Patterson v. Cty. of Oneida*, 375 F.3d 206, 230 (2d Cir. 2004) (explaining that, "mere employment by the state does not mean that the employee's every act can be properly characterized as state action").[1] In fact, in *Van Orden v. Perry*, Justice Stevens argued that public officials giving a public speech can express their own views rather than those of the state. *See Van Orden v. Perry*, 545 U.S. 677, 723 (2005) (Stevens, J., dissenting) ("Thus, when public officials deliver public speeches, we recognize that their words are not exclusively a transmission from the government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity.").[2] When determining whether an individual acted in a private or public capacity, no one fact is determinative and each situation should be assessed based on its specific circumstances. *Brentwood*, 531 U.S. at 295 (2001).

An individual who is a state official or employee does not always act in a public capacity. *Polk County*, 454 U.S. at 325; *Patterson*, 375 F.3d at 230. The Supreme Court in *Polk County*

[1] *See, e.g.*, *Screws v. United States*, 325 U.S. 91, 111 (1945) ("[A]cts of officers in the ambit of their personal pursuits are plainly excluded."); *Hughes v. Halifax Cty. Sch. Bd.*, 855 F.2d 183, 186–87 (4th Cir. 1988) (holding that public-school employees' extreme taunting of their colleague was not state action).

[2] Although *Van Orden v. Perry* is an Establishments Clause case, it is nevertheless instructive in this instance because of the general principal promulgated by the dissent that a public official may be engaging in an objectively public act while expressing his or her personal views as a private individual.

held that a public defender, who was paid entirely by the state, was not acting as a state actor. 454 U.S. at 321–22. The Court recognized that the public defender was acting as a traditional lawyer rather than on behalf of the state. *Id.* Along those same lines, the court in *Patterson*, when considering the § 1983 claim of a state employee against the Sheriff's Department for racism, noted that mere employment does not equate to every action by that employee being state action. 375 F.3d at 230.[3]

In light of the principles established in *Polk County* and *Patterson*, Governor Norton's role as the Governor of Calvada does not automatically make her conduct towards Mr. Wong state action. Calvada maintains an official Facebook page for the Governor titled "Office of the Governor of Calvada." R. at 30–31. The GEN page was Governor Norton's only personal Facebook page; she used before becoming Governor and will continue to use when she is no longer the Governor. R. at 26. She regularly uses the GEN page to post pictures of her children and communicate with friends and family. R. at 26. As Justice Stevens stated in *Van Orden v. Perry*, a state official may be expressing his or her own thoughts even when engaging in action that appears to be a part of the state function. Ms. Norton is not forbidden from expressing her own thoughts and opinions on social media channels just because she is the Governor of Calvada. Using the fact-specific inquiry required of this analysis from *Brentwood*, Governor Norton was acting as a private individual and not in her official capacity when she deleted Mr. Wong's Facebook comment and blocked him from the GEN page.

[3] Because the Plaintiff did not brief the question of state action claims against each individual defendant, the court left the question for consideration on remand.

B. Governor Norton's conduct does not amount to state action because there is not a close nexus between the State and the challenged action.

The actions of a private individual may constitute state action if and only if there is such a "close nexus between the State and the challenged action" that the seemingly private behavior can be fairly attributable to the state. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). The determination of whether the actions of a private individual constitute state action is a highly factual analysis determined by the totality of the circumstances, where no one fact is dispositive and no one "set of circumstances is absolutely sufficient." *Brentwood*, 531 U.S. at 295; *Burton v. Wilmington Parking Auth*., 365 U.S. 715, 722 (1961). Private action may be fairly attributable to the state if the actor is performing a function that has been "traditionally exclusively reserved to the state." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); *Jackson*, 419 U.S. at 352, *Perkins v. Londonberry Basketball Club*, 196 F.3d 12, 18–19 (1st Cir. 1999). When determining the sufficiency of the nexus, courts will also look to whether the state has "provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *American Mfr. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 41 (1999); *Rendell-Baker*, 457 U.S. at 839.

