NO. 17-874

IN THE

Supreme Court of the United States

ELIZABETH NORTON,
IN HER OFFICIAL CAPACITY AS GOVERNOR, STATE OF CALVADA,
Petitioner,

v.

BRIAN WONG,
Respondent.

On Writ of Certiorari to

the United States Court of Appeals

for the Fourteenth Circuit

BRIEF FOR PETITIONER

TEAM 19

QUESTIONS PRESENTED

1. Whether Governor Norton engaged in state action by deleting an individual's post on her personal Facebook page and banning him from posting further comments on her page; and

2. Whether Governor Norton's actions constituted government speech or, in the alternative, the removal was viewpoint neutral and reasonable in light of the limited public forum.

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The opinion of the Fourteenth Circuit is reported at No. 17-874. The opinion of the United States District Court for the District of Calvada is reported at No. 16-CV-6834.

STATEMENT OF JURISDICTION

The Fourteenth Circuit entered its judgment on November 1, 2017. The Petitioner timely filed a petition for writ of certiorari, which this Court granted. Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In January 2008, Elizabeth Norton created a Facebook account as a private citizen in order to connect with others. Norton Aff. ¶ 6. Three years later, she created a separate Facebook page entitled "Elizabeth Norton" and posted personal and business announcements on many different topics such as her daughters soccer team and her coffee roasting facility. Jt. Stip. ¶ 8. Only her connections could view the contents of the page. *Id*; Norton Aff. ¶ 7.

Facebook is a social media platform with more than 167 million daily users in the United States and Canada. Jt. Stip. ¶ 3. Any user with an account can create a page, thus enabling individuals, politicians, bands, businesses, and others to connect with other Facebook users. *See id.* at ¶ 3-5. Individuals with pages can delete posts and comments on their page and ban users from posting. *Id.* at ¶ 6. A banned account cannot publish to the page, like, comment, or message the page. *Id.* However, banned accounts can still view the page and share content. *Id.* Norton has always abided by Facebook rules and terms of service. Norton Aff. ¶ 16.

On January 11, 2016, Norton was inaugurated as the Governor of Calvada. *See* Jt. Stip. ¶ 9. The next day, she renamed her Facebook page to "Governor Elizabeth Norton" (hereinafter "GEN page") and set the page's privacy settings to "public." *Id.* Governor Norton and her staff administer and post on the page. Mukherjee Aff. ¶ 6. The page is primarily administered after working hours and while at home. *Id*. Governor Norton and her staff at times used their state-issued phones to post on the GEN page. Mukherjee Aff. ¶ 4; Mulholland Aff ¶¶ 8-12; Norton Aff. ¶ 15. All state employees are required to sign an agreement in which they agree to use their state-issued phones for "all communications that in any way touch on State of Calvada business or other matters of concern to the state, including [their] personal safety." Escalante Aff. ¶ 4.

Created in 2010, the State of Calvada separately maintains an official page for its governor, entitled "Office of the Governor of Calvada." *See id.* at ¶ 7. A link to the State's Facebook page can be found on the governor's official website. *Id.* Governor Norton's staff manages the state's website and Facebook page by posting on the page, and responding to postings on the governor's behalf. *Id.* The Calvadan Constitution does not compel its governor to maintain a social media account or to use social media. *See* Norton Aff. ¶ 14.

Governor Norton used her GEN page to update her connections on government issues, family life, and thoughts on news and national events. Norton Aff. ¶ 10. For example, she asked constituents for input on a new state flag and road conditions. Jt. Stip. ¶ 10. She also posted about her birthday and her daughter's soccer team. *Id.* She intends to use her personal page after her public service has ended. Norton Aff. ¶ 14.

On March 5, 2016, Governor Norton posted the New State Policy on Immigration Law Enforcement ("immigration policy post") on her GEN page, reproduced in relevant part below:

New State Policy on Immigration Law Enforcement

> Members of my cabinet, other senior advisors, the leadership of the Calvada Senate and House of Delegates, and I have now concluded an extensive discussion of the question whether state law enforcement officials should cooperate with federal law enforcement agencies in enforcing the immigration laws of the United States [. . .]
> You may find the Executive Order and more information about our new policy at https://www.immigrationenforcementinitiative.calvada.gov. As always, I welcome your comments and insights on this important step.

Jt. Stip. ¶ 12. Within minutes of reading the post, respondent, Brian Wong, published his response in a comment from his self-titled Facebook account:

> 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.

Jt. Stip. ¶ 13.

That evening, Governor Norton noticed respondent's remark and interpreted it as an *ad hominem* attack unrelated to her immigration policy announcement and unresponsive to her invitation for constituent insights related to the post. *See* Norton Aff. ¶ 13. At 9:45 p.m., Governor Norton emailed her Senior Media Director, Sanjay Mukherjee, at his home and asked him to delete the post and restrict respondent's ability to post. *See* Jt. Stip. ¶ 14; Mukherjee Aff. ¶ 7. She reasoned that no one "capable of such an *ad hominem* personal attack that was not connected to the subject matter of [her] post should be able to attack [her] like that on [her] Facebook page." Norton Aff. ¶ 13. Governor Norton's Director of Public Security, Nelson Escalante, monitored replies on the GEN page but did not flag respondent's comment as a security threat. *See* Escalante Aff. ¶ 7. The immigration policy post received more than thirty comments, and Governor Norton did not delete any other comment. Jt. Stip. ¶ 16. The remaining comments included the following critical remarks:

> I disagree with the new Calvada immigration enforcement policy. It will harm our state's economy. (posted at 4:55 p.m.)
>
> This is not a good policy. It will punish many hard-working people and their families. (posted at 6:12 p.m.)

Jt. Stip. ¶ 16. Respondent realized that his reply was removed and emailed Governor Norton shortly thereafter. Wong Aff. ¶ 11. Respondent did not receive a response and remains precluded from posting on the GEN page. *Id.* at ¶ 12.

The District Court for the United States District of Calvada held that Governor Norton's actions were attributable to the state. It also determined that Governor Norton's Facebook page constituted "government speech" and found that her actions did not violate respondent's First Amendment Rights. *See* Record on Appeal (hereinafter "R.") 1-12. The Fourteenth Circuit

affirmed that Governor Norton's actions constituted state action but reversed the holding that Governor Norton's immigration policy post constituted government speech.

SUMMARY OF THE ARGUMENT

The Fourteenth Amendment Equal Protection Clause does not apply merely to private conduct. U.S. Const. amend. XIV, § 1. For the state to be responsible for an individual's private conduct, the actor must act "under the color of state law." *West v. Atkins*, 478 U.S. 42, 49 (1988). Acts of individuals are "under the color of state law" if the private actor exercises a traditional and exclusive state function. *Jackson v. Metro. Edison Co.*, 419 U.S. 349, 353 (1974). Here, Facebook is not a traditional or exclusive state function because it is relatively new medium, can be used by individuals outside of government, and its use is not mandated by law.

If not a traditional or exclusive state function, acts by public employees fall under the color of state law only when they are acting in their official capacity or while exercising their responsibilities pursuant to state law. In other words, the defendant must have "exercised power made possible only because the wrongdoer is clothed with the authority of state law." *West*, 478 U.S. at 50. Governor Norton's actions were not under the color of state law because she did not use her personal Facebook page in her official capacity or in exercising responsibilities pursuant to state law. Acting as a public official is insufficient to establish state action and Governor Norton acted as any private citizen would. State resources did not facilitate her actions and her policy announcement occurred in an informal setting not attributable to the state.

Even if Governor Norton's conduct is attributable to the state, she did not violate the First Amendment when she removed an *ad hominem* and off-topic comment on her immigration policy post because her Facebook Page falls within the ambit of government speech, or, at the

very least, constitutes a limited public forum where the removal was reasonable in light of the forum and viewpoint neutral. *See* U.S. Const. amend. I.

The immigration policy post on Governor Norton's Facebook page constitutes government speech where (1) history indicates that the government has "long used" the medium to convey messages to the public; (2) the post is "closely identified in the public mind with the state"; and (3) Governor Norton exerted "direct control" by "exercising final approval authority" over the post. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2247 (2015) (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 470-71, 473 (2009)). Even though Facebook is a relatively new medium, the post nonetheless qualifies as government speech where this Court has found that the first factor is not dispositive.

The Court's recent holding in *Matal v. Tam* does not disturb a finding of government speech in the instant case because it relates primarily to commercial speech and the niche areas of trademark and copyright law. Importantly, although the Court held that federal trademarks did not constitute government speech, the Court applied the *Walker* factors. Furthermore, First Amendment jurisprudence, considered collectively, underscore the importance of government speech and counsel in favor of categorizing Governor Norton's immigration post as such.

If the Court does not accept that the immigration post falls within government speech, Governor Norton's actions are nevertheless constitutional because her Facebook Page is a limited public forum. In removing the *ad hominem* and off topic remark, Governor Norton acted reasonably because the comment served merely to distract the audience from the substance of her post, and her actions were viewpoint neutral because she maintained all remaining remarks that criticized the policy.

ARGUMENT

I. Governor Norton engaged in private conduct, not subject to the Fourteenth Amendment, by deleting Respondent's Facebook comment and banning him.

Governor Norton did not violate the Fourteenth Amendment Equal Protection Clause because it "erects no shield against merely private conduct." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961); U.S. Const. amend. XIV, § 1. The state must become involved in an individual's action for there to be any claim under the Equal Protection Clause. *Burton*, 365 U.S. at 722. "Careful adherence to the 'state action' requirement" is essential because it "preserves an area of individual freedom by limiting the reach of federal law and avoids the imposition of responsibility on a State for conduct it could not control." *Nat'l Coll. Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988).

For the state to be responsible for an individual's private action, the actor must act "under the color of state law." *West*, 478 U.S. at 49. Acts of an individual are considered to be "under the color of state law" if the private actor exercises a traditional and exclusive state function. *Jackson*, 419 U.S. at 353. If not a traditional or exclusive state function, acts of public employees are under the color of state law only when they are acting in their official capacity or while exercising their responsibilities pursuant to state law. *West*, 478 U.S. at 50.