1. Traditionally Exclusive State Function

The traditionally public function determination is a narrow one, requiring parties to show that a private entity performed a public function that is traditionally exclusively reserved to the state. *Rendell-Baker v. Kohn*, 457 U.S. at 842; *Jackson*, 419 U.S. at 352.[4] In *Jackson*, the Court rejected the claim that because the respondent provided an essential public service—power

[4] The list of functions that courts have determinately held are within the State's traditional and exclusive purview is short: elections, operations of a company town, eminent domain, peremptory challenges in jury selection, and the operation of a municipal park. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 162 (1978).

utilities—the respondent's actions should constitute state action. 419 U.S. at 352–53. Similarly, in *Rendell-Baker*, the Court held that the "education of maladjusted high school students" was not a traditionally exclusive function of the state. 457 U.S. at 842; *see also Perkins*, 196 F.3d at 19 (holding that the coordination of a youth basketball league funded almost entirely by the state is not a traditionally exclusive state function).

Governor Norton was not engaging in a traditionally exclusive state function when she deleted Mr. Wong's Facebook comment and blocked him from GEN page. On a theoretical level, it is a cornerstone of democracy that a state is required to keep its citizens comprised of new policies and to provide opportunities for citizens to comment on those policies. However, maintaining a Facebook or any other social media account is not a function that is traditionally or exclusively attributed to the state. At the end of her post to the GEN page, Governor Norton wrote that she would announce the new immigration policy post at a press conference later that day and the new Executive Order was on the official Calvada government website. R. at 4. If Calvada has a requirement that the Governor have a Facebook page, that requirement is satisfied by the official, verified gubernatorial Facebook that the government maintains. R. at 30–31.

2. State Encouragement and Support

A factor in determining the adequacy of the nexus is whether the State has provided significant encouragement or support to the private entity so that the actions of the private entity can be fairly attributable to the State. *Rendell-Baker*, 457 U.S. at 839. The use of state funds and state resources are considered when determining the extent of the state's support. *Blum v. Yartesky*, 457 U.S. 991, 102 (1982); *Rendell-Baker*, 457 U.S. at 839; *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 703, 713 (E.D. Va. 2017). In both *Rendell-Baker* and *Blum*, approximately ninety percent of the funding for the entities at issue, a school and a nursing

home, respectively, came from the state. *Blum*, 457 U.S. at 1102; *Rendell-Baker*, 457 U.S. at 841. In *Blum*, the Court held that the nursing home's dependence on public funds did not make the acts of the nursing home's physicians and administrators state action. 457 U.S. at 1101. Following this reasoning, the Court in *Rendell-Baker* held that the school's significant receipt of public funds did not make the actions of school administrators state action. 457 U.S. at 841. Diverging from Supreme Court reasoning, a federal district court in Virginia held that a county official's act of blocking the plaintiff from her Facebook page constituted state action because, *inter alia*, the public official used county resources to manage the Facebook page. *Davison*, 267 F. Supp. 3d at 713–14. In *Davison*, the county official's Chief of Staff was primarily responsible for maintaining the county official's Facebook page. *Id.*

Even if Governor Norton used state funds when she deleted Mr. Wong's Facebook comment and blocked him from the GEN page, that is nevertheless not enough for a finding of state action. The Supreme Court's holdings in both *Blum* and *Rendell-Bake* show that an entity can be almost entirely funded by the State without having its actions amount to state action; it follows that Governor Norton emailing her Chief of Staff and asking him to delete Mr. Wong's comment and block him from the GEN page on a state-provided device does not make this action attributable to the state. R. at 4. While the Court of Appeals below is correct in stating that the facts in *Davison* are strikingly similar to the facts here, the court in *Davison* strayed from Supreme Court jurisprudence by placing too much weight on the use of state resources when determining that the county official engaged in state action.

C. Even if Governor Norton was acting as a public individual, her actions nevertheless do not amount to state action because they arose out of private and personal conduct.

The actions of an individual acting in a public capacity do not constitute state action if they arise out of personal circumstances. *Rossignol v. Voorhaar*, 316 F.3d 516, 524 (4th Cir. 2003). This is true even if a public official "took advantage of his or her position as a public officer." *Id*; *see also Martinez v. Colon*, 54 F.3d 980, 987 (1st Cir. 1995) (holding that an on-duty police officer was not acting under color of state law when he shot a colleague because the act arose from a personal conflict).

The court in *Rossignol* held that several off-duty sheriff deputies were acting as public individuals when they purchased an issue of a newspaper critical of the sheriff prior to an election. 316 F.3d at 519–20. In finding state action, the court focused on how the defendants' actions arose out of public, not private, circumstances. *Id.* Specifically, the court explained that when the sole intention of a public official is to quash speech that is critical of her office or when her actions are driven "by a desire for retaliation to censor future criticism along those same lines," then the public official's actions arise out of public conduct. *Id.* at 525.