A. Governor Norton's use of her personal Facebook account was not a traditional or exclusive state function.

The use of Facebook is not a traditional or exclusive state function. In *Jackson*, this Court refused to extend the exclusive state function doctrine to businesses "affected with the public interest." 419 U.S. at 353. Instead, the Court limited the bounds of traditional and exclusive state functions and excluded even a state-approved private utility monopoly. *Id*. Under this Court's precedent, the traditional or exclusive state function analysis is extremely limited and only applied

in cases where the government has established a long-standing precedent of a particular function. *See Terry v. Adams*, 345, U.S. 461 (1953) (holding that when a state delegates an element of the electoral process to private groups, they are subject to the same restraints as the state); *Marsh v. Alabama*, 326 U.S. 501 (1946) (determining that city functions, even if carried out by a company, are subject to the Fourteenth Amendment); *Evans v. Newton*, 382 U.S. 296 (1966) (recognizing a park owned by private trustees did not avoid limits of the state where it was treated as a public facility for maintenance and tax status).

The use of Facebook in this case was neither a traditional nor exclusive state function. Interacting with constituents is a common practice among politicians and has existed for some time. However, using Facebook to reach constituents is not a traditional or exclusive government function. Using the internet, social media, and Facebook specifically, is a new phenomenon. *See Packingham v. North Carolina*, 137 S.Ct. 1730, 1736 (2017) ("[T]he Cyber Age is a revolution of historic proportions, we still cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be."). Many politicians still do not use common social media platforms such as twitter. *Cf. id.* at 1735. There were 167 million Facebook users in the United States and Canada in 2016, only a small number of whom are politicians. Jt. Stip. ¶ 3. The Calvada constitution does not require its governor to maintain any social media accounts or interact with constituents via social media. Norton Aff. ¶ 14.

The United States District Court for the Eastern District of Virginia recently considered whether a public official's use of a private Facebook account could be attributed to the state. *Davidson v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, (E.D. Va. 2017). The Court did not address the threshold inquiry of whether Facebook was a traditional or exclusive state function. *Davidson*, 267 F. Supp. 3d at 712-716. The use of Facebook is not a traditional or

exclusive state function because it is not a long-standing apparatus of state conduct, can be used by private individuals, and its use is not mandated by law.

B. Governor Norton's Facebook page lacked the requisite authority to be under the color of state law.

Governor Norton engaged in private actions against which the Fourteenth Amendment affords no shield. *See Tarkanian*, 488 U.S. at 190. The determination of whether the act is merely private conduct or attributable to the state "is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). The determination of state responsibility is "necessarily fact-bound." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). A totality of the circumstances test applies and no single factor is dispositive. *See Brentwood*, 531 U.S. at 295.

To hold a state responsible for an individual's private action, the actor must act "under the color of state law." *West*, 478 U.S. at 49. To act under the color of state law, the defendant must have "exercised power made possible only because the wrongdoer is clothed with the authority of state law." *Id.* at 49. Put another way, the "state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such a significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Public employees are considered to act under the color of state law only when acting in their official capacity or while exercising their responsibilities pursuant to state law. *West*, 478 U.S. at 50.

Governor Norton's actions were not under the color of state law because she did not use the GEN page in her official capacity or in exercising responsibilities pursuant to state law. Acting as a public official is insufficient to establish state action and Governor Norton acted as any private

citizen would. State resources did not facilitate her actions and her policy announcement occurred in an informal setting not attributable to the state.

i. Actions by public officials are not attributable to the state merely because they are state employees.

Not all conduct of state officers is attributable to the state simply by virtue of their profession; officials regularly engage in conduct that is not an exercise of state power. *Patterson v. Cty. of Oneida*, 375 F.3d 206, 230 (2d Cir. 2004). Here, Governor Norton's use of the GEN page is among the "acts of officers in the ambit of their personal pursuits are plainly excluded" from state action. *Screws v. United States*, 325 U.S. 91, 111 (1945).

Unquestionably, even important public officials can engage in conduct that does not constitute an exercise of state power. *Federer v. Fephardt*, 363 F.3d 754, 759 (8th Cir. 2004) (sitting United States Representative's campaign actions were not attributable to the state) *Zherka v. DiFiore*, 412 F. App'x 345, 347 (2d Cir. 2011) (holding district attorney's phone call complaint to newspaper regarding article—which included mention of the district attorney's position—was not state action); *Smith v. Winter*, 782 F.2d 508, 512 (5th Cir. 1986) (holding that a school superintendent's initiation of an education-related recall petition was not state action). In *Van Orden v. Perry*, Justice Stevens stated, "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." *Van Orden v. Perry*, 545 U.S. 677, 723 (2005) (Stevens, J., dissenting). On the GEN page, Governor Norton regularly engages in conduct that clearly does not constitute state action such as posting photos of her children. *See* Norton Aff. ¶ 3, 10.

Here, the GEN page was not made possible as a result of Governor Norton being "clothed with the authority of state law" and therefore is not state action. *West*, 478 U.S. at 50. Governor Norton created her personal Facebook account in 2008, long before coming into office in 2012. Jt. Stip. ¶ 8. Before her inauguration, she used her Facebook page to post about family and business matters such as her daughters soccer team and her coffee roasting facility. Norton Aff. ¶ 7. She plans to keep and continue to use the same Facebook account to share information about her family, and converse with friends long after her time in office. Norton Aff. ¶ 17. After her inauguration, she added "Governor" to the name of the page and made the page more easily viewable by the public. Jt. Stip. ¶ 9. However, Governor Norton continues to post about family and interact with family and friends both publically and privately on Facebook. Jt. Stip. ¶10.[1]

An official Facebook page for the Governor of Calvada exists entirely separate from Governor Norton's personal page. *Id*. The official page was created in 2010 and transferred to Norton upon taking office. *Id*. This page has no interaction with Governor Norton's private life and is used for state-related matters. *Id*. The Calvada government website directs readers to the Calvada Governor's page, but not the GEN page. Norton Aff. ¶ 9.

ii. Governor Norton's actions comport with those of any private citizen.

Governor Norton's decision to delete respondent's comment and block him from viewing the GEN page was made possible by Facebook rules, not her authority under state law. In *Carlos*

[1] This case is distinguishable from *Davidson* on two accounts. First, in *Davidson*, "[t]he impetus for Defendant's creation of the "Chair Phyllis J. Randall" Facebook page was, self-evidently, Defendant's election to public office." 267 F. Supp. 3d at 713-714. The page was created—and solely used—for addressing county residents. *Id.* at 708. Second, in *Davidson*, the Facebook page was directly linked to the government. The page description included Randall's official County email address and phone number and implored viewers to visit the County website. *Id.* at 715.

v. Santos, the court held that the activities of an elected official were not under the color of state action because "any citizen may perform [the challenged] acts." 123 F.3d 61, 65-66 (2d Cir. 1997); *see also Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 396 (6th Cir. 2016) (holding that Ohio Republican Party did not act under the color of state law where they submitted a nomination petition that "any private citizen with standing is authorized by Ohio law" to do).

Here, Governor Norton acted in conformity with Facebook rules and in a manner that any private citizen would. She has always acted in accordance with Facebook rules and terms of service. Norton Aff. ¶ 16. Facebook rules allow users to control what stays on their page and to ban certain individuals from posting their page for any reason. Jt. Stip. ¶ 6. Therefore, when Governor Norton deleted Respondent's comment and blocked him from posting future comments, she acted in the same way that any private person, band, or business could when faced with an *ad hominem* attack posted on their page. *See* Norton Aff. ¶ 13. Acts that any private individual, unaffiliated with the government, can undertake on their own accord should not be considered under the color of state law.

iii. Governor Norton's actions were not made possible because of the use of state resources.

Mere use of state resources in any capacity does not demonstrate that Governor Norton was acting in her official capacity. *See Blum*, 457 U.S. at 1011. In *Burton*, the court held that the state is responsible where there is "state participation through any arrangement, management, funds or property." 365 U.S. at 722. However, this Court has held that such links are not dispositive of state accountability. *See Blum*, 457, U.S. at 1011. In *Blum*, the Court held that there was no state action even where over 90% of funding came from the state. *Id.* at 1011.

Here, no money or property flowed directly to Governor Norton's personal Facebook account. Governor Norton and her staffers used state-issued phones to post occasionally. Mukherjee Aff. ¶¶ 4-5; Mulholland Aff ¶¶ 8-12; Norton Aff. ¶ 15. However, the Calvadan government encouraged Governor Norton and her staffers to use state-issued phones for most of their communications for security reasons. Escalante Aff. ¶4. When receiving a state-issued phone, the user must sign a document stating that they will use the phone for any communications that could implicate the state, including for security concerns. *Id*. As the highest-ranking state official, Governor Norton primarily accesses Facebook through Calvada-issued devices to prevent hackers from accessing personal communications contained on her Facebook account. Norton Aff. ¶ 15; Escalante Aff. ¶ 4. The content of the page is generally administered outside of work hours and while at home, including the removal of Respondent's comment and his subsequent ban from posting. Mukherjee Aff. ¶ 6.

iv. The policy post occurred in an informal setting not attributable to the state.

Governor Norton's page identifies her as the governor and she uses the page to interact with constituents and announce Calvada policy. Jt. Stip. ¶¶ 8, 10. However, the fact that Governor Norton uses the page as a medium to relay information to the public does not render all actions and posts on her page attributable to the state. Public officials, and more specifically sitting politicians, make statements about policy and announce new policies under circumstances which surely are not under the color of state law. *See Johnson v. Knowles*, 113 F.3d 1114, 1117-1118 (9th Cir. 1997) (holding that a California assemblyman's policies, statements, and votes in a county republican meeting were not state actions because he acted in his capacity as a republican party member not as a California assemblyman); *Federer*, 363 F.3d at 759 (holding that campaign activities and statements of a sitting United States representative were not attributable to the state

because he acted as a candidate). A public official's decision to announce a policy in an informal setting does not retroactively convert into state action the decision about which members of the public are allowed into the event.

Here, the decision to announce the policy on Facebook should not prevent Governor Norton from blocking respondent from posting and commenting on the post any more than a democrat has the right to be in a county republican meeting or someone refusing to follow the rules has the right to be present during a campaign town hall event.

II. Government Norton's actions did not violate the First Amendment under either the government speech or the private speech theories.