Unlike *Rossignol*, the court in *Martinez* held that an on-duty police officer was not engaging in state action when he shot a fellow officer with a state-issued gun at the stationhouse because the shooting arose from private conduct. 316 F.3d at 987–88. The court found that the incident stemmed from a personal issue between the two officers and that the defendant's "status as a police officer simply did not enter into his benighted harassment of his fellow officer." *Id.* at 987; *see also Bonsignore v. City of New York*, 683 F.2d 635, 638–39 (2d Cir. 1982) (finding no state action when police officer shot his wife with a police revolver).

Looking at the factors recognized in *Rossignol* and *Martinez*, the conduct that Mr. Wong complains of—Governor Norton deleting his comment to the GEN page and blocking him—arises much more out of personal and private circumstances than public ones. Mr. Wong's comment on the GEN page was an ad hominem attack. R. at 26. His comment is as follows:

> Governor, you are a scoundrel. Only someone with no conscience could act as you have. You have the ethics and morality of a toad (although, perhaps I should not demean toads by comparing them to you when it comes to public policy). You are a disgrace to our statehouse.

R. at 32. Instead of comment on the policy and disagree with it, Mr. Wong instead attacked Governor Norton personally. His comment does not respond to her policy; rather, it is merely an attack on who she is as a person. R. at 32. Her deletion of his comment and subsequent ban from the GEN page was a response to this personal attack. R. at 26.

Furthermore, and unlike the defendants in *Rossignol*, Governor Norton's actions were not driven by a desire to suppress speech that is critical of her policies and was not motivated by retaliation. Governor Norton's actions would be analogous to the ones in *Rossignol* if she had deleted all of the critical comments on the GEN page; however, even though there were other comments critical of the immigration policy post, Governor Norton only deleted Mr. Wong's. R. at 4. For example, one constituent expressed disagreement with the policy and another said "[t]his is not a good policy." R. at 32. If Governor Norton wanted to chill all speech that was critical towards her, she would have deleted comments from all individuals that disagreed with her. Given that she only deleted the comment that attacked her as a person, her intention was not to censor speech critical of her public acts as a Governor. Like in *Martinez*, this conduct arose from personal circumstances, regardless of whether she used state resources such as the help of

her Chief of Staff and a state-issued electronic device. R. at 26. Therefore, the use of state resources is not dispositive of this being state action. Even if Governor Norton was acting in her official capacity, the action nevertheless arose from private conduct.

II. GOVENOR ELIZABETH NORTON'S IMMIGRATION POLICY POST IS CHARACTERIZED AS GOVERNMENT SPEECH AND THEREFORE DOES NOT VIOLATE BRIAN WONG'S FIRST AMENDMENT RIGHTS

Government statements do not normally trigger First Amendment protections designed to safeguard ideas, thoughts, and speech. *Walker v. Texas Sons of Confederate Veterans,* 135 S. Ct. 2239, 2245 (2015). The Free Speech Clause helps the public form opinions and then the public utilizes the political process to influence the choices of the government. *Id*. at 2246. The constitutional system maintains the opportunity for free political discussion so that the government may respond appropriately to the people. *Id.* Therefore, when the government speaks, it is not barred by the First Amendment. *Pleasant Grove City v. Summum,* 555 U. S. 460, 467–68 (2009) (stating that government could not properly function if it lacked the freedom to select the messages it wished to convey).

Government speech balances with the Free Speech Clause. *Walker,* 135 S. Ct. at 2246. An interpretation suggesting that the Free Speech Clause bars government speech would create inefficiencies and inconsistencies in the governmental system, hindering the government's ability to duly act for its constituents. *Id*. at 2246.[5] Therefore, the government does not

[5] *See Walker,* 135 S. Ct. at 2246 ("Were the Free Speech Clause interpreted otherwise, government would not work. How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization?").

unconstitutionally discriminate when it chooses to advance its own position, even if that discourages the positions of others. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). Generally, the government may promote a program, advocate a policy, or take a position because the government represents its citizens and carries out their duties on its behalf. *Walker*, 135 S. Ct. at 2246.