Governor Norton's removal of respondent's *ad hominem* attack does not violate respondent's First Amendment rights, because the governor's post falls within the ambit of government speech. As such, the governor properly exercised her discretion in removing respondent's comment. Even assuming that the post is not government speech, the immigration policy post constitutes a limited public forum, and Governor Norton's removal of Respondent's comment was both reasonable and viewpoint-neutral, given that she merely sought to exclude the off-topic remark and left the other two comments opposing her policy on her Facebook page.

A. Governor Norton's immigration policy post constitutes government speech.

Governor Norton's immigration policy post constitutes government speech because (1) history indicates that the government of Calvada has "long used" the Facebook page to convey messages to the public; (2) the immigration policy post is "closely identified in the public mind with the State"; and (3) Governor Norton maintains "direct control" over the immigration policy post by "exercising final approval authority" over it. *See Walker*, 135 S. Ct. at 2247 (internal citations omitted). Although the *Walker* Court applied these factors, Governor Norton need not

satisfy each factor in order to prevail. *See Johanns v. Livestock Mrkg. Ass'n*, 544 U.S. 550, 560-67 (2005) (holding that beef industry promotions constituted government speech in the absence of historical evidence). Where government speech is established, the government need not include statements like respondent's off-topic, *ad hominem* attack. *See e.g.*, *Summum*, 555 U.S. at 467-68; *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000) ("the government can speak for itself").

Furthermore, the Court's holding in *Matal v. Tam* primarily concerns niche areas of law such as federal trademarks and copyright, and the First Amendment jurisprudence, more broadly, counsels in favor of including the post within the umbrella of government speech. 137 S. Ct. 1744 (2017).

i. Governor Norton's immigration policy post resembles the Texas license plates in *Walker*.

This Court has long acknowledged that "[w]hen the government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker*, 135 S. Ct. at 2245 (citing *Summum*, 555 U.S. at 467-68). Governor Norton's immigration policy post, like the license plates in *Walker*, satisfies the relevant factors for determining government speech and justifies her decision to remove the respondent's remark. In *Walker*, the Supreme Court upheld the Department of Motor Vehicles' denial of an organization's request for specialty license plates because the license plates constituted government speech. 135 S. Ct. at 2244. In so holding, the Court applied three factors from its earlier decision in *Summum* to make the ultimate finding of government speech. *Id.* at 2248-50. First, the Court considered the historical significance of the license plates and found that the plates had "long communicated messages from the state." *Id.* at 2248. Second, the license plates were "often closely identified in the public mind with the [State]." *See id.* (citing

Summum, 555 U.S. at 472). Significantly, the state placed the name "TEXAS" in large letters atop every plate and the plates were issued by the state. *See id.* Third, Texas "maintain[ed] direct control over the messages conveyed on its specialty plates." *Walker*, 135 S.Ct. at 2249. In this sense, the board exercised "final approval authority" over the license plates, which enabled the state to "choose how to present itself and its constituency." *See id.* (citing *Summum*, 555 U.S. at 473).

In light of *Walker* and *Summum*, this Court should recognize Governor Norton's immigration policy post as within the ambit of "government speech." While the government does not have a "long history" of communicating messages through Facebook, historical use is not a prerequisite for a finding of government speech. *See Johanns*, 544 U.S. at 560-67. In *Johanns*, the Court held that generic advertising by beef promoters constituted government speech without engaging in a historical inquiry or pointing to any historical evidence. Instead, the Court recognized the promotional campaign as government speech because "[t]he message of the promotional campaigns is effectively controlled by the Federal Government itself." *Id.* at 60. While Governor Norton's policy post, like the promotional beef campaign in *Johanns*, lacks a proven history of government use, the medium is nonetheless significant because it is widely used and considerably influential. Facebook reaches more than one billion users daily, including 167 million within the United States and Canada as of 2016. *See* Jt. Stip. at ¶3. Just as the *Summum* Court found it significant that government monuments "convey[ed] and ha[d] the effect of conveying a government message," here too, Governor Norton's Facebook immigration policy post constituted the announcement of a government message to Calvada constituents. *See Summum*, 555 U.S. at 472; *see also Mech v. Sch. Bd. of Palm Beach Cnty*, 806 F.3d 1070, 1076 (11th Cir. 2015) ("For example, if the school board posted a message about school closings for inclement weather on Facebook or Twitter, we would have little difficulty classifying the message

as government speech, even though social media is a relatively new phenomenon."); *Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 331 (1st Cir. 2009) (holding that the town "engaged in government speech by establishing a town website" and selecting hyperlinks to include within its website); *Page v. Lexington Cty. Dist. One*, 531 F.3d 275, 288 (4th Cir. 2008) (finding that school website and email communications to students constituted government speech).

Second, Governor Norton's immigration policy post enables the reader to identify the post with the State where it bears several indicia of the Calvadan government. Like the "TEXAS" labeled plates in *Walker*, Governor Norton affirmatively associated the state with her post "New State Policy on Immigration Law Enforcement." Leaving "little chance that observers [would] fail to appreciate the identity of the speaker," she also began the post by citing the various state government officials who worked together to create the policy (including the members of Governor Norton's cabinet, other senior advisors, Calvadan leadership within the Senate and House of Representatives). *See Summum*, 555 U.S. at 471; Jt. Stip. at ¶12. Governor Norton even included a link to the official executive order in her Facebook post. *See* Jt. Stip. ¶ 12. Taken together, these indicia leave little doubt that the readers of the immigration policy post would identify the State government as the speaker. *See Walker*, 135 S. Ct. at 2248.