Furthermore, although Governor Norton characterizes the GEN page as personal for purposes of the state action analysis, she may also contend that if her actions are attributable to the state, then the Court must consider the immigration policy post as government speech for purposes of First Amendment analysis. R. at 10. This Court does not need to address whether the GEN page in its entirety constitutes government speech because the Court is specifically concerned with Governor Norton's immigration policy post. R. at 34. First, the immigration policy post is government speech. Second, even if the post is not protected by the government speech doctrine, the limited nature of the forum constitutionally allows the Governor to reasonably delete irrelevant posts outside of the scope of immigration policy post on the GEN page. Thus, the Petitioner respectfully requests that this Court reverse the decision below.

A. The immigration policy post qualifies as government speech because the post communicates a government message, is closely identifiable with the government, and the government controls the message.

When the government speaks, it is not obligated to include or publish the dissenting views of those who oppose its position. *Walker*, 135 S. Ct. at 2239. Government speech allows the government to function for the benefit of its citizens and holding otherwise would render numerous government programs constitutionally suspect under the First Amendment. *Id.* at 2247; *see also Lamb's Chapel v. Center Moriches Union Free School Dist*, 508 U.S. 384, 394 (1993) (stating that imposing a requirement of view-point neutrality on government speech

would be paralyzing). A government expression becomes protected government speech when: (1) the government traditionally uses the medium to convey government messages; (2) the speech is closely identifiable with the government; and (3) the government maintains direct control over the messages on the medium of expression. *See Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017) (citing *Walker*, 135 S. Ct at 2246). The fact that private parties design or propagate a message does not extinguish the governmental nature of the message or create a government-sponsored forum. *Walker*, 135 S. Ct. at 2251. The government must exercise final authority over the medium and expression for the expression to be considered government speech; the government must act as the proprietor in managing its internal operations. *Id.* at 2242.

First, a government expression becomes protected speech when the government traditionally uses the medium to convey government messages. *Id.* at 2247; *Matal*, 137 S. Ct. at 1760. The Supreme Court determined that both monuments and license plates communicate government messages. *Walker*, 135 S. Ct. at 2247. The construction of a monument conveys government thoughts or instills feelings in those seeing the structure. *Id.*; *see also Pleasant Grove*, 555 U.S at 470 (stating that governments have used monuments to speak to the public). Similarly, license plates include government slogans, characteristics attributable to the government, and government-sponsored emblems. *Walker*, 135 S. Ct. at 2248. However, the Supreme Court notes that items such as trademarks have not been traditionally used to convey a government message. *Matal*, 137 S. Ct. at 1760.

Second, a government expression becomes protected speech when the speech and medium is closely identifiable with the government. *Walker*, 135 S. Ct. at 2248. In *Walker*, the Court stated that the governmental nature of license plates was clear because

> The State places the name "TEXAS" in large letters at the top of every plate. Moreover, the State requires Texas vehicle owners to display license plates, and every Texas license plate is issued by the State. Texas also owns the designs on its license plates, including the designs that Texas adopts on the basis of proposals made by private individuals and organizations. And Texas dictates the manner in which drivers may dispose of unused plates.

Id. In *Walker*, the speech is distinctly identifiable with the government because of the presence of the state name on the medium, the state requirement to display a license plate on every car, and because only the state issues license plates. *Id.* at 2249.

Third, the government must effectively control the message. *Walker*, 135 S. Ct. at 2249. When the government controls, approves, views, and limits the messages, it maintains direct control over the message. *Id.*; *see Matal*, 137 S. Ct. at 1670 (reaffirming that Texas had direct control over the messages conveyed on the license plates unlike the level of control the government had on the trademarks). Because Texas created the instructions for submitting a license plate and maintained final approval authority over the selection, Texas demonstrated direct control over the messages conveyed. *Walker*, 135 S. Ct. at 2249; *see also Pleasant Grove*, 555 U.S. at 473 (finding that because the city government selected the monuments, they held control over the message). Finally, private parties taking part in the creation of the message does not remove the governmental nature of that message. *Walker*, 135 S. Ct. at 2249. For example, a person who displays a message on a Texas license plate likely intends to convey to the public that the government endorsed that message; otherwise the person could have displayed the message on a bumper sticker through private speech. *Id; see also Johanns v. Livestock Mktg.*

Ass'n, 544 U.S. 550, 562 (2005) (holding that the government can still rely on the government-speech doctrine when a private party develops the message).

Here, Governor Norton's immigration policy post is protected by the government speech doctrine. First, like in *Walker* and *Pleasant Grove*, the government traditionally uses the GEN page, in addition to the official Governor of Calvada Facebook page, as a medium to convey government messages. Similar to license plates in *Walker* and monuments in *Pleasant Grove*, the Governor uses the GEN page as a medium to convey government messages when she makes announcement about the state flag, state budget negotiations, and the legislature's proposals. R. at 25. The GEN page, as a medium to convey government messages, is more akin to license plates in *Walker* and monuments in *Pleasant Grove* than trademarks in *Matal* because trademarks do not traditionally hold characteristics attributable to the government. Furthermore, Governor Norton states in her affidavit that she used the GEN page to post thoughts on the news and national events, while also using the page to keep Calvadans aware of the actions her administration was taking. R. at 25, 31. Therefore, traditionally, the State of Calvada utilizes the GEN page as a medium to convey government messages.

Second, a government expression becomes protected speech when the speech and the medium are closely identifiable with the government. Here, both the immigration policy post and the GEN page are closely identifiable with the government. The fact that the Governor posted the policy on a page titled "Governor Elizabeth Norton," indicates that the page is closely identifiable with the government. R. at 25. Governor Norton, who is identified as the Chief Executive of the State of Calvada on the GEN page, posted the policy. R. at 10, 31. Furthermore, the title of the immigration policy post itself, "New State Policy on Immigration Law Enforcement," closely identifies the government. R. at 25, 31. This is similar to the license

plates in *Walker* which displayed the text "TEXAS" boldly near the top of the plate. In Walker, Texas monitored, maintained, and recorded every license plate issued by Texas—here, similarly, government officials maintain and monitor the GEN page. R. at 3, 19.

Third, the government must control the message. The Governor and her staff—all of whom are state officials—control the messages conveyed on the immigration policy post. R. at 3. In particular, the Director of Public Security, the Governor's Chief of Staff, the Social Media Director, and the Governor herself all monitored the replies on the immigration policy post. R. at 18, 20, 22. Generally, the Director of Public Security regularly monitors all of Governor Norton's social media accounts to identify and address potential safety threats. R. at 19. Furthermore, the Social Media Director has direct access to sign into the page and has the authority to delete comments, block users, and accept subscribers. R. at 20, 21. Like in *Walker* and *Pleasant Grove* where the government maintained final approval authority over license plates and monuments, the Governor and other state officials have the ability to make a final approval on any comment posted on the GEN page and the immigration policy. R. at 20, 21.

Even though a private party, Mr. Wong, posted his separate opinion on the immigration policy post, the Court has held that a private party's interjection does not remove the governmental nature of the post. Therefore, Mr. Wong's ad hominem attack does not impact the government speech analysis and the Fourteenth Circuit erred in relying on *Matal*. 137 S. Ct. at 1744. In *Matal*, the Court held that privately created trademarks submitted for government review are not government speech because the government did not create or dream up the registered trademarks. *Id.* at 1758. However, a trademark becomes automatically registered once it meets statute-based, viewpoint-neutral requirements and cannot be removed from the register without formal processes. *Id.* Trademarks may also function without government

control, so long as it is valid. *Id.* at 1752. *Matal* is different than *Walker* because trademarks must meet the statutorily mandated, view-point neutral requirement to become automatically registered and may circumvent a government review process entirely. *Id*. In *Matal*, the government did not require the same level of governmental control over the content like in *Walker*, where the government was required to review each submitted license plate design. *Walker*, 135 S. Ct. at 2249.

Here, the amount of government control over the speech is more like *Walker* than *Matal*. High-ranking government officials control the GEN page and determine the content that is appropriate for the page. R. at 15. Each time a user posts to the GEN page, the government reviews the content users have posted. R. at 15. Like in *Walker* and unlike in *Matal*, when the government has more control over the private parties' interjection, the government expression is protected by the government speech doctrine. Here, the Governor and her staff is involved in controlling the message on a medium that the Governor has used to convey government messages. R. at 25. The immigration policy post qualifies as government speech because the post communicates a government message, the post is closely identifiable with the government, and the government controls the message. Therefore, the Petitioner respectfully requests that this Court reverse the decision of the Fourteenth Circuit.

B. Governor Norton did not open a forum for speech on the GEN page because Facebook is a privately-owned medium with security settings that does not demonstrate traditional public characteristics of a park or town hall and even if it did, the immigration policy post is limited enough to exclude ad hominem attacks.