Finally, like the final approval authority held by the Texas Department of Motor Vehicles Board, Governor Norton and her affiliates exert considerable control over the content of the post. Just as the state board in *Walker* possessed the authority to deny license plate designs, Governor Norton exhibited final approval authority over comments when she removed respondent's personal attack from her page. *See Walker*, 135 S. Ct. at 2249; Jt. Stip. at ¶¶ 14-15. Facebook users are likely aware of the governor's ability to monitor her posts because individual Facebook members can also edit comments on their respective posts. *See* Donald R. Lundberg & Caitlin S.

Schroeder, *Closing the Drapes: Counseling Clients About Social Media,* Res Gestae, December 2015, at 20, 21 ("Social media is dynamic; users post, repost and delete content regularly").

Given the importance of the social media platform, the strong indication that the immigration policy post represented a message from the state government, and the state's ability to exert control over the immigration policy post, Governor Norton's post satisfies the *Summum* factors, as applied in *Walker*, and constitutes government speech.

ii. Governor Norton's post is distinguishable from the Court's holding in *Matal*.

This Court's recent decision in *Matal v. Tam* is inapposite to Governor Norton's immigration policy post because the decision primarily concerns commercial speech and the niche areas of trademark and copyright law. In *Matal*, the Court invalidated a broad provision of the Lanham Act, which prohibited registration of trademarks that may "disparage. . . or bring into contemp[t] or disrepute" any "persons, living or dead, institutions, beliefs, or national symbols." *See* 137 S. Ct. at 1753. The trademark application at issue involved an Asian American lead singer who sought to trademark his band name, "The Slants." *Id.* at 1754. While the term was considered historically derogatory, the lead singer chose the moniker in an attempt to "reclaim" the term. *Id.* In abrogating the Act's provision, this Court cited the expansive impact that would result if the government were allowed to deny the singer's trademark application, "[t]here is also a deeper problem with the argument that commercial speech may be cleansed of any expression likely to cause offense. The commercial market is well stocked with merchandise that disparages prominent figures and groups." *See id.* Additionally, the *Matal* Court emphasized that a "worrisome" consideration of extending the government speech doctrine to federal trademarks "concern[ed] the system of copyright registration." *See Matal*, 137 S.Ct. at 1760.

Governor Norton's Facebook post, in contrast, does not involve commercial speech and

would not implicate the wide array of merchandise at issue in *Matal*. Furthermore, the relatively new social media format of concern here is quite distinct from the copyright process and requires separate consideration. *See also Packingham*, 137 S.Ct. at 1736 ("[The] Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be."). Importantly, the *Matal* Court recognized potential difficulties resulting from an undue limitation of government speech where it noted, "it is not easy to imagine how government could function if it were subject to the restrictions that the First Amendment imposes on private speech." *See id.* at 1757 (quoting *Summum*, 555 U.S. at 468 (internal citations omitted)). Here, First Amendment scrutiny would impede the government's ability to function. Accordingly, this Court should not apply *Matal*'s narrow holding, as it is inapposite to Governor Norton's circumstances.

iii. First Amendment jurisprudence underscores the importance of government speech and justifies Governor Norton's actions.

This Court's precedents, considered collectively, counsel in favor of labeling Governor Norton's immigration policy post as government speech. Indeed, several government speech decisions have underscored the important role that government speech plays in enabling the state to launch and execute its initiatives. *See Walker*, 135 S.Ct. at 2246; *Summum*, 555 U.S. at 486 ("Indeed it is not easy to imagine how government could function if it lacked this freedom."). However, this Court has explained that the electoral process serves as an important check on any unpopular uses of the government speech doctrine. *See Southworth*, 529 U.S. at 235 ("When the government speaks . . . it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials could later espouse some different or contrary position."); *see also Walker*, 135 S. Ct. at 2245. This Court recognizes that the

government should be able to relay messages without entertaining off-base remarks like respondent's comment. In *Walker*, this Court gave the example of a government recycling initiative, and asked how the government could possibly establish a successful recycling program if it were forced to include a "long plea from the local trash disposal enterprise demanding the contrary." 135 S. Ct. at 2246. Here too, respondent's comment served to distract other readers from the policy at stake and personally attacked Governor Norton. In doing so, it hindered discussion of the immigration policy.

Because the immigration policy post falls within the ambit of government speech, consideration of whether the Facebook page constituted a public forum is obviated. *See Matal*, 137 S. Ct. at 1757 ("When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause *does not require* government to maintain viewpoint neutrality when its officers and employees speak about that venture.") (emphasis added); *Walker*, 135 S. Ct. at 2250 ("Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply."). Even if the Court finds that respondent's *comment* is not government speech, the *ad hominem* attack was still properly removed because private parties taking part in "the design and propagation of the message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider." *See Walker*, 135 S. Ct. at 2251.