Even if the immigration policy post is not protected by the government speech doctrine, the limited nature of the forum constitutionally allows Governor Norton to delete Mr. Wong's ad hominem attack. A traditional forum must be completely and intentionally open to the public and devoted to assembly and debate. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460

U.S. 37, 45 (1983); *see Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989) ("[T]he city commission designated their meeting a public forum when the commission intentionally opened it to the public and permitted public discourse on agenda items."). While the Supreme Court identifies the importance of social media, the Supreme Court has not yet held that Facebook is a traditional public forum. The government may reasonably control speech in a limited public forum. *See Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 807 (1985) (holding that excluding groups from a government charity campaign was reasonable to ensure the appearance of the government); *Perry*, 460 U.S. at 45–46. Because GEN page is not a traditional open forum, Governor Norton permissibly and reasonably deleted Mr. Wong's ad hominem attack.

A "traditional" or "open, public forum" is a place with a long tradition of freedom of expression such as a public park or a street corner. *See Perry*, 460 U.S. at 45 (citing *Hauge v. CIO*, 307 U.S. 496, 515 (1939) (finding that streets and parks are immemorially held in trust for public use to communicate free thoughts between citizens)). The government may impose content-neutral time, place, and manner restrictions in a traditional public forum, subject to constitutional strict scrutiny. *Perry*, 460 U.S. at 45. The Constitution also protects speech in forums that have similar characteristics as traditional forums. *See Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (holding that university meeting facilities constituted an open forum); *City of Madison Joint Sch. Dist. v. Wisconsin Pub. Emp't Relations Comm'n*, 429 U.S. 167, 179 (1976) (holding that the school board meeting constituted an open forum); *see also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (holding that a municipal theater became an open forum when it solicited plays from the public).

However, the Supreme Court governs nontraditional public forums using different standards. *Perry*, 460 U.S. at 46. Within this category, the government "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable." *Perry*, 460 U.S. at 45; *see also Rust*, 500 U.S. at 194 (stating that the government is not constitutionally required to support or select programs that encourage competing ideologies). The government creates a limited public forum for speech when it opens an otherwise nonpublic forum, but limits the expressive activity to certain kinds of speakers or discussions. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (holding that when a state establishes a limited public forum, the State is not required to allow persons to engage in every type of speech); *Bowman v. White*, 444 F.3d 967, 975–76 (8th Cir. 2006); *see also Travis v. Owege-Appalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir. 1991). A government may seek to justify deletion of a post on the grounds that it was outside of the scope of any limited forum created. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (stating that a university opened a limited public forum when it limited events to only those which pertained to the welfare of the community); *Bowman*, 444 F.3d at 976.

While the Court recognizes the value of speech on social media, the Supreme Court has not yet held that Facebook constitutes a traditional public forum. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (holding that social media has become an important place for communications of all kinds). *But see Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013) (finding that liking a campaign page on Facebook qualifies as speech). Recognizing Facebook as a traditional public forum would extend First Amendment protections to private conversations. For example, a shopping mall has characteristics similar to an open forum—both are large spaces and include open areas for the public to freely enter and speak. Yet, recognizing

a shopping mall as a public forum would too broadly protect private speech within a privately-owned shopping mall. Similarly, the Supreme Court does not consider a train platform to be a public forum. While accessible to the public, the Supreme Court and the First Amendment do not seek to protect these types of private conversations.

Generally, reasonable government oversight is necessary to preserve social media websites as a forum. *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 703, 719 (E.D. Va. 2017). A government official only violates a user's First Amendment rights when she asserts limitations on social media that are unreasonable. *Id*. In *Davison*, a government official violated a user's First Amendment rights after the government official asked for *any* criticism on her social media page and then banned a series of a user's posts criticizing that official and her government. *Id*. at 717. The court held that the government official violated the user's First Amendment policy only under the specific circumstances presented in the case, upheld the need for neutral social-media policies, and stressed the importance of government oversight stating that ". . . a degree of moderation is necessary to preserve social media websites as useful forums for the exchange of ideas . . . ." *Id*. at 719.

The GEN page is not a traditional open public forum. Facebook is unlike a street, intersection, movie-theater that solicits plays from the public, school classroom, or a public park. Facebook has not been recognized by the Supreme Court as a public forum. Furthermore, there are consequences to formally recognizing Facebook as a public forum— broad categories of private speech would be protected by the First Amendment. Posts on Facebook do not require a formulated agenda typically required at public town hall meetings like those mentioned in *Jones*. The Supreme Court protects speech at public forums in cases like *Perry* and *Jones* because traditional public forums encourage opinions and perspectives that are necessary to the

democratic process. Posts and comments on Facebook also may not relate to one specific issue geared towards the benefit of the community; rather, an individual may post whatever he or she wants—the post may be irrelevant, harmful, not productive to discourse, and may even be threatening. [6] R. at 13.

Furthermore, social media platforms such as Facebook are not as open or accessible as public parks and town hall meeting spaces. Facebook features sophisticated security measures that allow any administrator to delete comments or block users on a page even if the page is public. R. at 13, 14. A Facebook user must still actively "like" or subscribe to a page in order for its updates to be visible on his newsfeed. R. at 13. Unlike a park or street corner a community member may just walk by, a Facebook user will not automatically see or be invited to participate in any discourse unless that user actively seeks out the public page. R. at 13. Furthermore, not everyone has equal access to internet. Where someone may be more inclined to participate in conversation at a park or local library because participation is free, participating in Facebook dialogue is not. An individual must have the ability to access the internet to engage in these discussions.

Furthermore, Mr. Wong's ad hominem attack fell outside the scope of any type of limited forum created by the Governor. Here, the deletion of Mr. Wong's post was reasonable in light of

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[6] *See also* Thomas Wheatley, *Why Social Media is Not a Public Forum*, THE WASHINGTON POST (Aug. 4, 2017), https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2017/08/04/why-social-media-is-not-a-public-forum/?utm_term=.ae48bffcb5bd ("There is another reason, however, *Packingham* cannot stand for the proposition that social media is a public forum warranting First Amendment protection. If the contrary were true, Facebook's own terms of use and Community Standards would violate the First Amendment. No public forum—traditional or designated—could ban, for example, "hate speech," speech by people under the age of 13, speech by a convicted sex offender or speech that is "misleading, malicious, or discriminatory," as Facebook does. Facebook even reserves the right to "remove certain kinds of sensitive content or limit the audience that sees it," and provides users the unqualified ability to "avoid distasteful or offensive content" by unfriending, blocking and even reporting other users.").

the purpose the Governor's immigration policy post served. Generally, the purpose of the immigration policy post was to inform Calvada citizens of a change in policy. R. at 14, 15. Governor Norton made clear that the government would publish the final Executive Order on a government-affiliated website. R. at 15, 16. The immigration policy post was a notification—Calvada leadership, including the Governor, already finalized the discussion and committed state resources by the time of the posting. R. at 3. Therefore, the post itself did not encourage public comment to gain perspective; rather, it only notified the community of an already established and determined plan. R. at 3. Furthermore, unlike in *Davison* where the government official opened herself to all types of criticism, Governor Norton did not open up the immigration policy post to any criticisms about her, but rather limited the post to the immigration policy itself. R. at 3. Governor Norton did not delete two other posts specifically critical of the immigration policy or any posts that praised the policy. R. at 39. Instead, Mr. Wong's post is an ad hominem attack unrelated to the immigration policy post—this deletion is permissible because Mr. Wong attacked Governor Norton's fitness to serve, which is unrelated to the immigration policy post. R. at 16. Governor Norton did not open a forum for speech because Facebook is a private social media platform that does not demonstrate traditional public characteristics of a park or town hall and even if she did, the forum is limited enough to exclude ad hominem attacks. Therefore, the Petitioner respectfully requests that this Court reverse the decision of the Fourteenth Circuit.

CONCLUSION

Petitioner respectfully requests that this Court reverse the judgment of the Fourteenth Circuit Court of Appeals and reinstate the decision of the district court.

Respectfully Submitted,

s/o Team 18
Attorneys for Petitioner

CERTIFICATE OF SERVICE

We, attorneys for Petitioner, certify that on January 31, 2018, have served upon the Respondent a complete and accurate copy of this Brief for Petitioner by placing a copy in the United States Mail, sufficient postage affixed and properly addressed.

Date: January 31, 2018

s/o Team 18
Attorneys for Petitioner

BRIEF CERTIFICATE

Team 18 certifies that the work product contained in all copies of Team 18's brief is in fact the work product of the members of Team 18 only; and that Team 18 has complied fully with its law school's governing honor code and that Team 18 has complied with all Rules of the Competition.

s/o Team 18
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