B. Governor Norton's GEN page is a limited public forum, and her actions are nonetheless justifiable as reasonable and viewpoint-neutral.

Even if the immigration policy post is not recognized as government speech, Governor Norton's actions are nonetheless valid because her Facebook page is a limited public forum. This

Court has protected the government's ability to regulate speech in a limited forum so long as the restrictions imposed are reasonable and view-point neutral. *See e.g.*, *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 808 (1985); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 893 (1995); *Summum*, 555 U.S. at 470. Accordingly, Governor Norton properly removed respondent's remark from her immigration policy post because her Facebook page constitutes limited public forum, and the deletion of the offensive and off-topic remark was reasonable and viewpoint-neutral.

i. Governor Norton's GEN Page is a limited public forum.

Governor Norton created a limited public forum when she asked constituents to provide commentary specifically on government-related issues. A limited public forum exists "when government opens a nonpublic forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects." *Travis v. Oswego-Apalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir.1991); *see also Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 71 n.7 (1983) ("A public forum may be created for a limited purpose such as use by certain groups, or for the discussion of certain subjects.") (internal citations omitted). A forum need not exist physically to receive constitutional protection and can exist in a "metaphysical [over a] spatial or geographical sense" where "the same principles are applicable." *See Rosenberger*, 515 U.S. at 830.

Governor Norton's created the limited public forum of her Facebook page to "interact with the public on matters of social and political concern." Jt. Stip. at ¶ 9. Indeed, when she published the immigration policy post she made a direct appeal for constituents to share their comments and insights related to the policy. *Id.* at ¶12.

Governor Norton's Facebook page is analogous to the limited public forum recognized in *Davidson v. Plowman*. The U.S. District Court for the Eastern District of Virginia held that a

commonwealth's attorney, James Plowman, properly removed plaintiff's Facebook comment because his page constituted a limited public forum and the comment removal was both reasonable and viewpoint neutral. *See* 247 F.Supp.3d 767, 770-71 (E.D. Va. 2017). In *Plowman*, the court recognized that the commonwealth's attorney maintained a Facebook page to communicate with his constituents. *See id.* at 772. Plowman held "decision making authority" over his Facebook page and the purpose of his Facebook page was to "present matters of public interest in Loudoun County." *See id.* The attorney also adhered to the county's social media policy, which encouraged constituents to "submit . . . questions, comments and concerns through Loudoun County's social media websites" but retained the ability to remove submissions that violated policy rules, such as when comments were "clearly off topic." *See id.* (internal citations omitted). The court ultimately agreed that while the plaintiff's comment intended to place political pressure upon the commonwealth's attorney, it was nonetheless off-topic and properly removed. *See id.* at 773. In a related case, *Davidson*, the court held that the Commonwealth Chair, Phyllis J. Randall, violated defendant's First Amendment rights when she deleted his offending comments in response to her social media request "to hear from ANY Loudoun citizen on ANY issues, request, criticism, compliment, or just [their] thoughts." 267 F. Supp. 3d at 708 (emphasis in original). The deletion and subsequent decision to ban the plaintiff amounted to viewpoint discrimination because "speech may not be disfavored by the government simply because it offends." *Id.* at 717 (citing *Matal*, 137 S. Ct. at 1763). Importantly, the *Davidson* court declined to designate the exact type of forum created by the chair because the record reflected clear viewpoint discrimination and "viewpoint discrimination is prohibited in all forums." *See id*. (internal citations omitted).

Governor Norton's actions, like the commonwealth attorney's in *Plowman*, are constitutionally sound because her Facebook page constituted a limited public forum, thus

enabling her to legitimately remove the off-topic remark. Unlike the expansive appeal for "ANY" comment, Governor Norton made a direct appeal to constituents and requested their comments and insights on her immigration policy post. *See* Jt. Stip. at ¶ 12 ("as always, I welcome your comments and insights on *this* important step.") (emphasis added). Although the record does not reflect that Governor Norton followed any particular social media policy, her specific appeal within the immigration policy post focused upon soliciting comments related to the initiative. Her Facebook page, like the page in *Plowman* and unlike the overly broad appeals for "ANY" feedback in *Davidson*, made limited appeals related to specific initiatives. Respondent's off-topic and *ad hominem* attack referring to Governor Norton as a "scoundrel" stood in stark contrast to the other direct and responsive comments. *See* Jt. Stip. at ¶ 13. Furthermore, constitutional protection applies only to the expressive activity permitted within the forum, which renders respondent's offensive and off-topic remark unprotected by the First Amendment. *See Travis*, 927 F.2d at 692.

Separately, the GEN page closely resembles a town hall because constituents can comment directly upon specific initiatives, and courts have acknowledged that town hall meetings constitute limited public forums. *See e.g., Rowe v. City of Cocoa*, 358 F.3d 800, 802 (11th Cir. 2004) (finding that a city commission meeting was a limited public forum); *Galena v. Leone*, 638 F.3d 186, 198-99 (3d Cir. 2011) (holding that county council meetings constituted limited public forums.). For example, in *White v. City of Norwalk*, the Ninth Circuit held that city council meetings, once open to public participation, were limited public forums. 900 F.2d 1421, 1425 (9th Cir. 1990). The court also held that the council could regulate the time, place, and manner of speech as well as the speech's content in a limited public forum, so long as the restrictions were reasonable and viewpoint neutral. *See id.* Here, Governor Norton's post was the functional equivalent of a town hall meeting, where constituents could comment on a specific policy initiative, albeit online.

Similarly, if the court believes, as the Fourteenth Circuit did, that Governor Norton's personal Facebook page created a public town hall, the classification of limited public forum is still appropriate.

ii. Governor Norton justifiably removed respondent's off-topic comment.

Governor Norton acted reasonably in removing respondent's crude remark from her Facebook post and restricting his access to her page. Given that the governor's Facebook page constitutes a limited public forum, Governor Norton could only remove the respondent's comment if the decision to do so was "reasonable in light of the forum" and viewpoint-neutral. *See Rosenberger*, 515 U.S. at 829, 831 ("Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set.").

Governor Norton's decision to remove respondent's remark is justifiable because it was non-responsive to her request for comments and insights related to the immigration policy. Minutes after reading Governor Norton's post, respondent published the following comment:

> 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.

Jt. Stip. ¶ 13. Rather than respond to the governor's post with constructive criticism, respondent launched an intensely personal attack on Governor Norton, her moral character, and her ability to hold office. Even if a fraction of respondent's remark is in reaction to the immigration policy post, the entire comment serves to detract from the limited and otherwise focused discussion of the policy itself (and not its creator). *See id.* ("Governor, *you* are a scoundrel . . . *You* have the ethics and morality of a toad. *You* are a disgrace to our statehouse.") (emphasis added). This hostile language is misplaced within a limited public forum focused on improving the community and

serves only to disrupt otherwise productive conversation. This Court has established that First Amendment freedom of expression "does not guarantee persons the right to communicate their views 'at all times or in any manner that may be desired.'" *See Rowe*, 358 F.3d at 802 (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981)). Furthermore, the Calvadan government has an interest in protecting the orderly function of its limited public forum. *See Zapach v. Dismuke*, 134 F. Supp. 2d 682, 692 (E.D. Pa. 2001) ("The government has a significant interest in the orderly and efficient conduct of its business") (citing *Grayned v. City of Rockford,* 408 U.S. 104, 119 (1972) (finding that city has a compelling interest in undisrupted school session)).

Therefore, Governor Norton properly removed the comment and the disruptive actor from the discussion before the comments could worsen. *See Luckett v. City of Grand Prairie*, No. Civ.A.3:99CV1752-L, 2001 WL 285280, at *8 n.2 (N.D. Tex. Mar. 19, 2001) ("Being 'disruptive' is not confined to physical violence of conduct"). Removing the disruptive comment and actor, was reasonable in light of the limited public forum's focus on immigration policy. *See also Cornelius*, 105 S. Ct. at 3453 ("The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation.").

iii. Governor Norton's removal of respondent's comment was viewpoint-neutral.

Governor Norton did not exhibit viewpoint discrimination in removing respondent's remark because the removal constituted a "value judgment" and Governor Norton maintained the remaining, critical comments on her post. *See Rust v. Sullivan*, 500 U.S. 173, 192 (1991). Viewpoint discrimination occurs "when [the government] denies access to a speaker *solely* to suppress the point of view he espouses on an otherwise includible subject." *See Cornelius*, 473 U.S. at 806 (emphasis added); *see also Matal*, 137 S. Ct. at 1767 (Kennedy, J. concurring in part

and concurring in the judgment) ("The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate.").

Respondent's comment disrupted the otherwise targeted discussion of the immigration policy post, and Governor Norton therefore made the value judgment to remove the post and prohibit respondent from contributing to her page. *See* Jt. Stip. at ¶ 13; *see also Rust*, 500 U.S. at 192 (finding that the government did not discriminate on the basis of viewpoint when it funded one activity over another; instead, it made a value judgment.). This Court has also noted that "the First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." *See Cornelius*, 105 S. Ct. at 3453. Accordingly, Governor Norton did not exhibit viewpoint-discrimination in removing respondent's remark on her post. Rather, preserved the focus of the limited public forum.

Finally, Governor Norton acted reasonably in preserving all other critical comments on her immigration policy post. In *Southworth*, this Court stated, "[t]he whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." *See* 529 U.S. at 235. Governor Norton featured the critical comments just as she featured the comments from those in favor of the immigration policy. In doing so, she gave equal respect to both sides and properly removed the distracting and overly-hostile remark. Therefore, Governor Norton's actions were viewpoint neutral and reasonable in light of the limited public forum of her Facebook page. *See Rosenberger,* 515 U.S. at 829 (1995).

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the United States Court of Appeal for the Fourteenth Circuit and reinstate summary judgment for the School District.

Respectfully Submitted,
Counsel for Petitioner

COMPETITION CERTIFICATE

Team 19 affirms the following:

1. all copies of the brief are the work product of the members of the team only;
2. the team has complied fully with its law school honor code; and
3. the team has complied with all the Rules of the Competition.

Sincerely,

Team 19

APPENDIX A

U.S. CONST. amend. I

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.

APPENDIX B

U.S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.